Martinez v RXR Realty LLC
2017 NY Slip Op 32513(U)
November 8, 2017
Supreme Court, New York County
Docket Number: 159233/2013
Judge: David B. Cohen

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

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WILBERT MARTINEZ,

Plaintiff,

-against-

RXR REALTY LLC, et al.,

Defendants.

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DECISION AND ORDER
Index No. 159233/2013

Hon. David B. Cohen

This is a personal injury action arising out of an accident which occurred on September 13, 2012, in a building located at 25 West 18th Street, New York, New York. The plaintiff claims that he was participating in a fire drill when he tripped and fell down an interior staircase. The action was commenced on October 8, 2013 by the filing of a Summons and Verified Complaint, naming various defendants including RXR Realty LLC, RXR 620 Owner I LLC, Bonjour 620 II LLC, CF620 Owner One, LLC and YL 620 Sixth LLC (the "RXR Defendants"). Issue was joined on December 6, 2013.

On October 30, 2014, the parties stipulated to add Newmark Knight Frank Management Inc. and Newmark & Company Real Estate Inc. (the "Newmark defendants") as defendants and allow for the filing and service of a Supplemental Summons and Amended Verified Complaint. The plaintiff filed the Amended Verified Complaint on November 6, 2014. On May 6, 2015, the Newmark defendants commenced a third-party action against Building Services 32BJ Health Fund ("Building Services") by filing a third-party complaint asserting causes of action for breach of contract, indemnification, contribution and failure to procure insurance. The parties stipulated that the plaintiff could add Building Services as a direct defendant. On September 10, 2015, the

plaintiff filed a Second Amended Verified Complaint naming Building Services as a direct defendant.

On October 24, 2016, the Newmark defendants filed a Second-Third-Party Complaint naming Quality Fire Protection Consultants Inc. ("Quality Fire") as a third-party defendant. Quality Fire answered the Second Third-Party Complaint on December 8, 2016. On February 24, 2017, plaintiff unilaterally filed a summons and a Third Amended Verified Complaint, naming Quality Fire as a direct defendant. Pursuant to CPLR § 3211(a)(5), Quality Fire now moves to dismiss the Third Amended Verified Complaint on the ground that the plaintiff's claims against Quality Fire are barred by the expiration of the statute of limitations. For the reasons set forth below, the Court grants the motion.

Quality Fire bears the initial burden of establishing that the time in which to commence a direct action against it had expired prior to the filing of the Third Amended Verified Complaint. Quality Fire has met its burden. Plaintiff's accident occurred on September 13, 2012. CPLR § 214 (5) provides that an action for personal injuries arising out of negligence must be commenced within three years of the date of the alleged injury. Accordingly, in order to be timely, any action predicated upon the September 14, 2012 accident had to be commenced no later than September 13, 2015. Plaintiff did not commence its action against Quality Fire until February 24, 2017, over 17 months after the expiration of the statute of limitations. On its face, the Third Amended Verified Complaint is time-barred.

The burden now shifts to the plaintiff to raise an issue of fact as to whether the statute of limitations was satisfied or is otherwise inapplicable (*see Xavier v. RY Management Corporation, Inc.*, 45 AD3d 677, 678 [2d Dept 2007]). In opposing the motion, the plaintiff argues that the claims against Quality Fire relate back, for statute of limitations purposes, to the

date the plaintiff commenced his action against the RXR Defendants. The plaintiff relies upon CPLR §203(b) which allows a claim to relate back to the date on which the claim was interposed against the originally named defendants, if the subsequently served defendant is united in interest with the defendants originally named (*see Cintron v. Lynn*, 306 AD2d 118, 119 [1st Dept 2003]). There are three conditions that must be satisfied for a claim asserted against a defendant subsequently sought to be joined to relate back to claims asserted against another defendant: (1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit that it will not be prejudiced in maintaining its defense on the merits and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against it as well (*see Buran v. Coupal,* 87 NY2d 173, 177 [1995]; *Mondello v. New York Blood Ctr.*, 80 NY2d 219, 226 [1992]; *Cintron*, 306 AD2d at 119).

Here, plaintiff has met the first requirement as the claims in the original complaint and those in the Third Amended Verified Complaint arise out of the same accident. With respect to the third requirement, the Court of Appeals has held that a plaintiff need not show that a mistake is excusable as long as the omission in joining the parties is not intentional or based on tactical advantage (*see Buran*, 87 NY2d at 176). In this case, there is nothing to suggest that plaintiff's failure to name Quality Fire as a defendant was intentional or done for any unfair tactical advantage.

Nevertheless, the motion to dismiss the Third Amended Verified Complaint must be granted because the plaintiff has failed to demonstrate that Quality Fire is united in interest with the RXR Defendants. In order for there to be a unity of interest under CPLR 203(b), the parties

must have a relationship which gives rise to the vicarious liability of one for the conduct of the other. The classic test for vicarious liability is whether "the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." (*Vanderburg v. Brodman*, 231 AD2d 146, 147-148 [1st Dept. 1997] [citation omitted]. In other words, the original defendants and proposed defendants must "necessarily have the same defenses to the plaintiff's claim" (*Connell v. Hayden*, 83 AD2d 30, 40-41 [2d Dept 1981]). If the only relationship between the original defendants and the proposed new defendant is that of joint tortfeasors, they are not united in interest and the claims cannot relate back (*id.*).

The plaintiff relies on a service contract agreement between the RXR defendants, as owners, managers and/or operators of the premises, and Quality Fire. The contract provides that Quality Fire was responsible for fire safety training, supervision and consulting at the premises. It further provides that Quality Fire is liable for any negligence committed during the course of its fire safety training and consulting. Contrary to the plaintiff's contentions, the service contract does not make the RXR defendants and Quality Fire united in interest for purposes of this litigation. Quality Fire was an independent contractor retained by the RXR defendants for the sole purpose of performing fire prevention and safety services at the premises. There is no evidence that the RXR defendants controlled Quality Fire's work and Quality Fire did not assume control over all maintenance at the premises. An independent contractor retained to perform specific services is not united in interest with its employer because the latter is not vicariously liable for the torts of the former. (*see Kleeman v. Rheingold*, 81 NY2d 270, 273 [1993]; *Stulberger v. Bellucci*, 251 AD2d 569 [2d Dept 1998]; *Kitson v. Atlantic Refining & Marketing Corp.*, 227 AD2d 971, 972 [4th Dept 1996]). Although, under certain circumstances,

an employer may be vicariously liable for the acts of its independent contractor engaged in an inherently dangerous activity, there is no indication that this exception applies here as neither the original nor the amended complaints allege that the plaintiff's injuries were caused by a danger inherent to the performance of the fire drill itself, as opposed to the manner in which the drill was performed (*see Whelen v. Whelen*, 231 AD2d 712, 713 [2d Dept 1996]; *Christie v. Ranieri and Sons*, 194 AD2d 453, 454 [1st Dept 1993]). In any event, despite plaintiff's characterization of the liability between the RXR Defendants and Quality Fire as vicarious, the nature of the claims asserted in the Third Amended Verified Complaint indicate that the RXR Defendants and Quality Fire's interests do not stand and fall together and that their defenses are not identical (*see Hilliard v. Roc-Newark Assoc.*, 287 AD2d 691, 692-693 [2d Dept 2001].

As the plaintiff has not demonstrated that the RXR Defendants are united in interest with Quality Fire, the claims against Quality Fire are time-barred, and the motion to dismiss the Third Amended Verified Complaint is granted. Accordingly, it is hereby

ORDERED that the Third Amended Verified Complaint is hereby dismissed.

Dated: November 8, 2017

Hon. David B. Cohen, J.S.C.

HON. DAVID B. COHEN
J.S.C.