

**Hyatt Hotels Corp. v Lendlease (US) Constr. LMB
Inc.**

2019 NY Slip Op 33403(U)

November 15, 2019

Supreme Court, New York County

Docket Number: 155647/2018

Judge: W. Franc Perry

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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. W. FRANC PERRY

PART IAS MOTION 23EFM

Justice

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INDEX NO. 155647/2018

HYATT HOTELS CORPORATION, ZURICH AMERICAN
INSURANCE COMPANY, FACTORY MUTUAL
INSURANCE COMPANY, NATIONAL FIRE & MARINE
INSURANCE COMPANY, CERTAIN UNDERWRITERS AT
LLOYDS, LONDON SUBSCRIBING TO POLICY
WB1401068, ALLIED WORLD ASSURANCE COMPANY,
LTD, LEXINGTON INSURANCE COMPANY,

MOTION DATE 05/23/2019

MOTION SEQ. NO. 004

Plaintiffs,

- v -

LENDLEASE (US) CONSTRUCTION LMB INC., EXTELL
DEVELOPMENT COMPANY, EXTELL WEST 57TH
STREET, LLC, ASCO VALVE, INC., ROSEMOUNT
PRODUCTS INC., PAR PLUMBING CO., POST ROAD
IRON WORKS, INC., PINNACLE INDUSTRIES, INC., AKF
GROUP LLC, AKF ENGINEERS, LLP, RWDI USA LLC,
RWDI CANADA, WSP USA, INC., WSP CANTOR SEINUK,
T.M. BIER & ASSOCIATIES, INC.,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 52, 55, 57, 58, 59, 60, 61, 62, 63

were read on this motion to/for DISMISS

This is an action to recover damages for negligence, negligent manufacture, design and failure to warn, strict products liability, and breach of warranty.

Defendants RWDI USA LLC and RWDI Canada move, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the complaint and all cross claims as asserted against them, or, in the alternative, for summary judgment pursuant to CPLR 3211(c) and 3212.

Plaintiffs cross-move, pursuant to CPLR 305(c), 1024, and/or 3025(b), for leave to amend the summons and complaint to add Rowan Williams Davies & Irwin, Inc. (Rowan) as a defendant this action.

BACKGROUND

157 West 57th Street is a mixed-use hotel and residential building in Manhattan (the Premises). Subsidiaries of plaintiff Hyatt Hotels Corporation (Hyatt) own and operate a hotel occupying the first 25 floors of the Premises (the Hotel). As alleged in the complaint, on or about June 17, 2015, a slosh tank located on the 90th floor of the Premises released thousands of gallons of water into the interior of the building, causing significant damage to the Hotel.

Pursuant to the terms of insurance policies issued to Hyatt, plaintiffs Zurich American Insurance Company, Factory Mutual Insurance Company, National Fire & Marine Insurance Company, Lloyd's London, Allied World Assurance Company, Ltd., and Lexington Insurance Company (collectively the Insurers), paid Hyatt for the damages it allegedly sustained as a result of the leak. Hyatt also allegedly incurred uninsured damages, consisting of its deductible.

On or about June 14, 2018, Hyatt and the Insurers, as subrogees of Hyatt, commenced this action against the parties allegedly responsible for the damages. The complaint asserts claims for negligence, negligent manufacture, design and failure to warn, strict product liability, and breach of warranty.

DISCUSSION

I. RWDI Defendants' Motion to Dismiss the Complaint and All Cross Claims Against Them.

Defendants RWDI USA LLC and RWDI Canada (together the RWDI defendants) move to dismiss the complaint and all cross claims as asserted against them pursuant to CPLR 3211(a)(1) and (7) or, in the alternative, for summary judgment pursuant to CPLR 3211(c) and 3212. For the following reasons, the motion is denied.

A motion to dismiss may be granted pursuant to CPLR 3211(a)(1) if the defendant asserts "a defense . . . founded upon documentary evidence" (CPLR 3211[a][1]). Dismissal is warranted "only if the documentary evidence submitted utterly refutes plaintiff's factual allegations and

conclusively establishes a defense to the asserted claims as a matter of law” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014][internal quotation marks and citations omitted]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]). “Judicial records, such as judgments and orders, would qualify as documentary, as should the entire range of documents reflecting out-of-court transactions, such as contracts, deeds, wills, mortgages, and even correspondence” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d at 432[internal quotation marks and citation omitted]). “Factual affidavits . . . do not constitute documentary evidence within the meaning of the statute” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]).

A motion to dismiss may be granted pursuant to CPLR 3211(a)(7) if “the pleading fails to state a cause of action” (CPLR 3211[a][7]). “[T]he pleading is afforded a liberal construction, facts as alleged in the complaint are accepted as true, plaintiffs are afforded the benefit of every possible favorable inference, and the motion court must only determine whether the facts as alleged fit within any cognizable legal theory” (*D.K. Prop., Inc. v National Union Fire Ins. Co. of Pittsburgh, Pa.*, 168 AD3d 505, 506 [1st Dept 2019]). Where a motion under CPLR 3211(a)(7) “is not converted to a summary judgment motion, affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint, although there may be instances in which a submission by plaintiff will conclusively establish that he has no cause of action” (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). “[A]ffidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action” (*id.*).

As relevant here, the complaint alleges that the RWDI defendants were “responsible for designing, testing, and/or engineering the slosh tanks” at the Premises (Complaint at ¶¶ 38-40). The RWDI defendants argue that RWDI USA LLC did not contract to perform work at the Premises and RWDI Canada is a non-existent entity. Therefore, they were improperly named as defendants in this action.

In support of their motion, they rely on the affidavit of Rob Tonin, the Director of Finance for Rowan, wherein Tonin states that Rowan was the entity retained to design, test and/or otherwise engineer the slosh tanks and related components located at the Premises (NYSCEF Doc. No. 42, at ¶ 4). Tonin avers that Rowan’s offices are located in Canada, and that it is a separate entity from RWDI USA LLC (*id.* at ¶¶ 2-3). He also maintains that “RWDI USA LLC never contracted to perform damper slosh tank work or any other work on the project” and that “RWDI CANADA does not exist and never did” (*id.* at ¶¶ 5-6).

In further support of their motion the RWDI defendants rely on a proposal, dated February 17, 2009, submitted by Rowan to perform “damping design consulting services” for the Premises (NYSCEF Doc. No. 43). They also rely on a proposal, dated May 18, 2010, submitted by Rowan to perform “tuned sloshing damper construction consultation & commission” for the Premises (NYSCEF Doc. No. 44). Finally, they rely on a “Supplemental Provisions Rider,” between Rowan and the owner of the Premises, which appears to modify and supplement the May 18, 2019 proposal (NYSCEF Doc. No. 45).

The RWDI defendants assert that these three documents, along with Tonin’s affidavit, evince that Rowan was the entity engaged to provide engineering services to the project, and that it, alone, was the entity that entered into the contract and delivered services in connection with the project. They argue that since Rowan’s name and address appear throughout the three documents, with no mention of “RWDI USA LLC” or “RWDI Canada,” the documentary

evidence establishes that an entirely different entity was involved in the project. This, they assert, utterly refutes the allegations in the complaint and, therefore, all claims and cross claims should be dismissed insofar as asserted against them. The court finds these arguments unavailing.

As plaintiffs point out, the RWDI defendants did not authenticate the copies of the documents upon which they rely (*see Bou v Llamozza*, 173 AD3d 575, 576 [1st Dept 2019]). In any event, assuming the authenticity of the copies, the documents do not dispositively demonstrate that RWDI USA LLC lacked any involvement in the design, testing, and/or engineering of the slosh tanks, as alleged in the complaint. In other words, the fact that Rowan contracted to perform certain consultation and commissioning services associated with the slosh tanks does not preclude the possibility that RWDI USA LLC was also involved in some aspect of the design, testing and/or engineering of the slosh tanks.

Tonin's affidavit, which does not constitute documentary evidence within the meaning of CPLR 3211(a)(1) (*see Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d at 438), also does not conclusively establish that plaintiffs have no cause of action against the RWDI defendants so as to warrant dismissal pursuant to CPLR 3211(a)(7) (*see Rovello v Orofino Realty Co.*, 40 NY2d at 636). Tonin's statements that RWDI Canada does not exist and that RWDI USA LLC "never contracted to perform damper slosh tank work or any other work on the project" are wholly conclusory. He does not provide any basis for these assertions and does not claim to have personal knowledge of these facts. Indeed, he does not state that he is in any way affiliated with RWDI USA LLC. Rather, he states that he is the Director of Finance for Rowan, which he describes as a "separate entit[y]" from RWDI USA LLC. Thus, the RWDI defendants' motion is denied.

II. Plaintiffs' Cross Motion for Leave to Amend the Summons and Complaint to Add Rowan As A Defendant.

Plaintiffs cross-move for leave to amend the summons and complaint to add Rowan as a defendant. They do not dispute that the statute of limitations applicable to their claims against Rowan had expired by the time they made the instant cross motion (*see* CPLR 214 [4]; UCC § 2-725). They contend that they should be permitted to include Rowan as a defendant on the basis of the relation-back doctrine.

Pursuant to CPLR 3025, a party may amend a pleading “at any time by leave of court” (CPLR 3025 [b]). While leave to amend the pleadings is “freely given upon such terms as may be just” (CPLR 3025[b]), where the statute of limitations has run against a proposed additional defendant, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine (*see Rivera v Wyckoff Hgts. Med. Ctr.*, 175 AD3d 522, 523-524 [2d Dept 2019]; *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 615 [1st Dept 2014]).

As codified in CPLR 203, “what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are ‘united in interest’” (*Buran v Coupal*, 87 NY2d 173, 177 [1995], quoting CPLR 203[b]). The relation-back “doctrine . . . gives courts the sound judicial discretion to identify cases that justify relaxation of limitations strictures . . . to facilitate decisions on the merits if the correction will not cause undue prejudice to the plaintiff’s adversary” (*id.* [internal quotation marks and citations omitted]).

“The Court of Appeals has recognized that a more relaxed standard applies where a plaintiff seeks to use the relation-back doctrine by adding a new claim against a defendant who is already a party to litigation as opposed to adding a new defendant” (*O’Halloran v Metropolitan*

Transp. Auth., 154 AD3d 83, 86 [1st Dept 2017]). In order to invoke the relation-back doctrine to join new parties after the statute of limitations has expired, a plaintiff must establish the following:

First, the plaintiff must show that the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants. Second, the plaintiff must show that the new defendants are united in interest with the original defendants, and will not suffer prejudice due to lack of notice. Third, the plaintiff must show that the new defendants knew or should have known that, but for the plaintiff's mistake, they would have been included as defendants

(*Higgins v City of New York*, 144 AD3d 511, 513 [1st Dept 2016][internal quotations marks and citations omitted]). "All three features must be met for the statutory relation back remedy to be operative" (*Mondello v New York Blood Ctr.--Greater N.Y. Blood Program*, 80 NY2d 219, 226 [1992]).

Here, the claims asserted against the original defendants and the claims to be added against the proposed defendant arose out of the same conduct, transaction, or occurrence.

Therefore, plaintiffs satisfied the first requirement.

However, plaintiffs fail to satisfy the second prong of the test. The unity of interest requirement is:

more than a notice provision. 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. Thus, unity 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. Unity of interest fails if there is a possibility that the new defendants may have a defense unavailable to the original defendants

(*Higgins v City of New York*, 144 AD3d at 513 [internal quotations marks and citations omitted]); see *Lord Day & Lord, Barrett, Smith v Broadwall Mgt. Corp.*, 301 AD2d 362, 363 [1st Dept 2003]). "[H]aving common shareholders and officers is not dispositive on the issue of unity of interest and such unity 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" (see *Valmon v 4 M*

& M Corp., 291 AD2d 343, 344 [1st Dept 2002]; see *Jaliman v D.H. Blair & Co. Inc.*, 105 AD3d 646, 648 [1st Dept 2013]; *Raymond v Melohn Props., Inc.*, 47 AD3d 504, 505 [1st Dept 2008]).

Plaintiffs maintain that RWDI USA and Rowan are united in interest for the purposes of the relation-back doctrine. As plaintiffs point out, the inter-connectedness of these entities is evidenced by the fact that in the proposals attached to RWDI USA LLC's motion, Rowan refers to itself as "RWDI" (NYSCEF Doc. Nos. 43-45). The proposals also identify Rowan's website as "rwdi.com" and represent it as being part of the "RWDI Group" (NYSCEF Doc. No. 43). Individuals on the website are identified as working for "RWDI" (NYSCEF Doc. No. 43). In addition, plaintiffs emphasize that representatives signed in as "RWDI" at joint scene inspections and lab examinations (NYSCEF Doc. No. 59). Plaintiffs also highlight that RWDI USA LLC has access to Rowan's records, as evidenced by the fact that it attached the entity's proposals and agreement to its motion.

The foregoing clearly demonstrates that RWDI USA and Rowan are related entities. However, it does not establish that there is a relationship between them giving rise to the vicarious liability of one for the conduct of the other, or that their interests will stand or fall together. Therefore, plaintiffs have not established that these entities are united in interest. Accordingly, they cannot rely on the relation-back doctrine, regardless of whether they satisfied the third prong of the test.

Alternatively, plaintiffs assert that curing a misnomer by amendment is permitted under CPLR 305(c) after the statute of limitations has run. They contend in this regard that since there is no real prejudice to Rowan, this court should permit them to amend the complaint to name it as a defendant in place of RWDI Canada. This argument is also unavailing.

Pursuant to CPLR 305 (c), an amendment to correct the misnaming of a defendant "should be granted even if the statute of limitations has run where '(1) *there is evidence that the*

correct defendant (misnamed in the original process) has in fact been properly served, and (2) the correct defendant would not be prejudiced by granting the amendment sought” (*New Found., LLC v Ademi*, 140 AD3d 1038, 1039 [2d Dept 2016][emphasis added], quoting *Ober v Rye Town Hilton*, 159 AD2d 16, 19-20 [2d Dept 1990]; see *Rivera v Beer Garden, Inc.*, 51 AD3d 479, 479 [1st Dept 2008]; *Foley v Chase Manhattan Banking Corp.*, 212 AD2d 448, 449 [1st Dept 1995]). “While CPLR 305 (c) may be used to cure a misnomer in the description of a party defendant, it cannot be used after the expiration of the statute of limitations as a device to add or substitute an entirely new defendant who was not properly served” (*Associated Geriatric Info. Network, Inc. v Split Rock Multi-Care Ctr., LLC*, 111 AD3d 861, 862 [2d Dept 2013]; see *Smith v Garo Enters., Inc.*, 60 AD3d 751, 752 [2d Dept 2009][“A plaintiff may not invoke CPLR 305 (c) to proceed against an entirely new defendant, who was not served, after the expiration of the statute of limitations”]).

Here, while no prejudice has been demonstrated, no affidavit of service has been filed or submitted to show that proper service was made on Rowan. Therefore, plaintiffs cannot rely on CPLR 305 (c).

Finally, in their notice of cross-motion, plaintiffs identify CPLR 1024 as an alternate ground for relief. CPLR 1024 provides:

A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly.

“In order to employ the procedural mechanism made available by CPLR 1024, a plaintiff must show that he or she made timely efforts to identify the correct party before the statute of limitations expired” (*Comice v Justin’s Rest.*, 78 AD3d 641, 642 [2d Dept 2010]; see *Goldberg*

v. Boatmax://, Inc., 41 AD3d 255, 256 [1st Dept 2007]; Opiela v May Indus. Corp., 10 AD3d 340, 341 [1st Dept 2004]; Tucker v Lorieo, 291 AD2d 261, 261 [1st Dept 2002]). Since plaintiffs have not demonstrated that they conducted a diligent inquiry into the actual identity of the intended defendant before the expiration of the statutory period, they cannot rely on CPLR 1024 as a shield from the statute of limitations. Thus, plaintiffs' cross motion is denied without prejudice to renewal upon the completion of discovery.

CONCLUSION

For the foregoing reasons, it is hereby

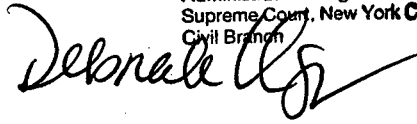
ORDERED that the motion of defendants RWDI USA LLC and RWDI Canada to dismiss the complaint and all cross claims insofar as asserted against them is denied; and it is further

ORDERED that plaintiffs' cross motion to amend the summons and complaint to add Rowan Williams Davies & Irwin, In. as a defendant in this action is denied without prejudice to renewal upon the completion of discovery; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 307, 80 Centre Street, on January 7, 2020, at 9:30 AM.

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

Hon. Deborah A. Kaplan
Administrative Judge
Supreme Court, New York County
Civil Branch



W. FRANC PERRY, J.S.C.

11/15/19
DATE

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