

Silva v 770 Broadway Owner, LLC
2020 NY Slip Op 32817(U)
August 26, 2020
Supree Court, New York County
Docket Number: 155857/2017
Judge: Margaret A. Chan
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN PART IAS MOTION 33EFM

Justice

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CARLITO SILVA,

Plaintiff,

- v -

770 BROADWAY OWNER, LLC,

Defendant.

-----X

770 BROADWAY OWNER, LLC

Plaintiff,

-against-

FACEBOOK, INC, L&K PARTNERS, INC, CONSOLIDATED
CARPET WORKROOM, LLC

Defendant.

-----X

FACEBOOK, INC, L&K PARTNERS, INC

Plaintiff,

-against-

CONSOLIDATED CAPRET WORKROOM, LLC

Defendant.

-----X

INDEX NO. 155857/2017
MOTION DATE 05/14/2020
MOTION SEQ. NO. (MS) 002

DECISION + ORDER ON MOTION

Third-Party
Index No. 595829/2018

Second Third-Party
Index No. 595586/2019

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 57, 58, 59, 60, 61, 62, 63, 67, 102, 103, 104

were read on this motion to/for AMEND CAPTION/PLEADINGS.

In this personal injury matter, plaintiff Calito Silva moves is MS2 to amend his complaint to add as direct defendants, third-party defendants Facebook, Inc. (Facebook), L&K Partners, Inc. (LK), Consolidated Carpet Workroom, LLC (CCW), and Stoney Road Industries, LLC (SR) (collectively third-party defendants) pursuant to CPLR §§ 3025, 1001, and 1002. Facebook, LK, and CCW have appeared

in this matter; SR has not. The appearing third-party defendants oppose the motion. The Decision and Order is as follows:

BACKGROUND

Plaintiff claims that on March 26, 2016, he was struck in the head by a ladder at the 770 Broadway building owned by defendant 770 Broadway Owner, LLC (770 Broadway). Plaintiff filed a summons and complaint on June 28, 2017, against 770 Broadway (NYSCEF # 1). 770 Broadway answered on February 1, 2018 (NYSCEF # 2). On October 17, 2018, 770 Broadway filed a third-party complaint against Facebook and LK (NYSCEF # 13). On January 17, 2019, LK answered; Facebook followed on April 5, 2019 (NYSCEF ## 19, 21). Subsequently, on July 9, 2019, Facebook and LK filed a second third-party complaint against CCW (NYSCEF # 24). CCW answered on September 4, 2019 (NYSCEF # 31). On November 22, 2019, CCW filed the third third-party action against SR, which has gone unanswered (NYSCEF # 43).

On March 22, 2020, the Chief Administrative Judge of the Courts issued Administrative Order (AO) 78/20, which directed that, due to the COVID-19 pandemic, no papers were to be accepted by the county and court clerks, except for essential matters (NYSCEF # 58). However, plaintiff filed the instant motion on March 23, 2020, and the documents were accepted by the NYSCEF system (NYSCEF # 52). CCW filed its opposition to the motion on May 11, 2020, after the Chief Administrative Judge issued AO 87/20, which reopened the NYSCEF system to non-essential matters (NYSCEF # 57). Facebook and LK submitted their reply on May 13, 2020 (NYSCEF # 67). Plaintiff filed his reply on June 19, 2020, and the motion was marked submitted.

Plaintiff's proposed amended complaint simply applies the same negligence cause of action asserted against 770 Broadway to the third-party defendants (*compare* NYSCEF # 1 *with* NYSCEF # 55).

DISCUSSION

A motion for CPLR 3025(b) to amend or supplement the pleading is typically "freely given upon such terms as may be just including the granting of costs and continuances" and shall be "accompanied by the proposed amended or supplemented pleading clearly showing the changes or additions." Leave to amend is often granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*see Davis v South Nassau Communities Hospital*, 26 NY3d 563, 580 [2015]).

Third-party defendants argue that the motion should be denied on the basis that the statute of limitations has expired. Plaintiff's claim arose on March 26,

2016. As per CPLR § 214, the statute of limitations period for a personal injury claim is three years (CPLR § 214). As such, the statute of limitations in this matter expired on March 26, 2019.

Nevertheless, when a plaintiff seeks to add a direct defendant that has already been impleaded as a third-party defendant, “an amendment of the complaint may be permitted, in the court's discretion, and a direct claim asserted against the third-party defendant, which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint” (*Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 478 [1985]). However, the relation back doctrine does not allow a plaintiff to add a third-party defendant as a direct defendant when the third-party claim was interposed following the expiration of the statute of limitations (*see Zaveta v Portelli*, 127 AD2d 760, 760 [2d Dept 1987]).

CCW was added as a third-party defendant on July 9, 2019, and SR was added on November 22, 2019. As such, plaintiff is prohibited from adding CCW and SR as direct defendants because they were added as third-party defendants after the expiration of the statute of limitations.

Additionally, plaintiff is barred from adding CCW and SR as direct defendants via the alternative relation back methodology which requires plaintiff to show that

“(1) both claims arose out of 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 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]).

Plaintiff does not even attempt to make such a showing. As such, the branches of plaintiff's motion to add CCW and SR as direct defendant are denied.

However, Facebook and LK were added as third-party defendants on October 17, 2018, prior to the expiration of the statute of limitations, and were therefore on notice of plaintiff's claims and the potential for claims to be made against them. As such, plaintiff's proposal to add Facebook and LK properly relates back to the October 17, 2018 third-party complaint and the proposed amended complaint is not barred by the statute of limitations.

In their final attempt to defeat plaintiff’s motion, Facebook and LK argue that they are prejudiced because almost two years have passed since they were added to this litigation, and discovery would be difficult (NYSCEF # 67, ¶ 5). However, Facebook and LK do not provide any evidence that they will be prejudiced or are unfairly surprised by the delay. As such, they do not fulfill their burden in opposing plaintiff’s motion to amend (*see Redd v Vilage of Freeport*, 150 AD3d 780, 781 [2d Dept 2017] [“The party opposing the application has the burden of establishing prejudice, which requires a showing that the party ‘has been hindered in the preparation of (its) case or has been prevented from taking some measure in support of (its) position’”]). Additionally, there is no indication that plaintiff’s proposed amended complaint lacks merit. Hence, plaintiff has properly added Facebook and LK as direct defendants in this matter.

The court also notes that while plaintiff’s motion was filed during the court’s shutdown of new filings of non-essential matters due to COVID-19 health concerns, the non-movants fully briefed this motion and will experience no prejudice with the resolution of this motion. Indeed, requiring the plaintiff to resubmit this motion would only delay the inevitable conclusion that Facebook and LK can be added as defendants and that CCW and SR cannot.

Accordingly, it is ORDERED that the branches of plaintiff’s motion to amend his complaint to add Facebook and LK as defendants pursuant to CPLR 3025 are granted; it is further

ORDERED that the branches of plaintiff’s motion to amend his complaint to add CCW and SR as defendants are denied; it is further

ORDERED that plaintiff submit via NYSCEF a revised amended complaint that reflects this Decision and Order within ten (10) days and that such revised amended complaint be deemed served upon Facebook and LK at that time; it is further

ORDERED that the clerk of the court is directed to amend the caption as follows:

CARLITO SILVA X

Plaintiff,

- v -

770 BROADWAY OWNER, LLC, FACEBOOK,
INC., and L&K PARTNERS, INC.,
Defendants.

_____ X

It is further, ORDERED that Facebook and LK shall serve answers or otherwise move within twenty (20) days after the revised amended complaint is uploaded to NYSCEF; and it is further

ORDERED that plaintiff shall serve a copy of this order with notice of entry upon the other parties and the Clerk of the Court within ten (10) days.

This constitutes the Decision and Order of the court.

8/26/2020
DATE


MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION

GRANTED IN PART OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE