

Vivar v BSREP UA River Crossing LLC
2021 NY Slip Op 32153(U)
October 28, 2021
Supreme Court, New York County
Docket Number: 162024/2018
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE **PART** **12**

Justice

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ERLIN VIVAR,

Plaintiff,

- v -

BSREP UA RIVER CROSSING LLC,

Defendant.

-----X

INDEX NO. 162024/2018

MOTION DATE _____

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 18-31 were read on this motion to amend pleadings.

Plaintiff moves pursuant to CPLR 3025(b) for an order granting him leave to serve an amended complaint adding a cause of action under Labor Law § 240(1). Defendant BSREP UA River Crossing LLC (BSREP) opposes in part.

I. PERTINENT BACKGROUND

This action arises from a construction site accident that occurred on December 7, 2017 in Manhattan. Plaintiff alleges that he sustained injuries while removing tar from a rooftop elevator bank. On December 21, 2018 commenced this action against BSREP, asserting causes of action for negligence and violations of Labor Law §§ 200 and 241(6). (NYSCEF 1).

On September 22, 2020, plaintiff filed a summons and complaint against Vichihel, asserting causes of action identical to those set forth against BSREP. (NYSCEF 26). By decision and order dated July 15, 2021, the two actions were consolidated. (NYSCEF 21). On July 20, 2021, plaintiff filed this motion.

II. CONTENTIONS

Plaintiff contends that, upon investigation, it determined that Labor Law § 240(1) is applicable to the circumstances causing his accident, asserting that defendants failed to provide him with proper safety devices and that as a result, he fell and injured himself. He maintains that, although his accident occurred on December 7, 2017, due to the pandemic toll imposed by Executive Orders 202.8, 202.14, 202.28, 202.38, 202.48, 202.55, 202.55.1, 202.60, and 202.67, from March 20, 2020 until November 4, 2020, a total of 228 days, his proposed cause of action is not time-barred. Even if time-barred, plaintiff argues, the amendment should be granted as it relates back to the original pleadings, which gives sufficient notice of the occurrences at issue and would not unduly prejudice any party. (NYCEF 19).

In response, defendant BSREP takes no position except to the extent that it denies plaintiff's factual allegations set forth in his supporting affirmation and proposed amended complaint, and it reserves all rights to assert defenses to plaintiff's additional claim. (NYSCEF 36).

III. ANALYSIS

Pursuant to CPLR 3025(b), leave to amend pleadings must be freely given where “the amendment is not patently lacking in merit” and the nonmoving party suffers no prejudice. (*Davis v S. Nassau Communities Hosp.*, 26 NY3d 563, 580 [2015], quoting *Pink v Ricci*, 100 AD3d 1446 [4th Dept 2012]). While it is unclear whether a motion for leave to amend must be accompanied by an affidavit of merit or other evidentiary proof (*St. Nicholas W. 126 L.P. v Republic Inv. Co.*, 193 AD3d 488 [1st Dept 2021] [plaintiff not required to support amendment with evidence or affidavit of merit]; *Hickey v Kaufman*, 156 AD3d 436 [1st Dept 2017], *lv denied* 32 NY3d 905 [2018] [same]; cf *Velarde v City of New York*, 149 AD3d 457 [1st Dept

2017] [plaintiff must submit evidentiary proof of kind admissible on motion for summary judgment]), the movant bears the burden of establishing that the proposed amendments are “not palpably insufficient or clearly devoid of merit.” (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 [1st Dept 2010]). Whether to grant leave to amend is within the motion court’s discretion. (*Davis*, 26 NY3d at 580; *Velarde*, 149 AD3d at 457).

Pursuant to Labor Law § 240(1):

All contractors and owners and their agents, . . . in the erection, demolition, repair, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangars, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Given defendant’s statutory duty to provide proper protection under the circumstances set forth by plaintiff, plaintiff meets his burden of demonstrating that his proposed cause of action for a violation of Labor Law § 240(1) is not patently lacking merit, and there is no indication nor do defendants allege, that any party will be prejudiced. (*St. Nicholas*, 193 AD3d at 488).

As Executive Order 202.8 and its subsequent extensions tolled time limitations under the CPLR, including that to commence an action, from March 20, 2020 through November 3, 2020 (*Brash v Richards*, 195 AD3d 582 [2d Dept 2021]), a period of 228 days is excluded from the calculation of the time within which plaintiff was required to commence this action (*Bermudez Chavez v Occidental Chem. Corp.*, 35 NY3d 492 [2020]). Thus, plaintiff’s proposed amendment, filed three years and 226 days after the incident underlying the complaint occurred, is timely.

Even if plaintiff’s proposed amendment is untimely, it relates back to the original complaints, which gives proper notice to defendants of the underlying transactions and occurrences. (*O’Halloran v Metro. Transp. Auth.*, 154 AD3d 83, 86-67 [1st Dept 2017], *citing Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 477 [1985] [amendment which adds new theory of

recovery arising from same transaction or occurrence does not conflict with policies underlying statute of limitations]).

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion to amend his complaint is granted; and it is further

ORDERED, that the second amended verified complaint, in the form annexed to the motion papers (NYSCEF 31), shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action.

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10/28/2021
DATE

BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE