

Morris v Kips Bay Unit 2195 AMC Theatre
2015 NY Slip Op 32230(U)
November 19, 2015
Supreme Court, New York County
Docket Number: 159562/2013
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
KEVIN MORRIS,

Plaintiff,

Index No. 159562/2013

-against-

DECISION/ORDER

KIPS BAY UNIT 2195 AMC THEATRE, AMC
ENTERTAINMENT INC. and FAIRWAY KIP BAY LLC,

Defendants.
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced the instant action seeking recovery for personal injuries he allegedly sustained when he tripped over debris and fell while descending stairs in a movie theater. Plaintiff now moves for an order pursuant to CPLR § 3025(b) granting him leave to amend his complaint to add ACS Enterprises, Inc. ("ACS") as an additional defendant and to amend the case caption to reflect the stipulated discontinuance of defendant Fairway Kip Bay LLC from this action. As will be explained more fully below, plaintiff's motion is granted.

The relevant facts are as follows. On or about May 20, 2013, plaintiff allegedly tripped over debris and fell while descending stairs in premises located at AMC Theater, Kips Bay, 570 Second Avenue, New York, New York (the "theater"). On or about September 17, 2013,

plaintiff brought the instant action against defendants Kips Bay Unit 2195 AMC Theatre, AMC Entertainment Inc., and Fairway Kip Bay LLC, who allegedly owned and operated the theater. On or about November 13, 2013, American Multi-Cinema, Inc. s/h/a Kips Bay Unit 2195 AMC Theatre and AMC Entertainment Inc. brought a third-party action against ACS seeking a declaration that it is entitled to contractual indemnification, common law indemnification, contribution, and recovery for breach of contract from ACS on the basis that the contract between ACS and third-party plaintiff for ACS's performance of janitorial services at the theater required ACS to indemnify third-party plaintiff. On or about January 12, 2015, the parties to the instant action stipulated to discontinue the action against defendant Fairway Kips Bay LLC with prejudice.

Pursuant to CPLR § 3025(b), “[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit.” *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Moreover, on a motion for leave to amend, the movant is not required to establish the merit of the proposed new allegations “but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.” *Id.*

In the present case, plaintiff's motion for leave to amend the complaint to add ACS as an additional defendant is granted as he has sufficiently established that the amended complaint is not palpably insufficient or clearly devoid of merit and that no prejudice or surprise would result from the proposed amendment. Plaintiff's claim that ACS is liable for negligence on the basis of his allegations that ACS performed janitorial services at the theater, that ACS was negligent in

its performance of these services and that ACS's negligence caused plaintiff to sustain personal injuries is not palpably insufficient or clearly devoid of merit.

Further, there is no unfair prejudice or surprise to defendants in adding ACS as a party to this action. Although the court notes plaintiff's two-year delay in seeking to amend his complaint, it is well settled that "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side." *Edenwald Contr. Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983). Here, defendants fail to identify any prejudice they would face separate from the two-year delay itself. Discovery is ongoing, although at least some party depositions have been taken. Proposed defendant ACS's argument that plaintiff's motion should be denied because the proposed amendment may require plaintiff and certain defendants to be again deposed is without merit as "the need for additional discovery does not constitute prejudice sufficient to justify denial of an amendment." *See Jacobson v. McNeil Consumer & Specialty Pharms.*, 68 A.D.3d 652, 655 (1st Dept 2009). Finally, proposed defendant ACS's argument that plaintiff's motion is procedurally deficient because he does not move for leave to join a party pursuant to CPLR § 1003 is without merit. Thus, plaintiff's motion for leave to amend the complaint to add ACS as an additional defendant is granted.

Plaintiff's motion for leave to amend the case caption to reflect the stipulated discontinuance of defendant Fairway Kip Bay LLC from this action is granted without opposition.

Accordingly, it is hereby

ORDERED that the Amended Verified Complaint, in the form annexed to plaintiff's motion papers, shall be deemed served upon service of a copy of this order with notice of entry

upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and the Verified Amended Complaint, in the form annexed to plaintiff's motion papers, shall be served, in accordance with the CPLR, upon the additional party in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
KEVIN MORRIS,

Plaintiff,

-against-

KIPS BAY UNIT 2195 AMC THEATRE, AMC
ENTERTAINMENT INC. and ACS ENTERPRISES, INC.,

Defendants.

-----X

And it is further

ORDERED that counsel-for plaintiff shall serve a copy of this order with notice of entry upon the Clerk in the General Clerk's Office (Room 119), who is directed to mark the court's records to reflect the additional party. This constitutes the decision and order of the court.

Dated: 11/19/15

Enter: _____

CK
J.S.C.
CYNTHIA S. KERN
J.S.C.