

Wolf v Walgreens Boots Alliance, Inc.

2019 NY Slip Op 30685(U)

March 18, 2019

Supreme Court, New York County

Docket Number: 156071/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 156071/2015

NAOMI WOLF,

MOTION SEQ. NO. 003

Plaintiff,

- v -

WALGREENS BOOTS ALLIANCE, INC., RETAIL PHARMACY
USA, INC., DUANE READE, INC., WALGREEN CO., PETER
MALKIN MANAGEMENT, INC., ESRT 250 WEST 57TH STREET
ASSOCIATES, LLC, C/O EMPIRE STATE REALTY TRUST, INC.,
250 WEST 57TH STREET ASSOCIATES, LLC, C/O MALKIN
HOLDINGS, LLC, and AVP TERMITE AND PEST CONTROL OF
NEW YORK, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121

were read on this motion to

DISMISS

Upon the foregoing documents, it is ordered that the motion is **granted**.

In this personal injury action, third-party defendant AVP Termite and Pest Control of New York, Inc. (“AVP”) moves for: (1) dismissal of plaintiff Naomi Wolf’s (“Wolf”) amended complaint pursuant to CPLR 3211(a)(5); and (2) dismissal of defendant Duane Reade, Inc.’s (“Duane Reade”) cross claims against AVP on the basis that those claims already exist in Duane Reade’s third-party complaint against AVP.¹ (Doc. 98.) Wolf is the only party that opposes the motion. (Doc. 111.) After oral argument, and after a review of the parties’ papers and the relevant statutes and caselaw, it is ordered that the motion is **granted**.

¹ AVP does not cite a CPLR provision for dismissing Duane Reade’s cross claims.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 11, 2013, plaintiff Wolf allegedly tripped and fell over a loose base plate on the floor of a Duane Reade store located on West 57th Street in Manhattan. (Docs. 35 at 3; 99 at 2; 111 at 2.) She commenced the captioned negligence action on June 16, 2015 by filing a summons and complaint against defendants Walgreen Boots Alliance, Inc. (“Walgreen Boots Alliance”), Retail Pharmacy USA, Inc. (“Retail Pharmacy”), Duane Reade, Walgreen Co. (“Walgreen”), and Peter Malkin Management, Inc. (“Peter Malkin Management”). (Docs. 1–2.) On July 15, 2015, Walgreen Boots Alliance, Retail Pharmacy, Duane Reade, and Walgreen served their answer. (Doc. 101.)

Thereafter, on January 11, 2016, Wolf, Walgreen Boots Alliance, Retail Pharmacy, Duane Reade, and Walgreen entered into a stipulation to amend the complaint. (Doc. 102.) The stipulation provided that the amended caption would join ESRT 250 West 57th Street Associates, LLC c/o Empire State Realty Trust, Inc. (“ESRT”) and 250 West 57th Street Associates, LLC c/o Malkin Holdings, LLC (“Malkin Holdings”) as defendants. (*Id.* at 5.) Peter Malkin Management was not named in this caption. (*See id.*) However, Peter Malkin Management was a named defendant in Wolf’s first amended complaint, which she filed on March 18, 2016. (Doc. 103 at 6.)

Plaintiff alleges that, sometime during discovery, Duane Reade produced a video that showed “an individual creat[ing] a trap-like condition on April 10, 2013, at the store” (Doc. 111 at 3), just a day before plaintiff’s accident. Plaintiff also represents that, on August 15, 2017, “while in court, counsel for the Walgreens Defendants indicated that [they recently] became aware of the individual in the April 10, 2013 video” (*id.*), and that counsel further indicated that the individual was associated with AVP, with which Duane Reade had a contract for pest control services (*id.*).

On September 11, 2017, Duane Reade filed a third-party action against AVP for contractual indemnification, common law indemnification, negligence, and attorneys' fees. (Docs. 99 at 3; 106.) AVP filed its answer to the third-party complaint on October 16, 2017. (Doc. 107.) On October 30, 2017, Wolf filed a second amended complaint joining AVP as a direct defendant in this action. (Doc. 108.)

AVP now moves, pursuant to CPLR 3211(a)(5), for dismissal of Wolf's second amended complaint, arguing that she is barred by the statute of limitations from bringing a claim against it. (Doc. 99 at 2.) AVP further moves for dismissal of Duane Reade's cross claims on the basis that those claims already exist in Duane Reade's third-party complaint against AVP.² (*Id.*) Wolf opposes the motion and argues that her second amended complaint naming AVP as a direct defendant is timely under the "relation back" doctrine. (Doc. 111 at 5-11.)

LEGAL CONCLUSIONS:

a. Whether Plaintiff's Claims Against AVP Must be Dismissed Pursuant to CPLR 3211(a)(5).

CPLR 3211(a)(5) provides that a motion to dismiss may be granted when a party's claims are barred by the statute of limitations. Actions based on personal injuries must be commenced within three years. (*See* CPLR 214[5].) Nevertheless, the "relation back" doctrine allows a personal injury plaintiff to bring a new defendant into an action even after the limitations period has expired. This doctrine has been codified in CPLR 203(f), which provides that a "claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original

² AVP does not cite a CPLR provision in support of its argument for dismissing Duane Reade's cross claims. (*See* fn. 1; *see also* Docs. 99 at 8; 120 at 9.) However, AVP's essential argument is that Duane Reade's cross claims should be dismissed because they are duplicative of the claims it asserts against AVP in its third-party complaint. (Doc. 120 at 9.)

pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences . . . to be proved pursuant to the amended pleading.”

Once the defendant establishes that the amended complaint was filed subsequent to the expiration of the limitations period, the burden shifts to the plaintiff “to present sufficient evidence that the relation-back doctrine applie[s].” (*Alvarado v Beth Israel Med. Ctr.*, 60 AD3d 981, 982 [2d Dept 2009].) Courts apply the relation back doctrine when:

- (1) both claims arose out of the same 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 the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and
- (3) the new party knew or should have known that, but for [a] . . . mistake by the plaintiff in originally failing to identify all the proper parties, the action would have been brought against the additional party united in interest as well.

(*See Mondello v New York Blood Ctr.—Greater N.Y. Blood Program*, 80 NY2d 219, 226 [1992].)

Here, AVP has shown that Wolf’s second amended complaint was filed more than three years after the statute of limitations expired. Plaintiff was injured on April 11, 2013 (Docs. 99 at 2; 111 at 2), but Wolf did not file a complaint joining AVP as a direct defendant until October 30, 2017 (Doc. 108). The burden was thus on Wolf to show that the relation back doctrine applied. (*Alvarado*, 60 AD3d at 982.)

This Court finds that plaintiff has easily satisfied the first requirement of the relation back doctrine. Her claims against Duane Reade and AVP both arise out of the same occurrence: her April 11, 2013 accident.

The parties' main contention is with respect to the second requirement: that the parties be united in interest. Courts have held that a unity of interest will be found "where there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." (*Vanderburg v Brodman*, 231 AD2d 146, 147 [1st Dept 1997].) AVP argues that it is not united in interest with Duane Reade because they are "two independent companies that are not affiliated with one another" (Doc. 120 at 5), because Duane Reade did not exercise control over AVP's work (*id.*), and because the two entities have pressed counterclaims against one another (Doc. 99 at 7).

The classic test in determining if a unity of interest exists 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*, 231 AD2d at 147.) Although AVP correctly points out that the contract between it and Duane Reade states that "[n]othing contained herein shall be deemed or constitute a joint venture, partnership, like association or employer/employee relationship between" the two entities (Doc. 114 at 3) (*contra Quiroz v Beitia*, 68 AD3d 957, 959 [2d Dept. 2009] (a unity of interest exists "by virtue" of parties' contractual relationship to create a joint venture)), this Court finds that other contractual provisions make one defendant liable for the other. Section 7 of the contract provides that AVP's duty to indemnify Duane Reade "applies whether the claim or loss was alleged to have been caused in part by the negligence or fault of Duane Reade." (*Id.* at 3-4.) (*See Quiroz*, 68 AD3d at 960 (also finding that a unity of interest exists where one party is required to indemnify the other).) Because First Department caselaw holds that parties are united in interest "by virtue" of a contractual indemnification provision (*see Brunero v City of New York Dept. of Parks & Recreation*, 121 AD3d 624, 626 [1st Dept 2014]), this Court determines that plaintiff has also satisfied the second element of the relation back doctrine.

Notwithstanding the foregoing, this Court determines that plaintiff failed to satisfy the third element of the relation back test. She argues that a surveillance video was produced by Walgreens “during discovery”³ (Doc. 111 at 3), and that she only became aware of AVP in August of 2017 when, on August 15, 2017 counsel for the Walgreens defendants stated in court that they had only recently become aware of the individual shown in the video (*id.*). Even if this were true, this was not a “mistake” that plaintiff made in failing to identify all the proper parties. Rather, it seems that it was because of a lack of due diligence that plaintiff did not know who the individual in the video was associated with. (*See Walker v Hormann Flexon, LLC*, 153 AD3d 997, 998 [3d Dept 2017] (dismissal properly granted where plaintiff did not try to explain the delay in joining a new defendant).) Moreover, plaintiff has not shown that AVP “knew or should have known” that she intended to sue AVP but for her mistake in identifying all the proper parties. AVP could have rightfully concluded that Wolf’s failure to sue it in either the original or first amended complaint meant that there was no intent to sue. (*See Alvarado*, 60 AD3d 981, 983 [2d Dept 2009] (applying the same reasoning).)

Because the relation back doctrine does not apply in this matter, plaintiff’s complaint against AVP should be dismissed pursuant to CPLR 3211(a)(5) as barred by the statute of limitations.

b. Whether Duane Reade’s Cross Claims Should be Dismissed.

AVP further moves to dismiss Duane Reade’s cross claims on the basis that Duane Reade

³ Plaintiff’s affirmation in opposition to the instant motion does not provide an exact date as to when this surveillance video was produced.

“is not prejudiced with the dismissal of plaintiff’s second amended verified complaint as to AVP Termite.”⁴ (Doc. 99 at 8.) Although AVP does not cite any CPLR provision in support of its argument for dismissal, this Court acknowledges that claims may be dismissed when they are duplicative. (*See Rivas v Raymond Schwartzberg & Assocs., PLLC*, 52 AD3d 401, 401 [1st Dept 2008] (claims are redundant when they arise from the same facts and allege similar damages and should therefore be dismissed).) AVP’s essential argument is that Duane Reade cannot have both: (1) claims against AVP in its third-party complaint; and (2) those same claims asserted as cross claims. (Docs. 99 at 8; 120 at 9.) This Court agrees and decides that AVP’s cross claims must be dismissed for redundancy.

Further, because this Court finds that plaintiff may not bring an action against AVP, Duane Reade does not have any cross claims against AVP. Instead, what Duane Reade has are direct claims against AVP, which Duane Reade has already asserted in its third-party complaint. (Doc. 106.) Thus, for this reason as well, Duane Reade’s cross claims should be dismissed.

In accordance with the foregoing, it is hereby:

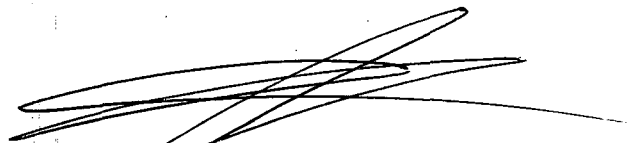
ORDERED that the motion by third-party defendant AVP Termite and Pest Control of New York, Inc. to dismiss the complaint of plaintiff Naomi Wolf and the cross claims of third-party plaintiff Duane Reade, Inc. is granted; and it is further

⁴ Duane Reade has not filed an opposition to this branch of AVP’s motion.

ORDERED that counsel for the moving party is directed to serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and upon all parties within 30 days after this order is entered; and it is further

ORDERED that his constitutes the decision and order of this Court.

3/18/2019
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE