

Slonim v Altman Stage Light. Co.

2019 NY Slip Op 32669(U)

September 9, 2019

Supreme Court, New York County

Docket Number: 190339/2017

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

IN RE: NEW YORK CITY ASBESTOS LITIGATION

**ERIC SLONIM, as Administrator of the Estate of
CHRISTINE SLONIM, and ERIC SLONIM, Individually,**

Plaintiffs,

INDEX NO. 190339/2017

- against -

MOTION DATE 08/21/2019

ALTMAN STAGE LIGHTING COMPANY, et al.,

MOTION SEQ. NO. 005

Defendants.

MOTION CAL. NO. _____

**J & R FILM CO. and MAGNASYNC/MOVIOLA,
CORPORATION,**

Third-Party Plaintiffs,

- against -

**STEENBECK B.V., ROSS-GAFFNEY, INC.,
READING INTERNATIONAL, INC.,**

Third-Party Defendants.

The following papers, numbered 1 to 8 were read on third-party plaintiffs' motion pursuant to CPLR §3025(a) and (b) to amend the third-party complaint to assert claims against Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, INC. :

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6</u>
Replying Affidavits _____	<u>7 - 8</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Third-Party Plaintiffs, J & R Film Co. (hereinafter individually "J&R") and Magnasync/Moviola Corporation's (hereinafter individually "M/M Corp.") motion pursuant to CPLR §3025 (a) and (b) to amend the third-party complaint to add Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. (hereinafter jointly referred to as "J&J") as Third-Party Defendants, is granted.

On October 20, 2017, Plaintiffs, Eric Slonim and Christine Slonim, commenced this action alleging that Christine Slonim's mesothelioma was caused by exposure to asbestos in the Defendants' products (NYSCEF Doc. # 1, Opp. Exh. 1). Third-Party Plaintiff, J&R was named as a party Defendant in the initial complaint (Opp. Exh. 1). J&J was also named as a party Defendant in the underlying action (Opp. Exh. 1).

The Summons and Complaint were subsequently amended approximately five times to substitute the estate and add additional defendants. The Fourth Amended Complaint and Supplemental Summons is dated February 1, 2018 (NYSCEF Doc. #37). The Fifth Amended Complaint and Supplemental Summons is dated July 30, 2018 (NYSCEF Doc. #57). On February 5, 2018, Defendant/Third-Party Plaintiff, J&R was served with the Third Amended Complaint and

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Supplemental Summons (NYSCEF Doc. #37, Reply Exh. E). J&R claims it had no prior notice of this action. On May 1, 2018 J&R appeared for the first time in this action and served its Answer (Reply Exh. F). On August 9, 2018 M/M Corp. was served with the fifth amended complaint (Reply Exh. E). On August 28, 2018 M/M Corp. served its answer to the Complaint (Reply Exh. F).

On January 23, 2018, J&J sought to enter into an Unopposed Summary Judgment Motion and Order with the plaintiff before any depositions were conducted. Plaintiff agreed and executed the Unopposed Summary Judgment Motion and Order dismissing all claims and cross-claims against J&J "without prejudice and without costs." On February 20, 2018, Justice Lucy Billings "So Ordered" the document. J&J served the Order granting Unopposed Summary Judgment with a Notice of Entry by uploading it to NYSCEF on April 2, 2018 (Opp. Exhs. F, H & I).

Plaintiff Christine Slonim died on November 26, 2017, before she could be deposed (NYSCEF Doc. # 139). Plaintiff Eric Slonim was deposed over the course of four days, on January 31, 2018, February 1, 2019, March 3, 2019 and March 28, 2019. M/M Corp. deposed Mr. Slonim separately on April 9, 2019. Movants state that over the course of his deposition, Mr. Slonim testified that his wife used J&J's powder products on their daughter at least five times a day from birth until possibly ten years old (1968-1978). Mr. Slonim further testified he believed his wife was exposed to asbestos through the use of J&J powder (Mot. Exh. G, pgs. 214-224 and 600-601).

On May 5, 2019 defendants J&R and M/M Corp. sought to commence a third-party action. Their motion was unopposed and this Court's May 31, 2019 Decision and Order granted the relief sought (Mot. Exh. B). Third-party defendants Ross-Gaffney and Rll were served on June 10, 2019 and service on Steenbeck a Dutch company is proceeding in accordance with the Hague Convention (Mot. Exh. D). Rll appeared and served a Verified Answer to the Third-Party Complaint on July 10, 2019 (Mot. Exh. E).

Third-Party Plaintiffs J&R and M/M Corp., now seek an Order pursuant to CPLR §3025 (a) and (b) to amend the Third-Party Complaint. The movants provide a copy of the proposed Third-Party Complaint that asserts claims for indemnification and contribution against J&J as a third-party defendant (Mot. Exh. M).

CPLR 3025(a) permits the amendment of a pleading without leave of court within twenty (20) days after service or at any time before the period for responding to it expires. "The permitted amendments range from minor corrections to the addition of substantial elements, to the addition of new causes of action" (The Plaza PH2001 LLC v. Plaza Residential Owner LLP, 98 AD 3d 89, 947 NYS 2d 498 [1st Dept. 2012]).

Third-Party Plaintiffs have stated a basis to amend the pleadings pursuant to CPLR 3025(a) because answers were not yet served by two of the named Third-Party Defendants.

Alternatively, pursuant to CPLR §3025(b) leave to amend pleadings "shall be freely granted upon such terms as may be just," the decision to allow the amendment is at the Court's discretion (McCaskey, Davies & Associates, Inc. v. New York City, 59 N.Y. 2d 755, 450 N.E. 2d 240, 463 N.Y.S. 2d 434 [1983]). The movant is required to establish that the proposed amendment is not "palpably insufficient or clearly devoid of merit." "An amendment is devoid of merit where the allegations are legally insufficient" (Reyes v. BSP Realty Corp., 171 AD 3d 504, 95 NYS 3d 808 [1st Dept. 2019] and MBIA Ins. Corp. v. Greystone & Co., Inc., 74 AD 3d 499, 901 NYS 2d 522 [1st Dept., 2010]). In the absence of prejudice, mere delay by a party in seeking to amend the pleadings is insufficient to defeat that relief. "Prejudice requires "some indication that the defendant has been

hindered in the preparation of his case or has been prevented from taking some measure in support of his position (*Cherebin v. Empress Ambulance Service, Inc.*, 43 AD 3d 364, 841 NYS 2d 277 [1st Dept. 2007]).

J&J opposes the motion arguing that Third-Party Plaintiff J&R was a party to this action at the time it entered into the Unopposed Summary Judgment Motion and Order and was given ample notice by mail and opportunity to object, before it was “So Ordered,” but failed to do so. J&J states that the attorneys representing J&R represented other defendants in this action and would have put all of their clients on notice. J&J claims that M/M Corp. was acquired by J&R about December of 1984 and they are in privity at all relevant times. J&J further argues that the proposed Third-Party claims for indemnification and contribution arise out of the same claims and cross-claims that were resolved in the “So Ordered” Unopposed Motion for Summary Judgment and are therefore barred under *res judicata*.

Under the doctrine of *res judicata*, a party may not litigate a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. The rule applies not only to claims actually litigated but to claims that could have been raised in the prior litigation (*In re Hunter*, 4 NY3d 260, 794 NYS2d 286, 827 NE2d 269 [2005] and *Silvar v. Commissioner of Labor of State*, 2019 N.Y. Slip Op. 05841 [1st Dept. 2019]). The determination of privity for purposes of *res judicata* is not susceptible to a hard and fast definition, but applies when the interests of the non-party were represented in a prior proceeding (*People ex rel. Spitzer v. Applied Card Systems, Inc.*, 11 NY 3d 105, 894 NE 2d 1, 863 NYS 2d 615 [2008]).

J&J did not provide any proof of its conclusory assertion that J&R acquired M/M Corp. and they are related entities. M/M Corp. was not named as a party in the caption at the time the Unopposed Motion for Summary Judgment and Order were entered. M/M Corp. was made a party to this action in a subsequently amended complaint, was served separately from J&R and answered the complaint about four months after J&R. J&J has not provided proof of its assertions that M/M Corp. is related to J&R, or was served with a copy of the Unopposed Summary Judgment and Order prior to it being “So Ordered” or entered. *Res Judicata* does not apply to Third-Party Plaintiff M/M Corp.

J&J has not provided proof that J&R’s attorneys specifically put J&R on notice of the pending “Unopposed Motion for Summary Judgment” after obtaining knowledge of its existence through other clients. J&R claims it did not retain its attorney until May of 2018, long after the Order was entered in February of 2018. The alleged affidavit of service that is provided as proof by J&J that J&R had notice does not identify service on J&R through its attorneys (Opp. Exh. 4) J&R further argues that even if it had notice, before service of J&R’s Answer, it did not have privity or standing in the action to raise any objections to the Order. Under the circumstances J&R has established that there was no privity even though it was named in the caption, plaintiff did not actually serve J&R with the complaint such that it could be deemed a party for purposes of having its objection heard. *Res judicata* does not apply to Third-Party Defendant J&R.

J&J next argues that the plaintiffs will be prejudiced and the case will be delayed because of the discovery that will be needed. Third-Party Plaintiffs have shown that the other Third-Party Defendants are at the same point of discovery in this case. They claim that although the case is on the pre-trial calendar, discovery is ongoing and there will not be a substantial delay or any prejudice to the plaintiff by the proposed amendment. J&J’s arguments of prejudice to the plaintiff are conclusory and speculative. J&J has not established that being added as a third-party defendant will delay the plaintiffs’ underlying action.

As part of the opposition J&J alternatively pursuant to CPLR §1010 and CPLR §603 seeks to have this Court sever the third-party action.

CPLR §1010 permits the Court in its discretion to sever an action after taking into consideration whether doing so will unduly delay the main action or prejudice the substantial rights of a party. “Although it is within a trial court’s discretion to grant a severance, this discretion should be exercised sparingly” (Shanley v. Callanan Indus., 54 N.Y. 2d 52, 429 N.E. 2d 104, 444 N.Y.S. 2d 585 [1981]). A severance of actions is discouraged if the third-party action will not unduly delay the determination of the main action or prejudice the substantial rights of the plaintiff, and if J&J’s discovery rights can be accommodated (Marbilla v.143/145 Lexington LLC, 116 A.D. 3d 544, 984 N.Y.S. 2d 317 [1st Dept., 2014]).

Pursuant to CPLR §603, severance is granted “in furtherance of convenience or to avoid prejudice.” Even if the circumstances are not identical to the plaintiffs, where common elements outweigh the differences and much of the evidence and witnesses are the same, severance is not “in furtherance of convenience” (DeFreitas v. Bronx Lebanon Hospital Center, 168 A.D. 3d 541, 92 N.Y.S. 3d 27 [1st Dept. 2019]). A joint trial is preferable when the third-party action presents questions of law and fact in common with the main action, judicial economy would be served and there has been no showing of prejudice to the third-party defendant by being impleaded into the case at the “eleventh hour” (Wilson v City of New York, 1 A.D. 3d 157, 766 N.Y.S. 2d 841 [1st Dept. 2003]).

Although the third-party action was commenced after the note of issue was filed, to conduct discovery and begin trial preparation J&J has the ability to review the existing discovery in plaintiffs’ action, and has conducted its own deposition of the plaintiff. A trial date has not yet been assigned to plaintiffs’ case. J&J provides a list of potential discovery issues, but no proof of any specific outstanding demands or that it is otherwise unable to have its rights accommodated by the parties “while this case makes its way up the trial calendar.” J&J has not shown that it will be prejudiced (See Range v. The Trustees of Columbia University in the City of New York, 150 A.D. 3d 515, 54 N.Y.S. 3d 391 [1st Dept. 2017] and 147 A.D. 3d 487, 46 N.Y.S. 3d 420 [1st Dept., 2017]).

J&J has not established that plaintiff’s action should be severed from the third-party action. The third-party action arises out of the same facts. J&J also failed to seek severance in a separate cross-motion or make the necessary showing that proceeding with discovery while plaintiff’s case “makes its way up the trial calendar” will be prejudicial to it or that it will not have sufficient time to complete discovery.

Accordingly, it is ORDERED, that Third-Party Plaintiffs, J & R Film Co. and Magnasync/Moviola Corporation’s motion pursuant to CPLR §3025 (a) and (b) to amend the third-party complaint to add Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. as Third-Party Defendants is granted, and it is further,

ORDERED that Third-Party Plaintiffs, J & R Film Co. and Magnasync/Moviola Corporation are directed to serve a copy of this Order with Notice of Entry on the named parties in the underlying action, the third-party defendants and Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. as Third-Party Defendants, and it is further,

ORDERED that Third-Party Plaintiffs, J & R Film Co. and Magnasync/Moviola Corporation are directed to serve a copy of this Order with Notice of Entry on the Trial Support Clerk in the General Clerk’s Office (room 119) and the County Clerk (room 141b) who are directed to mark their records accordingly, and it is further,

ORDERED, that the pleadings as amended in the proposed Amended Verified Third-Party Complaint annexed to the moving papers as Exhibit M are deemed served upon Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. as Third-Party Defendants upon

service on them or their attorneys of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that Johnson & Johnson and Johnson & Johnson Consumer Inc., f/k/a Johnson Consumer Companies, Inc. serve an Answer to the Amended Verified Third-Party Complaint within 30 days of service of a copy of this Order with Notice of Entry, and it is further,

ORDERED, that the caption is amended as follows:

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ERIC SLONIM, as Administrator of the Estate of
CHRISTINE SLONIM, and ERIC SLONIM, Individually,

Plaintiffs,

INDEX NO.

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- against -

STEENBECK B.V., ROSS-GAFFNEY, INC.,
READING INTERNATIONAL, INC., JOHNSON &
JOHNSON and JOHNSON & JOHNSON CONSUMER, INC.,
f/k/a JOHNSON CONSUMER COMPANIES, INC.

Third-Party Defendants.

ENTER:

Dated: September 9, 2019



MANUEL J. MENDEZ
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE