Elkady v Amano

2017 NY Slip Op 30892(U)

April 17, 2017

Supreme Court, New York County

Docket Number: 114315-2011

Judge: Margaret A. Chan

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 33

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MAXINE ELKADY,

Plaintiff,

-against-

AMANO, 125TH STREET MUNICIPAL PARKING GARAGE FACILITY, INC., IMPARK 125 LLC, FC HARLEM CENTER, LLC and FOREST CITY RATNER HOUSING COMPANY, INC.,

Defendants.
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DECISION/ORDER
Index No. 114315-2011

FILED
APR 28 2017
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury action plaintiff slipped and fell on the roof of a parking garage located at 121 West 125th Street, in the City, County, and State of New York, on January 12, 2009. This action was "consolidated for the purposes of joint discovery" by another justice of this court with *Meyers v Amano et al.*, Index No. 104659/2010 on January 30, 2013. That order did not amend the caption of the consolidated cases. The clerk of the court joined these indexed cases, but did not disturb their captions. Before this court is defendants FC Harlem Center, LLC and Forest City Ratner Housing Company, Inc.'s joint motion for summary judgment (mot seq 005) and plaintiff's motion to amend (mot seq 006). The decisions and orders are as follows:

Motion sequence 005

Defendants FC Harlem Center, LLC and Forest City Ratner Housing Company, Inc., jointly move for summary judgment (collectively referred to herein as the Forest City defendants). Plaintiff submitted opposition to which the Forest City defendants replied.

A movant seeking summary judgment in its favor must make "a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*see Winegrad v New York Univ. Med.* Ctr., 64 NY2d 851, 853 [1985]). The evidentiary proof tendered must be in admissible form (*see Friends of Animals v Assoc. Fur Manufacturers*, 46 NY2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). The proof raised by the opponent to the motion "must be sufficient to permit a finding of proximate cause 'based not upon speculation, but upon a logical inference to be drawn from the evidence'" (*see Robinson v City of New York*, 18 AD3d 255 [1st Dept 2005], quoting *Schneider v Kings Highway Hops. Ctr.*, 67 NY2d 743, 744 [1986]).

The Forest City defendants submitted proof in admissible form that they did not own, occupy, or control the premises where plaintiff fell. They submitted the deposition transcript of Jeanne Mucci, the Director of Legal Services for Forest City Ratner Companies (mot seq 005, Forest City's Mot, Exh H). She testified that neither FC Harlem Center, LLC nor Forest City Ratner Housing Company, Inc. had anything to do with the property located at 121 West

125th Street, where plaintiff fell (*id.* at pp 7, 10-11). Plaintiff failed to raise any triable issues of fact in opposition.

Therefore, FC Harlem Center LLC and Forest City Ratner Housing Company, Inc.'s joint motion for summary judgment is granted.

Motion sequence 006[1]

Plaintiff moves to amend the caption to add proposed defendants Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark. Initially, plaintiff named Impark 125 LLC as a party defendant in this action. However, plaintiff alleges the garage where she fell was operated and maintained by Imperial Parking U.S., Inc. . In 2011, Imperial Parking U.S., Inc. dissolved and Imperial Parking (U.S.) LLC was created in its place. At a deposition in this action, Steven Ching, the Operations Manager for Imperial Parking (U.S.) LLC testified that at the time of plaintiff's accident either Imperial Parking U.S., Inc. or Imperial Parking (U.S.) LLC had ownership and control of the subject parking garage and that the garage was operating under the d/b/a Impark (mot seq 006, Pltf's Mot, Exh 1-D, pp 6, 10, 11-12).

Plaintiff previously made a similar motion seeking the same relief (motion sequence 003) and it was granted on default by this court on April 23, 2015. Thereafter, defendant Impark 125 LLC moved to vacate the default (motion sequence 004). For clarity, defendant Impark 125 LLC moved to vacate the default order that added Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark as parties. That motion was also granted by this court on June 25, 2015. However, this court erred in the order and erroneously directed the clerk to amend the caption to vacate the addition of Impark 125 LLC, rather than Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark. As it should stand now, Impark 125 LLC is a party defendant, and Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark are not presently parties although the instant motion seeks to add them both. This order shall serve to amend and correct the June 25, 2015 decision and order (motion sequence 004) so that Impark 125 LLC is a party defendant.

In opposition to the instant motion to add Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark, defendant Impark 125 LLC argues that the addition of these parties is time-barred by the statute of limitations. Moreover, Impark 125 LLC argues that the motion is late because this court gave plaintiff 30 days after entry of the order vacating the amendment to renew. The instant motion was made four months after entry of the order.

Undisputedly, plaintiff's motion to add defendants Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark is made well beyond the relevant statute of limitations for personal injury actions (*see* CPLR §214)[2]. However, plaintiff argues that pursuant to CPLR § 305 (c) an amendment to the summons and complaint may be made after the expiration of the statute of limitations when there is a misnomer of the party and the party to be named is fully appraised of the action against it. In the alternative, plaintiff seeks

[1] The identical motion was made by plaintiff in the related *Meyers* matter in motion sequence 007. This court's reasoning and decision in both this action, in motion sequence 006, and the *Meyers* matter, in motion sequence 007, is the same.
[2] It is worth noting that plaintiff's prior motion to add the defendants, which was granted on default, was also made well after the statute of limitations ran.

leave to amend the complaint pursuant to CPLR § 203 (f), which permits the addition of a new party to the litigation where the claim relates back to the same transaction. Defendant Impark 125 LLC argues that neither CPLR § 305 (c) nor the relation back doctrine are applicable.

CPLR § 305 (c) permits amendment at the court's "discretion and upon such terms as it deems just . . . if a substantial right of a party against whom the summons issued is not prejudiced." While this section permits the correction of a named party, it does not permit the wholesale addition of a party in an attempt to avoid the operation of the statute of limitations (*see Chemicraft Corp. v Honeywell Protection Services,* 161 AD2d 250 [1st Dept 1990]; *Manhattan Plaza, Inc. v Air Tech Indus., Inc.*, 107 AD2d 578, 579 [1st Dept 1985]).

As to plaintiff's relation back argument, once a defendant has shown that the statute of limitations has run, plaintiff bears the burden of demonstrating the applicability of the relation back doctrine (*Cintron v Lynn*, 306 AD2d 118, 119 [1st Dept 2003]). Three conditions must be satisfied for its application: (1) the claims against the existing and the new party must be borne from the same transaction or occurrence; (2) the new party is united in interest with the existing defendant; and (3) the new party knew or should have known that, but for plaintiff's mistake, the action would have been brought against it as well (*see Buran v Coupal*, 87 NY2d 173, 178 [1995]).

Defendant Impark 125 LLC contends that it is a completely separate corporate entity than Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark. It claims to operate a parking garage at another location, 215 West 125th Street. Plaintiff argues that the companies are related and thus, she has satisfied three prongs of the relation back doctrine.

Here, there is no question that the first prong of the test necessary to invoke the benefit of the relation back doctrine has been met. The action arises from a single slip and fall incident. Plaintiff argues that the third prong was met as well because Steven Ching, the Operations Manager for Imperial Parking (U.S.) LLC, testified that "legal documents" for this action were provided to him at Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark, although, he does not state when he received such documents or what specifically they were (mot seq 006, Pltf's Mot, Exh 1-D, p 26).

As to the second prong, plaintiff again relies on the production of Steven Ching, the Operations Manager for Imperial Parking (U.S.) LLC, for Impark 125 LLC's deposition. He testified that Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark handled cleaning and snow removal for the garage located at 121 West 125th Street (mot seq 006, Pltf's Mot, Exh 1-D, p 12). He also testified that the receipt plaintiff was provided on the date of the accident, which states "Amano" in large font at the top and "Impark" in small font at the bottom, refers to Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark (mot seq 006, Pltf's Mot, Exh 1-D, pp 32 -33; exh F). His appearance at the deposition and his testimony certainly indicate some relationship between the entities.

However, for purposes of relation back doctrine, more is required. The existing defendant and the new defendant must stand or fall together so that the judgment against one will similarly affect the other, that is, the defendants must necessarily have the same defenses to plaintiff's claim (*Lord Day & Lord, Barrett, Smith v Broadwall Mgt. Corp.*, 301 AD2d 362 [1st Dept 2003]). The information elicited during Mr. Ching's deposition does not

cement the relationship between the parties other than to say that they are somehow related. Defendant Impark 125 LLC proffers that they cannot stand and fall together if, as it alleges, they operate different garages at different locations. As it is plaintiff's burden to show the unity in interest between the parties, at this juncture, the corporate relationship remains unclear (*cf. Donovan v All-Weld Products Corp.*, 34 AD3d 257, 258 [1st Dept 2006] [through discovery plaintiff demonstrated that added party was a wholly owned subsidiary]).

Therefore, plaintiff's motion to amend the caption to add Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark is denied (mot seq 006).

Accordingly, it is hereby

ORDERED, this court's June 25, 2015 decision and order is amended so that Impark 125 LLC is a party defendant rather than Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark, it is further

ORDERED, as to motion sequence 005, FC Harlem Center LLC and Forest City Ratner Housing Company, Inc.'s joint motion for summary judgment is granted. All claims and any cross claims against FC Harlem Center LLC and Forest City Ratner Housing Company, Inc. are dismissed. The clerk of the court is directed to enter judgment as written in favor of FC Harlem Center, LLC and Forest City Ratner Housing Company, Inc., and it is further

ORDERED, as to motion sequence 006, plaintiff's motion to amend the caption to add Imperial Parking (U.S.) LLC and Imperial Parking (U.S.) LLC d/b/a Impark is denied.

Impark 125 LLC is directed to serve a copy of this order on the clerk of the court and all parties with notice of entry within 30 days of its entry.

This constitutes the decision and order of the court.

DATE : 4/17/2017

FILED
APR 28 2017
COUNTY CLERK'S OFFICE
NEW YORK

MARGARET A. CHAN,
J.S.C.