1626 Second Ave., LLC v Metropolitan Transp. Auth.
2020 NY Slip Op 31364(U)
May 14, 2020
Supreme Court, New York County
Docket Number: 151297/2015
Judge: Lisa A. Sokoloff
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 21

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1626 SECOND AVENUE, LLC, DECISION AND ORDER

Plaintiff, Index No. 151297/2015

- against - Mot. Seq. 1

METROPOLITAN TRANSPORTATION AUTHORITY, a/k/a MTA and THE NEW YORK CITY TRANSIT AUTHORITY a/k/a MTA NEW YORK CITY TRANSIT,

Defendants.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Plaitiff's Motion / Affirmation	27-33
Defendant 's Opposition / Affirmation	34-37
Plaitiff 's Affirmation in Reply	38-41

LISA A. SOKOLOFF, J.:

This action arises out of property damage to 1626 Second Avenue, New York New York (the Building), allegedly caused by construction work carried out by defendants Metropolitan Transportation Authority (MTA) and the New York City Transit Authority (NYCTA) (together, defendants). Plaintiff moves, pursuant to CPLR 3025, to amend its complaint to add MTA Capital Construction Company (MTA Capital) as a new party defendant and to add additional claims against defendants.

Background

Plaintiff, the owner of the Building, alleges that on January 7, 2014, it discovered cracks and loose wall tiles in the Building related to blasting activities for the Second Avenue Subway (NY St Cts Elec Filing [NYSCEF] Doc No. 30, Danielle Conn Rosenberg [Rosenberg] affirmation, exhibit B [complaint], ¶¶ 7 and 9). Plaintiff commenced this action against

defendants on February 6, 2015 by filing a summons and complaint asserting two causes of action sounding in negligence.

Plaintiff now moves to amend its complaint to add MTA Capital as a defendant on the ground that it supervised and controlled the construction work, and to assert new claims against all defendants for strict liability related to the blasting activities.

Defendants oppose the motion and argue that the claims for negligence and strict liability against MTA Capital are time-barred by a three-year statute of limitations. Defendants posit that the relation back doctrine is inapplicable because MTA Capital is a separate and distinct entity from MTA, and thus, they are not united in interest. Defendants also maintain that plaintiff was aware of the blasting activities from the inception of this case, but it has unreasonably delayed moving to amend its complaint to assert a cause of action for strict liability.

In reply, plaintiff argues that defendants were aware of the claim related to blasting activities because those activities were described in the original complaint. Plaintiff attributes the delay to inaction by prior counsel. Lastly, plaintiff alleges that MTA Capital is, in effect, "MTA 2.0," and is responsible for coordinating and managing MTA's various projects (NYSCEF Doc No. 38, Rosenberg reply affirmation, ¶ 26).

The parties were granted leave to file supplemental affirmations, which largely repeat the prior arguments.

Discussion

It is well settled that a motion for leave to amend the pleadings should be freely granted unless there is prejudice or surprise from the delay or if the amendment is "palpably insufficient or patently devoid of merit" (*see JPMorgan Chase Bank, N.A. v Low Cost Bearings NY Inc.*, 107 AD3d 643, 644 [1st Dep't 2013], quoting *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d

499, 500 [1st Dept 2010]). "An amendment is devoid of merit where the allegations are legally insufficient" (*Reyes v BSP Realty Corp.*, 171 AD3d 504, 504 [1st Dept 2019]). As such, the court must examine the sufficiency of the merits of the proposed amendment and is not required to accept plaintiff's allegations as true (*see Bag Bag v Alcobi*, 129 AD3d 649, 649 [1st Dept 2015]). The party moving to amend the pleadings need not prove the facts (*see Fairpoint Cos., LLC v Vella*, 134 AD3d 645, 645 [1st Dept 2015]), but must tender an affidavit of merit or an offer of evidence similar to that used to support a motion for summary judgment (*see Velarde v City of New York*, 149 AD3d 457, 457 [1st Dept 2017]); *Matthews v City of New York*, 138 AD3d 507, 508 [1st Dept 2016]). The party opposing the motion bears a heavy burden of showing prejudice (*see McGhee v Odell*, 96 AD3d 449, 450 [1st Dept 2012]), or demonstrating that the facts as alleged are unreliable or insufficient to support the motion (*see Peach Parking Corp. v 346 W. 40th St., LLC*, 42 AD3d 82, 86 [1st Dept 2007]).

CPLR 214 (4) provides a three-year statute of limitations for claims arising out damage to property. The claim accrues "upon the date of injury, and not upon discovery of the damage" (*Verizon-New York, Inc., v Reckson Assoc. Realty Corp.*, 19 AD3d 291, 291 [1st Dept 2005]). According to the complaint, plaintiff discovered the damage in January 2014, making the new claims for strict liability untimely (*see Atlantic Express Transp. Corp. v Weeks Mar., Inc.*, 68 AD3d 903, 905 [2d Dept 2009]).

Nevertheless, the relation back doctrine, which is codified in CPLR 203 (f), permits a plaintiff to correct a pleading error by adding a new claim or party after the statute of limitations has expired upon a showing that:

> "(1) both claims arose out of [the] same conduct, transaction or occurrence, (2) the new party is '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 will not be

> prejudiced in maintaining his defense on the merits, and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well"

(*Buran v Coupal*, 87 NY2d 173, 178 [1995], quoting *Brock v Bua*, 83 AD2d 61, 69 [2d Dept 1981]). It is the plaintiff's burden to establish the doctrine's applicability (*see Anderson v Montefiore Med. Ctr.*, 41 AD3d 105, 107 [1st Dept 2007]).

As applied herein, the motion insofar as it pertains to defendants MTA and NYCTA is granted. Both the notice of claim dated April 7, 2014 and the original complaint refer to blasting activities taking place shortly before plaintiff discovered the damage (NYSCEF Doc No. 29, Rosenberg affirmation, exhibit A at 2; NYSCEF Doc No. 30, ¶ 9), and thus, defendants were on notice that the blasting activities would be an issue. Despite plaintiff's four-year delay in moving for relief, defendants' assertion of prejudice is conclusory, in view of the absence of any meaningful discovery (*see Edenwald Contr. Co. v New York*, 60 NY2d 957, 959 [1983]).

However, plaintiff has not demonstrated that the relation back doctrine salvages its claim against MTA Capital (*see Watkins-Bey v MTA Bus Co.*, 174 AD3d 553, 555 [2d Dept 2019]; *Rampersaud v Metropolitan Transp. Auth. of the State of N.Y.*, 73 AD3d 888, 888 [2d Dept 2010]). Plaintiff has satisfied the first element by showing that its claims arise out of the same occurrence as in the original complaint. Plaintiff, though, has not satisfied the second and third criteria.

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" (*see Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002], *lv denied* 98 NY2d 611 [2002], citing *Vanderburg v Broman*, 231 AD2d 146, 147 [1st Dept 1997] [discussing control as the notion underlying the doctrine of vicarious liability]). "Their interests must be 'such that they stand or fall together

and that judgment against one will similarly affect the other'" (*Lord Day & Lord, Barrett, Smith v Broadwall Mgmt. Corp.*, 301 AD2d 362, 363 [1st Dept 2003], quoting *Connell v Hayden*, 83 AD2d 30, 40 [2d Dept 1981]). There is no unity of interest among the parties "if there is a possibility that the new defendants may have a defense unavailable to the original defendants" (*see Higgins v City of New York*, 144 AD3d 511, 513 [1st Dept 2016]).

Here, MTA Capital is a subsidiary corporation of the MTA (*see* Public Authorities Law §§ 1265-b [1] and 1266 [5]). It is settled that "[t]he Metropolitan Transportation Authority and its subsidiaries must be sued separately, and are not responsible for each other's torts" (*Mayayev v Metropolitan Transp. Auth. Bus*, 74 AD3d 910, 911 [2d Dept 2010] [collecting cases]; *Noonan v Long Is. R.R.*, 158 AD2d 392, 393 [1st Dept 1990] [stating that "it has been held that the MTA may not be liable for the torts committed by a subsidiary arising out of the operations of the subsidiary corporation"]). Indeed, "MTA Capital … is a distinct legal entity for purposes of suit, and its employees 'shall not be deemed employees of [the MTA]'" (*Matter of Rodriguez v Metropolitan Transp. Auth.*, 155 AD3d 520, 521 [1st Dept 2017] [internal citations omitted]). Furthermore, MTA and NYCTA are separate entities (*see Konner v New York City Tr. Auth.*, 143 AD3d 774, 776 [2d Dept 2016]). Thus, "MTA Capital's connection to … [NYCTA] is even more remote" (*Matter of Rodriguez*, 155 AD3d at 521]).

As noted above, plaintiff's property damage claims are untimely, and plaintiff has not alleged any fact that would establish that MTA, NYCTA and MTA Capital are united in interest. That defendant served the summons and complaint upon "[MTA] A/K/A MTA, ET AL" (NYSCEF Doc No. 50, Rosenberg supplemental affirmation, ¶ 8) is insufficient to satisfy the requisite notice element, since "[t]he requirement of unity of interest is 'more than a notice provision'" (*Higgins*, 144 AD3d at 513 [internal citation omitted]).

Nor has plaintiff proffered an excusable mistake "in failing to sue the prospective defendant within the applicable time limitations" (*Ramirez v Elias-Tejada*, 168 AD3d 401, 404 [1st Dept 2019]). Prior counsel's inaction is not the type of excusable mistake contemplated for purposes of the relation back doctrine.

Accordingly, it is

ORDERED that plaintiff's motion to amend the complaint and to add a new party defendant is granted to the extent of granting plaintiff leave to serve an amended complaint upon defendants Metropolitan Transportation Authority a/k/a MTA and the New York City Transit Authority a/k/a MTA New York City Transit, and the balance of the motion is otherwise denied; and it is further

ORDERED that the amended complaint in the proposed form annexed to the moving papers as Exhibit E shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the defendants Metropolitan Transportation Authority a/k/a MTA and the New York City Transit Authority a/k/a MTA New York City Transit shall each serve an answer to the amended complaint within 20 days from the date of said service.

Dated: May 14, 2020

ENTER:

LISA A SOKOLOFF A.J.S.C.

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