

Lapp v Silverstein Props., Inc.
2017 NY Slip Op 30099(U)
January 4, 2017
Supreme Court, New York County
Docket Number: 160894/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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ELIZABETH LAPP

Plaintiff

Index No. 160894/2014

v

SILVERSTEIN PROPERTIES, INC., CLUB 7,
THE GYM AT UNION SQUARE, LLC, CLAY, TODD
DOE, BLACK MOUNTAIN PRODUCTS, INC., BMP
FITNESS EQUIPMENT, INC., JOHN DOE 1, and
JOHN DOE 2

DECISION AND ORDER

MOT SEQ 001

Defendants.
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NANCY M. BANNON, J.:

I. INTRODUCTION

In this personal injury action, the plaintiff moves pursuant to 1003 and 3025(b) for leave to amend the caption and complaint so as to (a) join River Place II, LLC (RP), and The Gym at 42nd Street, LLC, doing business as Club 7 By Clay (Gym 42nd), as defendants and assert causes of action against them, (b) delete Club 7 as a separate defendant, and (c) denominate the two defendants named as The Gym at Union Square, LLC (Union Square) and Clay, respectively, as one defendant to be named The Gym at Union Square, LLC, doing business as Clay. No opposition is submitted to that motion. The defendants Silverstein Properties, Inc. (SPI), Union Square, and Clay (collectively the Silverstein defendants) cross-move pursuant to CPLR 3211(a)(1) and (7) to

dismiss the complaint insofar as asserted against them or, in the alternative, pursuant to 3212 for summary judgment dismissing the complaint insofar as asserted against them. The plaintiff opposes the cross motion. The plaintiff's motion is granted to the extent that she is permitted to file and serve a supplemental summons and amended complaint so as to join RP and Gym 42nd as defendants and assert the causes of action against them set forth her proposed amended complaint, and to delete Club 7 as a discrete defendant, and her motion is otherwise denied. The cross motion is granted to the extent that summary judgment is awarded to the Silverstein defendants dismissing the complaint insofar as asserted against them, and the cross motion is otherwise denied as academic.

II. BACKGROUND

The plaintiff was injured on June 20, 2013, while attending a fitness class at a Clay fitness facility at defendant Club 7, located on the seventh floor a midtown highrise (the building), when a heavy rubber resistance band that was provided to her by an instructor snapped back while she was using it, and struck her in the eyes. She commenced this action against Club 7, alleging that it was negligent in failing to properly instruct her in the use of the band or supervise her activities as its paying customer. She also asserted negligence causes of action against

SPI, which she asserted was the owner or the building, but in actuality was the owner's agent, Union Square, which she asserted owned the club, but in actuality owned a separate club operating under the Clay brand, and Clay, which she asserted was an independent entity that jointly owned the club with Union Square, but in actuality is a brand of health clubs operated by other entities. In addition, she asserted a negligence cause of action against the instructor, and products liability causes of action against the manufacturers of the band and unknown defendants who distributed and retailed the band.

On December 29, 2015, the plaintiff moved for leave to amend the complaint so as to join the building's actual owner, River Place II, LLC (RP), and the club's actual owner and operator, The Gym at 42nd Street, LLC, doing business as Club 7 By Clay (Gym 42nd), as defendants so as to assert causes of action alleging that RP negligently failed to provide a safe facility and that Gym 42nd was, among other things, vicariously liable for the negligence of its instructor. She also sought to amend the caption so as to delete Club 7 as a discrete defendant and proceed against it solely as part of the fictitious, or "d/b/a" name of Gym 42nd, jointly denominate Union Square and Clay as one defendant, and amend the allegations in the complaint accordingly. Neither the Silverstein defendants nor any other defendant opposes the motion.

III. DISCUSSION

A. LEAVE TO AMEND THE COMPLAINT AND CAPTION

Leave to amend a complaint should be freely granted, unless the proposed amendment is palpably insufficient or clearly devoid of merit. See CPLR 3025(b); MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 (1st Dept. 2010). To be timely, a motion for leave to amend a complaint to join additional defendants must be made within the applicable limitations period, unless the movant establishes that the party sought to be joined is united in interest with an existing defendant, triggering the relation back doctrine, which, for limitations purposes, deems the claims against the new defendants to have been interposed on the date that the claims had initially been asserted against the existing defendant. See Royce v DIG EH Hotels, LLC, 139 AD3d 567, 568-569 (1st Dept. 2016). Where the motion is made within the limitations period, a proposed supplemental summons and amended complaint must be filed as part of the motion papers. See Gomez v City of New York, 49 AD3d 473, 473 (1st Dept. 2008)

In support of her motion, the plaintiff filed an affidavit of merit, a proposed supplemental summons, a proposed amended complaint, an operating agreement between RP and Gym 42nd, and a business memorandum issued by Clay.

The documentation submitted by the plaintiff established

that Gym 42nd, rather than Union Square, was the entity that actually owned and operated the Clay facility at Club 7, and that it assumed a contractual obligation to manage the orderly, safe, and proper use of the club facilities. She now seeks to assert a cause of action against Gym 42nd, based on its negligent supervision of the exercise class and the negligent acts and omissions of its employee, who provided the plaintiff with the resistance band. That proposed amendment is neither palpably insufficient nor clearly devoid of merit. See generally Nyala C. v Miniventures Child Care Dev. Ctr., Inc., 133 AD3d 467, 467 (1st Dept. 2015); Dowdy v New York Health & Racquet Club, 223 AD2d 382, 382 (1st Dept. 1996). She also submitted evidence showing that RP was the owner of the building with a right to enter the facility, and she seeks to assert a cause of action alleging that it negligently supervised Gym 42nd's operations. It cannot be said at this juncture that such a cause of action is palpably insufficient or clearly devoid of merit. See generally Mathis v New York Health Club, Inc., 288 AD2d 56, 56 (1st Dept. 2001).

Inasmuch as the plaintiff moved for leave to join RP and Gym 42nd within the three-year limitations period applicable to the causes of action she seeks to assert against them (see CPLR 214[5]), and filed a proposed supplemental summons and proposed amended complaint with her motion papers, the limitations period was tolled from the time that she filed the motion papers until

the date that this order is entered. See Perez v Paramount Communications, 92 NY2d 749, 754, 755 (1999); Gomez v City of New York, supra; cf. Karagiannis v North Shore Long Is. Jewish Health Sys., Inc., 80 AD3d 569, 569 (2nd Dept. 2011) (movant failed to file proposed supplemental summons). Accordingly, despite the allegations in the proposed amended complaint respecting the alleged unity of interest between RP and Gym 42nd, on the one hand, and existing defendants, on the other, it is unnecessary for the court address that issue to determine whether there is indeed a unity of interest or whether the relation back doctrine is applicable. In any event, by declining to oppose the motion, the Silverstein defendants have waived any contention that the proposed claims against RP and Gym 42nd are untimely.

In light of the foregoing, that branch of the plaintiff's motion which is for leave to amend the caption and complaint is granted to the extent that she is permitted to file and serve a supplemental summons and amended complaint so as to join RP and Gym 42nd as defendants and assert the causes of action against them set forth her proposed amended complaint, and to delete Club 7 as a discrete defendant. Since, as will be discussed, summary judgment must be awarded to the Silverstein defendants, the remainder of the plaintiff's motion, referable to Union Square and Clay, must be denied, and the supplemental summons and amended complaint that the plaintiff is permitted to file and

serve must omit the Silverstein defendants from the caption and omit all causes of action against them from the body of the amended complaint.

B. SUMMARY JUDGMENT

After service of their answer, the Silverstein defendants cross-moved pursuant to CPLR 3211(a)(1) and (7) to dismiss the complaint insofar as asserted against them or, in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the complaint insofar as asserted against them. Since they have answered the complaint, expressly sought relief pursuant to CPLR 3212, and have charted a summary judgment course (see Reiss v Financial Performance Corp., 279 AD2d 13, 16 n 2 [1st Dept. 2000]; Four Seasons Hotels v Vinnik, 127 AD2d 310, 320 [1st Dept. 1987]), the court addresses that branch of their cross motion which is for summary judgment. Summary judgment is awarded to the Silverstein defendants and, accordingly, the cross motion, which also seeks relief pursuant to CPLR 3211(a), must otherwise be denied as academic. See Kuzma v Protective Ins. Co., 104 AD3d 820, 820 (2nd Dept. 2013).

In support of their cross motion, the Silverstein defendants submit the pleadings, the health club operating agreement between RP and Gym 42nd, a printout of the Department of State's records with respect to the corporate status of both Gym 42nd and Union Square, and affidavits from both Michael Levy, SPI's executive

vice president, and Craig Harrington, Union Square's chief financial officer. The liability of the Silverstein defendants may only be predicated upon occupancy, ownership, control, or special use of the Clay health club facility. See Branch v County of Sullivan, 25 NY3d 1079, 1082 (2015). The Silverstein defendants established their prima facie entitlement to judgment as a matter of law dismissing the complaint insofar as asserted against them with proof that they did not own, manage, maintain, or assume a duty to maintain the health club facility or supervise Gym 42nd's operations at the facility. Levy's affidavit explains that SPI, although affiliated with RP, is a completely separate corporate entity, does not own the building, does not manage the Clay facility at the building, and has no obligation to manage the facility. Harrington asserts that Union Square and Gym 42nd are completely separate entities, and Union Square neither owns nor operates the Clay facility at the building, but operates a Clay facility on 14th Street. They each assert that their respective companies committed no affirmative act of negligence. In opposition, the plaintiff submits only an attorney's affirmation, which asserts that (1) SPI never denied that it managed the building on behalf of RP, (2) SPI executed the health club operating agreement between RP and Gym 42nd on behalf of RP as RP's agent, (3) Gym 42nd and Union Square both belonged to the same consortium of entities that operated Clay

health clubs, and (4) Union Square presumably owned all Clay facilities. An agent is not liable to third persons for nonfeasance, but only for affirmative acts of negligence or other wrongs. See Pelton v 77 Park Ave. Condominium, 38 AD3d 1, 11 (1st Dept. 2006), citing Greco v Levy, 257 App Div 209, 211 (1st Dept (1st Dept 1939), affd 282 NY 575 (1939). Moreover, the purported relationship between Gym 42nd and Union Square, as described by the plaintiff's counsel, is insufficient to impute Gym 42nd's negligence to Union Square, and counsel's affirmation describing that relationship and asserting, with no basis whatsoever, that Union Square owned all Clay facilities is of no probative value in any event. See Guzman v Mike's Pipe Yard, 35 AD3d 266, 266 (1st Dept. 2006). Since the plaintiff failed to raise a triable issue of fact in opposition to the Silverstein defendants' showing that they assumed no duty to oversee the health club or its operations, and committed no affirmative act of negligence, the Silverstein defendants' cross motion must be granted.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the plaintiff's motion for leave to amend the complaint and caption is granted, without opposition, to the

extent that the plaintiff is permitted to file and serve a supplemental summons and amended complaint (a) joining River Place II, LLC, and The Gym at 42nd Street, LLC, doing business as Club 7 By Clay, as defendants and assert causes of action against them as set forth in her proposed amended complaint, and (b) deleting Club 7 as a discrete defendant, and the motion is otherwise denied in light of the court's determination of the cross motion of the defendants Silverstein Properties, Inc., The Gym At Union Square, LLC, and Clay; and it is further,

ORDERED that the branch of the cross motion of the defendants Silverstein Properties, Inc., The Gym At Union Square, LLC, and Clay which is for summary judgment dismissing the complaint insofar as asserted against them is granted, and the cross motion is otherwise denied as academic; and it is further,

ORDERED that the action against the defendants Silverstein Properties, Inc., The Gym At Union Square, LLC, and Clay is severed and the Clerk of the court is directed to enter judgment dismissing the complaint insofar as asserted against them accordingly; and it is further,

ORDERED that and the caption of the action is amended as follows:

ELIZABETH LAPP,
Plaintiff,

- against -

RIVER PLACE II, LLC, THE GYM AT 42ND STREET, LLC,
doing business as CLUB 7 BY CLAY, TODD DOE, BLACK
MOUNTAIN PRODUCTS, INC., BMP FITNESS EQUIPMENT, INC.,
JOHN DOE 1, and JOHN DOE 2,

Defendants

and it is further,

ORDERED that the Clerk of the Court is directed to update
and revise his records and files accordingly, and it is further,

ORDERED that all parties shall appear for a preliminary
conference on April 6, 2017, at 2:30 p.m.

This constitutes the Decision and Order of the court.

Dated: January 4, 2017

ENTER: _____



J.S.C.

HON. NANCY M. BANNON