Strautmanis v MDC Two Corp.
2021 NY Slip Op 31682(U)
May 18, 2021
Supreme Court, New York County
Docket Number: 158429/20
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

IRJA STRAUTMANIS

INDEX NO. 158429/20

MOT. DATE

- v -

MOT. SEQ. NO. 001

MDC TWO CORPORATION et al.

The following papers, numbered to were read on this motion to/for DISMISS and x-mot

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits	No(s). 1
Notice of Cross-Motion/Answering Affidavits — Exhibits	No(s). 2
Replying Affidavits	No(s). 3, 4

In this action, plaintiff seeks to recover for alleged property damage to and destruction of 32 original, large format paintings created by artist Edvins Starutmanis. Defendant “Philip Cheung a/k/a John Doe #1” moves to dismiss plaintiff's complaint pursuant to CPLR § 1024 and 3211 based on expiration of statute of limitations, failure to state a cause of action and lack of jurisdiction. Plaintiff opposes the motion and cross-moves pursuant to CPLR 1024 and 3025(b) to amend the caption and the complaint to substitute Defendant’s Philip Cheung and Alison Smith in the place of the defendants previously identified as “John Doe No. 1” and “John Doe No. 2” and granting plaintiff additional time, if necessary, to serve Cheung with the summons and complaint and/or amended complaint. Defendant “Philip Cheung a/k/a John Doe #1” opposes the cross-motion. The court's decision follows.

The following facts are alleged in the complaint. Plaintiff is the widow of the artist Edvins Starutmanis and is the current owner of the artworks. The 32 paintings were stored at 1155-1205 Manhattan Avenue, unit 1-2-12, Brooklyn, New York, which plaintiff leased from the landlord/defendant GMDC, GMDC Two Corp and MAHC. Plaintiff alleges that the paintings were stored in the unit so that they could be photographed and catalogued to promote and preserve artist Starutmanis’ legacy. Plaintiff further alleges that on or about November 17, 2017, and unbeknownst to her, a flood occurred at the building “outside and on the floor above plaintiff’s unit and through no fault of plaintiff”. The water from the flood entered plaintiff’s unit and saturated and severely “damaged/destroyed” the paintings. Plaintiff alleges that the landlord never contacted her to inform her of the flood and that she only learned of the flood or damage to the paintings on January 27, 2018, when her son visited the unit to continue cataloguing and photographing the paintings. Plaintiff alleges that after discovering the conditions in the unit, her son asked the building manager for information about the cause of the flood and was told that it originated on November 17, 2017, from a unit on the third floor of the building, above and down her hall from plaintiff’s unit on the second floor. At the time of the discovery, plaintiff learned that the paintings were destroyed by the severe water damage and a buildup of mold and were beyond hope of restoration or stabilization. Plaintiff’s son passed away shortly thereafter. Plaintiff commenced this action

Dated: 5/18/21

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☐GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☒ REFERENCE (traverse)

on October 9, 2020 by filing a summons and complaint alleging property damage to various artworks by her late husband/artist Edvins Strautmanis.

Defendant Cheung argues that plaintiff's claims against him should be dismissed because: [1] plaintiff failed to name him as a defendant and has failed to exercise due diligence to identify the correct party defendants in place of the "John Doe" defendants; [2] plaintiff fails to state a cause of action; [3] plaintiff's claims are barred by the statute of limitations; and [4] for lack of jurisdiction.

In turn, plaintiff maintains that she "made 'genuine efforts to ascertain the defendants' identities prior to the running of the Statute of Limitations' – both before and after filing this lawsuit", the Complaint provides detailed notice of the events giving rise to the claims and from which Cheung could not but reasonably understand that he is an intended defendant, " the period of time between March 20, 2020, and November 4, 2020 (229 days), must be added to the statute of limitations for the claims involved herein" based on the Governor's Executive Orders, and that defendant John Doe/Cheung did in fact receive the summons and complaint as Cheung acknowledged receipt in his affidavit and that he has leased units 1-3-11 and 1-3-12 from at least 2011 to the present and has listed the building as his address for his New York Voter Registration and New York Motor Vehicle Registration therefore preventing him from contesting the validity of service at that address.

Plaintiff cross-moves to amend the complaint to add causes of action of negligence under a theory of *res ipsa loquitur* against the "John Doe" defendants Philip Cheung and Allison Smith, to amend the caption and pursuant to CPLR 306-b granting additional time, if necessary, based upon the outcome of Defendant Cheung's instant motion, to serve Cheung with the Summons and Complaint and/or Amended Complaint in this action.

Defendant John Doe/Cheung opposes the cross-motion, still arguing that plaintiff failed to exercise due diligence to identity Cheung, that the proposed amendments add specific new allegations against Cheung after the expiration of the statute of limitations and that Cheung would be prejudiced by this late amendment.

The court will address plaintiff's cross-motion first since it impacts defendant's motion to dismiss under CPLR 1024 and 3211. Under CPLR 3025(b), "[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." CPLR 3025(b). Rule 3025(b) continues to state, "Leave shall be freely given upon such terms as may be just including the granting of costs and continuances." Id. The standard is not a high one as the moving party only needs to show that the amendment "is not palpably insufficient or devoid of merit." *MBIA v. Greystone & Co., Inc., et al.,* 74 A.D.3d 499, 500, 901 N.Y.S.2d 522 [1st Dep't 2010] (stating "[o]n a motion for leave to amend, plaintiff need not establish the merits of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit").

Defendant John Doe/Cheung's argument that these new allegations are after the statute of limitations expired and that Cheung would be prejudiced based on the late amendment is rejected. Plaintiff's amendments to the original complaint are sufficiently intertwined to the original complaint that defendant Cheung can hardly claim surprise or prejudice. Moreover, the litigation is at the infancy stage and there has been no exchange of discovery between any parties in the litigation.

The court will now consider that portion of defendant's motion to dismiss pursuant to CPLR 1024. CPLR 1024 authorizes the commencement of an action or proceeding against an unknown party or parties under certain specified circumstances. It provides: "A party who is ignorant, in whole or in part, of the name or identity of a person who may properly be made a party, may proceed against such person as an unknown party by designating so much of his name and identity as is known. If the name or remainder of the name becomes known all subsequent proceedings shall be taken under the true name and all prior proceedings shall be deemed amended accordingly."

"In order to employ the procedural mechanism made available by CPLR 1024, the plaintiff must show that he made "genuine effort[s] to ascertain the defendants' identities prior to the running of the Statute of Limitations". *Porter v Kingsbrook OB/GYN Assocs*., 209 AD2d 497, appeal dismissed 86 NY2d 871; *see also, Capital Resources Corp. v Doe*, 154 Misc 2d 864, 865; *see generally*, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1024:1, at 234. Absent evidence that "timely efforts" were made to identify the defendants, the plaintiff will not be entitled to avail himself of the procedural mechanism provided by CPLR 1024. *Porter v Kingsbrook OB/GYN Assocs*., *supra*, at 497. The plaintiff must show that the persons named as unknown were actually unknown. "To make that showing, counsel should present an affidavit stating that a diligent inquiry has been made to determine the names of such parties". *Capital Resources Corp. v Doe, supra*, at 865; *see also*, 2 Weinstein-Korn-Miller, NY Civ Prac P 1024.04)."

Here, plaintiff's counsel has shown that he made genuine and diligent efforts to identify defendant John Doe/Philip Cheung prior to the commencement of this action. While the alleged flood at the premises occurred on or about November 17, 2017, the record before the court establishes that plaintif was unable to ascertain much information about the origin and cause of the flood prior to the commencement of the action and only received information from the landlord that the flood/leak originated in whole or in part from unit 1-3-11 and/or 1-3-12, and at the time of the flood/leak both units were leased from the landlord by Cheung. Plaintiff became aware of the flood when her son went to the unit to continue to catalogue and photograph the artworks on January 27, 2018. Plaintiff claims that an examination and consultation with an art expert determined that the paintings could not be salvaged or restored and then removed any undamaged paintings from the unit with the balance of damaged/destroyed paintings in the unit. In August 2019, plaintiff's counsel inquired of the landlord as to the current location of the paintings and was informed that landlord disposed of the paintings. Plaintiff's counsel claims that he corresponded with the landlord's insurance carrier/adjuster for the first half of 2020 in an effort to resolve/reach an amicable resolution and avoid litigation the issues to no avail. Plaintiff then sent a written demand to the landlord in a last effort on August 14, 2020, and never received a response.

On September 8, 2020, plaintiff counsel sent a letter to the landlord and its insurance carrier to try to identify the identity of the Doe Defendants requesting's information regarding "all persons known or suspected to have caused, in whole or in part, any flood, water damage, or plumbing concern ... whether or not you consider such person(s) to be at legal fault." Plaintiff never received any response from that correspondence. Plaintiff claims it began to prepare an order to show cause for expedited discovery on the identity of the Doe defendants. Plaintiff then on October 14, 2020, just after commencement of the lawsuit, the Firm again wrote to Landlord's representative and the insurance adjuster seeking information regarding the Doe Defendants:

> "As you know, we contacted you by letter last month seeking information concerning the cause of the flood and the individuals and entities involved. We did not receive any response to our letter and therefore will be moving by order to show cause to obtain expedited disclosure on these issues. If you are able to provide the information we requested, we may be able to avoid motion practice, which would be beneficial to all of us. Please contact us immediately if you are able to provide this information."

From October throughout November, plaintiff's counsel continued his efforts through e-mail and telephone calls in an attempt to obtain the information on the Doe Defendants. Plaintiff's counsel received communication on November 11, 2020 from Mr. Rocco who advised him by e-mail as follows: that the Flood appeared to have been caused by a sprinkler head releasing water from either unit 1-3-11 or unit 1-3-12 and that both units were leased by Cheung and that although Cheung rented both of these units at the time of the Flood, beginning in 2018 (after the Flood), Cheung added Allison Smith, a co-tenant to the lease for unit 1-3- 12. Once plaintiff's counsel learned of Cheung, he directed the process server to serve process on Cheung. Based on the foregoing, the court finds that plaintiff is entitled to avail himself of the procedural mechanism under CPLR 1024.

Next, plaintiff seeks additional time, if necessary, to serve Cheung with the summons and complaint and/or amended complaint pursuant to CPLR 306-b. Plaintiff commenced this action by filing the summons and complaint on October 9, 2020. After commencement of this action by filing, defendant /Philip Cheung a/k/a John Doe No. 1 was allegedly served with the summons and complaint on November 18, 2018, pursuant to CPLR 308(2).

Defendant opposes the cross-motion under 306-b and moves to dismiss arguing that "service of process of the "John Doe" complaint against Cheung was improper and, accordingly, whether or not Cheung received the pleadings is irrelevant", and that while Cheung acknowledged being on a lease for unit 1-3-12 at the time of the purported service of process at the location, "that he co-signed that lease in October 2018 with Allison Smith, and that Ms. Smith was the only person utilizing that unit after that date" and the only date relevant to the issue of service of process was Cheung's connection to that space in November 2019.

Here, the record before the court shows that John Doe No. 1/Philip Cheung has leased units 1-3-11 and 1-3-12 from at least 2011, that he listed unit 1-3-12 on his NYS DMV commercial driver's license, and the internet searches reveal multiple addresses for Cheung including unit 1-3-12 at 1205 Manhattan Avenue, Brooklyn. On this record, the court finds that a traverse hearing is warranted.

In light of the foregoing, the court will hold in abeyance the balance of defendant's motion to dismiss and plaintiff's cross-motion.

CONCLUSION

In accordance herewith, it is hereby **ORDERED**, that portion of defendant John Doe No. 1/Philip Cheung's motion to dismiss pursuant to CPLR 1024 is denied; and it is further

ORDERED that plaintiff's cross-motion to amend is granted to the following extent: [1] plaintiff's proposed complaint in the form annexed to his motion exhibit 14 is deemed served and filed; and [2] that defendants Philip Cheung and Allison Smith will be substituted for John Doe No. 1 and 2; and it is further

ORDERED that the motion is granted to the extent that the issue of whether John Doe No. 1/defendant Philip Cheung was properly served with the summons and complaint is referred to a Special Referee for a traverse hearing and to report; and it is further

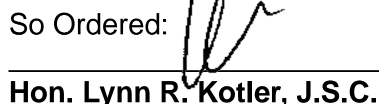
ORDERED that within 20 days, defendant's counsel shall serve a copy of this order with notice of entry, together with the completed Information Sheet, upon the Special Referee Clerk in the Motion Sup-port Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earlier convenient date for a traverse hearing; and it is further

ORDERED that the failure to schedule this matter before a referee within the time provided by the court shall result in an order denying that portion of the motion as to personal jurisdiction; and it is further

ORDERED that the balance of the motion and cross-motion is held in abeyance pending a motion to confirm/reject the referee's report, and this motion is marked off until such motion is made, subject to the provisions set forth herein.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 5/18/21
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.