

CBIZ, Inc. v Grubhub, Inc.

2022 NY Slip Op 32087(U)

June 29, 2022

Supreme Court, New York County

Docket Number: Index No. 651472/2019

Judge: Lyle E. Frank

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYLE E. FRANK

PART **11M**

Justice

-----X

CBIZ, INC., HARTFORD UNDERWRITERS INSURANCE
COMPANY,

Plaintiff,

INDEX NO. 651472/2019

MOTION DATE 03/11/2022

MOTION SEQ. NO. 002

- v -

GRUBHUB, INC., AMERICON CONSTRUCTION INC.,

Defendant.

**DECISION + ORDER ON
MOTION**

-----X

GRUBHUB, INC.

Plaintiff,

Third-Party
Index No. 595412/2019

-against-

AMERICON CONSTRUCTION INC., PAR PLUMBING CO.,
INC., SOVEREIGN MECHANICAL CORP., JACOBS
ENGINEERING GROUP, INC., ATLANTIC ENGINEERING
LABORATORIES OF NY, INC., TRIZECHAHN 1065 AVENUE
OF THE AMERICAS LLC

Defendant.

-----X

AMERICON CONSTRUCTION INC.

Plaintiff,

Second Third-Party
Index No. 595873/2019

-against-

SOVEREIGN MECHANICAL CORP., ATLANTIC
ENGINEERING LABORATORIES OF NY, INC.

Defendant.

-----X

GRUBHUB, INC.

Plaintiff,

Third Third-Party
Index No. 595184/2020

-against-

PAR PLUMBING CO., INC., SOVEREIGN MECHANICAL

CORP., JACOBS ENGINEERING GROUP, INC.

Defendant.

-----X

GRUBHUB, INC.

Fourth Third-Party
Index No. 595424/2022

Plaintiff,

-against-

SOVEREIGN SERVICE CORP., STRUCTURE TONE

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 170, 171, 172

were read on this motion to/for

AMEND CAPTION/PLEADINGS

Upon the foregoing documents, plaintiff's motion for an order pursuant to CPLR § 3025(b) for leave to amend the complaint is denied.

This action arises out of damages allegedly sustained on March 5, 2017, as a result of a bursting of a sprinkler pipe. Plaintiffs', in Action 3¹, seek to recover damages incurred by plaintiffs' subrogor, Blackstone Real Estate Advisors. Plaintiffs now seek to amend their Amended Complaint to include Jacobs Engineering Group, Inc., Abco Peerless Sprinkler Corporation, and Sovereign Service Corporation as additional defendants². Jacobs Engineering Group, Inc. and Abco Peerless Sprinkler Corporation oppose the instant motion.

Preliminarily, the Court notes that while plaintiff did not address the *relation back* doctrine in its underlying motion papers, it applies to the instant motion and the Court will address it accordingly.

¹ By Order dated 4/23/2021 the Honorable Erika M. Edwards consolidated the above-entitled matter with two related matters that all have retained their respective captions and pleadings however have been consolidated under this index number.

² While only Jacobs Engineering Group Inc. and Abco Peerless Sprinkler Corporation opposed the instant motion, the Court denies the motion in its entirety as plaintiff failed to establish entitlement to the relief sought as to all three of the proposed defendants.

It is well established that a party seeking to invoke the *relation back* doctrine must establish that: first, the claims arose out of the same conduct, transactions, or occurrence; second, that the new party is united in interest with the original defendant, and will not suffer prejudice due to lack of notice; third, that 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 (*Buran v Coupal*, 87 NY2d 173, 178, [1995] internal citations omitted).

Moreover, a movant seeking to apply the relation-back doctrine to a later identified "John Doe" defendant, pursuant to CPLR § 1024, also has the burden of establishing that diligent efforts were made to ascertain the unknown party's identity prior to the expiration of the statute of limitations. See *Diaz v City of New York*, 160 AD3d 457, 457 [1st Dept 2018]; *Holmes v City of New York*, 132 AD3d 952, 954 [2nd Dept 2015].

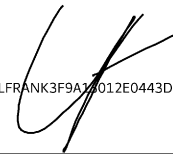
Here, plaintiffs have failed to establish that the newly proposed defendants are united in interest with any of the original defendants in this action, failed to allege any mistake in identifying the parties or diligent efforts made to ascertain the identities of the proposed defendants within the applicable statute of limitations. Notably, plaintiff's initial moving papers fails to address the *relation back* doctrine at all, rather it conclusory asserts that motions to amend pleadings should be freely granted and does not address the potential statute of limitations issue. It is only in reply, to the proposed defendants' opposition that plaintiff attempts to satisfy the prongs of the *relation back* doctrine, and those attempts are woefully insufficient. Plaintiffs do not include any "John Does" or "XYZ Corp" placeholders nor advance any arguments that the identity of the proposed defendants was sought and unattainable during the applicable statute of limitations period.

Plaintiffs’ arguments that the proposed defendants are not prejudiced because they are parties to litigation that includes the same occurrences and transactions and thus the statute of limitations argument does not apply turns the statute on its head. The Court declines to find that a party in one action should be expected to be subject to untimely claims simply by the existence of a timely action. Plaintiffs’ argue that the consolidation of the cases for the purposes of joint trial and discovery, dated April 23, 2021, and the proposed defendants appearance in Action 2 renders the proposed defendants in the litigation in Action 3, the Court does not agree. Additionally, plaintiff has failed to establish that defendants are united in interest. Unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other (*Higgins v City of New York*, 144 AD3d 511, 512 [1st Dept 2016]).

Moreover, to the extent plaintiffs contend that the amendments are proper based on an alleged privity of contract, although disputed by defendants, it would still be untimely as the work under the purported contracts was completed in 2013. Accordingly, it is hereby

ADJUDGED that plaintiffs’ motion is denied.

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LYLE E. FRANK, J.S.C.

6/29/2022
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