

Murphy v Westchester One, LLC
2020 NY Slip Op 34556(U)
September 25, 2020
Supreme Court, Westchester County
Docket Number: 58550/2017
Judge: Sam D. Walker
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. SAM D. WALKER, J.S.C.

-----X
CHANDRA MURPHY,

Plaintiff,

-against-

DECISION & ORDER
Index No. 58550/2017
Motion Sequence 5

WESTCHESTER ONE, LLC and 44 SOUTH BROADWAY
PROPERTY, LLC, CUSHMAN & WAKEFIELD INC.,
BEACON CAPITAL PARTNERS, BCSP IV PROPERTY
MANAGEMENT LLC,

Defendants.

-----X
44 SOUTH BROADWAY PROPERTY, LLC,

Third-Party Plaintiff,

-against-

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendant.

-----X
44 SOUTH BROADWAY PROPERTY, LLC,

Second Third-Party Plaintiff,

-against-

TEMCO SERVICE INDUSTRIES, INC.,

Second Third-Party Defendant.
-----X

The following papers were read and considered in connection with the plaintiff's order to show cause for an order pursuant to CPLR 3025(b) and CPLR 203(f), granting leave to amend the caption to reflect the addition of Temco Service Industries, Inc. ("Temco") as a direct defendant; and granting leave to serve a second supplemental

summons and second amended complaint, together with such relief as the Court deems just and proper. .

Order to Show Cause/Affirmation/Exhibits A-R
Affirmation in Opposition
Reply Affirmation

Procedural and Factual Background

The plaintiff, Chandra Murphy ("Murphy"), commenced this action on May 31, 2017, against the defendants Westchester One, LLC and 44 South Broadway Properties LLC ("44 SBP"), seeking damages for alleged injuries sustained on December 5, 2016, when she slipped and fell at 44 S. Broadway, White Plains, New York.

The Court (Everett, J.) previously granted the plaintiff's motion for leave to serve and file a supplemental summons and amended verified complaint to add Beacon Capital Partners ("Beacon"), BCSP IV Property Management LLC, and Cushman & Wakefield, Inc. ("Cushman"), as direct defendants to the action. Jerome Montrone, Senior Vice President and asset manager for New York at Beacon, testified that 44 SBP is owned by BCP Fund Six, LLP, for which Beacon is an investment advisor. Cushman was the property manager at the time of the alleged incident and Temco was the cleaning subcontractor hired by Cushman at the time of the alleged incident.

On May 16, 2018, the defendant, 44 SBP filed a third-party complaint against Cushman and on July 10, 2018, 44 SBP filed a second third-party complaint against Temco. The parties executed a Stipulation of Discontinuance dated August 14, 2019 as to Temco and a Stipulation of Discontinuance dated December 6, 2019, as to Cushman with regard to the third party complaint.

This Court granted 44 SBP's motion for summary judgment pursuant to CPLR 3212, to dismiss the complaint against it, finding that 44 SBP established that it neither created the condition, nor had actual or constructive notice of the condition that caused Murphy's injuries. The Court also found that 44 SBP did not expend any control over the management of the building nor the janitorial services and was essentially an out of possession owner/landlord and not liable for any defects. The Court also granted summary judgment to Cushman, finding that it neither created the condition, nor had actual or constructive notice of the condition that caused Murphy's injuries and it did not owe a duty of care to the plaintiff. The Court also denied that part of Cushman's motion seeking to amend its answer to file cross-claims against Temco, since Temco was no longer a party to the action.

The plaintiff now files this order to show cause for an order pursuant to CPLR 3025(b) and CPLR 203(f), granting leave to amend the caption to reflect the addition of Temco as a direct defendant and granting leave to the plaintiff to serve a second supplemental summons and second amended complaint.

The plaintiff argues that the equities mandate an amendment of the pleadings and that the relation back doctrine allows a claim asserted against a defendant in an amended pleading to relate back to claims previously asserted against a co-defendant for statute of limitations purposes. The plaintiff argues that where a party seeks to add a third-party defendant that has been served with all the prior pleadings in the action, as required by CPLR 1007, the third-party is deemed to have actual notice of the plaintiff's potential claim

at that time and an amendment of the complaint may be permitted in the court's discretion and a direct claim asserted against the third-party defendant.

The plaintiff asserts that Temco cannot assert prejudice or surprise because it participated in all depositions and major discovery, including the employee responsible for cleaning the floor where the alleged incident occurred, testifying at a deposition on March 15, 2019. Further, Temco's insurance company took over the defense and indemnification of 44 SBP on July 11, 2019, after completion of discovery and while summary judgment motions were pending. The plaintiff also argues that Cushman has also filed an application to assert cross-claims against Temco in its summary judgment motion.

In opposition, Temco argues that it should not be added as a direct defendant because the plaintiff cannot satisfy the third prong of the relation-back test. Temco argues that the plaintiff failed to address why she filed the note of issue and certified the case ready for trial, prior to seeking to amend the complaint and add Temco as a direct defendant. Temco asserts that the plaintiff had approximately eighteen months to add Temco as a direct defendant, but failed to do so.

Temco further argues that the plaintiff cannot utilize the relation back doctrine because her cause of action is dissimilar to the prior causes of action asserted against it. Lastly, Temco argues that the plaintiff cannot rely on Cushman's application to file cross-claims against Temco, since Temco is no longer a party to the case and that part of Cushman's motion is moot.

In reply, the plaintiff contends that she meets all three prongs of the relation back doctrine. Her counsel states that Temco admits that the plaintiff meets the requirement for

the first two prongs, but disputes the third prong. The plaintiff argues that the emphasis in the third prong of the doctrine is a showing that the defendant knew. The plaintiff asserts that Temco did in fact know or should have known that, but for the mistake in not moving to bring Temco in as a defendant, it would be sued as a direct defendant. The plaintiff further argues that, in the cases proffered by Temco, the plaintiff failed to establish that the proposed defendant was united in interest and then also failed to show that the proposed defendant knew or should have known that a direct action should be brought against them.

The plaintiff also argues that it is irrelevant that Temco is no longer a party in the action and there is no proof that the plaintiff ever signed off on the stipulation of discontinuance, which would indicate that the plaintiff agreed to the discontinuance. Next, the plaintiff asserts that CPLR 3025 does not impose a duty on the party seeking leave to amend, to provide a reasonable excuse for the delay, because leave is to be freely given upon such terms as may be just. The plaintiff further argues that Temco was actively involved in the discovery process and the third-party complaint against Temco provided notice that it failed to comply with the provisions of the contractual agreement and would have responsibility over the plaintiff's claimed causes of action. Further, the plaintiff contends that her pleading's were attached to the third-party complaint, thereby giving notice to Temco.

Discussion

The plaintiff seeks to amend the complaint, pursuant to CPLR 3025(b), to assert claims against Temco. Under CPLR 3025(b), leave to amend a pleading shall be freely granted absent prejudice to the adverse party. On a motion for leave to amend a pleading

before trial, the opposing party cannot successfully claim prejudice where the proposed amendment would not change the fundamental nature of the allegations in the original pleading (*Pepe v Tannenbaum*, 262 AD2d 381 [2d Dept 1999]), or where the opposing party has had full knowledge of the facts (*Pejcinovic v City of New York*, 258 AD2d 365 [1st Dept 1999]) and an opportunity to present an opposing theory of the case is allowed. (*Stow v City of New York*, 122 AD2d 45 [2d Dept 1986]).

Here, 44 SBP discontinued the third-party claims against Temco on August 14, 2019. Thus, Temco was no longer a party to the action as of that date. The time within which the plaintiff had to file her claims against Temco, expired as of December 5, 2019, three months prior to the plaintiff's filing of her order to show cause on March 5, 2020, seeking to amend the complaint to add Temco as a direct defendant. Since "there is no dispute that the statute of limitations had expired by the time the plaintiff moved for leave to amend the complaint to add a direct claim against [Temco], whether the amendment may be allowed turns on whether the relation-back doctrine applies, with the burden being on the plaintiff to establish that the doctrine applies" (*Rivera v Wyckoff Heights Medical Center*, 175 AD3d 522, 523-524 [2d Dept 2019] [citations omitted]).

"To establish the applicability of the relation-back doctrine, a plaintiff must demonstrate that (1) both claims arose out of the 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 notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her; and (3) the new

party 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 timely commenced against him or her as well" (*Id.* @ 524). "The "linchpin" of the relation back doctrine is whether the new defendant had notice within the applicable limitations period" (*Id.*).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds that, while the first prong of the relation-back doctrine applies in this case, the second prong and third prongs do not apply because the parties are not necessarily united in interest and the plaintiff did not establish that she made a mistake as to the identity of Temco.

"Parties are united in interest only where 'the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other'" (*Gatto v Smith-Eisenberg*, 280 AD2d 640, 641 [2d Dept 2001]; *Desiderio v Rubin*, 234 AD2d 581, 583]). "Further, parties' interests are united only where one is vicariously liable for the acts of the other" (*Id.*). 44 SBP and Cushman have different defenses and have already been granted summary judgment dismissing the case against them, while Temco's employee testified to cleaning the floor immediately prior to the plaintiff's fall and failing to place any warning signs.

However, even if the second prong applies in this case, the third prong does not. 'Notice to the new defendant within the applicable limitations period is the "linchpin" of the relation-back doctrine, and thus the third prong of the test focuses, inter alia, on "whether

the defendant could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue that [entity] at all 'and that the matter has been laid to rest as far as [it] is concerned'" (*Shapiro v Good Samaritan Regional Hosp. Medical Center*, 42 AD3d 443, 444 [2d Dept 2007]).

Further, "where the party suing "intentionally decides not to assert a claim against a party known to be potentially liable, there has been no mistake and the [party suing] should not be given a second opportunity to assert that claim after the limitations period has expired" (*Losner v. Cashline, L. P.*, 303 AD2d 647, 648 [2d Dept 2003] quoting *Buran v Coupal*, 87 NY2d 173, 177 [1995]).

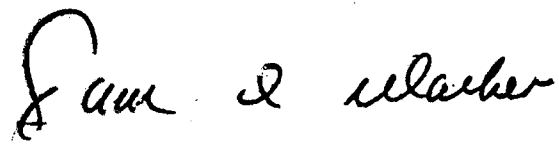
In this case, there was no confusion or mistake as to Temco's identity and as the plaintiff's attorney stated herself, Temco's employee testified at a deposition during discovery and thus was known to be potentially liable. The plaintiff also previously added Cushman as a direct defendant and chose not to add Temco as a direct defendant at that time. There was ample time for the plaintiff to amend the complaint prior to the expiration of the statute of limitations and Temco could have reasonably concluded that the failure to sue within the limitations period meant that there was no intent to sue it at all and that the matter had been laid to rest as far as it is concerned.

Accordingly, based on the foregoing, it is

ORDERED that the order to show cause seeking an order granting leave to amend the caption to reflect the addition of Temco Service Industries, Inc., as a direct defendant; and granting leave to the plaintiff to serve a supplemental summons and second amended complaint, is DENIED.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York
September 25, 2020



HON. SAM D. WALKER, J.S.C.