

Karamchand v Extell Dev.
2021 NY Slip Op 32610(U)
December 9, 2021
Supreme Court, New York County
Docket Number: Index No. 153214/2021
Judge: John J. Kelley
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOHN J. KELLEY

PART

56M

Justice

-----X

SATRAM KARAMCHAND,

Plaintiff,

- v -

EXTELL DEVELOPMENT, EXTCELL MANAGEMENT
SERVICE, INC., 95TH AND THIRD, LLC., CCA
CONSTRUCTION CONSULTING ASSOCIATES, SAILON
INDUSTRIES, INC., GILBANE RESIDENTIAL
CONSTRUCTION, LLC, GILBANE BUILDING COMPANY, S
& E BRIDGE AND SCAFFOLD, LLC, and YORK
SCAFFOLD EQUIPMENT

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 11, 12, 13, 14, 15,
16, 17, 18, 19, 20

were read on this motion to/for

AMEND CAPTION/PLEADINGS

In this action to recover damages for personal injuries based on violations of Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, the plaintiff moves (a) pursuant to CPLR 305(a), (b), and (c), CPLR 1003, and CPLR 3025(b) for leave to file and serve a supplemental and amended summons and amended complaint so as to add Menotti Enterprise, LLC (Menotti), as a party defendant, (b) pursuant to CPLR 3217(b) for leave voluntarily to discontinue the action insofar as asserted against the defendants York Scaffold Equipment Corp. (York), Extell Management Service, Inc. (EMS), and CCA Construction Consulting Associates (CCA), and (c) pursuant to CPLR 305(c) and 3025(b) to amend the caption so as to correct the names of several of the remaining defendants and delete the names of York, EMS, and CCA from the caption, and for related relief. No party opposes the motion. The motion is granted.

“CPLR 3025(b) allows a plaintiff to amend his complaint, with leave of court, to add a party defendant” (*Pensabene v City of New York*, 172 AD3d 1396, 1397 [2d Dept 2019]). Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit (see CPLR 3025[b]; *McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp.*, 59 NY2d 755 [1983]; *360 West 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552 [1st Dept 2011]; *Smith-Hoy v AMC Prop. Evaluations, Inc.*, 52 AD3d 809 [1st Dept 2008]). The court must examine the sufficiency of the proposed amendment only to determine whether the proposed amended pleading is “palpably insufficient or clearly devoid of merit” (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]; see *Hill v 2016 Realty Assoc.*, 42 AD3d 432 [2d Dept 2007]). The court also “should consider how long the amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered” (*Haller v Lopane*, 305 AD2d 370, 371 [2d Dept 2003]).

The accident that is the subject of this action occurred on April 26, 2018. Due to the COVID-19 pandemic, filings in all actions were suspended from March 22, 2020 until May 5, 2020. Moreover, all service and filing deadlines in pending actions, including statutes of limitation, were tolled between March 20, 2020 and November 3, 2020, a period of 228 days (see L 2020, ch 23, § 2; Executive Law § 29-a; Executive Order 202.8, Executive Order 202.67; see *Brash v Richards*, 195 AD3d 582 [2d Dept 2021]). Applying that toll to the instant matter, the limitations period for commencement of an action against Menotti, which otherwise would have expired on April 26, 2021, was extended until December 10, 2021. The court further notes, however, that the limitations period applicable to claims against persons sought to be added as defendants is tolled where, as here, a motion for leave to file and serve a supplemental and amended summons with notice is made prior to the expiration of an applicable limitations period, and includes a copy of the proposed amended pleading (see *Perez*

v Paramount Communications, 92 NY2d 749, 754-756 [1999]; *Abreu v Casey*, 157 AD3d 442 [1st Dept 2018]). The toll encompasses the period from the date that the motion for leave to amend is made, here July 19, 2021 (see CPLR 2211), until the date that the order granting that motion is entered, with the limitations period commencing to run again “after entry of the order” (*Perez v Paramount Communications*, 92 NY2d at 756; see *Schlapa v Consolidated Edison Co. of N.Y., Inc.*, 174 AD3d 934, 935-936 [2d Dept 2019]).

Inasmuch as the plaintiff only recently learned that Menotti was involved in the construction and demolition project at which he was injured, has established that his claims against Menotti are potentially meritorious, and demonstrated that the three-year limitations period applicable to those claims (see CPLR 214[5]; *Calamari v Panos*, 131 AD3d 1088, 1090 [2d Dept 2015]) has yet to expire, the court grants the plaintiff leave to file and serve a supplement and amended summons and amended complaint so as to add Menotti as a defendant and assert Labor Law and common-law negligence claims against it. Since the toll created by the submission of this motion encompasses at least 144 days, the plaintiff would ordinarily have 144 days after the entry of this order to commence the action against Menotti. The court, however, will deem the supplemental and amended summons and amended complaint to be filed, and the action commenced against Menotti, as of the date of the entry of this order.

CPLR 3217(b) authorizes this court to exercise its discretion and permit a plaintiff voluntary to discontinue a plenary action before a case is submitted to the court or jury for findings of fact. “[C]ourts are generally reluctant to compel a party to litigate and, in the exercise of discretion, will grant a motion for discontinuance absent compelling circumstances or particular prejudice to defendants” (*DuBray v Warner Bros. Records, Inc.*, 236 AD2d 312, 314 [1st Dept 1997] citing *Tucker v Tucker*, 55 NY2d 378 [1982]; see also *Matter of Baby Boy C.*, 84 NY2d 91, 99 [1994]). Inasmuch as the plaintiff learned that York, EMS, and CCA were not

proper parties to the action, he is granted leave to discontinue the action against those defendants.

CPLR 305(c) provides that “[a]t any time, the court may allow any summons or proof of service of a summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced.”

“Where the summons and complaint have been served under a misnomer upon the party which the plaintiff intended as the defendant, an amendment will be permitted if the court has acquired jurisdiction over the intended but misnamed defendant, provided that: (1) the intended but misnamed defendant was fairly apprised that he or she was the party the action was intended to affect, and (2) the intended but misnamed defendant would not be prejudiced”

(*Kingalarm Distribs. v Video Insights Corp.*, 274 AD2d 416, 417 [2d Dept 2000]; see *Matter of Tsoumpas 1105 Lexington Equities, LLC v 1109 Lexington Ave. LLC*, 189 AD3d 524, 525 [1st Dept 2020]; *Holster v Ross*, 45 AD3d 640, 642 [2d Dept 2007]). Since the plaintiff established that the misnamed defendants were properly served and fairly apprised that they were the parties that the action was intended to affect, and that those defendants will suffer no prejudice from the amendment, leave to amend the caption to correct those defendants’ names, and account for the discontinuance of the action against York, EMS, and CCA, is warranted.

In light of the foregoing, it is

ORDERED that the plaintiff’s motion is granted, without opposition, the plaintiff is granted leave to file and serve a supplemental and amended summons and amended complaint, in the form uploaded to the New York State Court Electronic Filing system under docket entry 19, so as to add Menotti Enterprise, LLC, as a party defendant, voluntarily discontinue the action against York Scaffold Equipment Corp., Extell Management Service, Inc., and CCA Construction Consulting Associates, and amend the caption accordingly, as well as to correct the names of the remaining defendants; and it is further

ORDERED that the supplemental and amended summons and amended complaint, in the form uploaded to the New York State Court Electronic Filing system under docket entry 19,

is deemed to be filed and served upon the previously named defendants in this action as of the date of entry of this order; and it is further,

ORDERED that the caption of the action is amended to read as follows:

-----X
SATRAM KARAMCHAND,

Plaintiff,

v

INDEX NO. 153214/2021

EXTELL DEVELOPMENT COMPANY, 95TH AND
THIRD, LLC, SAILON INDUSTRIES, INC., GILBANE
RESIDENTIAL CONSTRUCTION, LLC, GILBANE
BUILDING COMPANY, S & E BRIDGE & SCAFFOLD,
LLC, and MENOTTI ENTERPRISE, LLC,

Defendants.

-----X;

and it is further,

ORDERED that, on the court's own motion, within 15 days of the entry of this order, the plaintiff shall serve a copy of this order upon the Trial Support Office (60 Centre Street, Room 148, New York, NY 10007), and shall separately file and upload the notice required by CPLR 8019(c) and a completed Form EF-22, and the Trial Support Office shall thereupon amend the court records accordingly.

This constitutes the Decision and Order of the court.

12/9/2021

DATE

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

JOHN J. KELLEY, J.S.C.