SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

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INDEX NO. 150236/2017

SABRINA JACKSON,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 001

- v -

160 WEST END AVENUE OWNERS CORP, 170 WEST END AVENUE OWNERS CORP., FIRSTSERVICE RESIDENTIAL NEW YORK, INC., and CITY & COUNTY PAVING CORP.,

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 34-52, 54-60, 62-70 were read on this motion to amend caption/pleadings.

By notice of motion, defendants 170 West End Avenue Owners Corp. (Owners Corp.) and FirstService Residential New York Inc. (FirstService) request leave to amend their answer pursuant to CPLR 3025(b).

Plaintiff opposes and cross-moves pursuant to CPLR 3025(b) for an order granting her leave to amend her summons and complaint. FirstService and Owners Corp. oppose.

I. UNDISPUTED BACKGROUND

By amended verified complaint dated November 28, 2017, plaintiff alleges that on September 20, 2016, she tripped and fell on the roadway between 160 and 170 West End Avenue in Manhattan, sustaining injury. (NYSCEF 40).

In their verified answer dated January 26, 2018, movants admit that Owners Corp. owned the premises encompassing the roadway at the time of plaintiff's accident and deny that

FirstService owned or controlled it. (NYSCEF 41).

In a contract entered into by Owners Corp. and former defendant City & County Paving Corp., Owners Corp. is identified as the owner of the roadway for the purposes of the "Sidewalk/Roadway Replacement at 170 West Ave, NY." (NYSCEF 56).

In the condominium declaration for the building located at 170 West End Avenue, Owners Corp. and nonparty 170 West End Avenue Associates (Associates) are identified as the declarants and the Board as the condominium for the premises. It also reflects that the Board consists of residential units, owned by Owners Corp., and professional units, owned by Associates. The land, including the sidewalks, driveways, and curbing, except those that are part of any "Unit," are common elements. (NYSCEF 43). The Board's by-laws reflect that the Board is responsible for maintaining common elements. (NYSCEF 44).

At her deposition conducted on December 6, 2018, FirstService's general manager testified that the Board, not Owners Corp., owns the land where plaintiff fell, and explained that the Board is not a party to the 2015 contract, because although it owns the land, the money is "filtered through the co-op."

II. CONTENTIONS

A. Movants (NYSCEF 35)

In seeking to amend their answer by including a denial of ownership of the roadway on which plaintiff fell, movants rely on the testimony of FirstService's general manager, the condominium declaration, and the by-laws. (NYSCEF 45). They deny that plaintiff would be prejudiced by the amendment as she has not filed her note of issue and in view of her having sought their stipulation permitting her to amend her complaint to add the Board as a defendant, which stipulation "has not been forwarded to" movants' counsel.

B. Plaintiff (NYSCEF 63)

In opposition to movants, plaintiff contends that she would be prejudiced by the amendment, as she relied on movants' admission for over two and a half years of litigation. She argues that movants move to amend in bad faith and could have addressed amending their answer at an earlier conference. The proposed amendment lacks merit, plaintiff argues, as the evidence, including the general manager's testimony, the condominium declaration and by-laws, and Owners Corp.'s contract, is conflicting as to ownership and control of the roadway.

In support of her cross motion to amend, plaintiff seeks leave to add the Board as a defendant. Although the pertinent statute of limitation has elapsed, she argues that she should be permitted to add the Board as the claims against it arise from the timely pleaded events, that the Board is united in interest with the original defendants, and that the Board should have known that but for a misidentification of the proper parties, it would have been named as a defendant. Moreover, she maintains, adding the Board as a defendant would not warrant additional discovery nor would it delay this action, and she requests permission to file her note of issue once the motion is decided. She maintains that the failure to add the Board as a defendant before the limitations period is due to her reliance on movants' misrepresentation as to ownership.

C. Movants' opposition and reply (NYSCEF 66)

Movants again deny that plaintiff is prejudiced by their proposed amended answer, observe that she waited to move to amend her complaint ten months after the general manager's testimony, and failed to sustain her burden of identifying the owner of the location where she fell. They reiterate that the by-laws and condominium declaration establish the Board's ownership, and contend that the general manager's testimony clarifies that the Board owns the land, despite the contract reflecting ownership by Owners Corp.

Movants also deny that the Board is united in interest with either Owners Corp. or FirstService, as they share no defenses. Owners Corp. is owner of only the residential units, while the Board owns the land, including the roadway where plaintiff fell. They likewise deny that FirstService is responsible for managing the roadway.

D. Plaintiff's reply (NYSCEF 67)

Plaintiff contends that she fulfilled her responsibility to name the correct party, as evidenced by movants' admission of ownership in two verified pleadings which remained of record for over two years, and notwithstanding the agreement reached with movants to amend the pleadings, she received no further correspondence from movants on the issue, although the parties continued to exchange other communications via email. (NYSCEF 68). Neither did movants mention the ownership issue at either of two compliance conferences following the deposition. Thus, plaintiff argues, movants intentionally waited until after expiration of the statute of limitations to address the issue. Moreover, as FirstService was responsible for maintaining the land, it is united in interest with the Board.

III. ANALYSIS

A. Movants' motion to amend

Leave to amend "shall be freely given upon such terms as may be just . . .." (CPLR 3025 [b]). It is well-settled that leave to amend pleadings should be liberally granted unless the amendment plainly lacks merit or would prejudice or surprise the other parties. (*MBIA Ins. Corp. v Greystone & Co.*, 14 AD3d 499, 499 [1st Dept 2010]). When moving for leave to amend, the movant bears the burden of demonstrating that the proposed causes of action are not palpably without merit. (*Id.*).

As FirstService's general manager testified that the Board owned the area where plaintiff

was injured, and the condominium declaration and by-laws reflect the Board's responsibility for maintaining the area, movants' proposed amendment to their answer denying ownership is not palpably devoid of merit.

Even if movants delayed in seeking leave, absent prejudice, such delay is insufficient to deny them leave. (*See Edenwald Contracting Co. v City of New York*, 60 NY2d 957, 959 [1983] [lateness, absent prejudice, is not a basis to deny motion to amend]; *Cherebin v Empress Ambulance Serv., Inc.*, 43 AD3d 364, 365 [1st Dept 2007] [same]). Moreover, plaintiff admits that adding the Board as a defendant would not result in any delay to the action, and thus, movants denial of ownership likewise would not result in any delay. Whether plaintiff is permitted to amend her complaint is immaterial as to prejudice. (*See infra*).

B. Plaintiff's cross motion

A party may add a claim or party to an action notwithstanding the expiration of the pertinent limitations period if the substance of the amendment relates back to the original claim, "unless the original pleading does not give notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading. (CPLR 203[f]; *Buran v Coupal*, 87 NY2d 173, 177 [1995]). To add a new party, the movant must demonstrate that, as pertinent here, that "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 . . ." (*Id.* at 178).

Parties are generally not held to be united in interest unless they, as pertinent here, have the same jural relationship. (2B Carmody-Wait 2d § 13:413). That relationship must be such that the parties "will stand or fall together" because their defenses are the same. (*Connell v Hayden*, 83 AD2d 30, 42-43 [2d Dept 1981]). "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 NY*, 144 AD3d 511, 513 [1st Dept 2016]).

The condominium declaration and by-laws provide that a roadway is not part of a unit, and that the roadway, the undisputed location of plaintiff's accident, is a common element for which the Board is responsible. That Owners Corp. owns the residential units in the condominium is insufficient to impose liability on it for the condition of a common element. (*See Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 49-50 [1st Dept 2016] ["[U]nit owners, though they collectively own the common elements, are divested of the powers and responsibilities of ownership with respect to those elements.]; *Rothstein v 400 E. 54th St. Co.*, 51 AD3d 431, 431-32 [1st Dept 2008] [unit owners owe no duty to plaintiff as to condition of common elements]). As the roadway where the accident occurred is owned by the Board, it cannot deny ownership of it, whereas Owners Corp. can. Consequently, there is no unity of interest between the Board and Owners Corp.

Notwithstanding movants' denial that FirstService was responsible for managing the roadway, its general manager testified not only that FirstService was responsible for the roadway in issue but that it was the agent of the Board. That evidence suffices to show that the Board may be held vicariously liable for FirstService's conduct or that their defenses would be the same. (*Cf. Bossung v Rebaco Realty Holding Co., N.V.*, 169 AD3d 538 [1st Dept 2019] [denying leave to amend where no evidence that building manager vicariously liable for actions of condominium board or that they shared defenses]; *Xavier v RY Mgmt. Co.*, 45 AD3d 677, 679 [2d Dept 2007] [nothing in record to indicate that defendant-managing agent and proposed defendant-owner vicariously liable for acts of one another]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants 170 West End Avenue Owners Corp.'s and FirstService Residential New York Inc.'s motion for leave to amend their answer is granted; it is further

ORDERED, that the amended answer, in the form annexed to the motion papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; it is further

ORDERED, that plaintiff's cross-motion to amend its complaint is granted; and it is further

ORDERED, that the second amended verified complaint, in the form annexed to the motion papers (NYSCEF 74), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action.

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6/23/2020
DATE

BARBARA JAFFE, J.S.C.

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