Mero v Vuksanovic
2016 NY Slip Op 31324(U)
July 14, 2016
Supreme Court, New York County
Docket Number: 105113/10
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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YOLANDA MERO, as Administrator of the Estate of ELSA SAMAYOA, deceased,

Plaintiff,

-against-

ANNA VUKSANOVIC and CACO SON REALTY CORP.,

Defendants.

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ANNA VUKSANOVIC and CACO SON REALTY CORP.,

Third-party plaintiffs,

-against-

GEORGE DEEGAN,

Third-party defendant.

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Index No. 105113/10

Motion seq. no. 005

DECISION & ORDER

Third-Party Index No. 590743/10

BARBARA JAFFE, JSC:

For plaintiff:
James Ross, Esq.
Ross & Hill, Esqs.
16 Court St., 35th fl.
Brooklyn, NY 11241
718-855-2324

For defendants:
Curt J. Schiner, Esq.
Lester Schwab *et al.*
100 Wall St.
New York, NY 10005
212-964-6611

Plaintiff seeks, post-note of issue, an order granting her leave to file a second amended bill of particulars. Defendants oppose and seek, in the alternative, an order vacating the note of issue and permitting additional discovery.

I. PERTINENT PROCEDURAL BACKGROUND

Plaintiff commenced this action on April 20, 2010, and on or about May 10, 2010, she served a bill of particulars alleging, *inter alia*, that defendants acted negligently in causing the fire that led to decedent's death by (1) permitting to exist in third-party defendant Deegan's apartment for several years before the fire old, defective, and combustible electrical equipment, circuits, and wiring that were insufficient for their use and constituted a fire hazard, (2) failing to perform necessary repairs and replacements to electrical equipment, circuits, and wiring in Deegan's apartment, (3) failing to inspect that equipment, (4) failing to warn plaintiff and others of the extreme potential hazard of that equipment, (5) failing to have adequate smoke detectors in the building or an adequate number of working smoke detectors, (6) failing to have an adequate number of working smoke detectors in Deegan's and decedent's apartments or in the building's common areas, (7) failing to repair broken, non-working smoke detectors in both apartments and the common areas, (8) failing to provide Deegan and decedent with electric smoke detectors, or in the common areas, (9) failing to inspect or repair the smoke detectors in the building, (10) attempting to charge tenants for working smoke detectors, and (11) failing to warn plaintiff and others of the dangers posed. (NYSCEF 123). Defendants interposed an answer on June 28, 2010. (NYSCEF 122).

During her March 14, 2012 deposition, plaintiff referenced a report lodged with NYC Housing Preservation and Development (HPD) in the 1990s reflecting that there were cracks and leaks in the apartment, along with a 1999 proceeding between defendants and decedent wherein the latter requested, among other things, the installation of a self-closing door. (NYSCEF 101). At Deegan's deposition on September 5, 2012, he testified to the disrepair of the ceiling below decedent's apartment and defendants' ongoing failure to repair it. (NYSCEF 104).

On or about June 18, 2014, plaintiff efiled an amended verified bill of particulars by which she added an allegation that defendants violated certain statutes and regulations. (NYSCEF 125). On June 19, 2014, plaintiff efiled an expert witness notice pursuant to CPLR 3101(d)(1) and expert report noting defendants' failure to seal adjoining pipe openings and that the disrepair of the ceiling accelerated the spread of the fire. (NYSCEF 124). On June 20, 2014, plaintiff efiled her note of issue and certificate of readiness, and indicated therein that the third-party action had been discontinued. (NYSCEF 52).

On October 2, 2014, defendants moved for an order summarily dismissing the complaint. (NYSCEF 64). On December 15, 2014, plaintiff efiled an affidavit in which she complained, *inter alia*, that there were frequent leaks from the roof above decedent's apartment, and that even though the roof was eventually repaired, the apartment walls remained cracked, the baseboards remained uneven, there were leaks into the apartment below, and holes in the floor, including around radiator pipes in the living room and master bedroom, which resulted in HPD-issued violations. She also complained about long-standing issues with electrical service in the apartment. (NYSCEF 100).

On December 19, 2014, plaintiff efiled her opposition to defendants' motion, as well as an affidavit of her expert dated December 18, 2014 (NYSCEF 92, 95), wherein the expert, relying on plaintiff's December 15 affidavit, stated that after the fire started in Deegan's apartment, it spread to decedent's apartment through the spaces around pipes and the bottom of her entrance door, circumstances that are prohibited by law. He also opined that chronic water leakage in Deegan's apartment compromised the structural integrity of the walls and ceiling, and that defendants had failed to install a self-closing door to the apartment. (NYSCEF 95). Plaintiff also relied on violations issued by HPD on March 2009, soon after the fire, indicating the

absence of working smoke and carbon monoxide detectors and defendants' failure to seal adjoining pipe openings. (NYSCEF 99).

By decision and order dated May 13, 2015, I partially granted defendants' motion for summary judgment, dismissing claims that they had failed to post a fire safety notice on the entrance door to decedent's apartment and provide decedent with an operational smoke detector, and upholding her claims that the holes around the pipes in both apartments and the condition of Deegan's ceiling permitted smoke to enter decedent's apartment and those respecting the self-closing door. (2015 WL 2280649 [Sup Ct, New York County 2015]; NYCSEF 111). By decision dated June 23, 2016, the Appellate Division, First Department, reinstated the claim that defendant had failed to provide a working smoke detector, but otherwise affirmed. (2016 NY Slip Op 05025 [1st Dept 2016]).

II. CONTENTIONS

Plaintiff now seeks leave to supplement her amended bill of particulars by adding allegations that defendants failed to (1) repair leaks in the ceiling of the apartment below decedent's apartment, thereby enhancing the acceleration of the fire; (2) seal the adjoining pipe openings between decedent's apartment and the apartment below, thereby allowing for smoke to enter; and (3) install a self-closing door in the apartment below, thereby allowing smoke to enter the hallway. She contends that the subjects of her proposed amendments were addressed in discovery, contain no new factual allegations or theories of liability, were discussed in plaintiff's opposition to their motion for summary judgment dated December 19, 2014, as well as in my May 2015 decision, and will not prejudice or surprise defendant. In support, she offers her December 15, 2014 affidavit and her expert's affidavit. (NYSCEF 121, 127-128, 131).

Defendants oppose, complaining that plaintiff filed this motion long after filing the note of issue and during the pendency of her appeal of my May 2015 decision in an improper attempt to enlarge the appellate record with her new allegations. They argue that the motion should be denied absent any reasonable excuse for the inordinate delay or affidavit based on personal knowledge attesting to the merits of the new allegations, deny that the new allegation were addressed in discovery, and raise a host of factual issues arising from them. By cross motion, they seek an order vacating the note of issue and permitting further discovery, including an order compelling plaintiff to produce documentary support for her new claims, a supplemental deposition of plaintiff, a deposition of plaintiff's expert as to the new theories of liability, and the production of documentary support for his findings. (NYCSEF 134).

In opposition to defendants' cross motion and in further support of her motion to amend, plaintiff observes that no trial date has been set, and denies that any of the proposed amendments are new or that they constitute any surprise or prejudice to defendants given their awareness of the allegations contained in affidavits and reports previously served. While she admits having sought to expand her record on appeal to include her expert's report, she notes that the report had been exchanged before she filed the note of issue and that it includes "almost all" of the arguments the expert set forth in opposition to defendants' summary judgment motion, and explains that she sought to add it to the record solely in response to defendants' appellate claim that the expert raised new arguments. For the same reason, plaintiff denies that defendants have been prejudiced. She objects to any further discovery, claiming that no new facts have been raised and that there exist no special circumstances permitting the deposition of her expert. (NYCSEF 141).

In reply, defendants reiterate their opposition, and object to plaintiff's supplementary affidavit, claiming that it constitutes an attempt to avoid the consequences of her prior deposition by raising feigned factual issues. (NYCSEF 143).

III. DISCUSSION

A. Amending the bill of particulars

"As a general rule, leave to amend a pleading [pursuant to CPLR 3025(b)] should be freely granted in the absence of prejudice to the nonmoving party where the amendment is not patently lacking in merit . . ., and the decision whether to grant leave to amend a complaint is committed to the sound discretion of the court." (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015] [internal quotation marks omitted]; *Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166, 170 [1989]). Amendments may not contradict an original theory of recovery. (*Brunetti v Musallam*, 59 AD3d 220, 223 [1st Dept 2009]).

An extended delay in moving to amend must be explained by a reasonable excuse, supported by an affidavit of merit. (*Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007]; *Fuentes v City of New York*, 3 AD3d 549, 550 [2d Dept 2004]). Lateness alone poses no obstacle to amendment. Rather, "lateness coupled with significant prejudice to the other side" may warrant denial of a motion to amend. (*Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983], quoting Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3025:5 at 477). That a defendant is "exposed to greater liability or because a defendant has to expend additional time preparing its case" does not constitute prejudice sufficient to preclude an amendment. (*Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 654 [1st Dept 2009] [internal citations omitted]). Rather, there exists prejudice warranting the denial of leave when the opposing party "has been hindered in the

preparation of [its] case or has been prevented from taking some measure in support of his position." (*Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]; *Jacobson*, 68 AD3d at 654-55).

Where entirely new facts and theories of liability are raised, prejudice may result. (*Eg*, *Jean-Baptiste v 153 Manhattan Ave. Hous. Dev. Fund Corp.*, 124 AD3d 476, 476 [1st Dept 2015] [leave to amend denied as plaintiff sought to allege entirely new statutory violations which substantially altered theory of case five years after accident, and six months after filing note of issue]; *cf. Ryan v Town of Riverhead*, 117 AD3d 707, 710 [2d Dept 2014] [no prejudice where proposed amendment included new statutory violation based on allegations in original pleadings and defendants already asserted affirmative defense based on same statute]; *Martino v Bendo*, 93 AD3d 500, 501 [1st Dept 2012] [no new theory of liability, and thus, no prejudice, where plaintiff's amendments expounded allegations in complaint and bill of particulars]; *Alvarado v Beth Israel Med. Ctr.*, 78 AD3d 873, 874 [2d Dept 2010] [no prejudice where factual basis for new allegations available to defendants since discovery and addressed by their expert in their reply]).

Here, defendants have had notice of the factual bases underlying plaintiff's proposed amendments long before this motion. In light of the HPD violations issued shortly after the fire, the numerous instances the proposed factual allegations have been addressed in previous depositions, affidavits, and expert materials in this litigation, the merits of the proposed amendments, and the fact that a trial has not been scheduled, defendants have not established that they have either been surprised or prejudiced by the proposed amendments. While plaintiff does not offer a reasonable excuse for her delay, in light of the foregoing circumstances, the

delay is not unreasonable. Accordingly, plaintiff is granted leave to amend the bill of particulars.

B. Vacating the note of issue and/or allowing additional discovery

"At any time, the court on its own motion may vacate a note of issue if it appears that a material fact in the certificate of readiness is incorrect" (22 NYCRR 202.21[e]), such as if the certificate "incorrectly states that all discovery has been completed." (*Nielsen v New York State Dormitory Auth.*, 84 AD3d 519, 520 [1st Dept 2011]). When allowing for an amendment to the bill of particulars after the note of issue has been filed, it is proper to vacate the note of issue and allow for additional discovery "to avoid any possible prejudice." (*Alvarado*, 78 AD3d at 874).

Alternatively, it is within the discretion of the trial court to permit additional discovery without vacating the note of issue "[w]here unusual or unanticipated circumstances develop subsequent to the filing of a note of issue and certificate of readiness which require additional pretrial proceedings to prevent substantial prejudice . . . ." (22 NYCRR 202.21[d]; *Hartnett v City of New York*, 139 AD3d 506 [1st Dept 2016]).

As stated *supra,* III.A., plaintiff advances no new facts that prejudice or surprise defendants. Thus, vacating the note of issue and reopening discovery is unnecessary and would delay the scheduling of the trial. As defendants have been aware of the facts underlying the proposed amendments since before the filing of the note of issue, and have had an ample opportunity to investigate them, a second deposition of plaintiff is unwarranted. (*See Orr v Yun*, 74 AD3d 473, 473 [1st Dept 2010] [improper to grant additional discovery where it could have been obtained before note of issue was filed]; *Tirado*, 75 AD3d at 161 ["plaintiff was . . . possessed of all information regarding the purported inconsistent statements (and thus need for new deposition) . . . almost two years before the filing of the note of issue"]; *Schroeder v IESI*

NY Corp., 24 AD3d 180, 181 [1st Dept 2005] [no unusual or unanticipated circumstances where new allegations in amended bill of particulars had been disclosed to defendants prior to filing note of issue, and defendant subsequently retained new counsel who wanted to investigate further]). Moreover, as defendants have the materials on which plaintiff and her expert base her proposed amendments, their production would be duplicative. Defendants are not confronted with new evidence nor do they lack access to the evidence.

Assuming, *arguendo*, that additional discovery is warranted, defendants are nonetheless not entitled to depose plaintiff's expert absent special circumstances or indication that his opinion is based on facts known to him personally. (*See generally* CPLR 3101[d][1][iii] ["Further disclosure concerning the expected testimony of any expert may be obtained only by court order upon a showing of special circumstances and subject to restrictions as to scope and provisions concerning fees and expenses as the court may deem appropriate."]; *cf. Taft Partners Dev. Group v Drizin*, 277 AD2d 163, 163 [1st Dept 2000] [accountant experts were in possession of relevant facts and thus their depositions warranted "specifically . . . as to the facts, not their opinions" (internal quotation marks omitted)]). In any event, defendants will have an opportunity to cross-examine plaintiff's expert at trial.

C. Feigned issue of fact

It is improper to raise a feigned issue of fact in a subsequent affidavit to circumvent or contradict prior testimony or admissions in an effort to avoid negative consequences. (*Eg*, *Red Zone LLC v Cadwalader, Wickersham & Taft LLP*, 27 NY3d 1048, 1049 [2016]). To the extent that defendants allege that plaintiff's supplemental affidavit presents a feigned issue of fact, the affidavit does not contradict any of her previous testimony, as she previously testified to the lack of self-closing doors, and the presence of leaks and cracks in the apartment.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for leave to serve a second amended bill of particulars is granted, and the second amended bill of particulars in the form annexed to the moving papers (NYSCEF 131) shall be deemed served upon service of a copy of this order with notice of entry upon defendants; and it is further

ORDERED, that defendants' cross motion for an order vacating the note of issue and permitting further discovery is denied.

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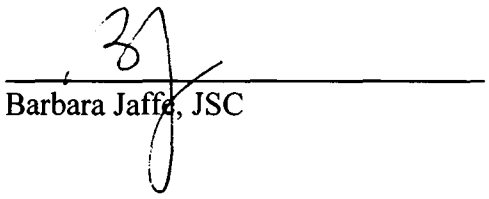

Barbara Jaffe, JSC

DATED: July 14, 2016
New York, New York