DeBlasie v E.E. Cruz & Co., Inc.
2019 NY Slip Op 31987(U)
July 8, 2019
Supreme Court, Kings County
Docket Number: 504147/2016
Judge: Debra Silber
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9

---x

DECISION / ORDER

FRANCIS DEBLASIE, JR.,

Plaintiff,

Index No. 505147/2016
Motion Seq. No. 3 & 4
Date Submitted: 5/30/19

-against-

E.E. CRUZ & COMPANY, INC.,

Defendant.

---x

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant's motion for summary judgment dismissing the complaint and plaintiff's cross motion to amend.

Papers	**NYSCEF Doc.**
Notice of Motion, Affirmation and Exhibits Annexed.....	35-50
Notice of Cross Motion, Affirmation and Exhibits Annexed.....	60-72
Affirmation in Opposition and Exhibits Annexed.....	52-55, 73
Reply Affirmation.....	57-59

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This action arises from a workplace accident which occurred on September 22, 2015. Plaintiff was employed by Enclos Corp., apparently also known as Environmental Interiors Inc., a nonparty, and was working on construction of the Second Avenue subway. The action was commenced on April 5, 2016. The only defendant named in the complaint is E.E. Cruz & Company, Inc.[1] Plaintiff asserts claims for violations of Labor Law 200, 240 (1), 241(6) and common law negligence. Defendant answered the

[1] Plaintiff's counsel points out that he was not retained until after the deadline for filing a notice of claim against the property owner, the City of New York and/or the New York City Transit Authority, had passed.

complaint without its attorney noting any misnomer, such as "i/s/h/a," and asserted seven affirmative defenses, none of which claim that defendant was the wrong party to sue. A Preliminary Conference was held, a Compliance Conference was held, and a Note of Issue was filed. The case is on the calendar in the trial assignment part of this court, JCP, on July 9, 2019. On September 28, 2018, a few days after the three-year statute of limitations ran out, defendant filed this motion for summary judgment dismissing the action on the ground that plaintiff sued the wrong party, as the defendant is not a proper defendant in a Labor Law matter, as it is neither the owner, the contractor, nor an agent of either. Defendant also makes substantive arguments addressed to the plaintiff's causes of action, should the court find that defendant is a proper defendant in this matter. Plaintiff opposes defendant's motion and cross-moves to amend the complaint to name as an additional defendant E.E. Cruz/Tully Construction Co., A Joint Venture, LLC, to add what plaintiff claims is a "proper named defendant" (affirmation ¶4) and avers that plaintiff is entitled to the benefit of the relation-back doctrine.

In support of its motion, defendant provides an affirmation from counsel; the pleadings; EBT transcripts of plaintiff and a representative of defendant (taken December 22, 2017); a log of sorts for the day of the accident, which is not in admissible form; a contract between "E.E. Cruz and Tully Construction Co., A Joint Venture, LLC" and a nonparty, apparently plaintiff's employer, dated in 2013, which is not in admissible form; discovery-related orders and documents not relevant herein; and the first and last pages of a contract, number C-26010, "Volume 1 of 11," which is not in admissible form, and recites that the contract is between the New York City

Transit Authority and "E.E. Cruz/Tully Construction, A Joint Venture, LLC." The document is signed for E.E. Cruz/Tully Construction, A Joint Venture, LLC by someone named Joseph F. Malandro, as its "Attorney in Fact" and the acknowledgment states that it was signed on May 17, 2012.

Defendant corporation E.E. Cruz & Company, Inc. argues that it is a member of the LLC named E.E. Cruz & Tully Construction Co., A Joint Venture, LLC, and as such, is an improper Labor Law defendant as it is not an owner or general contractor or an agent of either an owner or a general contractor. Defendant avers that the correct defendant is E.E. Cruz and Tully Construction Co., A Joint Venture, LLC, but does not provide any documentation to indicate that the corporate defendant is in fact a member, or the managing member, of this LLC. The court is satisfied, however, that E.E. Cruz & Company, Inc. was not the owner or contractor nor an agent of either, as the contracts with the MTA/NYCTA and with plaintiff's employer are with E.E. Cruz & Tully Construction Co., A Joint Venture, LLC, not E.E. Cruz & Company, Inc. Defendant's witness, Mr. Dorceus, was deposed on December 22, 2017 and authenticated the contract between E.E. Cruz & Tully Construction Co., A Joint Venture LLC and the Transit Authority, and the signature of Mr. Malandro [Page 13], whom he described as the "company president." In fact, the court cannot figure out where plaintiff's counsel located the name of the defendant sued, as its name does not appear on anything in the record.

With regard to plaintiff's claims under Labor Law 240(1) and 241(6), the named defendant was not the general contractor, as became clear at Mr. Dorceus' deposition, if not before. It was not a subcontractor. It did not own the property. Therefore, it is not

a proper Labor Law defendant. It cannot be deemed an "agent" of the owner or a "general contractor" within the meaning of the Labor Law. It is well settled that "[a] subcontractor will be held strictly liable under Labor Law § 240(1) . . . where it has become a statutory agent of . . . the general contractor by virtue of having been delegated the authority to supervise and control the plaintiff's work or work area" (*Stevenson v Alfredo*, 277 AD2d 218, 220 [2d Dept 2000]). That was not the case here.

Defendant also seeks to dismiss plaintiff's Labor Law § 200 and common-law negligence claims. Section 200 (1) provides, in relevant part, that "[a]ll places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places." The protection afforded by Labor Law § 200 is not limited to workers involved in construction or renovation. It codifies the common-law duty of an owner or employer to provide employees a safe place to work (*see Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; Cyclone Realty, LLC, 78 AD3d 144, 147 [2d Dept 2010]; *Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763, 764 [2d Dept 2009]; *Chowdhury v Rodriguez*, 57 AD3d 121, 127—128 [2d Dept 2008]). Cases involving Section 200 generally fall into two categories: those involving the manner in which the work giving rise to plaintiff's injuries was performed and those where workers were injured as a result of dangerous or defective conditions at a work site (*see LaGiudice v Sleepy's, Inc.*, 67 AD3d 969, 972 [2d Dept 2009]; *Chowdhury*, 57 AD3d at 127—128; *Ortega v Puccia*, 57 AD3d 54, 61, [2d Dept 2008]). Where a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the property owner or contractor is available

under Section 200 only if it is shown that it had the authority to supervise or control the work giving rise to plaintiff's injury (*Ortega*, 57 AD3d at 61). On the other hand, where a premises condition is at issue, a property owner or contractor is liable under Section 200 when the owner or contractor created the dangerous condition causing an injury or when the owner or contractor failed to remedy a dangerous or defective condition of which it had actual or constructive notice (*id.*). As defendant was not the owner or the contractor, it owed no duty to plaintiff and is not a proper party to this action.

In his affirmation in opposition to the motion, plaintiff's counsel withdraws all of plaintiff's claims other than his Labor Law 241(6) claim. Plaintiff claims he tripped and fell on debris, which is a violation of section 23-1.7 of the Industrial Code. Defendant, as neither an owner nor a contractor, is not a proper Labor Law defendant under section 241(6) of the Labor Law. Thus, defendant's motion is granted and the complaint is dismissed as against it.

Turning to plaintiff's cross motion to amend the complaint to add as an additional defendant E.E. Cruz/Tully Construction Co., A Joint Venture, LLC, for the reasons which follow, the motion is denied. In support of his cross motion to amend, plaintiff provides an affirmation of counsel, the same contract with the Transit Authority, the same EBT of defendant's witness Mr. Dorceus, a proposed supplemental summons and amended complaint, various contract documents which are not in admissible form, and a printout from the website of the New York State Department of State, Division of Corporations database that indicates that an entity with a name similar to that of the

proposed additional defendant is a New York LLC formed in 2007.[2]

Pursuant to CPLR 3205, leave to amend a pleading should be freely given unless the pleading is devoid of merit or will result in undue prejudice or surprise to the other party (*see McCaskey, Davies & Assoc. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]. To be clear, as more applicable here, the "civil harmless error doctrine" as is discussed recently in the dissent in *Matter of Larchmont Pancake House v Board of Assessors* (NY Court of Appeals, 2019 NY Slip Op 02241), is employed when a "substantial right of a party is not prejudiced." However, once the statute of limitations has run, the motion must be analyzed under the relation-back doctrine, and when this court does so, the motion fails. To the extent plaintiff seeks to amend under CPLR 203(f), that section is not applicable to the facts herein, as defendant points out. That section applies when the defendant stays the same but the plaintiff's claims are amended.

While the court acknowledges that defendant's motion was adjourned and plaintiff was "recommended" by the undersigned to make a motion to correct what appeared to be merely a misnamed defendant, the court was unaware that the statute of limitations had run, but more importantly, plaintiff has not in fact made a motion to correct the name of a misnamed defendant, as defendant's counsel amply notes.

Here, plaintiff's attorney does not aver he made a mistake until the seventh page

---

[2]The court notes that this website indicates that there are four entities registered with names that start "E.E. Cruz," three are LLC's and one is the corporate defendant herein. All three LLC's were formed in New York, while the corporation was formed in New Jersey but registered to do business in New York. The CEO for defendant corporation is listed as "Joseph Malandro," the same person who signed the contract with the Transit Authority on behalf of E.E. Cruz and Tully Construction Co., A Joint Venture, LLC.

of his affirmation, when he states "the proposed new joint venture defendant knew or should have known but for the initial mistake of the plaintiff, the joint venture would have been brought as a direct defendant in the action herein." Nor does counsel request permission to make a correction in the defendant's name. Instead, he seeks leave to add as an additional defendant E.E. Cruz/Tully Construction Co., A Joint Venture, LLC, and provides a supplemental summons and amended complaint against both defendants, misnaming the proposed additional defendant[3] in the process. He argues (incorrectly it seems) that the defendant originally sued herein "entered into a joint venture with Tully to act as the general contractor." Further, counsel avers that "the proposed new defendant . . . most certainly was aware of this occurrence." He further points out (affirmation ¶10) that Mr. Dorceus testified at his EBT [page 32- 34] that plaintiff reported his accident to him. Finally, plaintiff's counsel explains (¶11) that his amended complaint adds "the joint venture as a direct defendant to this matter." Counsel then proceeds to argue that the relation-back doctrine is applicable and that plaintiff satisfies all of its requirements. Specifically, he states (¶14) "it is hard to fathom parties more united in interest than parties to a joint venture. Here, one of the parties to the joint venture has been in this case from its inception . . . I'm sure this very same defense firm would be representing the new party . . . under the very same insurance policy . . . there will be no need for additional discovery if the new party is added to this case as it would be the same discovery herein."

The problem seems to be some confusion on counsel's part with regard to the

---

[3] As it is misnamed in some but not all of the contract documents, but is correctly named in Exhibit 10 to plaintiff's motion, a print-out from NY State Division of Corporations as "E.E. Cruz & Tully Construction Co., A Joint Venture, LLC".

nature of various legal entities. While there is no provision in the Limited Liability Corporation Law that prohibits the use of the words "joint venture" in the name of an LLC, the use of these words in the name of the LLC here seems to have so confused counsel that his arguments in the motion papers make absolutely no legal sense.

The general contractor for the project was a New York Limited Liability Company. This is a legal entity under New York law. The defendant originally named is a corporation organized under the laws of New Jersey. It is a distinct legal entity. Defendant's counsel claims the defendant corporation is a member of the proposed LLC defendant. That may be true, or not, or it may be the managing member. This does not matter as far as this motion is concerned. They are separate legal entities, and are not obligated for each other's liabilities. To repeat, a corporate member of an LLC is not responsible for the liabilities of the limited liability company. (*Singh v Nadlan, LLC,* 171 AD3d 1239 [2d Dept 2019]; *Grammas v Lockwood Assoc., LLC*, 95 AD3d 1073 [2d Dept 2012]). The law in New York states clearly that, unless provided to the contrary by a written agreement, the debts, obligations and liabilities of a limited liability company, whether arising in contract, tort or otherwise, shall be solely the debts, obligations and liabilities of the limited liability company, and no member or manager of a limited liability company shall be obligated personally for any such debt, obligation or liability of the limited liability company solely by reason of being a member or acting as a manager of the limited liability company. New York Limited Liability Company Law, Section 609 (a). Therefore, the corporate defendant originally sued herein cannot be held responsible for the obligations of the limited liability company which is proposed to be added as an additional defendant.

A corporation in New York is permitted to be a partner in a partnership, a member of an LLC, or a joint venturer (BCL 202[a][15]). However, here, contrary to counsel's misconception, there is no joint venture. There is only a limited liability company which put the words "joint venture" in its name. There is also no partnership. A joint venture may not be carried on by the parties to it in the form of a corporation[4], a partnership[5], or a limited liability company, which is a statutory hybrid of the two, because it is none of these.

"Although the incidents of a joint venture and the mutual obligations of its members are very similar to those existing in a partnership, the two relationships are not identical. A joint venture is a special combination of two or more persons (or entities) in some specific venture where a profit is jointly sought without any actual partnership or corporate designation, while an indispensable requirement of a partnership is a mutual promise or understanding of the parties to submit to the burden of making good the losses as well as to share in the profits of the business." *16 NY Jur Business Relationships § 2041 - Joint ventures distinguished from partnerships.*

With the understanding that the named defendant is a corporation separate from the limited liability company it is apparently a member of, the court must apply the requirements of the relation-back doctrine to the facts in this matter. The three conditions that a plaintiff must satisfy before claims against one defendant may relate back to claims asserted against another are: (1) both claims must arise out of the same

---

[4] *Bevilacque v Ford Motor Co.*, 125 AD2d 516 [2d Dept 1986].

[5] *Roberts v Rubio*, 189 AD2d 867 [2d Dept 1993]; *Judelson v Weintraub*, 55 AD2d 906 [2d Dept 1977]; *Sagamore Corp. v Diamond W. Energy Corp.*, 806 F2d 373 [2d Cir 1986].

conduct, transaction, or occurrence, (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 action that he or she will not be prejudiced in maintaining a defense on the merits, and (3) the new party either 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 that party as well. (*Berkeley v 89th Jamaica Realty Co., L.P.*, 138 AD3d 656 [2d Dept 2016]). Here, the plaintiff satisfies the first requirement, but not the second or third. As explained above, the new defendant is a distinct and separate entity, and is not united in interest with the original defendant. With regard to the third prong, plaintiff is not entitled to another chance to sue the party it was made aware of before the statute of limitations expired.

With regard to the second prong, that the two defendants be united in interest, plaintiff has not met his burden of proof. As the court states in *Berkeley v 89th Jamaica Realty Co.* LP:

> [T]he plaintiff had to show that their interest in the subject matter of the action is such that they stand or fall together and that a judgment against one would similarly affect the other (see *Gatto v Smith-Eisenberg*, 280 AD2d 640, 641, 721 NYS2d 374 [2001]). HN2[ ] "If the relationship between the parties is such that one may have a defense not available to the other, they are not united in interest" (*Desiderio v Rubin*, 234 AD2d 581, 583, 652 NYS2d 68 [1996] [internal quotation marks omitted]; see *Connell v Hayden*, 83 AD2d 30, 443 NYS2d 383 [1981]). Further, parties' interests are united only where one is vicariously liable for the acts of the other (see *Desiderio v Rubin*, 234 AD2d at 583).

As the defendant originally sued is not vicariously liable for the acts of the LLC, nor would a judgment against one be a judgment against the other, and as the corporate defendant clearly has a defense [that it is not a proper Labor law defendant] not available to the other party, they are not united in interest.

Turning to the third prong, the court finds that the plaintiff's motion is not a request to correct an error which was a mere misnaming of the defendant. Plaintiff does not offer any explanation for naming and serving the wrong entity, nor does counsel offer any explanation for not moving to amend the complaint sooner, such as upon receiving the documents which indicate clearly that the general contractor was an LLC. Instead, plaintiff's counsel blames defendant's counsel, stating that he was provided with the requested discovery without objection, and defendant produced a witness for an EBT with personal knowledge, so he sees no harm in fixing his error now, as the correct defendant has known about the accident all along. This is not the proper analysis.

When the identity of a party who may be liable is known prior to the expiration of the statute of limitations and the plaintiff fails to join that party, the relation back doctrine does not apply, as there was no mistake that equity can correct. The courts instead hold that, as the plaintiff decided not to bring the claim when he could have, he should not be given a second chance (*see Sally v Keyspan Energy Corp.*, 106 AD3d 894 [2d Dept 2013].)

The defendant's motion for summary judgment dismissing the complaint is granted and the complaint is dismissed. Plaintiff's cross motion is denied. This shall constitute the decision and order of the court.

Dated: July 8, 2019

ENTER:

Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court