Smith v Glenwood Mgt. Corp.
2021 NY Slip Op 30035(U)
January 8, 2021
Supreme Court, New York County
Docket Number: 100466/2019
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN **PART** IAS MOTION 58EFM

Justice

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MELISSA SMITH,

Plaintiff,

- v -

GLENWOOD MANAGEMENT CORPORATION, and EAST 39TH REALTY LLC,

Defendants.

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INDEX NO. 100466/2019

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 8, 9, 10, 11, 12, 13, 17, 18, 19, 20, 21, 22, 23, 24

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

In this personal injury action, Plaintiff Melissa Smith ("Plaintiff") moves for an Order granting Plaintiff leave to serve a Supplemental Summons and Amended Complaint so as to add East 39th Realty, LLC, as a party defendant, and to amend the caption accordingly. For the reasons set forth herein, the motion is denied.

BACKGROUND

On April 2, 2019, Plaintiff *pro se* filed a Summons (Ex. A, Doc. No. 18). On July 14, 2020, Defendant Glenwood Management Corporation ("Glenwood") moved to dismiss this action pursuant to CPLR 3012(b) for Plaintiff's failure to serve a complaint (Ex C, Doc. No. 20). On August 18, 2020, Plaintiff, by her attorneys, filed a Complaint against Defendant Glenwood Management Corporation ("Glenwood") (Complaint, Doc. No. 8). The Complaint alleges that, on April 2, 2016, Plaintiff sustained injuries as a result of Glenwood's negligence in the ownership, operation, management, maintenance and control of the premises located at 240 East 39th Street, New York, New York (*Id.*). The injury was allegedly sustained as a result of drug

fumes entering Plaintiff's unit at the subject premises (Affirm in Supp. ¶ 2, Doc. No. 9). Glenwood's motion to dismiss was subsequently withdrawn.

On August 24, 2020, Plaintiff, without leave of court, served Glenwood with a Supplemental Summons and Amended Complaint adding East 39th Realty, LLC, ("East 39th Realty") as an additional party defendant (Ex. C, Supplemental Summons and Amended Complaint, Doc. No. 12; *see also* Doc. No. 13). The Amended Complaint alleged that East 39th Realty owned the subject premises.[1] It appears that Plaintiff, again without leave of court, amended the caption to add East 39th Realty as a party defendant. The Amended Complaint was not answered by either party.

A. The Management Agreement

On January 1, 2002, Glenwood and 39th Realty entered into a Management Agreement (the "Management Agreement") whereby East 39th Street Realty appointed Glenwood as its managing agent (Ex. E, Doc. No. 22). The Management Agreement became effective on that date, and was to continue in full force and effect until December 31, 2021 (*Id.*). The relevant provisions of the Management Agreement are quoted below.

Article II(f), "Repairs," states:

> Anything herein stated to the contrary notwithstanding all repairs and maintenance shall be the exclusive jurisdiction and responsibility of the Owner, the Owner shall use its own personnel for said repairs and maintenance. The Agent shall not perform any services pertaining to same including, but not limited to supervision, acceptance, etc.

(Ex E.)

[1] Although the Amended Complaint does not appear to clearly allege that Plaintiff's subject injuries were caused by East 39th Realty, Plaintiff in its Affirmation in Support of the Motion before the Court (Mot. Seq. 002) alleges that 39th Realty is, in whole or in part, responsible for Plaintiff's subject injuries. (Amended Complaint ¶ 21; *id.* ¶ 13; Affirm in Supp. ¶ 5, Doc. No. 9). This potential issue is mooted by this Decision.

Article II(g), "Employees," states:

> Agent agrees on behalf of Owner to supervise the work of employees, other than repairs and maintenance; and with Owner approval, hire and discharge employees. It is expressly understood and agreed, that all employees are in the employ of Owner solely and not in the employ of Agent and that Agent is in no wise [sic] liable to employees for their wages or compensation nor to Owner or others for any act or omission on the part of such employees.

(*Id.*)

B. The Parties' Contentions

Both parties agree that the burden is on Plaintiff to demonstrate the applicability of the relation-back doctrine,[2] that is, to demonstrate that her claims against East 39th Realty relate back to the time of the commencement of the action against Glenwood. Both parties also agree that Plaintiff satisfies the first and third prong of the relation-back doctrine. At issue, therefore, is whether Plaintiff satisfies the second "united in interest" prong of the doctrine.

Plaintiff argues that "the new party, being the owner, is 'united in interest' with the original defendant, the owner's Managing Agent, and by reason of that relationship can be charged with such notice of the institution of the action that he [sic] will not be prejudiced in maintaining his [sic] defense on the merits" (Affirm ¶ 12, Doc. No. 09). Plaintiff further argues that "[t]he proposed defendant hired the named defendant to manage its premises. Accordingly, the named defendant was merely the agent of the proposed defendant who is vicariously liable for its agent's conduct" (*Id.*). Plaintiff further adds that "an action commenced against a managing agent herein was notice of an institution of an action which involved the proposed defendant. No prejudice accrues to the proposed defendant in maintaining its defense" (*Id.*).

In opposition, Defendant makes two arguments (Affirm in Opp ¶ 25, Doc. No. 17). First, Defendant argues that Glenwood and East 39th Realty "do not share 'identical' defenses" (*Id.*

[2] For a discussion of the relation-back doctrine and relevant statutes, *see infra* Discussion at 4-5.

¶ 26). Specifically, Defendant argues that, unlike East 39th Realty, Glenwood "may assert the defense that, as a managing agent of the premises, it did not owe any duty to [P]laintiff because it was not in complete and exclusive control of the management and operation of the building [and that] [Glenwood], as managing agent of the building could be subject to liability for nonfeasance only if it was in complete and exclusive control of the management and operation of the building" (*Id.* ¶ 28). Defendant additionally argues that Glenwood "could also assert the defense that a managing agent does not owe any duty as a third-party beneficiary of a management agreement" (*Id.* ¶ 29).

Second, Defendant argues that Glenwood and East 39th Realty "are not vicariously liable for each other's acts and they do not share any non-delegable duty to make the premises safe" (*Id.* ¶ 31). Defendant further argues that based on the Management Agreement "[P]laintiff cannot establish that [Glenwood] was in any way responsible for maintaining the premises such that it could be liable for permitting any purported 'drug fumes' from entering the [P]laintiff's apartment, or was in any way responsible for [P]laintiff's personal injuries" (*Id.* ¶¶ 41-46).

In reply, Plaintiff argues that there is a relationship between the parties that gives rise to vicarious liability (Affirm in Reply ¶ 8, Doc. No. 23).

DISCUSSION

CPLR 203(b), "Claim in complaint where action commenced by service," in relevant part, states:

> In an action which is commenced by service, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when … the summons is served upon the defendant[.]

(CPLR 203[b]).

> CPLR 203(c), "Claim in complaint where action commenced by filing," states:
>
> In an action which is commenced by filing, a claim asserted in the complaint is interposed against the defendant or a co-defendant united in interest with such defendant when the action is commenced.

(CPLR 203[c]).

> CPLR 203(f), "Claim in amended pleading," states:
>
> 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.

(CPLR 203[f]).

Under the relation-back doctrine set forth in CPLR 203(b) and (c), new parties may be joined as defendants in a previously commenced action (*Higgins v City of New York*, 144 AD3d 511, 512 [1st Dept 2016]). "Once a defendant has shown that the statute of limitations has run, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine" (*Cintron v Lynn*, 306 AD2d 118, 119-20 [1st Dept 2003] [internal citations omitted]). For a claim asserted against a new party who is subsequently sought to be joined to relate back to claims asserted against the original defendant, three conditions must be satisfied:

> (1) both claims must arise out of the same conduct, occurrence or transaction; (2) the new party must be "united in interest" with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the lawsuit 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 a mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well.

(*Id.* at 119-20; *see also Buran v Coupal*, 87 NY2d 173, 178 [1995]).

Here, as agreed by both sides, Defendant met its initial burden of establishing, prima facie, that the three-year statute of limitations governing personal injury actions had expired on April 2, 2019, which was prior to the commencement of the instant action against the proposed

defendant East 39th Realty. Plaintiff did not bring this motion to add East 39th Realty, LLC, as an additional party defendant until August 24, 2010—one year and almost five months after the expiration of the statute of limitations (CPLR 214[5]; *see also* Affirm in Reply ¶ 4, Doc. No. 23). Therefore, the burden has shifted to Plaintiff to demonstrate the applicability of the relation-back doctrine (*Cintron*, 306 AD2d at 119-20; *see also Raymond v Melohn Properties, Inc.*, 47 AD3d 504, 505 [1st Dept 2008]).

As noted above, both sides agree that Plaintiff has met her burden to satisfy the first and third prongs of the relation-back doctrine (Affirm in Opp ¶ 23, Doc. No. 17). At issue is whether Plaintiff meets her burden of satisfying the second prong of the doctrine (*Id.* ¶ 23). In determining whether the new party is "united in interest" with the original defendant, the courts look at 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" (*Higgins*, 144 AD3d at 513). "Unity of interest fails if there is a possibility that the new defendants may have a defense unavailable to the original defendants" (*Id.*). "In a negligence action, 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" (*Xavier v RY Mgt. Co., Inc.*, 45 AD3d 677, 679 [2d Dept 2007] [internal citations and quotations omitted]). "To establish a unity of interest between two defendants, "[m]ore is required than a common interest in the outcome" (*Id.* at 678 [internal citations omitted]).

Plaintiff has failed to satisfy her burden of establishing the applicability of the relation-back doctrine since there is nothing in the record to indicate that Glenwood and East 39th Realty are vicariously liable for the acts of one another (*See Xavier*, 45 AD3d at 679). Glenwood and East 39th Realty have different defenses to Plaintiff's claims. Particularly, Glenwood's defense

that it was not the property owner and lacked exclusive control of the premises at the time of the incident is not available to 39th Realty (*See Raymond*, 47 AD3d at 505, citing *Xavier*, 45 AD3d at 679; *see also Bossung v Rebaco Realty Holding Co., N.V.*, 169 AD3d 538 [1st Dept 2019]). Further, the record establishes that Glenwood was not in exclusive control of the subject premises and Plaintiff offered no evidence from which it could be inferred that Glenwood was in exclusive control (*Mangual v U.S.A. Realty Corp.*, 63 AD3d 493 [1st Dept 2009]). Moreover, a judgment against one would not affect the other (*See Xavier*, 45 AD3d at 679). Thus, they are not united in interest and, as such, they do not stand or fall together (*Id.*). For the reasons stated, Plaintiff's claims against East 39th Realty do not relate back to the time of the commencement of the action against Glenwood and, accordingly, are time-barred.

Any remaining contentions are without merit or have been rendered academic by this decision.

CONCLUSION

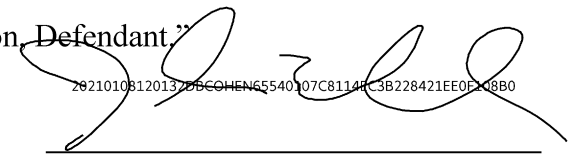
Accordingly, it is hereby:

ORDERED that the motion by Plaintiff Melissa Smith for an Order granting Plaintiff leave to serve a Supplemental Summons and Amended Complaint adding East 39th Realty, LLC, as a party defendant, is DENIED, and it is further

ORDERED that, within twenty (20) days, counsel for Defendant Glenwood Management Corporation shall serve a copy of the instant decision and order with notice of entry; and it is further

ORDERED that, upon being served with a copy of the instant decision and order with notice of entry, the Clerk is directed to amend the caption of the case to remove East 39th Realty,

LLC, from the caption as a named party. The amended caption is to read as follows: "Melissa Smith, Plaintiff, v. Glenwood Management Corporation, Defendant."



1/8/2021
DATE

DAVID BENJAMIN COHEN, J.S.C.

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