

Cirino v 15 E. 208th St. Realty Corp.

2018 NY Slip Op 30886(U)

April 3, 2018

Supreme Court, Bronx County

Docket Number: 302950/14

Judge: Doris M. Gonzalez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

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CHARLOTTE CIRINO,

Plaintiff,

Index No. 302950/14

-against-

DECISION AND ORDER

15 EAST 208TH STREET REALTY CORPORATION
and MNS MANAGEMENT GROUP, INC.,

Defendants.

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GONZALEZ, D.:

Upon: i) the Order to Show Cause by Christopher M. Lochner, Esq., attorney for the defendants, 15 East 208th Street Realty Corporation (“15 East 208th Street”) and MNS Management Group, Inc. (“MNS”), for an Order: 1) pursuant to CPLR Rule 3212 and CPLR Rule 214(5), dismissing plaintiff’s action as against MNS Management Group, Inc.; or, in the alternative; 2) staying the trial of the matter and vacating the Note of Issue and striking the matter from the Court’s trial calendar, pursuant to NYCRR1 Rule 202.21, on the grounds that all preliminary proceedings have not been completed; 3) compelling plaintiff to provide responses to discovery demands served by MNS Management, compelling plaintiff to appear for a deposition by MNS Management and independent medical examination(s) on behalf of MNS Management; 4) extending the time to file any summary judgment motions; and 3) for such other and further relief as this Court may deem just and proper; ii) the Notice of Cross-Motion and Affirmation in Opposition, dated January 26, 2018, by Jason Herbert, Esq., attorney for the plaintiff, for an Order: 1) permitting the plaintiff to amend the Bill of Particulars; and 2) for such other, further and different relief as this Court may deem just and proper; and iii) the Affirmation in Opposition to the Cross-Motion, dated January 31, 2018, by Christopher M. Lochner, Esq.

PROCEDURAL HISTORY

The action was commenced against defendant 15 East 208th Street with the filing of a Summons and Complaint, on or about May 21, 2014. Issue was joined by defendant's service of the Answer, on or about July 11, 2014.

A Note of Issue and Certificate of Readiness was filed, on or about January 16, 2016. The plaintiff, thereafter, filed an Amended Summons and Complaint adding MNS, on or about August 11, 2017. Issue was joined by defendants' service of the Amended Answer, on or about September 26, 2017.

This matter is on the trial calendar. The trial is currently scheduled for April 2, 2018.

FACTUAL BACKGROUND

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff arising from a slip and fall accident that occurred on or about February 20, 2014. It is alleged that the plaintiff slipped and fell on snow and ice outside of the premises known as 15 East 208th Street, County of Bronx, City and State of New York. It is alleged that 15 East 208th Street owned the premises in question and MNS was the property manager.

The defendant MNS argues that the note of issue should be stricken since MNS was recently added as a defendant. The defendant MNS also argues that it should be allowed to move for summary judgment once it completes discovery.

The plaintiff opposes the motion arguing that MNS is not entitled to conduct any discovery since the defendants are united in interest. The plaintiff alleges 15 East 208th Street is the owner of the premises and MNS is the property manager. The plaintiff contends that the defendants should not be granted an extension of time to move for summary judgment.

In addition, the plaintiff cross-moves for leave to amend the bill of particulars to include additional injuries that have not been plead, but the defendants were made aware of during the plaintiff's deposition. The defendants oppose the amendment arguing that a post-note of issue amendment would prejudice the defendants since discovery has not been exchanged as to the proposed, new injuries.

DISCUSSION OF LAW

Motions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom (CPLR 3025 [b]; *see Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652, 891 NYS2d 387 [2009]). On a motion for leave to amend a pleading, the movant need not establish the merit of the proposed new allegations, but must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*see MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500, 901 NYS2d 522 [2010]).

The plaintiff seeks to amend her bill of particulars to include additional injuries, specifically, a pulmonary embolism and a left wrist fracture. The plaintiff testified at her examination before trial about the additional injuries. However, although she testified about these injuries, based on the record, it would be prejudicial to allow the amendment without further discovery.

Once the Court allows the amendment, the Court must also entertain the defendants' discovery issues so there is no prejudice in the defense of the action. The plaintiff should be permitted to amend the bill of particulars, however, in the interest of justice and to prevent any prejudice to the defendants, the note of issue should be stricken and the matter referred to the pre-note discovery part. Ironically, the defendants seek to strike the note of issue so that MNS can continue to engage in discovery and move for summary judgment as of right.

It is undisputed that the plaintiff amended his complaint, on or about August 11, 2017, to add MNS as a party defendant, approximately 19 months after the note of issue and certificate of readiness was filed. MNS was a newly added party to the action and entitled to conduct its own discovery and move for summary judgment even though it was added to the action while the case was on the trial calendar. The plaintiff argues that the note of issue should not be stricken since MNS and 15 East 208th Street are parties united in interest and, as such, MNS has received all discovery to date.

The ‘united in interest’ term describes the relationship between two parties under the relation back doctrine. The relation back doctrine enables a plaintiff to correct a pleading error by adding either a new claim or a new party ‘united in interest’ with the original defendant after the statutory limitations period has expired (*see Buran v Coupal*, 87 NY2d 173 [1995]). The relation back doctrine, however, does not deprive a newly added party of its right to engage in discovery (*see Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652 [1st Dept 2009]).

The defendants’ order to show cause seeks to strike the note of issue upon the grounds that MNS is a newly added party and is entitled to engage in discovery. Whether or not the defendants are united in interest does not bar MNS’ right to discovery or its right to move for summary judgment. In addition, a Court may exercise its discretion in granting further discovery where there are “unusual or unanticipated circumstances” to prevent “substantial prejudice” (22 NYCRR §202.21[d]; *see Schroeder v IESI NY Corp.*, 24 AD3d 180 [1st Dept 2005]). Based on the record before the Court, and in order that no party is prejudiced, the note of issue must be stricken

ACCORDINGLY, after consideration of the foregoing, the applicable law, a review of the Court file, and due deliberation; it is hereby


ORDERED, that leave to amend the bill of particulars is granted; and it is further

ORDERED, that the plaintiff's note of issue and certificate of readiness is stricken.

This constitutes the Decision and Order of the Court.

Dated: April 3, 2018
Bronx, New York

ENTER:



HON. DORIS M. GONZALEZ, J.S.C.