Russ v 33 Bond St. LLC
2022 NY Slip Op 32455(U)
January 28, 2022
Supreme Court, Queens County
Docket Number: Index No. 711178/17
Judge: Robert I. Caloras
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Short Form Order
NEW YORK SUPREME COURT - QUEENS COUNTY
PRESENT: HON. ROBERT I. CALORAS PART 36
Justice

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ANDRE RUSS,
Plaintiff,
-against-
33 BOND ST. LLC, 33 BOND ST. (LIHTC) LLC, 33 BOND GC COMM LLC, TF CORNERSTONE PROPERTIES LLC, KAMRAN T. GROUP LLC, FREDERICK GROUP LLC, FD SPRINKLERS, INC, JAM CONSULTANTS, INC., SAFWAY ATLANTIC, LLC, K&M ARCHITECTURAL WINDOW PRODUCTS, INC., RAD & D'APRILE CONSTRUCTION CORP., A1 EXPEDITING SERVICE CORP., HIGHRISE SAFETY SYSTEMS, INC., PARKVIEW PLUMB1NG & HEATING, INC.,
Defendants.

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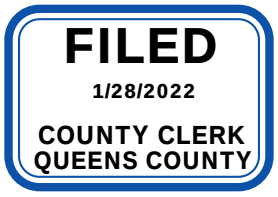

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33 BOND ST. LLC, 33 BOND ST. (LIHTC) LLC, 33 BOND GC LLC, TF CORNERSTONE PROPERTIES LLC,
Third Party Plaintiffs,
-against-
S.J. ELECTRIC, INC.,
Third Party Defendant.

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The following papers numbered E1266-E160 read on this motion by the Plaintiff for an order pursuant to CPLR 3025 granting plaintiff leave to amend his summons and complaint in order to add additional Defendants as proposed herein.

	PAPERS NUMBERED
Notice of Motion-Affirmations-Exhibits……....	E126-E139
Affirmation in Opposition-Exhibits..…….....	E140-E52
Reply Affirmation……...….....	E153-E160

Upon the foregoing papers, it is ordered that Plaintiff's motion is denied for the following reasons:

Plaintiff commenced this action on August 14, 2017 by filing a Summons and Verified Complaint, wherein he alleged that on September 9, 2016 he was injured during the course of his employment when he tripped and fell on a ramp at the premises located at 33 Bond Street in Kings County. On or about November 30, 2017, a partial stipulation was executed and filed discontinuing against Defendant A1 Expediting Service Corp. Thereafter, on or about May 24, 2021, a stipulation of partial discontinuance was executed and filed discontinuing against defendants FD Sprinklers, Inc., Safeway Atlantic, LLC, K&M Architectural Window Products, Inc., RAD & D'Aprile

Construction Corp., Highrise Safety Systems, Inc. and Parkview Plumbing & Heating, Inc. To date, Defendant Jam Consultants has not appeared in this action.

Plaintiff now moves for an order to add Woodworks Construction Co., Inc. ("Woodworks") and Total Safety Consulting, LLC ("TSC") as additional Defendants pursuant to CPLR 3025. Plaintiff has submitted, among other things, the following: pages 1-3 and 186-189 from his deposition transcript; an order issued by this Court on August 1, 2019, wherein the Note of Issue was vacated and outstanding discovery was scheduled; and the first page of the contract between 33 Bond GC LLC ("33 Bond") and Woodworks. Although Plaintiff did not annex as an Exhibit to his motion the transcript for the deposition of Defendants' witness, Pablo Fernandez (construction manager for the project), on July 29, 2021, Plaintiff submits that Mr. Fernandez purportedly testified that Woodworks was responsible for the subject ramp and TSC was responsible for overseeing the safety of the project. Defendants 33 Bond St. LLC, 33 Bond St. (LIHTC) LLC, 33 Bond GC LLC and TF Cornerstone Properties ("Defendants") oppose.

Initially, the Court finds Plaintiff's claim that Defendants' opposition is deficient and should not be considered in determining this motion, because Defendants' failed to comply with 22 NYCRR 202.8-b(c) is without merit. 22 NYCRR 202.8-b(c) provides that a statement of facts must be submitted by the movant and opponent for a motion for summary judgment. In the instant motion, Plaintiff is only moving to amend pursuant to CPLR 3025. As such, 22 NYCRR 202.8-b(c) is inapplicable herein.

"Pursuant to CPLR 3025(b), leave to amend or supplement a pleading is to be "freely given" (Watkins-Bey v City of New York, 174 AD3d 553 [2d Dept. 2019]). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, such applications are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (id.). "A party seeking leave to amend a pleading need not make an evidentiary showing of merit and leave to amend will be granted unless such insufficiency or lack of merit is clear and free from doubt (id. [internal citations omitted]).

In this matter, since the relevant three-year statute of limitations expired prior to the filing of the instant motion (see CPLR 2I4), Plaintiff is required to demonstrate the applicability of the relation-back doctrine (see CPLR 203[b]: Weekbecker v Skanska USA Civ. Northeast. Inc., 173 AD3d 936 [2d Dept 2019]; Kanunerzell v Clean Burn. Inc., 165 AD3d 768 [2d Dept 2018]; Poulard v Papamihlopoulos, 254 AD2d 266 [2d Dept 1998]). As codified in CPLR 203(f). the relation-back doctrine provides that "[a] claim asserted in an amended pleading is deemed to have been interposed at the time the claims in the original pleading were interposed, unless the original pleading does not give notice of the transactions [or] occurrences ... to be proved pursuant to the amended pleading" (O'Halloran v. Metro. Transp. Auth., 154 AD3d 83, 86 [1st Dept. 2017]). "The doctrine is '[a]imed at liberalizing the strict, formalistic pleading requirements of the [nineteenth] century, while at the same time respecting the important policies inherent in statutory repose,' and 'enables a plaintiff to correct a pleading error--by adding either a new claim or a new party--after the statutory limitations period has expired' " (id.). "It is within courts' "sound judicial discretion to identify cases that justify relaxation of limitations strictures ... to facilitate decisions on the merits if the correction will not cause undue prejudice to the plaintiff's adversary" (id.). Where a claim against the new party would otherwise be barred by the statute of limitations, the claim may nonetheless be asserted pursuant to

the relation-back doctrine upon the Plaintiff establishing "(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 (3) the new defendant knew or should have known that, but for an excusable mistake by the plaintiff as to the identity of the proper parties, the action would have been brought against him as well" (Pirozzi v Garvin, 185 AD3d 848 [2d Dept. 2020).

Here, it is undisputed that the claims against Woodworks and TSC arose out of the same conduct, transaction, or occurrence as the claims against the Defendants. With respect to the second prong of the relation-back doctrine, the Court finds that Plaintiff has failed to establish that Woodworks and TSC are united in interest with the Defendants. It is well settled that "[p]arties are united in interest if their interest " 'in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other' " (Mileski v MSC Indus. Direct Co., Inc., 138 AD3d 797 [2d Dept. 2016]). "Defendants are not united in interest if there is a possibility that the new party could have a different defense than the original party" (id.). "In a negligence action, 'the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other" (Weckbecker v Skanska USA Civil Northeast, Inc., supra). "The fact that two defendants may share resources such as office space and employees is not dispositive. They must also share exactly the same jural relationship in the subject action" (Mileski v. MSC Indus. Direct Co., supra)

Here, Plaintiff failed to address the issue of vicarious liability. Rather, Plaintiff claimed that Woodworks and TSC are united in interest with Defendants, because Defendants' attorney would presumably represent both Woodworks and TSC in this action. Plaintiff bases this claim solely upon his presumption that since Defendants' counsel has represented (and still does) a litany of Defendants in this action, including the owner, general contractor and various sub-contractors, that Defendants' counsel will also represent Woodworks and TSC because they were sub-contractors on the subject project. These claims fail to establish that Defendants are variously liable for the alleged acts of Woodworks and TSC. Notably, the page of the contract between 33 Bond Street and Woodworks that Plaintiff submitted did not indicate 33 Bond Street would be vicariously liable for Woodworks.

The Court also finds that Plaintiff failed to establish the third prong of the relation-back doctrine. Plaintiff attributes his failure to identify Woodworks and TSC as additional parties due to Defendants delay in serving responsive discovery. However, Plaintiff did not state when Defendants provided the contract between 33 Bond and Woodworks. Moreover, although Plaintiff claims Defendants failed to provide the contract between 33 Bond and TSC, Plaintiff failed to submit a copy of the demand he served requesting this contract. Notably, in Defendants' opposition papers they stated that Plaintiff demanded the contract between 33 Bond and TSC by email on August 26, 2021, one day before the instant motion was filed. Furthermore, Defendants submitted, among other things, their response, dated March 13, 2019, to Third Party Defendants' Combined Demands, which included the Supplemental Accident Report and daily logs. Significantly, the Supplemental Accident Report stated that the Safety Manager was "Carl Crandon Site Safety Manager in Training and Total Safety Consulting". In addition, the daily logs indicated that the Site & Fire Safety Manager was TSC, and Woodworks was the Carpenter. As such, the Court finds that Plaintiff failed to demonstrate an excusable mistake for failing to identify Woodworks and TSC as additional parties. Finally, the Court also finds Plaintiff failed to demonstrate that Woodworks and TSC knew or should have

known that this action would be brought against them. Based upon the foregoing, the Court finds that the relation-back doctrine cannot be applied to Plaintiff's claims against Woodworks and TSC, and as such, those claims are time-barred. Accordingly, the motion is denied.

Dated: January 28, 2022

ROBERT I. CALORAS, J.S.C.