Cevoli v Consolidated Edison Co. of N.Y., Inc.
2022 NY Slip Op 32407(U)
July 22, 2022
Supreme Court, New York County
Docket Number: Index No. 156869/2019
Judge: Richard G. Latin
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. RICHARD LATIN, *Justice* — PART 46V

INDEX NO. 156869/2019
MOTION DATE 06/28/2022
MOTION SEQ. NO. 003

---X

JAMES CEVOLI,

Plaintiff,

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,C.A.C. INDUSTRIES INC.,

Defendant.

---X

DECISION + ORDER ON MOTION

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

-against-

C.A.C. INDUSTRIES INC.

Defendant.

---X

Third-Party
Index No. 595253/2022

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 75, 76, 77, 78, 79, 80, 81, 82

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendant C.A.C. Industries Inc.'s motion to dismiss plaintiff's complaint pursuant to CPLR 3211(a)(5) and/or (8) is determined as follows:

Plaintiff commenced the instant action to recover for injuries that were allegedly sustained in a construction accident that occurred on August 3, 2016 at a site owned by Consolidated Edison Company of New York, Inc. ("Con Edison"), located at or near Junction Boulevard and 40th Road, Queens, New York. The action was commenced on or about July 12, 2019 and only named Con Edison as a defendant. Thereafter, defendant Con Edison commenced a third-party action on or about March 30, 2022, seeking, inter alia, indemnification from C.A.C. Industries Inc. ("CAC

Industries”). Following the commencement of the third-party action, plaintiff filed a supplemental pleading naming CAC Industries as a direct defendant and asserted claims sounding in negligence and Labor Law § 200, Labor Law § 240, and Labor Law § 241. Defendant CAC Industries now moves to dismiss plaintiff’s complaint against it as time barred.

Pursuant to CPLR 214, an action to recover damages for personal injuries is subject to a three-year statute of limitations (CPLR 214[5]). Here, the alleged injury took place on August 3, 2016 so plaintiff had until August 3, 2019 to commence this action. Plaintiff did commence this action on July 12, 2019 but did not add CAC Industries as a direct defendant until April 11, 2022. Inasmuch as CAC Industries was added as a direct defendant nearly three years after the passing of the statute of limitations, plaintiff must rely on the applicability of the relation-back doctrine (CPLR 203).

The purpose of the relation-back doctrine is to “enable a plaintiff to correct a pleading error—by adding either a new claim or a new party—after the statutory limitations period has expired” (*Buran v Coupal*, 87 NY2d 173 [1995]). The relation-back doctrine allows the courts to exercise discretion to relax limitation strictures so that cases may be decided on the merits, so long as the correction does not cause undue prejudice (*id.*).

The courts have analyzed the relation back doctrine using two different lines of cases (*see Hemmings v St. Marks Hous. Assoc.*, 169 Misc2d 155 [Sup Ct, Kings County 1996]; *Rinaldi v Comptroller of City of New York*, 19 Misc3d 1138[A] [Sup Ct, Kings County 2008]). The first line of cases is pursuant to *Duffy v Horton Mem. Hosp.* while the second line comes from *Buran* (66 NY2d 473 [1985]; 87 NY2d 173). Under *Duffy*, “where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation,” amendment to relate

back may be permitted (66 NY2d 473). In *Duffy*, the Court specifically found that the direct claims against a third-party defendant should relate back to the service of the third-party complaint since a third-party defendant "must gather evidence and vigorously prepare a defense" (*id.*). However, that analysis relied on the specific facts of that case, and the interposition of a third-party complaint for breach of contract or indemnification is not an automatic toll of the statute of limitations for a direct claim against a third-party (*see Fitzpatrick v City of New York*, 185 Misc2d 79, 83 [Sup Ct, New York County 2000). Here, the third-party action that was commenced almost three years after the statute of limitations on the direct action had expired, and the third-party defendant only had a couple weeks' notice of even the third-party complaint (*see id.*; *Hemmings*, 169 Misc2d 155). In circumstances like this, to permit a *Duffy* extension "would open an exception that would swallow the rule" (*Fitzpatrick*, 185 Misc2d 79). Thus, plaintiff must rely on the second line of cases in order to relate back.

Pursuant to *Buran*, three conditions must be met in order for the claims to relate back:

> "(1) both claims arose 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 he will not be prejudiced in maintaining his defense on the merits and (3) the new party knew or should have known that, but for an excusable mistake by plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (87 NY2d 173, 178 [1995]).

Here, the first prong is met as the claims all arise out of plaintiff's alleged August 3, 2016 accident. The third prong is also easily met as discovery delays and potential misinformation concerning Safeway Construction, all attributable to defendant Con Edison, greatly complicated plaintiff's ability to identify defendant CAC Industries, and defendant should have known, but for plaintiff's inability to identify the proper parties, that the action would have been brought against it as well.

As to the second prong, unity of interest will be found where one of the parties is vicariously liable for the conduct of the other (see *Raschel v Rish*, 69 NY2d 694 [1986]). Here, there is both an indemnification clause in the contract between Con Edison and CAC Industries and there are claims against both pursuant to Labor Law §§ 240 and 241. Con Ed, as the owner of the premises in a construction accident, has certain non-delegable duties and would be vicariously liable for CAC Industries violation of Labor Law §§ 240 and 241 (*see Hemmings*, 169 Misc.2d 155; Labor Law § 240[1]; Labor Law § 241[6]). Thus, the parties are united in interest as to these claims. The other claim as to CAC Industries sounding in negligence and a violation of Labor Law § 200, which is the codification of the common law negligence standard, would not impute the same vicarious liability onto Con Edison. With respect to common law negligence, there is no non-delegable duty and the parties may have different defenses (*see LeBlanc v Skinner*, 103 AD3d 202 [2d Dept 2012]). Accordingly, only the claims against CAC Industries pursuant to Labor Law §§ 240 and 241 relate back to the commencement of the action against defendant Con Edison.

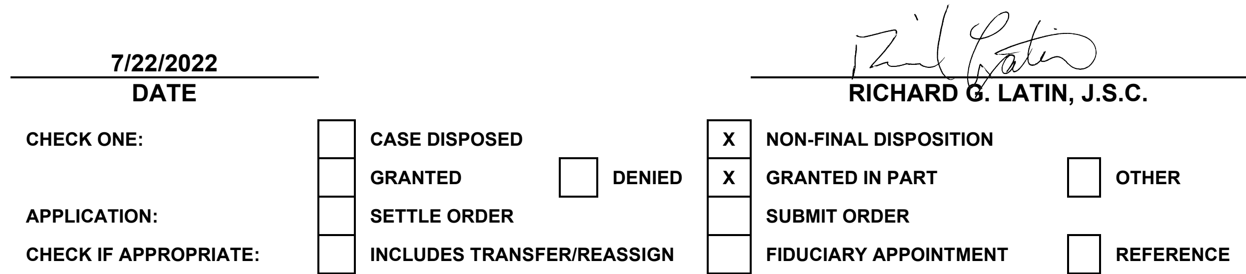
Moreover, that branch of the motion to dismiss pursuant to CPLR 3211(a)(8), for lack of personal jurisdiction, must be denied. The crux of defendant's argument is that plaintiff was required to seek leave to amend the pleadings and then serve them as opposed to merely uploading the amended pleadings onto NYSCEF (CPLR 3025). However, when a third-party action is commenced, a plaintiff may amend its complaint to assert direct claims against the third-party defendant without leave of court (CPLR 1009). Here, the third-party summons and complaint was commenced against movants on March 30, 2022, and plaintiff's amended pleading was filed, shortly thereafter, on April 11, 2022. Moreover, inasmuch as jurisdiction was obtained over the movants by the commencement of the third-party action and defendants failed to raise an objection

to jurisdiction in its answer, service on defendant's counsel via NYSCEF upload was sufficient (CPLR 2103[b]; CPLR 1009; *see Ruiz v Griffin*, 50 AD3d 1007 [2d Dept 2008]).

Accordingly, defendant CAC Industries motion to dismiss plaintiff's complaint as to it is granted solely to the extent that the negligence and Labor Law § 200 claim is dismissed; and it is further

ORDERED that the remainder of the motion is denied in all other respects.

This constitutes the decision and order of the Court.



7/22/2022	RICHARD G. LATIN, J.S.C.
DATE	

CHECK ONE:	CASE DISPOSED		X NON-FINAL DISPOSITION		
	GRANTED	DENIED	X GRANTED IN PART		OTHER
APPLICATION:	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT		REFERENCE