

**Ducos v Lorac House, Inc.**

2021 NY Slip Op 33640(U)

October 1, 2021

Supreme Court, Bronx County

Docket Number: Index No. 30008/2017E

Judge: Kim Adair Wilson

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, NEW YORK : Part IA-12

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JEANETTE DUCOS,

Plaintiff,

-against-

LORAC HOUSE, INC., CAROL GARDENS ASSOCIATES,  
L.P., GRENADIER REALTY CORP., and B&A  
PLUMBING and HEATING CORP.,  
Defendants.

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**Kim Adair Wilson, J.:**

**DECISION AND ORDER**  
Index No. 30008/2017E  
**Motion Seq. #001**

**HON. KIM ADAIR WILSON**

"NOTICE OF MOTION," dated and filed May 24, 2021, by Charles E. O'Bryan, Esq. (Barry McTiernan & Moore LLC), counsel for defendant B&A Plumbing and Heating Corp., seeks an Order:

- a. Pursuant to CPLR §2004, in favor of defendant, B&A PLUMBING AND HEATING CORP., granting this movant leave to amend their Answer to include the defense of the statute of Limitations upon the grounds that a statute of limitations defense may be asserted given the fact that when the plaintiff sought to amend unilaterally its Complaint no leave of Court was sought or granted and that was no mere oversight and the applicable statute of limitations had long since expired; and a further Order:
- b. Pursuant to CPLR §203(f), finding that the plaintiff improperly added the movants without leave of Court and has failed to demonstrate that there is a relation back to the filing of the original Summons and Complaint of CPLR 203(f) or a combination of said statute plus CPLR 203(c) nor the Amended Complaint plead any such relation back; and a further Order:
- c. Pursuant to CPLR §3211(a), upon granting said amendment dismissing the claims of the plaintiff as against the movant, together with said other and further relief which this Court may deem just, proper, and equitable.

Submitted in opposition is an "AFFIRMATION IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS," dated and filed August 16, 2021, by Ricardo J. Martinez, Esq. (Leav & Seinberg, LLP), counsel for plaintiff Jeanette Ducos. In reply, counsel for defendant B&A Plumbing and Heating Corp. submits a "REPLY AFFIRMATION," dated and filed August 23, 2021.

Plaintiff commenced the underlying action against defendants Lorac House, Inc., Carol Gardens Associates, L.P. and Grenadier Realty Corp. by "SUMMONS" and "VERIFIED COMPLAINT," dated and filed October 23, 2017. Therein, plaintiff alleges that she was lawfully on the premises, described as 820 Thieriot Avenue in Bronx County ("subject premises"), owned by the defendants, when their negligence caused her to slip on water and fall in an interior stairwell within the subject premises and sustain serious personal injuries.

Procedurally, plaintiff commenced the underlying action on October 23, 2017 against defendants Lorac House, Inc. (“Lorac”), Carol Gardens Associates, L.P. (“Carol Gardens”) and Grenadier Realty Corp. (“Grenadier Realty”). Issue was joined by service of their Verified Answer on December 1, 2017, which was subsequently replaced by a “Corrected Answer” on the same day. The plaintiff and named defendants participated in a Preliminary Conference on January 30, 2018. The parties engaged in Compliance Conferences on June 12, 2018, September 11, 2018 and January 16, 2019. On November 30, 2020, defendants Lorac, Carol Gardens and Grenadier Realty commenced a third-party action, impleading defendant B&A Plumbing and Heating Corp. (“B&A Plumbing and Heating”) alleging that Grenadier Realty “retained Third Party Defendant B&A Plumbing and Heating Corp., to replace the existing galvanized feed line to the roof tank, core bore from the 17<sup>th</sup> floor to the basement, turn on system and test for leaks, furnish and install a new 1” thick pipe insulation.” Third-Party Defendant B&A Plumbing and Heating filed its Verified Answer to the third-part complaint on March 25, 2021. Six days later, by “AMENDED VERIFIED COMPLAINT,” dated March 30, 2021 and filed March 31, 2021, without leave of court, plaintiff Ducos added B&A Plumbing and Heating as a named defendant on the ground that the defendant “provided plumbing and/or heating services at the premises located at 820 Thieriot Avenue, Bronx, New York.”

Now, here, in the instant motion, defendant B&A Plumbing and Heating’s counsel seeks in his “AFFIDAVIT IN SUPPORT,” “leave to amend [defendant’s] answer and its Affirmative Defenses and add the defense of statute of limitations, and upon the service of the Amended Answer dismiss the plaintiff’s claims against this defendant as both time barred and not susceptible to relation back to the time of the original filing,” pursuant to CPLR §2004, CPLR §203[f] and CPLR 3211(a), as applicable. Defendant B&A Plumbing and Heating Corp. points out that plaintiff’s accident occurred on March 28, 2017, and thus, the statute of limitations for the original action expired on March 28, 2020. On March 31, 2021, however, plaintiff Ducos added B&A Plumbing and Heating as a named defendant.

CPLR § 3025[b] provides that a party may amend his pleadings by setting forth additional or subsequent transactions or occurrences at any time by leave of court (CPLR §3025[b]). It is within the trial court’s broad discretion as to whether to grant leave to serve an amended pleading. “In exercising its discretion, the court should consider how long the amending party was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom” (*Brooks v Robinson*, 56 AD3d 406 [2<sup>nd</sup> Dept 2008]).

Defendant B&A Plumbing and Heating contends that it is not united in interest with its co-defendants. It asserts that, during the four years preceding it being added as a direct defendant in the action, it was not engaged in the exchange of discovery and likely, telephone conversations, held between the parties; and it lacked notice of the filings and court appearances made by the parties. During these appearances, defendant B&A Plumbing and Heating notes that plaintiff, at no time, sought to add it as a direct defendant.

In opposition, plaintiff Ducos contends that after receiving defendant B&A Plumbing and Heating's Third-Party Verified Answer to its co-defendants' third-party complaint, she added it as a direct defendant pursuant to CPLR 1009<sup>1</sup>. However, CPLR 1009 "does not relieve a plaintiff from the operation of the Statutes of Limitations otherwise applicable to the claims asserted" (*Liverpool v Arverne Houses, Inc.*, 67 NY2d 878 [1986]). "The statute of limitations was enacted to afford protection to defendants against defendant stale claims after a reasonable period of time had elapsed during which a person of ordinary diligence would bring an action" (Siegel, NY Prac § 33 [6<sup>th</sup> ed]). Here, plaintiff's action is grounded in negligence and thus, the statute of limitations is three years. Accordingly, since plaintiff's alleged accident occurred on March 28, 2017, its statutory expiration date was March 28, 2020. It is patently evident that defendant B&A Plumbing and Heating's addition as a direct defendant on March 31, 2021, almost a year later, was outside the statute of limitations. Plaintiff was obviously aware that she was statutorily barred and required leave of court to amend her pleadings, and her failure to do so was improper. Since the action was time-barred at the time plaintiff made the amendment, it must be "related-back" to when the action was originally commenced.

Now that defendant B&A Plumbing and Heating has established that the statute of limitations has run, plaintiff Ducos bears the burden of showing the applicability of the relation-back doctrine (*Spaulding v Mt. Vernon Hosp.*, 283 AD2d 634 [2<sup>nd</sup> Dept 2001]). The doctrine is applicable when (1) both claims arouse out of the same conduct, transaction or occurrence; (2) the new party is united in interest with the original defendant, and by reason of that relationship can be charged with such notice of the institution of the action that the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement; and (3) the new party knew or should have known that, but for an excusable mistake by the plaintiff in originally filing to identify all the proper parties, the action would have been brought against the additional party united in interest as well. "All three features must be met for the statutory relation back remedy to be operative" (*Mondello v New York Blood Center-Greater New York Blood Program*, 80 NY2d 219 [1992]). The plaintiff avers that defendant B&A Plumbing and Heating and defendant Grenadier Realty are united in interest and the "only prong at issue is the second prong." In support of this position, plaintiff states that Grenadier Realty contracted B&A Plumbing and Heating to do work in the stairwell, the location of plaintiff's fall, and if Grenadier Realty is found liable based on defendant B&A Plumbing and Heating's plumbing work, then defendant B&A Plumbing and Heating is deemed liable. "To be 'united in interest'...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" (*Grossman v New York City Health and*

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<sup>1</sup> CPLR 1009. Claim by plaintiff against third-party defendant. Within twenty days after service of the answer to the third-party complaint upon plaintiff's attorney, the plaintiff may amend his complaint without leave of court to assert against the third-party defendant any claim plaintiff has against the third-party defendant.

*Hospitals Corp.*, 178 AD2d 323, 324 [1<sup>st</sup> Dept 1991]) citing *Prudential Ins. Co. v Stone*, 270 NY 154, 159, 200 NE 679). Stated another way, “[t]o determine unity of interest...one looks not to whether the two defendants will assert different defenses but rather whether they could assert such different defenses (*Connell v Hayden*, 83 AD2d 30 [2<sup>nd</sup> Dept 1981]). This is clearly the case here. Defendant B&A Plumbing and Heating can certainly assert a different defense fully absolving it of liability. Moreover, defendants Lorac, Carol Gardens and Grenadier Realty can be deemed solely liable for plaintiff’s alleged accident and injuries since, as owners of the subject premises, they have a duty to maintain their property in a reasonably safe condition (*O’Connor-Miele v Barhite & Holzinger*, 234 AD2d 106 [1996]; *Mejia v New York City Transit Authority*, 291 AD2d 225 [1<sup>st</sup> Dept 2002]). Upon review and analysis of the foregoing, this Court determines that defendants B&A Plumbing and Heating and Grenadier Realty are not united in interest. This Court further determines that plaintiff’s remaining opposing arguments are unavailing.

Accordingly, defendant B&A Plumbing and Heating Corp.’s motion **seeking leave to amend its Answer to include the defense of the statute of limitations is GRANTED** as stated herein; and now, upon the granting of such relief, **the plaintiff’s claim(s) against defendant B&A Plumbing and Heating Corp. is dismissed.**

The movant is directed to serve a copy of this Order with Notice of Entry, within thirty (30) days of entry of this Order.

This constitutes the Decision and Order of this Court.

Dated: October 1, 2021  
Bronx, New York

  
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Hon. Kim Adair Wilson, J.S.C.