Ramirez v Elias-Tejada
2016 NY Slip Op 32808(U)
August 4, 2016
Supreme Court, Bronx County
Docket Number: 300174/2012
Judge: Lucindo Suarez
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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PILAR RAMIREZ, YEDMY BATISTA PERALTA, and DELIO POLANCO, as Administrator of the Estate of PAULINA CORTORREAL HICIANO,

Plaintiffs,

- against -

JOSE M. ELIAS-TEJADA, MICHAEL P. THOMAS, and PAUL CHARLES YOVINO,

Defendants.

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DECISION AND ORDER

Index No. 300174/2012

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated July 8, 2016 of plaintiff Delio Polanco, as Administrator of the Estate of Paulina Cortorreal Hiciano, and the affirmation, affidavits and exhibits submitted in support thereof; the affirmation in opposition dated July 19, 2016 of defendants Fairway Douglaston, LLC aand Fairway Group Holdings, LLC and the exhibits submitted therewith; the affirmation in support dated July 28, 2016 of plaintiffs Pilar Ramirez and Yedmy Batista Peralta and the exhibit submitted therewith; the reply affirmation dated July 27, 2016 of plaintiff Delio Polanco, as Administrator of the Estate of Paulina Cortorreal Hiciano; and due deliberation; the court finds:

This action arises out of a three-car motor vehicle accident that occurred on December 12, 2011 on the Throgs Neck Bridge. Plaintiffs Pilar Ramirez ("Ramirez") and Yedmy Batista Peralta ("Peralta") and decedent Paulina Cortorreal Hiciano were passengers in a vehicle owned and operated by defendant Jose M. Elias-Tejada ("Elias-Tejada") at the time. Ramirez, Peralta, and plaintiff Delio Polanco, as Administrator of the Estate of Paulina Cortorreal Hiciano, each brought separate suits against Elias-Tejada and defendants Michael P. Thomas and Paul Charles Yovino, the drivers of the other two vehicles involved in the accident. The actions were consolidated under Index No. 300174/2012 (the

"Main Action").[1]

Ramirez and Peralta also brought an action against their employers, Fairway Douglaston LLC and Fairway Group Holdings Corp. in *Ramirez v. Fairway Douglaston, LLC,* Index No. 309415/2012 (the "Fairway Action"). They alleged that their co-worker, Elias-Tejada, was acting within the scope of his employment and sought recovery under a theory of respondeat superior. Ramirez and Peralta did not name Fairway Group Central Services LLC or Fairway Group Acquisition Company as defendants. Plaintiff, who is not a party to the Fairway Action, now moves pursuant to CPLR 203(b) and (f) and CPLR 3025(b) for leave to serve a supplemental summons and amended complaint upon Fairway Douglaston LLC, Fairway Group Holdings Corp., Fairway Group Central Services LLC, and Fairway Group Acquisition Company (the "Fairway Defendants") and for an order directing a joint trial of the Main Action with the Fairway Action.

Generally, leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is palpably insufficient or patently devoid of merit. *See McGhee v. Odell*, 96 A.D.3d 449, 946 N.Y.S.2d 134 (1st Dep't 2012). Plaintiff essentially concedes there is a two-year Statute of Limitations for wrongful death claims, *see* EPTL § 5-4.1, by preemptively stating that he was deposed "before the expiration of the Statute of Limitations herein of December 11, 2013." He relies upon the relation-back doctrine to assert his otherwise untimely claim.

CPLR 203(c) provides that "a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced."[2] The relation-back doctrine permits a plaintiff to correct a pleading error by adding a new claim or new party after the Statute of Limitations has expired upon a showing that "(1) both claims arose out of [the] same

[1] The Main Action has been consolidated for joint trial with two other actions, *Corchado v. Thomas*, Index No. 300885/2013, and *Elias-Tejada v. Thomas,* Index No. 21702/2013.

[2] Plaintiff referred to CPLR 203(b) and (f) in the notice of motion but mentioned only CPLR 203(c) in the affirmation.

conduct, transaction or occurrence, (2) the new party is 'united in interest' with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well." *Buran v. Coupal*, 87 N.Y.2d 173, 178, 661 N.E.2d 978, 981, 638 N.Y.S.2d 405, 408 (1995). It is plaintiff's burden to establish the applicability of the relation-back doctrine. *See Garcia v. New York-Presbyt. Hosp.*, 114 A.D.3d 615, 981 N.Y.S.2d 84 (1st Dep't 2014). Plaintiff contends there is no prejudice because the Fairway Defendants had actual notice of the claim in the Fairway Action and because his claim has merit. Plaintiff has met his burden on the first prong but he has failed as to the second and third prongs.

Notice to defendant is a linchpin of the relation-back doctrine. *See Cintron v. Lynn*, 306 A.D.2d 118, 762 N.Y.S.2d 355 (1st Dep't 2003). The allegations in plaintiff's original complaint fail to give notice of his claim against the Fairway Defendants. *See Robinson v. New York City Hous. Auth.*, 89 A.D.3d 497, 932 N.Y.S.2d 337 (1st Dep't 2011); *Rodriguez v. Palange*, 295 A.D.2d 155, 743 N.Y.S.2d 274 (1st Dep't 2002). Plaintiff did not allege that Elias-Tejada was a Fairway employee or that he was acting within the scope of his employment. He did not serve the Fairway Defendants with his original complaint. Nor can the Fairway Defendants be charged with notice of his prospective claim for purposes of the relation-back doctrine because of the Fairway Action. Plaintiff did not commence an action against the Fairway Defendants, and "[a]n action arising out of the same incident previously and timely filed by a different plaintiff against the same defendants does not inure to a plaintiff who failed to file an action against those very same defendants." *Anderson v. J.D. Posillico, Inc.*, 2015 N.Y. Misc. LEXIS 2583, at *16-17 (Sup. Ct. Suffolk County July 16, 2015). Allowing plaintiff to assert a claim against the Fairway Defendants and "have it relate back to a claim asserted by a different plaintiff in a different action" would impermissibly expand the relation-back doctrine to revive a time-barred claim.

Lexington Ins. Co. v. Gallaria Condominium, 2014 N.Y. Misc. LEXIS 5176, at *3 (Sup. Ct. New York County Nov. 25, 2014), *quoting Moore v. Nuremore Constr., Inc.*, 33 Misc.3d 1214(A), 941 N.Y.S.2d 539 (Sup. Ct. Dutchess County 2011); *accord Anderson v. J.D. Posillico, Inc.*, *supra.*

As to the third prong, plaintiff has not shown that but for a mistake as to the Fairway Defendants' identities, he would have brought an action against them as well. *See Crawford v. City of New York*, 129 A.D.3d 554, 11 N.Y.S.3d 595 (1st Dep't 2015). Plaintiff first learned of the Fairway Action in July 2015, but he was aware in 2011 that the decedent was a Fairway employee. *See B.B.C.F.D., S.A. v. Bank Julius Baer & Co., Ltd.*, 62 A.D.3d 425, 878 N.Y.S.2d 56 (1st Dep't 2009). The accident occurred as the decedent was traveling to a new Fairway Supermarket with other Fairway employees. Notwithstanding the bankruptcy proceeding, plaintiff waited almost one year before bringing the instant motion and offered no explanation for the delay. This branch of the motion seeking leave to serve a supplemental summons and amended complaint upon the Fairway Defendants is denied.

Plaintiff also moves for an order directing a joint trial of the Main Action with the Fairway Action. A motion seeking consolidation for purposes of joint trial rests in the court's discretion. *See Progressive Ins. Co. v. Countrywide Ins. Co.*, 10 A.D.3d 518, 782 N.Y.S.2d 21 (1st Dep't 2004). The court must consider whether the actions share common questions of law and fact and whether a joint trial would avoid the unnecessary duplication of proceedings, save unnecessary costs, and prevent injustice arising from potentially divergent decisions. *See Cummin v. Cummin*, 56 A.D.3d 400, 870 N.Y.S.2d 238 (1st Dep't 2008). Prejudice of a substantial right or the possibility of an inconsistent verdict would bar joinder. *See Progressive Ins. Co. v. Countrywide Ins. Co.*, *supra.* Although plaintiff argues that both actions arise out of the same motor vehicle accident, the Fairway Defendants have moved for dismissal of the Fairway Action. That motion is currently pending before another justice. Consolidation requires two pending actions, *see Jacobs v. Mostow*, 113 A.D.3d 729, 978 N.Y.S.2d 894 (2d Dep't 2014), and if the motion is granted, it would render consolidation moot. Plaintiff's motion

for joint trial of the Main Action and the Fairway Action is denied at this time.

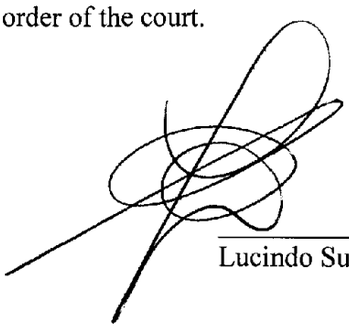
Accordingly, it is

ORDERED, that the branch of the motion of plaintiff Delio Polanco, as Administrator of the Estate of Paulina Cortorreal Hiciano, seeking leave to serve a supplemental summons and amended complaint is denied; and it is further

ORDERED, that the branch of the motion of plaintiff Delio Polanco, as Administrator of the Estate of Paulina Cortorreal Hiciano, seeking to consolidate *Ramirez v. Elias-Tejada*, Index No. 300174/2012, with *Ramirez v. Fairway Douglaston, LLC,* Index No. 309415/2012, for purposes of joint trial is denied without prejudice to renewal after a determination on the motion to dismiss presently pending in *Ramirez v. Fairway Douglaston, LLC,* Index No. 309415/2012.

This constitutes the decision and order of the court.

Dated: August 4, 2016



Lucindo Suarez, J.S.C.