SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART: 08

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UCETA, DOMINGO

Index №. 0033555/2018E

-against-

Hon. DONALD MILES,

Justice Supreme Court

SABA LIVE POULTRY

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The following papers numbered 1 to _____ Read on this motion, (Seq. No. 1) for **DISMISSAL**, noticed on **June 27 2019** .

Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	No(s).
Answering Affidavit and Exhibits	No(s).
Replying Affidavit and Exhibits	No(s).

Upon the foregoing papers, it is ordered that this motion is

Motion is decided in accordance with memorandum decision filed herewith

Motion is Respectfully Referred to Justice: _____
Dated: _____

Dated: 02/21/2020 Hon. _____
DONALD MILES, J.S.C.

1. CHECK ONE..... ☐ CASE DISPOSED IN ITS ENTIRETY ☑ CASE STILL ACTIVE
2. MOTION IS..... ☐ GRANTED ☑ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE..... ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ SCHEDULE APPEARANCE
☐ FIDUCIARY APPOINTMENT ☐ REFEREE APPOINTMENT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
IAS PART 8

Index No.: **33555/2018E**
Motion Calendar No. 12
Motion Date: 08/12/2019

DOMINGO UCETA,

Plaintiff,

-against-

SABA LIVE POULTRY, SABA (2) LIVE POULTRY (HALAL), RANA LIVE POULTRY, ELZEE ESTATES, INC., SUNGOLD ASSOCIATES LIMITED PARTNERSHIP and HKSMG CO.,

Defendants,

DECISION/ ORDER

Present:
Hon. Donald A. Miles
Justice, Supreme Court

Recitation, as required by C.P.L.R. 2219(a), of the papers considered in the review of this motion to dismiss and cross-motion for leave to amend complaint to add party:

Papers	**Numbered**
Notice of Motion, Affirmation in Support, and Exhibits thereto	**1**
Affirmation in Opposition	**2**
Notice of Cross Motion, Affirmation in Support and exhibits thereto	**3**
Memo of Law in Opp to Cross Motion	**4**
Plaintiff's Reply Affirmation	**5**

Upon the foregoing papers and after due deliberation, following oral argument, the Decision/Order on this motion is as follows:

The motion by defendant SUNGOLD ASSOCIATES LIMITED PARTNERSHIP ("SUNGOLD"), pursuant to CPLR § 3211(a)(5), for an order dismissing plaintiff's amended complaint based upon statute of limitations, is denied without prejudice.

This is a premises liability action in which plaintiff alleges that on December 5, 2015, she slipped and fell due to a defect on the sidewalk in front of premises known as 700 Grand Concourse, Bronx County, New York. This action was initially commenced on November 30, 2018, against defendants SABA LIVE POULTRY, SABA (2) LIVE POULTRY (HALAL), RANA LIVE POULTRY, ELZEE ESTATES, INC. On February 14, 2019,

plaintiff filed an Amended Summons With Notice and Amended Verified Complaint adding defendants SUNGOLD and HKSMG CO. The new parties were added after plaintiff discovered that SUNGOLD was allegedly the correct owner of the property at the time of the accident.[1] In the instant motion, SUNGOLD moves to dismiss, pursuant the CPLR § 3211(a)(5), as SUNGOLD has been added after the expiration of the three-year statute of limitation under CPLR § 214(5). Plaintiff opposes the motion and cross moves for an order permitting plaintiff to amend the complaint to add SUNGOLD as a defendant and deem the action against SUNGOLD timely filed under the relation back doctrine.

In support of the motion to dismiss, SUNGOLD relies on the affidavit of Laura Goldstein, Managing Agent who attests that other than purchasing the subject premises from ELZEE ESTATES more than 20 years ago, SUNGOLD has had no connection, association or common interest with ELZEE; that other than being the owner of the property and having a landlord/tenant relationship with co-defendant HKSMG and of which the remaining co-defendants are the sub-tenants, SUNGOLD is not vicariously liable to any of the defendants from the original complaint and therefore has no unity of interest to support the relation back doctrine. SUNGOLD further claims that it had no notice of the original complaint until it was served with the amended complaint in March, 2019 and would be greatly prejudiced if called to answer now.

In opposition to the motion to dismiss and in support of the cross motion to add SUNGOLD as defendant, Plaintiff's counsel asserts that when they performed an ACRIS search both prior to and after the commencement of the action, it revealed that the owner of the subject location was ELZEE ESTATES INC., and not SUNGOLD. In addition, the NYC Department of Finance (tax record) through February 1, 2019, lists as owner, ELZEE ESTATES, INC., but under mailing address, it notes SUN GOLD ASSOCIATES (sic); and

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[1]Plaintiff asserts that as of the preparation of the Affirmation in Opposition, all defendants except SUNGOLD are in default for failure to appear or answer the summons and complaint.

that to date, the owner of the subject property is still incorrectly listed on ACRIS as ELZEE ESTATES INC. Plaintiff further claims that prior to the institution of the lawsuit, it sent claim letters to both the poultry company who is lessee of the street level portion of the premises, and to ELZEE, the perceived owner of the location and neither party contacted plaintiff and advised of SUNGOLD's involvement in the case.

According to plaintiff, on January 2, 2019, after the statute of limitations had run and after the defendant believed to be the correct owner had been served, counsel received an email from the attorney representing ELZEE ESTATES, LLC (Ex. 4 to Aff. in Opp) explaining that he had received service of the summons and complaint through the Secretary of State; that the deeds were recorded by the City Register in wrong sequence; that in connection with the purchase of the property in 1973, ELZEE ESTATES, INC., acted as the nominee for SUNGOLD who is the correct owner; that ELZEE ESTATES, INC., is no longer in existence having been dissolved by the Secretary of State over 20 years ago; and that a similar explanation was sent to an attorney under similar circumstances where an action was commenced naming ELZEE ESTATES, INC.

Plaintiff, citing the doctrine of equitable estoppel, argues that SUNGOLD has been aware of the ACRIS search being wrong for more than 20 years and did nothing about it and by so doing insulated itself from lawsuits because no one knew it was the proper entity to sue; that it would be unfair for the Court to allow the defendant SUNGOLD to use this "mistake" on ACRIS that has remained uncorrected for over two decades, as a shield since plaintiff would be left without a remedy and SUNGOLD would in essence be rewarded for its improper conduct; and that it should not inure to the detriment of the plaintiff, that the defendant, SUNGOLD and/or ACRIS did not correctly record the real estate transaction, such that ACRIS contained incorrect information. In any event, plaintiff contends that dismissal is premature until further discovery has been held regarding the relationship between the parties and why this mistake occurred and has remained uncorrected for so long.

In reply and in opposition to plaintiff's cross motion, defendant SUNGOLD argues

that plaintiff has failed to show that it relied on any affirmative action or conduct taken by defendant, as distinct from plaintiff's reliance on ACRIS, which prevented plaintiff from bringing a claim and therefore the doctrine of equitable estoppel is not applicable; that plaintiff's claim of unity of interest or that SUNGOLD was aware of the claim prior to March of 2019, is unsupported by any evidence such that plaintiff cannot rely on the doctrine of relation back.

While leave to amend the pleadings is "freely given upon such terms as may be just" (CPLR 3025[b]), where the statute of limitations has run against a proposed additional defendant, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine (see Rivera v Wyckoff Hgts. Med. Ctr., 175 AD3d 522, 523-524 [2d Dept 2019]; Garcia v New York-Presbyt. Hosp., 114 AD3d 615, 615 [1st Dept 2014]).

As codified in CPLR § 203, "what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a co-defendant for Statute of Limitations purposes where the two defendants are 'united in interest' " (Buran v Coupal, 87 NY2d 173, 177 [1995], quoting CPLR § 203[b]). The relation-back "doctrine . .. gives courts the sound judicial discretion to identify cases that justify relaxation of limitations strictures . . . to facilitate decisions on the merits if the correction will not cause undue prejudice to the plaintiff's adversary" (id. [internal quotation marks and citations omitted]).

"The Court of Appeals has recognized that a more relaxed standard applies where a plaintiff seeks to use the relation-back doctrine by adding a new claim against a defendant who is already a party to litigation as opposed to adding a new defendant" (O'Halloran v Metropolitan Transp. Auth., 154 AD3d 83, 86 [1st Dept 2017]). In order to invoke the relation-back doctrine to join new parties after the statute of limitations has expired, a plaintiff must establish the following:

First, the plaintiff must show that the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants. Second, the

plaintiff must show that the new defendants are united in interest with the original defendants, and will not suffer prejudice due to lack of notice. Third, the plaintiff must show that the new defendants knew or should have known that, but for the plaintiff's mistake, they would have been included as defendants (Higgins v City of New York, 144 AD3d 511, 513 [1st Dept 2016] [internal quotations marks and citations omitted]). "All three features must be met for the statutory relation back remedy to be operative" (Mondello v New York Blood Ctr.--Greater N.Y. Blood Program, 80 NY2d 219, 226 [1992]).

Here, the claims asserted against the original defendants and the claims against SUNGOLD, arose out of the same conduct, transaction, or occurrence. Therefore, plaintiff has satisfied the first requirement. However, plaintiff fails to satisfy the second prong of the test. The unity of interest requirement is: more than a notice provision. The test is whether 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. Thus, unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other. 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 New York, 144 AD3d at 513 [internal quotations marks and citations omitted]; see Lord Day & Lord, Barrett, Smith v Broadwall Mgt. Corp., 301 AD2d 362, 363 [1st Dept 2003]). "[H]aving common shareholders and officers is not dispositive on the issue of unity of interest and such unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (see Valmon v 4 M & M Corp., 291 AD2d 343, 344 [1st Dept 2002]; see Jaliman v D.H. Blair & Co. Inc., 105 AD3d 646, 648 [1st Dept 2013]; Raymond v Melohn Props., Inc., 47 AD3d 504, 505 [1st Dept 2008]).

The undisputed fact in this case is that SUNGOLD, at all material times, was the owner of the subject premises. However, despite reasonably relying on the ACRIS website, plaintiff obtained and relied upon incorrect information, to plaintiff's detriment. Besides, all

the co-defendants who were timely sued in the original complaint have either defaulted or failed to notify plaintiff as to the correct owner until after the statute of limitations had run. Plaintiff also reasonably relied on NYC Department of Finance (tax records) which revealed SUNGOLD, not as the owner but only as a mailing address for ELZEE ESTATES. Nor has it been disputed by SUNGOLD that as of June 12, 2019, even after the filing of its motion to dismiss, computer searches continue to reveal the incorrect information as to ownership of the premises in question.

This Court therefore agrees with plaintiff that discovery is necessary to ascertain, *inter alia*, the relationship between the entities as well as the responsibility for the maintenance of the sidewalk adjacent to the premises under the lease and/or sub-lease for the premises. Indeed, the nature of the relationship between these entities, is unclear at this juncture. Under the circumstances, plaintiff is entitled to disclosure on the issue (see CPLR § 3211[d]; Cerchia v V.A. Mesa, Inc., 191 AD2d 377, 378 [1st Dept 1993]).

Accordingly, it is

ORDERED that motion to dismiss the Amended Complaint is denied without prejudice to renew upon completion of discovery; and it is further

ORDERED that the cross-motion by plaintiff to add defendant SUNGOLD under the relation back doctrine, is denied without prejudice to renew upon completion of discovery.

This constitutes the decision and order of the Court.

FEB 2 1 2020

DATE

HON. DONALD A. MILES, JSC.