

Diaz v 611 W. 158th St. Corp.

2015 NY Slip Op 32862(U)

January 20, 2015

Supreme Court, New York County

Docket Number: 111926/11

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
Justice

PART 11

SANDRA DIAZ,

Plaintiff,

INDEX NO. : 111926/11
MOTION DATE: 10-2-14

- v -

611 WEST 158TH STREET CORP. and
VER-TECH ELEVATOR,

Defendants.

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MOTION SEQ. NO.: 001

The following papers, numbered 1 to _____ were read on this motion amend.

FILED PAPER NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____ | _____

Answering Affidavits — Exhibits _____ | _____

Replying Affidavits _____ | _____

JAN 29 2015

Cross-Motion: [x] Yes [] No

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff moves, by order to show cause, pursuant to CPLR 3025(b) for leave to amend its complaint to add Residential Management, Inc. as a defendant. Defendant Ver-Tech Elevator ("Ver-Tech") opposes the motion only insofar as it asserts that any amendment should include an entity known as Residential Management (NY), Inc. Defendant 611 West 158th Street Corp. ("611") opposes the motion, arguing that the statute of limitations has expired and that plaintiff's failure to annex a copy of a proposed amended complaint prevents the tolling of the limitations period during the pendency of this motion. 611 also argues that Vert-Tech's request for affirmative relief should be denied as it failed to submit a cross motion seeking such relief or a proposed amended pleading.

This is an action seeking to recover damages for personal injuries plaintiff allegedly sustained on August 3, 2011, as the result of a trip and fall incident involving an elevator located

at 611 West 158th Street, New York, NY (the Building”). The Building is owned by 611 and the elevator at issue is serviced by Ver-Tech. After Ver-Tech was added as a defendant in March 2014, plaintiff contends that it first discovered that the proposed defendant Residential Management, Inc. was the party that contracted with Ver-Tech to service the elevator at issue. When plaintiff was unable to obtain an agreement from the other parties to permit it to add Residential Management, Inc., plaintiff made this motion, by order to show cause, which this court signed on July 31, 2014, just prior to the expiration of the three year statute of limitations on August 3, 2014.

“Leave to amend a pleading should be ‘freely given’ (CPLR 3025[b]) as a matter of discretion in the absence of prejudice or surprise.” Zaid Theatre Corp. v. Sona Realty Co., 18 AD3d 352, 355-356 (1st Dept 2005)(internal citations and quotations omitted). Leave to amend will be granted as long as the proponent submits sufficient support to show that proposed amendment is not “palpably insufficient or clearly devoid of merit.” MBIA Ins Corp. v. Greystone & Co., Inc., 74 AD3d 499 (1st Dept 2010)(citation omitted). In addition, “[o]nce a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide a subsequent basis for a motion for summary judgment” Pier 59 Studios, L.P. v. Chelsea Piers, L.P., 40 AD3d 363, 365 (1st Dept 2007).

Here, there is no assertion of prejudice or surprise related to the proposed amendment. Moreover, the record adequately demonstrates that the proposed defendant, either by the name identified by plaintiff and/or by another name, is potentially liable here as the entity that contracted with Ver-Tech to service the elevator at issue. In particular, the record contains a five-year elevator maintenance contract between Ver-Tech and “Residential Management Co,” dated March 31, 2008. In addition, Ver-Tech submits a print-out from the New York Secretary of State indicating that the proposed defendant’s name as of 1989 was Residential Management

Inc., but as of 2010, was named Residential Management (NY), Inc., and, at best, such evidence supports the adding not only Residential Management Inc. but also Residential Management (NY), Inc. In this connection, 611's objection that Ver-Tech failed to cross move for relief is not a basis for ignoring the evidence submitted by Ver-Tech substantiating plaintiff's motion to amend to add the entity contracting with Ver-Tech with regard to the elevator at issue. The court also notes that in its opposition, 611 does not deny that either Residential Management, Inc. or Residential Management (NY), Inc. entered into a contract with Ver-Tech to service the elevators in its Building. In any event, to the extent the proposed amended complaint contains a misnomer with respect to the proposed defendant's name, such misnomer can be corrected, even after the limitations period expires. See Perrin v. McKenzie, 266 AD2d 269 (2d Dept 1999).

As for the statute of limitations issue, the Court of Appeals has held that the filing of a motion for leave to amend the complaint to add a defendant tolls the statute of limitations until entry of the order deciding the motion where the motion papers included the proposed supplemental summons and amended pleading. Perez v. Paramount Communications, Inc., 92 NY2d 749 (1999). Here, plaintiff submitted the proposed supplemental summons and second amended complaint and moved to amend prior to the expiration of the statute of limitations period.

In any event, any affirmative defense relating to the statute of limitations must be raised by the party to whom such defense belongs. See Orix Financial Services, Inc. v. Haynes, 56 AD3d 377 (1st Dept 2008). When, as here, leave is sought to add a defendant, the proposed new defendant need not be served with notice of the motion. Eastern States Elec. Contractors, Inc. v. William L. Crow Const. Co., 153 AD2d 522 (1st Dept 1989). Since the proposed defendant is not yet before the court, it is not proper at this juncture to consider whether it may have a defense based on the statute of limitations. See Defillippo v. Knolls of Melville Redevelopment Co., 29

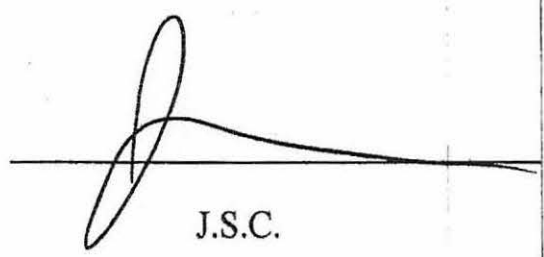
Misc3d 1228(A) (Sup Ct Suffolk Co. 2010)(noting that "as the person possessing a statute of limitations defense is not before the court because its joinder as a proposed new party defendant is part of the relief demanded by the plaintiff on its motion to amend, the court should not consider whether the plaintiff's new claims are exempt from a statute of limitations...").

In view of the above, it is

ORDERED that plaintiff's motion to amend is granted, and plaintiff shall serve the proposed summons and amended complaint within fifteen days of the date of this decision and order during which time the statute of limitations shall be stayed and this decision and order shall not be entered; and it is further

ORDERED that the status conference scheduled for December 4, 2014 is adjourned to February 26, 2015, at 9:30 am to give the newly added defendant an opportunity to answer and to appear at the conference.

Dated: ~~January 20, 2015~~ *January 20, 2015*


J.S.C.

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

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