

Finck v VL 10 1620 New Hwy., LLC

2019 NY Slip Op 34859(U)

August 14, 2019

Supreme Court, Nassau County

Docket Number: Index No. 603805-14

Judge: Jerome C. Murphy

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT : STATE OF NEW YORK
COUNTY OF NASSAU**

PRESENT:

**HON. JEROME C. MURPHY,
Justice.**

CHINET FINCK and JOSEPH FINCK,

Plaintiffs,

- against -

**VL 10 1620 NEW HIGHWAY, LLC and
LITTLE JOSEPH REALTY, LLC,**

Defendants.

TRIAL/IAS PART 13

Index No.: 603805-14

Motion Date: 6/18/19

Sequence No.: 004, 005

MG, MD

DECISION AND ORDER

**VL 10 1620 NEW HIGHWAY, LLC and
LITTLE JOSEPH REALTY, LLC,**

Third-Party Plaintiffs,

-against-

**ATLANTIC EXPRESS TRANSPORTATION CORP.
and K. CORR, INC.,**

Third-Party Defendants.

The following papers were read on this motion:

Motion No. 4

Notice of Motion and Exhibits..... 1

Affirmation in Opposition..... 2

Motion No. 5

Notice of Cross-Motion, Affirmation and Exhibits..... 1

Affirmation in Opposition..... 2

PRELIMINARY STATEMENT

In motion sequence 004, Defendants, VL 10 1620 New Highway, LLC , and Little Joseph Realty, LLC, bring this application for an order, pursuant to CPLR §3212, granting summary judgment to the defendants and dismissing the plaintiff's complaint and all claims and cross-claims with prejudice together with such other and further relief as this Court deems just and proper. Opposition papers were submitted.

In Motion Sequence No. 005, plaintiffs, Chinnet Finck and Joseph Finck, bring this application for an order; 1) pursuant to CPLR §3025(b), granting the Plaintiffs leave to amend and/or supplement the previously filed Complaint, adding the parties now disclosed by the Defendants as being necessary parties to this action; 2) upon granting leave, an Order directing that the annexed proposed Amended Complaint be deemed as served upon defense counsel, nunc pro tunc; 3) in the alternative to serving the newly added parties through service upon defense counsel, nunc pro tunc, an Order pursuant to CPLR§ 306(b) extending the time to serve the newly added Defendants, to a date to be delineated by this Court; 4) for such other and further relief as this Court may deem just and proper.

BACKGROUND

This action involves a slip and fall accident, which occurred on January 18, 2012, at approximately 3:50 P.M. Plaintiff was a school minibus operator who worked a morning and an afternoon shift, and drove the same minibus every day on both shifts. Her practice was to move the bus from its assigned parking spot, and replace it with her private vehicle, and reverse the process upon completion of her shift. On the day in question, after parking, she exited the minibus, and she stepped into a hole and fell.

Plaintiff commenced this action for personal injuries against Little Joseph Realty, LLC by filing a Summons and Verified Complaint on July 24, 2014. Plaintiff filed a Supplemental Summons and Amended Verified Complaint dated February 20, 2015, which named VL 10 1629 New Highway, LLC, and Little Joseph Realty, LLC as defendants. By Decision and Order dated December 6, 2018, entered December 10, 2018, this Court granted the motion by defendants to amend their Answer to the Amended Verified Complaint to include the Affirmative Defense of Statute of Limitations.

Defendants VL 10 1620 New Highway, LLC, and Little Joseph Realty, LLC move to dismiss the Complaint against Little Joseph Realty, LLC, and oppose the cross-motion by

plaintiff to amend the Complaint to add VL 10 1620 New Highway, LLC as a defendant. Defendants' argument is that Little Joseph Realty, LLC was not, and never was the owner of the premises at which plaintiff fell. A prior owner was Little Joseph Realty, Inc., which was dissolved in 2009, and title was held by VL 10 1620 New Highway, LLC at the time of the accident.

Defendants commenced a third-party action against Atlantic Express Transportation Corp., and K. Corr, Inc., but this action was discontinued by Stipulation filed on March 9, 2017.

DISCUSSION

"It is well settled that 'liability for a dangerous or defective condition on property is generally predicated upon ownership, occupancy, control or special use of the property . . . Where none is present, a party cannot be held liable for injuries caused by the dangerous or defective condition of the property.'"¹ In support of their motion, defendants submit the deposition testimony of Joseph Grillo, and Affidavits of Carl G. Palazzolo and Joseph Piccone, Jr. (Exhs. "O", "P", and "Q"). Joseph Grillo was employed as Vice-president of Operations for JPD United, Inc. ("JPD"), having held the position for two years prior to his May 26, 2017 deposition, and, prior to that, was the Director of Operations. JPD was in the business of real estate management, and was the sole member of JPD United 1, LLC, the owner of the premises at which plaintiff allegedly fell at the time of the accident. He was also the president of VL 10 1620 New Highway, LLC (Exh. "P").

The premises had previously been owned by Little Joseph Realty, Inc. (not Little Joseph Realty, LLC), which acquired title from J.D. Posillico, Inc. by deed April 22, 2080 (Exh. "1" to Exh. "P"). By Agreement of Merger as of September 30, 2009, Little Joseph Realty, Inc. merged with JPD United I, LLC (Exh. "2" to Exh. "P"). Following the merger, Little Joseph Realty, Inc. was dissolved (Exh. "O" at pp. 21—22; Exh. "P"). VL 10 1620 New Highway, LLC was never the owner or manager of the property, but was solely the agent for collection of rent from Atlantic Express, the sole tenant, which it then forwarded to JPD United I, LLC.

According to the transcript and Affidavits, Little Joseph, LLC has no relationship to the

¹ *Soto v. City of New York*, 244 A.D.2d 544 [2d Dept. 1997], quoting *Minot v. City of New York*, 230 A.D.2d, 719, 720 [2d Dept. 1996], in turn quoting *Turrisi v. Ponderosa, Inc.*, 179 A.D.2d 956 [3d Dept. 1992].

subject premises, was never in the chain of title, or involved in the management, maintenance or control of the premises. Defendants have established prima facie that Little Joseph, LLC has no ownership, occupancy, control or special use of the property, and the burden of refuting such evidence falls to plaintiff. Plaintiff merely claims that defendant has not submitted documentary evidence to support its position, but has not responded with any evidence that there is any relationship between the property and Little Joseph, LLC.

By Supplemental Summons and Amended Verified Complaint, filed on February 20, 2015, plaintiff has named V 10 1620 New Highway, LLC, as a defendant. This is more than three years after the January 18, 2012 incident, and is therefor barred by the 3-year Statute of Limitations pursuant to CPLR § 214. Moreover, there is no evidence that this entity exercised ownership, occupancy, control, or special use of the property. To the contrary, its sole purpose appears to have been the collection of rent on behalf of the owner of the premises.

Defendants' motion to dismiss the Complaint on behalf of plaintiffs against VL 10 1620 New Highway, LLC is granted based upon the Statute of Limitations, and against Little Joseph Realty, LLC based upon the fact that plaintiffs have not rebutted the evidence submitted by defendants that this company has no relationship of any kind with the premises upon which plaintiff claims to have been injured.

CPLR § 203(b) and (c) provide that where defendants whose interest in the action are "united", service upon one defendant within the limitations period can preserve the claims against the other defendants who are added to the action after the expiration of the statute of limitations. In order to be "united", the interests of the defendants must be the same and exist without any hostility between them. To invoke the "relation back doctrine", plaintiff must establish the following:

1. both the claim asserted against the new party and the claim previously asserted against an original named defendant, arise out of the same conduct, transaction, or occurrence;
2. that the new party is "united in interest" with the original defendant and, by reason of that relationship, can be charged with notice of the commencement of the action and will not be prejudiced in the defense of the action;
3. the new defendant knew, or should have known, that but for a mistake by plaintiff as to the identity of the proper parties, the action would have originally been brought against them

as well.²

Bouran v. Coupal compared the relation back doctrine to Rule 15 of the Federal Rules of Civil Procedure. Previously, plaintiff was required to establish an “excusable mistake” for failing to include the new defendant originally. The federal test did not require such proof, only that the new defendant knew, or should have known, that but for the mistake as to identity of the proper parties, the action would have originally been commenced against them.

It should be noted that the “unity in interest” doctrine is sparingly applied by the courts. The united in interest doctrine for the purpose of CPLR § 203, may occur when one defendant is responsible for the acts or omissions of the other.³ Thus, for example, by virtue of Veh. & Traffic Law § 388, the owner of a vehicle is liable for the actions of the driver, and they are therefore united in interest. To the contrary, a party is not responsible for the conduct of an independent contractor, and they are therefore not “united in interest.”⁴ The interests of the defendants must be such “that they stand or fall together and that the judgment against one will similarly affect the other.”

Little Joseph Realty, Inc., dissolved in 2009, is not united in interest with Little Joseph Realty, LLC, as the latter is wholly unrelated to the premises at which plaintiff claims to have been injured.

In Motion Sequence No. 5, plaintiff seeks to further amend its Complaint to add new parties as identified by defendants, and, upon granting such leave, for an Order directing that the proposed Second Amended Verified Complaint be deemed served upon defendant *nunc pro tunc*, or, alternatively, for service upon counsel for defendants pursuant to CPLR § 306(b) extending time to serve the newly added defendants. This motion is denied, as the only named defendant which was timely served was Little Joseph Realty, LLC, which has no relationship to the subject property, and is not united in interest with either VL 10 New Highway, LLC, JPD United, Inc., or JPD 1, LLC, the owner and manager, and owner, respectively of the premises.

To the extent that requested relief has not been granted, it is expressly denied.

² *Buran v. Coupal*, 87 N.Y.2d 173 (1995).

³ *Kazxmerek v. Benedictine Hospital*, 176 A.D.2d 1183 (3d Dept. 1991).

⁴ *Mondello v. New York Blood Center*, 80 N.Y.2d 219 (1992).

This constitutes the Decision and Order of the Court.

Dated: Mineola, New York
August 14, 2019

ENTER:


JEROME C. MURPHY
J.S.C.

ENTERED

AUG 15 2019

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**