Almonte v Consolidated Edison Co. of N.Y., Inc.
2020 NY Slip Op 31611(U)
April 20, 2020
Supreme Court, Bronx County
Docket Number: 24968/2019E
Judge: Fernando Tapia

SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

RAFAELINA D. ALMONTE,
Plaintiff(s),
-against- Index No.: 24968/2019E

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.
Defendant(s).

DECISION

This is a personal injury action whereby plaintiff, RAFAELINA D. ALMONTE was allegedly struck by shrapnel from a lamppost operated by defendant, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. ("CON ED"). ALOMONTE now moves pursuant to CPLR § 3025(b) amend her complaint to clarify the instrumentality which caused her injury and to add her infant daughter as an additional plaintiff. CON ED cross moves pursuant to CPLR § 3025(b) to assert an 'Act of God' affirmative defense in its answer.

After careful review of the motion papers, ALOMONTE's motion is **GRANTED**, and CON ED's cross motion is **GRANTED**.

FACTUAL BACKGROUND

ALOMONTE alleges that on July 5, 2014 she was on a public sidewalk when a lamppost operated by CON ED suddenly exploded propelling debris and shrapnel in her direction, injuring her.[1] As a result, ALOMONTE commenced the instant action by filing a summons and complaint on October 23, 2014.[2]

AMEND

ALOMONTE contends this Court should grant her leave to amend because after engaging in discovery she ascertained the cause of the exploding lamppost, an apparatus located

[1] Plaintiff's Complaint, ¶ ¶ 2-16.
[2] Plaintiff's Counsel's Affirmation in Support, Ex. B.

within the lamppost known as a 'lightning arrestor.' ALOMONTE further seeks to add her infant daughter, G.R. as a co-plaintiff since her daughter was within the proximity of the exploding lamppost and allegedly suffered post-traumatic stress from the accident. In opposition, CON ED argues ALOMONTE's application to amend is defective since there is no affidavit of merit as to her daughters' injuries and that it would be prejudiced as it has not obtained any discovery as to G.R.'s injuries. In reply, ALOMONTE maintains CON ED would not be prejudiced by adding G.R. as a plaintiff since discovery has not yet concluded, and that no affidavit of merit is needed on a motion to amend.

In its cross-motion CON ED seeks to amend its answer and assert an 'Act of God' affirmative defense claiming it learned in discovery, lightning arrestors rarely explode and typically only do so under extreme conditions such as when they are struck by lightning. In her opposition, ALOMONTE contends CON ED's request to amend to assert an 'Act of God' defense should be denied as the claim is insufficient, conclusory, and devoid of merit. In reply, CON ED maintains its defense is not insufficient since plaintiff had its expert analyze the lightning arrestor in question and that a lightning storm occurred in the subject area in question days before the alleged incident.

CPLR § 214(5) provides in part that, "an action to recover damages for personal injury…" must be commenced within three (3) years. Further, CPLR § 208 provides in pertinent part, "If a person entitled to commence an action is under a disability because of infancy… at the time the cause of action accrues, and the time otherwise limited for commencing the action is three years or more and expires no later than after the disability ceases… the time within which the action must be commenced shall be extended to three years after the disability ceases…" CPLR § 3025(b) also provides, "A party may amend his or her pleading, or supplement it by

setting forth additional or subsequent transactions or occurrences, at any time by leave of court…" "Leave to amend… is to be freely given, absent prejudice or surprise."[3] Further, on a motion to amend a movant need not establish the merits of a claim or defense unless the proffered is palpably insufficient or devoid of merit.[4]

Here, as G.R. is still an infant the statute of limitations for her to commence an action against CON ED has not yet run. Further, CON ED's reasoning that it would be prejudiced by allowing G.R. to assert her claims because no discovery has occurred as to those claims is circular since both ALOMONTE and CON ED affirmed discovery is still ongoing. Moreover, note of issue has not yet been filed, thus there is no undue prejudice or surprise as G.R.'s claims have not come at the eve of trial. Consequently, CON ED has more than ample time to engage in further discovery as to cause(s) of G.R.'s claims and to mount a defense as to those her claims.

ALOMONTE's argument that CON ED's 'Act of God' defense is insufficient is similarly circular. As ALOMONTE argued in her favor a movant seeking to amend his pleadings need not establish the merits of his claim, CON ED likewise need not establish the merits of its 'Act of God' defense at this time. CON ED's defense is not palpably insufficient as its witness attested to lightning arrestors exploding when struck by lightning. In addition, in its reply CON ED raised the issue of a lightning storm occurring around the subject area days before the incident, thus establishing an issue of fact as to whether an 'Act of God' caused the accident in question.

CONCLUSION

Accordingly, it is

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[3] *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364 (1st Dep't 2007).
[4] *MBIA v. Greystone*, 74 A.D.3d 499 (1st Dep't 2010); *See also*, *Thomas v. Crimmins Contracting Co. v. New York*, 74 N.Y.2d 166 (1989).

ORDERED that plaintiff, RAFAELINA D. ALMONTE's motion to is **GRANTED**, and her pleadings are hereby amended to reflect those found in her supplemental summons and proposed amended complaint annexed as 'Exhibit 1' in her moving papers; it is further

ORDERED that defendant, CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.'s cross motion is **GRANTED**, and its pleadings are hereby amended to reflect those found in its proposed amended answer annexed as 'Exhibit D' in its moving papers; and it is further

ORDERED that the parties' respective amended pleadings are hereby deemed served upon each other as of the date of entry of this order.

This constitutes this Court's Decision and Order.

Dated: April 28, 2020
Bronx, NY

Hon. Fernando Tapia, J.S.C.