Makkos v Braka
2019 NY Slip Op 31393(U)
May 16, 2019
Supreme Court, New York County
Docket Number: 160721/2017
Judge: William Franc Perry
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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GEORGE MAKKOS,

Plaintiff,

- v -

IVOR BRAKA, ROBIN BRAKA,

Defendants.

---X

INDEX NO. 160721/2017

MOTION DATE 05/01/2019

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 74, 75, 76, 77, 78

were read on this motion to/for AMEND/MODIFY DECISION/ORDER/JUDGMENT .

In this action, plaintiff seeks to recover damages for alleged property damage sustained at his premises on January 11, 2015. Plaintiff moves pursuant to CPLR §1002, §1003, and §3025(b), for leave to join non-party entity Centurian Credit Corp. ("Cènturian") as a defendant herein, and for leave to amend the complaint. Defendants oppose the motion, claiming that any claims against Centurian are time barred and thus, the proposed claims lack merit.

Plaintiff is asking this court to exercise its discretion and permit him to amend his complaint and add Centurian as a defendant, as Centurian is united in interest with the Braka defendants and thus, the relation-back doctrine operates to revive plaintiff's time barred claim against Centurian.

BACKGROUND

Plaintiff commenced this action against the Braka defendants on December 4, 2017, seeking to recover damages sustained to his premises on January 11, 2015, allegedly caused by defendants' negligence in the ownership, and maintenance of their apartment. (NYSCEF Doc. No. 1). Specifically, plaintiff alleges that the property damage resulted from an improperly

secured garden hose left running on the terrace of the apartment above his unit. (NYSCEF Doc. No. 17).[1]

Plaintiff contends that the Braka defendants have resided in apartment 52B, the unit directly above plaintiff's unit, since 2001 and were residing in that apartment on January 11, 2015, the date of the incident giving rise to the property damage claims here. (NYSCEF Doc. No. 67). Defendants do not deny that Centurian owns the apartment and that they resided in the apartment on the date of the incident.

Defendants maintain that allowing plaintiff leave to amend his pleadings and add Centurian as a party-defendant when the statute of limitations has expired, will unduly prejudice defendants by delaying the litigation. Additionally, defendants assert that plaintiff has not demonstrated that Centurian and the Braka defendants are united in interest. Defendants also argue that plaintiff has not provided a valid excuse for his failure to name Centurian as a defendant in a timely fashion as the duly recorded deed for Apartment 52B reflects that Centurian is the owner. Finally, in opposition to plaintiff's motion to add Centurian as a party to this action, defendants submit the affidavit of the Vice President and Secretary of Centurian, who states that Centurian has owned apartment 52B since February 24, 1994, owned it on January 11, 2015, and that Centurian has maintained and managed the apartment at all times relevant to plaintiff's claims without entering into any lease agreement with the Braka defendants who have resided in the apartment since 2001. (NYSCEF Doc. No. 70).

[1] The Braka defendants previously moved for summary judgment on October 19, 2018, claiming that the proposed additional defendant, Centurian, is the title owner of the subject premises, and as such the Braka defendants owed no duty to plaintiff and are entitled to summary judgment. (NYSCEF Doc. Nos. 13 - 21). Plaintiff opposed that motion and cross-moved on October 31, 2018 for the relief sought in the instant motion, however, at a status conference before this court on January 8, 2019, each party withdrew their respective motions with leave to refile. (NYSCEF Doc. Nos. 23 – 31, 37). Thereafter, plaintiff moved for the relief sought herein, however, that motion was denied by the court, without prejudice to refile upon proper papers. (NYSCEF Doc. No. 58).

Based on these uncontested facts, plaintiff argues that the defendants are united in interest and that no prejudice will result from the proposed amendment to add Centurian, as defendant Ivor Braka, who is the President and Chief Executive Officer of Centurian, either knew or should have known, at the outset of the litigation, that plaintiff had inadvertently failed to identify the proper title owner, whom Braka knew to be Centurian.

Plaintiff argues that title ownership by the Braka defendants was alleged in the complaint, denied in the answer, and then used as grounds to move for dismissal of plaintiff's claims. Moreover, plaintiff argues that since Centurian has admitted its ownership and responsibility to maintain and manage the apartment, its corporate officer Ivor Braka can be liable for the corporation's negligence in which he was a direct participant, and that defendants cannot play a "shell game" to escape the consequences of their negligence and deny that these defendants are united in interest, for purposes of defeating this motion. Finally, plaintiff argues that the absence of a lease, coupled with the decision to secure personal insurance coverage, as opposed to coverage for Centurian, creates issues of fact surrounding the corporate ownership structure that defendants are attempting to hide behind, and that these issues should be explored through the discovery process once Centurian has been added as a defendant. (NYSCEF Doc. No. 68).

STANDARD OF REVIEW/ANALYSIS

"Under the relation-back doctrine of CPLR 203 (b) and (c), new parties may be joined as defendants in a previously commenced action, after the statute of limitations has expired on the claims against them, where the plaintiffs establish that each of the following three criteria are satisfied" (*Higgins v City of New York,* 144 AD3d 511, 512, 43 N.Y.S.3d 1 [1st Dept 2016]). First, plaintiff must show that the claims against the new defendant arise from the same conduct, transaction, or occurrence as the claims against the original defendant. Second, plaintiff must

show that the new defendant is "united in interest" (CPLR 203 [b], [c]), with the original defendant, and will not suffer prejudice due to lack of notice. Third, plaintiff must show that the new defendant knew or should have known that, but for the plaintiff's mistake, they would have been included as a defendant (id., at 513); see also (*Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 981 NYS2d 84 [1st Dept 2014]).

Here, there is no question that plaintiff has satisfied the first and second prong of the relation-back criteria as the claims in the proposed amended complaint clearly arise from the same conduct as the claims against the Braka defendants, and based on the parties' submissions, there can be no doubt that Centurian knew or should have known, as owner of the apartment where the garden hose was allegedly left running, that it could be included as a defendant. The only issue raised by defendants' opposition is whether Centurian and the Braka defendants are united in interest and whether these defendants will be prejudiced by allowing the proposed amendment.

The requirement of unity of interest is "more than a notice provision" (*Mongardi v BJ's Wholesale Club, Inc.*, 45 AD3d 1149, 1151, 846 NYS2d 441 [3d Dept 2007] [internal quotation marks omitted]). The test 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, 660 NYS2d 438 [1st Dept 1997] [internal quotation marks omitted]). "[U]nity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*Higgins*, 144 AD3d at 513). "[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff" (*LeBlanc v Skinner*, 103

AD3d 202, 210, 955 N.Y.S.2d 391 [2d Dept 2012] [internal quotation marks and citation omitted]).

Here, defendants contend that plaintiff has not offered a satisfactory excuse for his delay in seeking to name Centurian as a defendant and that the defendants will be significantly prejudiced if plaintiff is permitted to amend his complaint. Plaintiff has explained that the absence of any lease agreement and his inability to locate any other documentation regarding Centurian 's role with respect to the defendants' premises led to his failure to identify this proposed additional defendant prior to the expiration of the statute of limitations on or about January 11, 2018. However, plaintiff notes that upon receipt of defendants' initial motion for summary judgment filed on October 19, 2018 and withdrawn on January 8, 2019, he immediately cross-moved on October 31, 2018 to amend the complaint.

Plaintiff concedes that his failure to name Centurian as a defendant was a mistake which should be excused by application of the relation-back doctrine, given the record before this court. Moreover, plaintiff contends that defendant Ivor Braka, as the President and Chief Executive Officer of Centurian, was undoubtedly aware at the commencement of the action, that title ownership rested with his corporate entity. Additionally, plaintiff avers that the Braka defendants knew that the underlying lawsuit arose from the occupancy of their dwelling unit, as they reported the claim to their insurance carrier two days after the incident, thus eliminating any possible prejudice that the Braka defendants and Centurian can now claim in opposition to this motion. (NYSCEF Doc. No. 68).

"New York law requires merely mistake—not excusable mistake—on the part of the litigant seeking the benefit of the [relation back] doctrine". (*Buran v Coupal*, 87 NY2d 173, 176, 661 N.E.2d 978, 638 N.Y.S.2d 405 [1995]). Indeed, the relation-back doctrine "enables a

plaintiff to correct a pleading error - by adding either a new claim or a new party - after the statutory limitations have expired" to allow for a decision on the merits in those cases that "justify the relaxation of limitation strictures" and where defendants have not demonstrated that they would suffer prejudice as a result of the proposed amendment. (*Buran*, 87 NY2d at 177).

Based on the record, defendants have simply not met their burden to demonstrate that they will be prejudiced by the proposed amended complaint. Defendants offer no proof of any significant prejudice that will result from permitting Centurian, the owner of the unit, to be added as a party defendant. Defendants claim that they will be hindered in preparing a defense in this action and may be prevented from obtaining discovery in defense of the claims because, Centurian may move to dismiss the complaint if the court permits the proposed amendment, causing further delay in defending these claims. Such circular reasoning, based on pure conjecture, does not demonstrate that defendants will suffer any prejudice by the proposed amendment.

This action is in the early stages and the Braka defendants have recently impleaded a third-party defendant into the action, who served its answer on March 22, 2019. (NYSCEF Doc. Nos. 50 and 57). Accordingly, any perceived prejudice that may result by a delay occasioned by a future motion that may be made by defendants, is speculative and non-existent. Moreover, defendants' contention that plaintiff has failed to demonstrate that the Braka defendants and Centurian can be held vicariously liable for each other's acts and that this omission is fatal to plaintiff's requested relief, is equally misguided.

Here, it is undisputed that Centurian is the owner of the apartment that the Braka defendants have resided in since 2001 without a lease. It is also undisputed that Ivor Braka is the President and CEO of Centurian. (NYSCEF Doc. No. 70). Parties are united in interest when

there is "some relationship between the parties giving rise to vicarious liability of one for the conduct of the other" *Valmon v 4 M & M Corp.*, 291 AD2d 343, 344, 738 N.Y.S.2d 340 [1st Dept 2002]).

Defendants illusory denials that they are not united in interest with Centurian, are not sufficient to defeat plaintiff's proposed amendment. (see, *LeBlanc v Skinner*, 103 AD3d 202, 955 N.Y.S.2d 391, [2d Dept 2012]; *Connell v Hayden*, 83 AD2d 30, 43, 443 N.Y.S.2d 383 [1981]). The affidavit submitted by Centurian's Vice President provides that Centurian has maintained and managed the apartment at all times relevant to plaintiff's claims and that Ivor Braka is the President and CEO of Centurian. Accordingly, the motion to amend the complaint and add Centurian as a party defendant is granted, and it is hereby,

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendant shall serve an answer to the amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to appear for a status conference in Room 307, 80 Centre Street, on June 18, 2019, at 9:30 AM.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

5/16/2019
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	[ ] CASE DISPOSED	[X] NON-FINAL DISPOSITION	
	[X] GRANTED [ ] DENIED	[ ] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER	[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN	[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE