

Diaz v Oak Beverages Inc.

2022 NY Slip Op 32778(U)

August 17, 2022

Supreme Court, Kings County

Docket Number: Index No. 508560/2017

Judge: Debra Silber

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

RAMON DIAZ,

Plaintiff,

DECISION/ORDER

-against-

Index No. 508560/2017

**OAK BEVERAGES INC. and
LINCOLN MERCURY HOLDING CO. LLC,**

Motion Seq. No. 11, 12

Date Submitted: 6/3/2022

Defendants.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant Lincoln's motion for summary judgment and plaintiff's cross motion to amend the complaint

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>207-220</u>
Notice of Cross Motion, Affirmations, Affidavits, and Exhibits Annexed	<u>224-263</u>
Affirmations in Opposition and Exhibits Annexed.....	<u>267-268</u>
Reply Affirmations.....	<u>270-271; 272</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

This is a personal injury action arising from a workplace accident that occurred on April 25, 2016, in Blauvelt, NY (Rockland County). Plaintiff was employed by Oak Beverages, Inc., and this action has been discontinued against this defendant [Doc 10]. The third-party action against Oak Beverages, Inc. has been discontinued as well [Doc 66]. This action was commenced on May 3, 2017. A Note of Issue was filed on September 24, 2021, and the case is on the trial calendar. Defendant's motion (Seq. #11) was filed on 11/23/21, the last day to file a summary judgment motion in Kings County.

In the amended complaint, plaintiff claims he was injured while moving beer, which was stacked on pallets, when he fell into a depression in the floor. He was not at

his regular place of employment at the time, but at a business nearby, where the beer was being delivered. He states that the address where his accident took place was 1 Flower Lane. His attorney does not say what town this is in, just that it is "Rockland County." His attorney also transposes the words in the defendant's name, calling it Lincoln Holding Mercury Co. LLC, when it is Lincoln Mercury Holding Co. LLC. The complaint avers at paragraphs 40-42 that "That on April 25, 2016, Plaintiff, RAMON DIAZ, was lawfully working at the aforesaid location. 41. That on April 25, 2016, Plaintiff, RAMON DIAZ, while at the aforesaid location was caused to fall into a hole/pit in the floor of the premises. 42. That the aforesaid accident was due solely and wholly as a result of the careless and negligent manner in which the defendants owned, operated, maintained, controlled, managed, leased, supervised, repaired, inspected, constructed, designed, the aforesaid premises without the plaintiff in any way contributing thereto."

In Motion Seq. #11, defendant Lincoln Mercury moves for summary judgment dismissing the complaint. The basis of the motion is that defendant Lincoln Mercury was not the owner of the property where plaintiff had his accident at the time of plaintiff's accident. Defendant's counsel states that the property is part of something called Bradley Industrial Park. He states that plaintiff took photos of the place where he had his accident, and then, when defendant's engineer went to do a site visit on October 28, 2012 [sic], the photos were not of the property he was asked to visit. Counsel then states that it was subsequently determined that the building where plaintiff had his accident is known as 800 Bradley Hill Road. Defendant claims, counsel states, that it owns 700 Bradley Hill Road, which is the same property known as 1 Flower Lane, but not 800 Bradley Hill Road. He also avers that one of the commercial tenants of both buildings, that is, 700 Bradley Hill Road/1 Flower Lane and 800 Bradley Hill Road, was

plaintiff's employer, Oak Beverage. Counsel then proceeds, for unknown reasons, to summarize the engineer's findings at 800 Bradley Hill Road, a property not owned by movant, which he inspected on October 28, 2021 [not 2012]. He then concludes "Based on the testimonial evidence, LINCOLN has established its burden that it did not own 800 Bradley Hill Road on April 25, 2016." He then proceeds to argue, inexplicably, that his client had no actual or constructive notice of any dangerous or defective condition, and that his client had no duty to plaintiff.

In response, plaintiff cross-moves to amend the complaint to change the location of his accident to the correct location address, 800 Bradley Hill Road, and to change the name of the defendant to the entity that owned the property at that address on the date of his accident, Pontiac Holding L.L.C. He claims naming "Lincoln" was merely a "misnomer," that the same people own both entities, and thus the court should apply the relation-back doctrine to the amended complaint, or, in the alternative, should estop Lincoln from denying ownership of the premises where he had his accident. The proposed supplemental summons and proposed second amended complaint is at Doc 263.

At first blush, this request seems like a bridge too far. However, upon further examination of the record, the equities weigh in plaintiff's favor.

Plaintiff provides a number of documents and EBT transcripts in support of his motion. The court will only discuss those which are relevant to the motions. First, Doc 229 is a certified copy of the deed to Lincoln Mercury Holding Co. LLC, dated in 1996, for the property described in part as "Lot 14-1 on a certain map entitled Bradley Industrial Park, Subdivision of Property for Rock-Art Associates in Blauvelt, Town of Orangetown, Rockland County, New York made by Adler, Caruso & Young, dated

5/10/74 last revised 7/6/76 and filed in the Rockland County Clerk's Office on 10/29/76 in Book 90 of Maps at Page 55 as Map No. 4773." The business address for Lincoln Mercury is listed as 500 Bradley Hill Road, Blauvelt, NY 10913. Plaintiff's counsel states that this is the 1 Flower Lane/700 Bradley Hill Road property. Neither designation is on the deed. However, it states that it is section 6518, Block 1, Lot 4. Document 234 is a certified copy of a deed executed in 2019 from Lincoln Mercury Holding Co., LLC, with offices at 500 Bradley Hill Road, Blauvelt, NY, to four different LLCs, for premises known on the "Rockland County Tax Map as Section 65.18, Block 1, Lot 4. Said premises also being known as 1-2 Flower Lane a/k/a 700 Bradley Hill Road, Blauvelt, New York 10913." This establishes that at the time of the plaintiff's accident, Lincoln Mercury owned 1 Flower Lane/700 Bradley Hill Road. The 2019 deed was signed by Patrick Magee and Jonathan Magee, both being listed as "Managing Member."

Doc 230 is described by plaintiff's attorney as the deed for 800 Bradley Hill Road. It is certified and indicates that the property was conveyed in 1997 from Bradley Industrial Park, "a NY Partnership" with offices at 500 Bradley Hill Road, Blauvelt, NY, to Pontiac Holding, L.L.C., with offices at the same address. The deed was signed by John Magee, "Partner" of Bradley Industrial Park. It describes the property, before the metes and bounds, as "Lot #3 on the subdivision plan entitled "Bradley Subdivision" Town of Orangetown, Blauvelt, New York, as prepared by Adler & Young, P.C. last dated 12/30/86, and which was filed in the Rockland County Clerk's Office on March 3, 1987, in Map Book 107 at page 21 as Map No. 6014." The property address is not indicated anywhere on this deed. The property is stated to be Section 65.18, Block 1, Lot 27.

Doc 246 is a prior deed, to Bradley Industrial Park, Inc. in 1976 from the prior owner, Rock-Art Associates. Doc 247 is a deed from Bradley Industrial Park Inc. to Magee-Blauvelt Corp., in 1977, and is signed by John Magee, Vice President. Doc 248 is a print-out from the New York State Department of State Division of Corporations which states that Magee-Blauvelt Corp. was dissolved in 1982 by proclamation, and its service of process address was c/o John Magee, 500 Bradley Hill Road, Blauvelt, NY 10913.

Doc 250 is a certified copy of a deed signed by John and Patrick Magee on 3/19/2019 for 800 Bradley Hill Road, Blauvelt, NY, Section 65.18, Block 1, Lot 3, from them as managing members of Pontiac Holding LLC to two other LLCs for no consideration.

Doc 231 is a print-out of the New York State, Department of State, Division of Corporations' website, which indicates that in 1976, Bradley Industrial Park, Inc. was incorporated, and that it was dissolved by proclamation for not filing NYS corporate taxes in 1982. John Magee was the service of process name, with 500 Bradley Hill Road as the service of process address. Presumably they continued as a partnership and filed a document to that effect with the applicable clerk. To be clear, all of the deeds from 1977 to the present are not provided, but neither are they relevant.

Doc 232 is a copy of an article from the New York Times, published 5/11/95, which describes a lawsuit John and Patrick Magee won with regard to the development of this property. The article is not admissible, but the decision is reported at *Town of Orangetown v Magee*, 88 NY2d 41 [1996]. The Court of Appeals affirmed the Second Department's determination that the Magee's' building permit should be reinstated, and that the revocation of the building permit deprived them of due process and entitled

them to monetary damages pursuant to 42 USC § 1983. The court takes judicial notice of this decision.

Next, Doc 233 is a copy of an affidavit of Patrick J. Magee in a different action, O'Hara v McEnroe, et al, Rockland Supreme Court Ind. 035290/2013. It was signed and notarized on 8/17/17. It was submitted in support of a motion to vacate a default judgment that was issued against Pontiac Holding and argues that John Magee had not understood that the insurance company was not representing Pontiac but was representing Bradley Corporate Park. Therein, he states that he and his brother John Magee each owned 50% of Pontiac Holding LLC. He continues at Page 2 "My brother John and I are also the sole partners of Bradley Industrial Park ("Bradley" or the "Partnership"), a New York general partnership. Bradley and Pontiac are the owners of a number of parcels of real property located in Rockland County, New York, operated as part of an industrial park located in Blauvelt, New York, commonly known as Bradley Corporate Park ("BCP"). BCP is not an actual entity and is a name that has been used to refer to the entire industrial park. The name Bradley Corporate Park has also been used informally and interchangeably for the Partnership at various times, including for purposes of insurance, and as a result BCP, and not the Partnership, was mistakenly named as a defendant in this action. 5. In or around 1982, my brother and I formed the Partnership, and between 1982 and 1988, the Partnership acquired essentially all the real property that today constitutes BCP. A number of those parcels were acquired as vacant land while others were improved with commercial buildings. In 1996, we formed Pontiac as a mechanism to hold title to, and borrow against, the improved Partnership properties, while leaving the vacant parcels un-encumbered for future development. It [Pontiac] was created solely for the benefit of the Partnership to achieve that specific

Partnership goal, and to ensure that purpose, it was formed with John and I each being equal 50% owners/members to reflect our equal Partnership interests. Towards that end in November 1997 the Partnership deeded to Pontiac nine (9) separate parcels for no consideration" . . . "6. Although Pontiac was formed as a separate entity, Pontiac was intended to be an integral part of the Partnership. In fact, the operations of Pontiac and Bradley are inextricably linked and intertwined, and the management, maintenance and operation of Pontiac and Bradley is performed without distinction. The office of BCP is in a building that is held in the name of Pontiac, the staff that works out of the BCP offices are all employed by, and on the payroll of Bradley and receive all their employee benefits, such as workers compensation and health insurance, through Bradley. All records of Pontiac and Bradley are kept in the same file cabinets, and all records are kept and maintained by the Bradley staff and reviewed by Bradley's accountants. Additionally, and significantly, BCP and Pontiac are on the same insurance policies . . . The reality is that BCP, for all intents and purposes is operated as one partnership. 7. Over the course of time, control over the day-to-day operations of Bradley and Pontiac gravitated to John Magee, and John has had, and continues to have, essentially exclusive possession, control and operation of Bradley and Pontiac to the essential exclusion of your deponent. In fact, I have had very real issues and concerns over the manner in which John had been operating Bradley and Pontiac which ultimately caused me to bring an action in this Court seeking to dissolve both Bradley and Pontiac. As a result, on September 27, 2016, this Court issued an order dissolving Bradley, and on March 8, 2017, this Court issued an order dissolving Pontiac. This Court has also appointed a referee to supervise the winding up process for each of Bradley and Pontiac. Annexed hereto as Exhibit's "B", "C", "D" and "E" are respectively this Court's

orders dissolving Bradley and Pontiac and appointing a Referee for Bradley and Pontiac.” [emphasis added]. These statements are judicial admissions, the court notes.

Doc 253 is a print-out of the New York State, Department of State, Division of Corporations’ website listing for Pontiac Holding L.L.C., which indicates that it was formed in 1996 and is still active. An LLC is not dissolved by proclamation for not filing NYS corporate taxes, as it is a pass-through entity. Thus, the fact that it has not been dissolved does not mean it is still in business.

Doc 259 is an inspection report prepared by an engineer, with an affidavit incorporating it by reference, presumably to set forth that plaintiff’s cause of action has merit. Doc 257 is an EBT transcript for the deposition of one of plaintiff’s co-workers, presumably submitted for the same reason.

Doc 260 is an affidavit signed on 11/7/2012 by John Magee in a suit filed against him by Patrick Magee, Rockland Ind. 31574/2012. It is in opposition to Patrick Magee’s motion for summary judgment dissolving Bradley Industrial Park, the partnership. This is the suit referenced in the affidavit of Patrick Magee described above [Doc 233]. Therein, he states that he and his brother each own 50% of Bradley Industrial Park, a general partnership, as well as of Bradley Corporate Park LLC, and of Pontiac Holding LLC. He states that he was the managing agent of Pontiac as president and sole shareholder of Gate Hill Inc. He describes the property as 185 contiguous acres with 1.3 million square feet of rentable space. He urges the court to permit him to buy his brother out rather than ordering that the property be sold.

Doc 258 is an affirmation from an attorney who used to work for the firm representing plaintiff. Therein, she states that on October 2, 2019, counsel for defendant Lincoln Mercury was still asking to postpone the EBT of his client. John

Magee's EBT was held on October 27, 2020, and the transcript is at Doc 236. It is noted that this was after the statute of limitations for plaintiff's accident had expired.

John Magee testified [in 2020] that he was no longer a member of Lincoln Mercury Holding LLC. He said that in June 2018 the LLC ceased to exist. He said this LLC was in the real estate business. They owned one building, 700 Bradley Hill Road, Blauvelt, NY. He testified that Patrick J. Magee had been a member of this LLC, along with himself and other relatives. The building was also known as 1 Flower Lane. He acknowledged that the property was transferred in 2018 to four LLC, and his LLC, MJLPS LLC, received 50%. But he then said he no longer had an interest in the property, as MJLPS LLC subsequently sold its entire interest to a company named Onyx in 2019.

Mr. Magee was then shown two photos. He testified that one was of 700 Bradley Hill Road/1 Flower Lane, also known as Building 3 (photo A) and the other (photo B) was building 4, 800 Bradley Hill Road, which was never owned by Lincoln Mercury. His EBT ended there, and nobody asked him which entity owned 800 Bradley Hill Road.

Plaintiff's EBT transcript is at Doc 228. He was shown more than two photos, and they were given numbers and not letters, so it is not possible to know if the photo identified by Mr. Magee when shown the photo called B as not on Lincoln Mercury's property was shown to plaintiff. The photos are not provided with either transcript. This is of no real consequence.

In opposition to the motion, defendant Lincoln Mercury provides an attorney's affirmation and nothing more. All positions taken are clearly on behalf of the as-yet added defendant, Pontiac, and not by Lincoln, and are more properly asserted in a motion to dismiss. Therein, counsel avers that the applicable statute is CPLR 305 (c),

“Amendment. At any time, in its discretion and upon such terms as it deems just, 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.” He then argues that the court should not use its discretion in this circumstance, as that statute is only to correct the misnaming of an existing defendant, not to add a new defendant. Counsel continues “in the case at bar, there is prejudice against PONTIAC as it had no connection or ownership to 700 Bradley Hill Road a/k/a 1 Flower Lane on April 25, 2016. Nor is PONTIAC a corporate subsidiary of LINCOLN.” He continues “As plaintiff’s counsel did not cross move until now, well after the statute of limitations expired, why would the owners of LINCOLN think or assume plaintiff’s injuries occurred at 800 Bradley Hill Road.” Finally, plaintiff “could have added Pontiac to this suit up until April 26 of 2019 but failed to do so.” Therefore, he argues, the statute of limitations has run, and the motion should be denied.

Conclusions of Law

The court finds and determines that on the date of plaintiff’s accident, the building where plaintiff had his accident was known as 800 Bradley Hill Road. It was owned by Pontiac Holding, L.L.C. since 1997, as evidenced by the deed at Doc 230. The deed in 1997 was signed by John Magee as Partner of Bradley Industrial Park. Thus, at the time this suit was commenced, Mr. John Magee knew which entity owned which property. Further, the many parcels of property in this industrial park were all owned, under various entity names, by the same handful of people. As Mr. Patrick Magee states in his affidavit submitted as Doc 233, all of the parcels were managed as one, and were covered by one insurance policy. Nonetheless, it appears that both Magee’s continuously refused to be deposed until the statute of limitations had expired, and then,

when shown a photo of the accident location, John Magee states unequivocally that Lincoln Mercury did not own that building. The motion to dismiss the complaint on that grounds was then filed, which was followed by the plaintiff's cross motion to amend the complaint.

As the Second Department explained in *Brock v Bua*, 83 AD2d 61, 68-71 [2d Dept 1981] (internal citations omitted):

In considering whether the defense of the Statute of Limitations should bar a plaintiff's claim against a new party, the Federal courts adopted a three-pronged test later codified in subdivision (c) of rule 15 of the Federal Rules of Civil Procedure. A similar test should be applied in situations such as the one at bar. Pursuant thereto, a claim asserted against a new party will relate back to the date upon which plaintiff's claim was previously interposed against the original named defendant despite the fact that the former was not named in the process served upon the latter only if (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 he 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. The notice required by the second prong of the test may be informal because it is intended only to satisfy the rationale underlying the Statute of Limitations (see Fed Rules Civ Pro, rule 15, subd [c]; Advisory Committee's Note, and not the more stringent notice requirement underlying the acquisition of jurisdiction over a defendant by the service of a summons.

The third prong requires the plaintiff to show that his failure to join the proper parties at the outset was not due to his own inexcusable neglect. In so doing the rule recognizes the desirability of commencing an action against all defendants within the period of limitation and it excuses the belated commencement thereof against one or more defendants united in interest with a defendant who was timely served only if the delay in adding the new defendant or defendants is not attributable to the plaintiff. . . the law balances the plaintiff's right to sue all those responsible for his injury against the inconvenience to the new defendant of defending against a belated claim, and in light of the fact that the new party is united in interest with a defendant who was timely served and who did have the opportunity to make an investigation within the period of limitations, it

finds the plaintiff's interests to be the weightier and opts to remove the bar of the Statute of Limitations.

Currently, the relation-back doctrine, which is codified in CPLR 203(b), allows a claim asserted against a defendant in an amended complaint to relate back to claims previously asserted against a codefendant for statute of limitations purposes where the two defendants are "united in interest" (see *Shapiro v Good Samaritan Regional Hosp. Medical Center*, 42 AD3d 443 [2d Dept 2007]; *Buran v Coupal*, 87 NY2d 173, 177-178 [1995]). In order for a claim asserted against a new defendant to relate back to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is united in interest with the original defendant, and by reason of that relationship can be charged with notice of the institution of the action such that he or she will not be prejudiced in maintaining a defense on the merits; and (3) the new defendant 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 the new defendant as well. (see *Buran v Coupal*, 213 AD2d 863, 865, quoting *Brock v Bua*, *supra* [3d Dept 1995]), *affd* 87 NY2d 173 [1995]).

The court has applied this analysis to the facts of this case. The result is the conclusion that the motion to amend should be granted. The plaintiff has established that at the time the suit was commenced, his attorney was unable to determine the correct address of the property where his accident took place or the name of the entity which owned it, that the entire industrial park was managed from one office by one staff, regardless of which entity owned one building or the other, that the entire industrial park was covered by one insurance policy, that John and Patrick Magee were the equal owners of all of the entities which owned parts of the industrial park, that there will be no

