Tavassoli v City of New York
2020 NY Slip Op 34431(U)
December 8, 2020
Supreme Court, Queens County
Docket Number: 706663/17
Judge: Kevin J. Kerrigan

[*1]

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Part **10**
Justice

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Roberta Tavassoli,

Plaintiff,

- against -

City of New York, Vitamin Shoppe Industries Inc., and AM Newspaper Delivery Service, Inc. d/b/a Mitchell's Newspaper Service,

Defendants.

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Vitamin Shoppe Industries, Inc.,

Third-Party Plaintiff,

- against -

AM Newspaper Delivery Service, Inc. d/b/a Mitchell's Newspaper Delivery Service, Community New Group LLC d/b/a Queens Family, Gay City News, Forest Hills Ledger, Davler Media Group LLC d/b/a Queens Parent, The Employment Guide LLC, The Epoch Times Association Inc. D/b/a Vision Times, Newsday LLC d/b/a AM New York, New York City Community Media LLC d/b/a Queens Family, Gay City News and The Village Voice LLC,

Third-Party Defendants.

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Index Number: 706663/17

Motion Date: 11/30/20

Motion Seq. No.: 5

The following papers numbered E74-111 read on this motion by third-party defendant, AM Newspaper Delivery Service Inc. d/b/a Mitchell's Newspaper Service, to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits.....	E
Affirmation in Opposition-Exhibits.....	E

Upon the foregoing papers it is ordered that the motion is decided as follows:

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Motion by AM to dismiss the amended complaint against it is granted.

Plaintiff allegedly sustained injuries as a result of tripping and falling over a defect in a curbside tree well in front of 107-60 Queens Boulevard in Queens County on March 2, 2016. The ground floor of said abutting property is operated by defendant Vitamin Shoppe. Newspaper distribution boxes were placed on the sidewalk adjacent to the location of the accident. Plaintiff commenced the action on May 16, 2017 against the City, Vitamin Shoppe and Mitchell's Subscription Service LLC. It was apparently the allegation of plaintiff that Mitchell's was negligent in the placement of its alleged news rack. Plaintiff subsequently moved for a default judgment against Mitchell's, pursuant to CPLR 3215, and Mitchell's cross-moved to dismiss the complaint against it as abandoned pursuant to CPLR 3215(c). Pursuant to the order of this Court issued on August 26, 2019, the motion was denied and the cross-motion was granted, and the caption of the action was amended to delete Mitchell's as a defendant.

On January 22, 2020, Vitamin Shoppe commenced a third-party action against, inter alia, AM Newspaper Delivery Service, Inc. d/b/a Mitchell's Newspaper Delivery Service. AM served an answer to the third-party complaint on March 5, 2020. Plaintiff subsequently served the present amended complaint on July 24, 2020. This Court notes that pursuant to Executive Orders 202.8, 202.14, 202.18, 202.38, 202.48 and 202.55, all time limits for the commencement, filing or service of any action, notice, motion or other process or proceeding was tolled as of March 20, 2020 through September 4, 2020. Therefore, plaintiff timely filed the amended complaint as of right pursuant to CPLR 1009.

AM moves for dismissal, pursuant to CPLR 3211(a)(5) upon the ground that the complaint against it is barred by the 3-year statute of limitations on tort actions governed by CPLR 214. Plaintiff also contends that the dismissal of the action against Mitchell's was a determination on the merits that bars reintroduction of Mitchell's as a defendant in the amended complaint under res judicata.

In opposition, plaintiff's counsel contends that the amended complaint against AM is not barred by the statute of limitations because it relates back to the timely complaint against Mitchell's Subscription Service, LLC and the City, pursuant to CPLR 203(f), in that AM is united in interest with Mitchell's and the City, and that res judicata does not apply because the dismissal against Mitchell's pursuant to CPLR 3215(c) was not on the merits. Counsel also contends that plaintiff's filing of the amended complaint as of right, without leave of court, was proper and timely as it was made within the 20-day time frame when factoring in the toll

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imposed by the successive Executive Orders. AM's counsel concedes this last point and the City does not address it.

In the first instance, AM's res judicata argument is without merit. The dismissal of the action against Mitchell's Subscription Service LLC as abandoned, even though such dismissal is with prejudice, does not bar the addition of AM Newspaper Delivery Service, Inc. d/b/a Mitchell's Newspaper Delivery Service as a defendant under res judicata, quite simply because the former was a different entity by a different name than AM and its d/b/a. That it does business under a name that also includes the name "Mitchell's" does not reintroduce the dismissed entity as a defendant.

As to the statute of limitations basis for the motion, CPLR 203(f) provides, "Claim in amended pleading. 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 transactions or occurrences, to be proved pursuant to the amended pleading." The relation-back doctrine of CPLR 203(f), therefore, applies where a claim is sought to be interposed by way of amendment of the original, timely-commenced, complaint after the statute of limitations would have ordinarily run on that new claim (see Cady v Springbrook NY, Inc. (145 AD 3d 846 [2nd Dept 2016]), 39 College Point Corp v Transpac Capital Corp. (27 AD 3d 454 [2nd Dept 2006]) and Pendleton v City of New York (44 AD 3d 733 [2nd Dept 2007]).

The relation-back doctrine, however, only applies where the two defendants are "united in interest" (see Buran v. Coupal, 87 N.Y.2d 173). In order that a cause of action against a new defendant relate back to the date the action was filed against another defendant under CPLR 203, 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 or she will not be prejudiced in maintaining a 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 the new defendant as well (see Shapiro v. Good Samaritan Reg'l Hosp. Med. Ctr., 42 A.D.3d 443, 2nd Dept 2007)

There is no controversy that both causes of action against the original Mitchell's defendant and AM arise out of the same occurrence. And this Court is of the opinion that the failure to include AM as a defendant in the original complaint was an unintended mistake on the part of plaintiff's counsel. However,

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plaintiff has failed to demonstrate that AM is united in interest with either Mitchell's or the City so as to allow the addition of AM as a direct defendant.

"[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff. In other words, when because of some legal relationship between the defendants they necessarily have the same defenses to the plaintiff's claim, they will stand or fall together and are therefore united in interest" Connell v. Hayden, 83 A.D.2d 30, 42-43, [2nd Dept 1981]) (emphasis added).

"Where one defendant 'may' have a defense which is not available to the other, they cannot be said to be united in interest...The mere possibility that a defendant who was served late could have such a different defense is all that is required ... To determine unity of interest, therefore, one looks not to whether the two defendants will assert different defenses but rather whether they could assert such different defenses" (id. at 41-42). Consequently, "the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other" (id. at 45).

AM and Mitchell's are separate entities. Plaintiff's counsel's only offer of proof that they are, or were, united in interest is his conclusory assertion that Mitchell's was merely a "shell" created by the same individual who incorporated AM for the purpose of evading suit and that they are "clearly" united in interest because both entities are represented by the same attorney and submitted the same affidavit by Mitchell Newman in support of their motions, that both have the same mailing address on Mitchell's website and "Mitchell's Newspaper Delivery Service" is the d/b/a of AM. Such does not establish unity of interest. Since it is undisputed that AM met its initial burden of establishing that the statute of limitations had long expired, it was the burden of plaintiff to demonstrate that the relation-back doctrine of CPLR 203 was applicable (see Austin v. Interfaith Med. Ctr., 264 A.D.2d 702 [2nd Dept 1999]). Plaintiff has failed to establish that AM and Mitchell's Subscription Service LLC are united in interest. In addition, since the action was dismissed against Mitchell's as abandoned, which is a dismissal with prejudice, almost 11 months before plaintiff filed and served the amended complaint adding AB as a defendant, there was no Mitchell's as a defendant to which the amended complaint against AB could relate back.

Plaintiff has also failed to establish that AM and the City are united in interest so as to allow the addition of AM as a

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direct defendant based upon a unity of interest with the City. Plaintiff contends that the City and AM are united in interest based upon the indemnification provision set forth in §19-128.1(d)(1) of the NYC Administrative Code that states, "Each person who owns or controls a newsrack placed or installed on any sidewalk shall indemnify and hold the city harmless from any and all losses, costs, damages, expenses, claims, judgments or liabilities that the city may incur by reason of the placement, installation or maintenance of such newsrack, except to the extent such damage results from the negligence or intentional act of the city." Plaintiff contends that this indemnification provision makes the City and AM united in interest but fails to explain why such statutory indemnification requirement creates a unity of interest. Counsel merely cites Austin v. Interfaith Med. Ctr. (supra) as the authority for such conclusion, without offering any critical analysis of the holding in that case which, had counsel done so, would have shown that the facts of that case are entirely inapposite to those of the present matter.

In that case, the plaintiff commenced a medical malpractice action against a hospital alleging departures from good and accepted medical practice on the part of a physician, one Dr. Sabir, who was working in the hospital's emergency room pursuant to an agreement between the hospital and an emergency services corporation by the name of Coastal Emergency Services, whereby Coastal provided full-time emergency physician services in the hospital's emergency room. The plaintiff commenced a timely action against the hospital, and the hospital commenced a third-party action against Coastal and Dr. Sabir for contribution and contractual indemnification. The plaintiff thereafter amended her complaint, pursuant to CPLR 1009, to add Coastal and Sabir as direct defendants. Coastal and Sabir, in turn, moved for dismissal of the amended complaint against them, pursuant to CPLR 3211(a)(5), upon the ground of statute of limitations. Plaintiff opposed the motion upon the relation-back provision of CPLR 203 based upon the unity of interest among the hospital, Coastal and Sabir.

The contract between the hospital and Coastal provided that Coastal would indemnify the hospital for claims resulting from wrongful acts or omissions of any contractor-supplied physician, and that the hospital would indemnify Coastal for claims resulting from wrongful acts or omissions of the hospital personnel in the provision of medical and hospital services to patients of the emergency room. There was also an independent contractor physician agreement between Sabir and Coastal which provided that Sabir was Coastal's independent contractor and not an employee or agent of Coastal but that Sabir would indemnify Coastal against any claims resulting from his actions or omissions.

The Appellate Division, Second Department, held that the

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hospital was vicariously liable for the malpractice of Sabir and therefore, their interests were united. The Appellate Division then stated, "Furthermore, Coastal is required to indemnify the Hospital for the malpractice of Dr. Sabir by reason of the contractual indemnification clauses contained in the agreement between the Hospital and Coastal. Thus, the Hospital and Coastal are also united in interest (see, Connell v. Hayden, 83 A.D.2d, supra, at 48, 443 N.Y.S.2d 383)" (Austin, 264 A.D.2d at 704).

Plaintiff's counsel quotes this passage from Austin in support of his argument that the City and AM are united in interest by virtue of the indemnification requirement of the Administrative Code, without distinguishing the completely dissimilar jural relationships in the two cases. Counsel does not argue that the City is vicariously liable for the negligence of AM in its placement or management of its newsracks. To the extent that he is contending that an indemnification provision of whatever nature, in general, of itself, somehow creates another category of unity of interest, apart from any vicarious liability or identity of possible defenses, is a clear misreading of the holding in Austin.

The Appellate Division, Second Department, did not extrapolate upon its one-sentence conclusion that the hospital and Coastal were united in interest, but merely cited its holding in Connell v. Hayden in support of its conclusion, without further comment. Therefore, Austin must be understood within the framework of the law on unity of interest explained at length by the Second Department in Connell.

The Second Department was quite explicit in Connell, as heretofore stated, that the question of unity of interest is to be determined by examining the jural relationship of the parties and the nature of the claim against them, and that unity of interest lies only where there is complete identity of available defenses between the two defendants by virtue of their legal relationship so that they will stand or fall together, and that the only way they could have identity of available defenses and thus be united in interest is where one is vicariously liable for the acts of the other.

The Connell case also involved a medical malpractice action, involving two physicians who had initially practiced together as a partnership but who later formed a professional corporation. The plaintiffs commenced an action against the doctors individually. The first doctor was properly served with the summons and complaint personally by in-hand delivery. The second doctor was not properly served and moved for summary judgment to dismiss the complaint against him for lack of personal jurisdiction and also upon the ground of statute of limitations. The trial court denied the motion and granted plaintiff leave to amend the complaint to add the P.C.

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as a defendant. The Appellate Division, Second Department, reversed, finding that personal jurisdiction had not been acquired over the doctor and thus the action should have been dismissed against him for lack of personal jurisdiction, and that the addition of the P.C., a new party, could not be accomplished only by amendment of the complaint, but must be done by way of service of a supplemental summons upon the P.C. The Second Department also stated that although it need not reach the issue of statute of limitations and unity of interest raised by the parties, it nevertheless would do so, in advisory fashion, to guide the parties in the event plaintiff served the P.C. with a supplemental summons to bring it into the case.

The Second Department opined, as heretofore noted, that the jural relationship of the defendant in the case and the one sought to be added must be such that one would have no other defenses available except those that would be available to the other and thus that one would be vicariously liable for the actions of the other, and on page 48 of its opinion cited in Austin, concluded, in sum and substance, that since the physician in the action was an employee of the P.C., the doctrine of respondeat superior would render the P.C. vicariously liable for any malpractice found on the part of the physician, thus rendering them united in interest so that addition of the P.C. to the action by way of service of a supplemental summons upon it would relate back, for purposes of the statute of limitations, to the commencement of the action against the physician.

The Connell opinion did not cite or discuss any contractual indemnification provision, and did not hold that a unity of interest is established by virtue of an indemnification provision. Yet it was not a mis-citation on the part of the Second Department in Austin to reference it in support its holding that the hospital and Coastal were united in interest by virtue of the contractual indemnification clauses in the agreement between them.

The hospital and Coastal had indemnification clauses in their contract obligating each to indemnify the other in the event of wrongful omissions or acts of the contractor-supplied physician (in that case Sabir) or the hospital's personnel, and Coastal had an indemnification provision in its contract with Sabir requiring Sabir to indemnify Coastal in case of any malpractice on his part. Moreover, the hospital was already vicariously liable to the hospital. These mutual contractual indemnification provisions, coupled with the vicarious liability of the hospital, rendered the hospital and Coastal united in interest to the extent that all possible defenses available to one would be available to the other and they would both necessarily prevail or fail together.

The Second Department subsequently clarified any misconception

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that a unity of interest is necessarily established by a mere indemnification provision. In Hilliard v. Roc-Newark Assocs., 287 A.D.2d 691 (2001), the plaintiff slipped and fell on a wet dining room floor of a hotel owned by an entity referred to as RNA and which operated it under a licensing agreement with Holiday Inn. The plaintiff commenced a timely action against Holiday Inn and, after the statute of limitations had expired, filed and served an amended summons and complaint adding RNA as a defendant. Holiday Inn subsequently moved for summary judgment, which was granted, and the caption of the action was amended to delete Holiday Inn as a defendant, leaving RNA as the sole defendant. RNA thereafter moved to dismiss the complaint upon the ground of statute of limitations. The motion was denied upon the ground that Holiday Inn and RNA were united in interest and thus the amended complaint related back to the timely action against Holiday Inn. The Appellate Division, Second Department, reversed, holding that the relationship between RNA and Holiday Inn was merely that of licensor-licensee and that the licensing agreement did not give Holiday Inn any authority or control over the daily cleaning and maintenance of the hotel so that RNA's alleged negligence in failing to mop the wet floor could be imputed to Holiday Inn. Moreover, the action was dismissed against Holiday Inn upon its showing that it was not liable. Thus, Holiday Inn had a defense based upon its lack of authority or control over the hotel which was unavailable to RNA, and so these two defendants did not necessarily stand or fall together against the plaintiffs' claim. The Court concluded, "Although the licensing agreement required RNA to indemnify Holiday Inn as to any claims arising out of the operation of the hotel, that does not establish that they were united in interest as to the plaintiffs' claim in the absence of vicarious liability (cf., Austin v. Interfaith Med. Ctr., supra)" (287 A.D.2d at 694).

The Second Department, in Hilliard, again stressed, as it did in Connell, that the jural relationship and the nature of the claim are central to the determination of whether the defendants' defenses will be the same so they will either stand or fall together and thus be united in interest, and that vicarious liability is key to that determination. And it more directly stated what it had merely implied in its opinion in Austin; namely, that a contractual indemnification provision will establish a unity of interest only where it serves to unify the defenses available to the defendants when coupled with vicarious liability.

In our case, there was no jural relationship between the City and AM. The indemnification provision relied upon by plaintiff's counsel is not a contractual indemnification provision since there is no contractual relationship between the City and AM. It is rather an indemnification obligation imposed by statute as a condition for the private use of public sidewalks for the placement of newsracks. Since it is apparently the opinion of the City that

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distribution of newspapers and other printed material implicates First Amendment rights, it may not prevent such activity or impose a licensing or contract requirement for the use of public sidewalks for that activity. Thus, there are no contract or even licensing agreements between the City and newsrack owners/operators. Instead, as is the prerogative of government to place reasonable restrictions on the exercise of constitutional rights, the City Council promulgated the Administrative Code provision in question. It imposes numerous requirements for the location and manner of placement of these newsracks, their appearance, maintenance, as well as requirements that the owner maintain a general liability insurance policy naming the City as an additional insured and that the owner indemnify the City against all claims against it arising from the placing and use of the newsracks on sidewalks. Failure to abide by the enumerated requirements results in the issuance of a notice of violation placed against the owner with the imposition of varying degrees of monetary penalties. Clearly, there is no business relationship whatsoever between the City and newsrack owners. The possible defenses available to the City are not identical to those that AM may have, and they would not prevail or fall together against plaintiff's causes of action. Since there is no jural relationship between the City and AM so that one would be vicariously liable for the negligence of the other, they are not united in interest.

Finally, this Court notes that plaintiff only filed and served an amended complaint adding AM as a defendant, but did not file or serve a supplemental summons. As the Appellate Division, Second Department, instructs in Connell, the addition of AM as a direct defendant is not in the nature of an amendment to correct a mere omission but is the addition of a new party defendant, which may not be accomplished only by amendment of the complaint, but must be done by way of service of a supplemental summons. Therefore, the bare amended complaint, in the absence of a supplemental summons, did not serve to add AM as a defendant, and for this additional reason alone, the motion must be granted.

Accordingly, the amended complaint is dismissed.

Dated: December 8, 2020

KEVIN J. KERRIGAN, J.S.C.

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COUNTY CLERK
QUEENS COUNTY