

Johnson v Krou

2020 NY Slip Op 31387(U)

April 23, 2020

Supreme Court, Kings County

Docket Number: 503381/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of April, 2020.

PRESENT:

HON. CARL J. LANDICINO,

Justice.

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ANIYAH JOHNSON,

Plaintiff,

Index No. 503381/2017

- against -

DECISION AND ORDER

ERNEST KROU, LUX CREDIT CONSULTANTS LLC, JAHLEEK DANIELS, DAVID YIFAT, 75 GREENE LLC, AND JOHN DOE CORPORATION, J.E. LEVINE BUILDERS, INC., UNITED INDUSTRIES & CONSTRUCTION CORP., and PRECISION SERVICES LLC

Defendants,

Motion Sequence # 9, 10, 11
12 and 13

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

	<u>Papers Numbered (e-file)</u>
Notice of Motion/Cross-Motion and Affidavits (Affirmations) Annexed	112-130, 132-140 141-150, 151-155 156-162, 167-169, 170-174, 175, 176-185
Opposing Affidavits (Affirmations)	<u>131, 166, 186</u>
Reply Affidavits (Affirmations)	<u>189</u>

After a review of the papers and oral argument the Court finds as follows:

The instant action is a personal injury claim arising from a motor vehicle accident that occurred on or about February 25, 2016, at or near the intersection of Clermont Avenue and Greene Avenue, Brooklyn, New York. This collision was allegedly caused by the instructions of a "flag man" who directed the vehicle, owned by Defendant LUX Credit Consultants LLC (hereinafter referred to as "LUX") and operated by Defendant Ernest Krou (hereinafter referred

to as “Krou”) (hereinafter referred to collectively as “Lux/Krou”), in which the Plaintiff, Aniyah Johnson (hereinafter referred to as the “Plaintiff”), was a passenger. The Lux/Krou vehicle was allegedly struck by another vehicle, owned by Defendant David Yifat (hereinafter referred to as “Yifat”) and operated by Defendant Jahleek Daniels (hereinafter referred to as “Daniels”) (hereinafter collectively referred to as “Yifat/Daniels”). The “flag man” was the alleged agent, or employee of the Defendants, 75 Greene LLC and Clermont Greene LLC, (hereinafter collectively referred to as “Greene”). At the time of the collision, the Yifat/Daniels vehicle was allegedly facing a green light. The Plaintiff alleges that her injuries were caused by the negligence of the various Defendants and the Plaintiff has been determined to be a passenger free from liability, by the Decision and Order of the undersigned dated December 12, 2018 (motion sequence #1).

The Plaintiff, pursuant to the Decision and Order dated April 10, 2019 (motion sequence #7), amended her complaint to include Defendants J.E. Levine Builder, Inc. d/b/a Levine Builders (hereinafter referred to as “Levine”), United Industries & Construction Corp. (hereinafter referred to as “United”), and Precision Services, LLC (hereinafter referred to as “Precision”). The Plaintiff filed her Supplemental Summons and Amended Complaint on May 1, 2019.

Defendant United now moves (motion sequence #9) for an order pursuant to CPLR 3211 (a)(5) dismissing the Plaintiff’s claim as against it as being time barred by the statute of limitations; or in the alternative, (i) pursuant to CPLR 603, granting severance of the action against it under the doctrine of laches; or (ii) pursuant to 22 N.Y.C.R.R. §202.21(e), (a) vacating the Plaintiff’s Note of Issue, (b) striking the matter from the trial calendar, and (c) compelling the parties to provide the required discovery, because the Plaintiff and the other co-defendants

have allegedly failed to provide necessary discovery and this matter is purportedly not ready for trial, as discovery is not complete.

Defendants Lux/Krou support United's motion. They believe that this is an appropriate result since they contend that the matter is not ready for trial. Specifically, Defendants Lux/Krou contend that none of the Defendants have been deposed and the Plaintiff has not responded to discovery demands which date back to October of 2018.

Defendants Greene and Levine (hereinafter collectively referred to as "Greene/Levine") oppose United's motion, to the extent that they argue that their cross claims against United are not time barred. Defendants Greene/Levine also move (motion sequence #10) for an order (i) pursuant to CPLR 3126 dismissing the Plaintiff's Complaint for repeatedly and willfully failing to appear for court-ordered independent medical examinations, or in the alternative (ii) pursuant to CPLR 3124 compelling the Plaintiff's compliance with all court orders directing her to appear for the independent medical examinations; and pursuant to 22 N.Y.C.R.R. §202.21(e) vacating the Plaintiff's Note of Issue, as significant discovery remains outstanding and the Certificate of Readiness contains material misstatements of fact.

Defendant Precision moves (motion sequence #11), for an order (i) pursuant to CPLR 3211 (a)(5) dismissing the Plaintiff's claim as time barred; or in the alternative (ii) pursuant to 22 N.Y.C.R.R. §202.21(e) vacating the Plaintiff's Note of Issue and striking the matter from the trial calendar since the Plaintiff and Co-Defendants have failed to produce necessary discovery and the matter is not ready for trial.

Defendants Yifat/Daniels move (motion sequence #12) for an order, pursuant to CPLR 602, consolidating the present claim (Index No. 503381) with a related action, Tia Moore v. Ernest Krou, Lux Credit Consultants LLC, Jahleek Daniels and David Yifat (Index No.

50406/2019) (hereinafter referred to as "Action 2"). Defendants Lux/Krou oppose Defendants Yifat/Daniels' motion, contending that the present claim and Action #2 are at different procedural stages and a consolidation of the actions would create undue delay.

Defendants Yifat/Daniels also move (motion sequence #13) for an order, pursuant to CPLR 3126, dismissing the Plaintiff's Complaint, with prejudice, for the Plaintiff's unreasonable violation of the Court's orders dated January 29, 2018, June 13, 2018, and February 27, 2019 and Plaintiff's failure to respond to discovery and inspection demands.

The Plaintiff opposes United's motion. She argues that the relation back doctrine tolls the applicable limitation period. The Plaintiff contends that there is a contractual relationship between United, Levine and Precision and that this relationship serves to unite all these parties in interest for the purposes of the Plaintiff's claim. Further, the Plaintiff contends that United knew or should have known that but for the Plaintiff's lack of knowledge as to the parties' identities and relationships, the action would have been commenced against all relevant actors.

CPLR 3211 (a)(5) allows a cause of action to be dismissed for several reasons, including breach of the statute of limitations. The applicable statute of limitations for claims to recover damages for injury to property or a person is three years, pursuant to CPLR 214. CPLR 203 governs the computation of limitation periods. Time is computed from the time the cause of action accrues. Personal injury claims accrue from the time of injury. CPLR203 (f) states that, "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions, occurrences, or series of occurrences, to be proved pursuant to the amended pleading." Where the statute of limitations is at issue, the burden is on the plaintiff to establish

the applicability of the relation-back doctrine. See *Boodoo v. Albee Dental Care*, 67 A.D.3d 317, 888 N.Y.S.2d 209 [2nd Dept 2009]

[T]he relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant where the two parties are united in interest... In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he will not be prejudiced in maintaining his defense on the merits; and (3) the new defendant 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 him as well... The burden is on the plaintiff to establish the applicability of the doctrine once a defendant has demonstrated that the statute of limitations has expired.

Schiavone v. Victory Mem'l Hosp., 292 A.D.2d 365,365 - 366, 738 N.Y.S.2d 87, 89 [2nd Dept 2002].

In negligence matters, parties are united in interest when each is vicariously liable for the acts of the other. *Weckbecker v. Skanska USA Civil Ne., Inc.*, 173 A.D.3d 936, 103 N.Y.S.3d 475 [2nd Dept 2019].

Motion Sequence 9 and 11

Defendants United and Precision allege that the Plaintiff's Complaint against them should be dismissed, as time barred. The Plaintiff's alleged injury occurred on February 25, 2016. The Amended Complaint was filed on May 1, 2019, some three years and three months after this cause of action accrued and accordingly, three months after the statute of limitation

expired. Thus, the Plaintiff has the burden of showing that the relation back doctrine applies in this instance.

United's position is that it is not united in interest with the other Defendants. It claims that it contracted with Levine to demolish two buildings located at or near 75 Greene Avenue ("hereinafter referred to as the "Site"). United argues that it contracted with Precision for Precision to conduct asbestos abatement at the Site. United contends that it did not employ any flag person at the Site. Rather, United argues that any flag person at the Site would have to have been an employee of Precision and operated under Precision's sole direction and control.

Precision argues that its obligation is to establish that the statute of limitations applies in this instance. It asserts that the Plaintiff's pleading was served upon it more than two months after the statutory period expired and it would be substantially prejudiced if forced to defend this action, especially after the Plaintiff has already obtained summary judgment.

The Plaintiff alleges that the liability of all of the Defendants arose from the same transaction and occurrence – the motor vehicle collision on December 25, 2016, as prompted by the instructions of the Defendants' flag person. The Plaintiff further alleges that the Defendants are united in interest by virtue of being in control of the flag person, either directly or indirectly, by virtue of their contractual relationships. Also, the Plaintiff believes that United and Precision knew or should have known that, but for the Plaintiff's mistake in identifying the parties, they would have been brought into the action at its initial commencement.

The Plaintiff's claim can survive if United and Precision are vicariously liable for the actions of the Defendants who were sued initially. However, the general rule is that an employer who hires an independent contractor is not liable for the independent contractor's negligent acts. *Rosenberg v. Equitable Life Assur. Soc. of U.S.*, 79 N.Y.2d 663, 595 N.E.2d 840 [1992]. To

determine whether an independent contractor relationship exists turns on whether the employer exercises control over those results, or the means used to achieve those results. *Shusterich v. Kleinman*, 171 A.D.3d 1236, 98 N.Y.S.3d 638 [2nd Dept 2019].

The contract between United and Precision details that Precision would perform the legal removal and disposal of all asbestos containing material. The scope of work of this contract is reflected in the Trade Contract between the Construction Manager and Subcontractor (see United's Motion, Exhibit R, Subsubcontract Agreement – Project: 75 Greene Ave Brooklyn, NY, page 3). Part of this scope of work includes an obligation to, “furnish a competent and adequate staff as necessary for the proper administration, coordination, supervision and superintendence of the Work... and keep an adequate force of skilled workmen on the job to complete the Work in accordance with all requirements of the Contract Documents” (see United's Motion, Exhibit Q, Exhibit A to Trade Agreement, page 13). United claims that it did not have any flag person at the site at the relevant time. United also claims that Precision employed flag persons to work at or around the site at the relevant time. This claim was not contradicted by Precision and was, in fact, supported by the Greene Defendants' witness, Andrew Weissman's testimony (see United's Motion, Exhibit Q, Andrew Weissman's Affidavit, paragraph 9).

The Plaintiff does not specifically oppose Precision's motion (motion sequence #11) and only opposes United's motion (motion sequence #9) in conclusory fashion. Moreover, the Plaintiff does not indicate that further discovery would be required in order for the Plaintiff to oppose these motions. Consequently, United and Precision are not united in interest. United, Precision, Levine, and the Greene Defendants all maintain independent contractor relationships since each contractor had control over the means by which their activity would be performed.

Therefore, United and Precision's motions (motion sequence #9 and #11 respectively) are granted. The Plaintiff's claims as against United and Precision are dismissed as barred by the statute of limitations pursuant to CPLR 3211(a)(5).

In addition, the Greene/Levine Defendants' position is that United's motion should not be granted in relation to their cross-claims against United. They contend that their claims against United include both contractual and common law claims for indemnification and contribution. The Greene/Levine Defendants acknowledge that their asserted claims have not accrued. Notwithstanding this, the dismissal of the complaint as against United does not extinguish the cross-claims, which cross-claims remain viable, since the action against the Greene/Levine defendants continues. See *Hawking-Bond v. Konefsky*, 48 A.D.3d 417 [2nd Dept 2008]. However, the cross-claims are properly converted to third party claims. See *Aarvac Properties Corp. v. Sterling & Fleetwood Co.*, 129 A.D.2d 600 [2nd Dept 1987]. Accordingly, the claims by the Greene/Levine Defendants' claims against United shall continue and be converted to third party claims.

Motion Sequence 10 and 13

CPLR 3126 states that, "[i]f any party... refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed... the court may make such orders with regard to the failure or refusal as are just." The Court may order that either (i) issues to which the information is relevant shall be deemed resolved in accordance with the claims of the party obtaining the order, (ii) prohibits the disobedient party from supporting or opposing designated claims or defenses through evidence; or (iii) (a) strikes the pleadings, in whole or part, or (b) stays further proceedings until the order is obeyed, (c)

dismisses the action in whole or part, or (d) renders a judgment by default against the disobedient party. Public policy strongly favors the resolution of actions on the merits wherever possible. *Krause v. Lobacz*, 131 A.D.3d 1128, 16 N.Y.S.3d 601 [2nd Dept 2015].

The striking of a party's pleading is a drastic remedy only warranted when there has been a clear showing that the failure to comply with discovery demands was willful and contumacious. *Arpino v. F.J.F. & Sons Elec. Co.*, 102 A.D.3d 201, 959 N.Y.S.2d 74 [2nd Dept 2012]. Similarly, the alternative remedy of preclusion may also be appropriate where the offending party's lack of cooperation with disclosure was willful, deliberate, and contumacious. However, it is not warranted unless there is evidence that the movant has been prejudiced by this behavior. See *Arpino supra* and *Mazzurco v. Gordon*, 173 A.D.3d 1001, 102 N.Y.S.3d 730 [2nd Dept 2019]. The willful and contumacious character of a party's conduct can be inferred from the party's repeated failure to comply with discovery demands or orders without a reasonable excuse. See *Arpino supra* and *Giraldo v. Highmark Indep., LLC*, 175 A.D.3d 654, 108 N.Y.S.3d 865 [2nd Dept 2019].

Here, the Plaintiff failed to attend the Court-ordered independent medical examinations (hereinafter referred to as "IMES") despite being offered numerous opportunities to attend same. The Plaintiff also failed to provide numerous items of discovery demanded by Krou and Lux, as mandated by the Court's order dated February 27, 2019. The Plaintiff has not filed any response to these allegations and has defaulted in opposition. There has been no excuse or explanation for the Plaintiff's other repeated failures to comply with the Court's orders. This is sufficient to presume that the Plaintiff's failure was willful and contumacious. *Westervelt v. Westervelt*, 163 A.D.3d 1036, 82 N.Y.S.3d 447 [2d Dept 2018]. The reasonable sanction, under the circumstances, is to preclude the Plaintiff from proffering evidence that Plaintiff failed to

provide in discovery. The Greene/Levine Defendants' motion (motion sequence #10) and Yifat/Daniels Defendants' motion (motion sequence #13) are granted on default. The Plaintiff is precluded from proffering evidence that it failed to provide in response to the respective discovery demands of the movants.

Motion Sequence 12

It appears that the present action and Action 2 arise from the same incident and involve similar actors. However, the present action involves parties that are not parties in Action 2. Normally, where there are multiple actions involving the same factual subject-matter but there are some parties uninvolved in at least one action, the most appropriate method for achieving efficient administration of justice is to have a joint trial. See *Cola-Rugg Enterprises, Inc. v. Consol. Edison Co. of New York*, 109 A.D.2d 726, 486 N.Y.S.2d 43 [2nd Dept 1985] and *Longo v. Fogg*, 150 A.D.3d 724, 55 N.Y.S.3d 61 [2nd Dept 2017].

The opposition to this motion contends that there is a disparity in the respective stages of these actions that would result in undue delay in this action. However, there is also support for the Court to vacate the Note of Issue and to compel the Plaintiff to provide necessary discovery. Therefore, the Daniels/Yifat's motion (motion sequence #12) is granted solely to the extent that the present action and Action 2 will be joined for joint trial only. This will permit separate discovery and the judicial economy of having one trial.

It is hereby ordered as follows:

United's motion (motion sequence #9) is granted. The Plaintiff's complaint as against United is dismissed, however the Greene/Levine Defendants' cross-claims against United shall continue and be converted to third-party claims.

Precision's motion (motion sequence #10) is granted. The Plaintiff's complaint as against Precision is dismissed.

The Greene/Levine Defendants' motion (motions sequence #11) and the Yifat/Daniels Defendants' motion (motion sequence #13) are granted on default of the Plaintiff. The Plaintiff is precluded from proffering evidence that it did not provide to these movants in discovery, at any further stage of this proceeding.

The Yifat/Daniels Defendants' motion (motion sequence #12) is granted solely to the extent that the present action and Action 2 shall be joined for the purpose of joint trial only.

The caption in this action shall be amended accordingly, in order to reflect this Decision and Order.

The Parties shall settle an order, on notice, together with a copy of this Decision and Order with notice of entry, within 30 days of entry, which order shall reflect the holding herein, including the provision of an amended caption.

This constitutes the Decision and Order of the Court.

ENTER:



Carl J. Landicino, J.S.C.