

Irizarry v Balton LLC
2022 NY Slip Op 34010(U)
November 28, 2022
Supreme Court, New York County
Docket Number: Index No. 155520/2017
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. SABRINA KRAUS

PART

57TR

Justice

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RAFAELA IRIZARRY,

Plaintiff,

- v -

THE BALTON LLC,BTL WINES & SPIRITS

Defendant.

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INDEX NO. 155520/2017MOTION DATE 11/28/2022MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90

were read on this motion to/for

JUDGMENT - SUMMARY

BACKGROUND

Plaintiff commenced this action seeking damages for personal injury allegedly suffered on April 21, 2017, as a result of a trip and fall accident on the sidewalk abutting the property at 340 St. Nicholas Avenue, known as The Balton Condominium. Plaintiff fell while walking from the corner of West 127th Street and St. Nicholas Avenue, in the direction of West 128th Street. Plaintiff attributes this fall to the purported negligence of The Balton LLC in allowing portions of said sidewalk to be in a dangerous condition.

PENDING MOTIONS

On August 30th, 2022, defendant moved for summary judgment and dismissal of the complaint on the grounds that it did not owe a duty of care to plaintiff, insofar as it was not the owner of the property adjacent to the sidewalk on which plaintiff fell, nor did it have any duty to

maintain the sidewalk; and because the plaintiff is unable to identify the cause or location of her alleged fall without speculation.

On the same date, plaintiff cross-moved for pursuant to CPLR §§3025(b) and 203(f) for leave to amend the complaint in the above-entitled action to add the The Board of Managers of The Balton Condominium, and the President and/or the Treasurer of the Board of Managers of The Balton Condominium, as defendants in the above-entitled action; and to compel the defendants to provide the names of the President and the Treasurer of the Board of Managers of The Balton Condominium.

The motions were fully briefed and submitted to the court on September 29, 2022. On November 28, 2022, the court heard oral argument and reserved decision.

The motion and cross-motion are granted to the extent set forth below.

ALLEGED FACTS

Plaintiff alleges she suffered serious injuries when she fell on a sidewalk outside of 340 Saint Nicholas Avenue on April 21, 2017 at approximately 3:00 PM. The weather on April 21, 2017, was good, and the sidewalk was dry. Plaintiff recalled the building was a big apartment building with a liquor and wine store on the ground floor. Plaintiff alleges she fell approximately 10 feet from the sign on the building which provided the address and approximately 20 feet from the wine store sign. The building was recently new, and the pavement was recently paved with the construction of the building. Plaintiff was walking with her husband at the time of the fall, and he witnessed it.

Plaintiff was looking forward when she fell and only noticed the raised portion of the sidewalk after she fell. Plaintiff recalled that one of the sidewalk flags was raised higher than the other, and her foot struck the raised portion of the sidewalk, causing her to fall forward.

While the ambulance report provided the address of the incident as 299 Saint Nicholas Avenue, two blocks away in the opposite direction from the liquor store, Plaintiff was adamant she fell right after the end of the liquor store, on Saint Nicholas and 127th Street. The ambulance picked up Ms. Irizarry across the street from where she fell on Saint Nicholas Avenue because the police officers had her cross the street with their help.

NYC Partnership Housing Development Fund Company, Inc., (HDFC), The Balton Affordable LLC and The Balton LLC entered into A Declaration dated June 30, 2009, which created a plan of condominium ownership of the premises located at 311 West 127th Street (aka 340 St Nicholas Avenue) in New York, New York.

The Balton Condominium is owned by the HDFC and consists of two units: a Mixed Unit (comprised of retail space and a parking garage on the first and cellar floor, and 117 residential apartments on the 2nd through 125 floors) and a Residential Unit (comprised of 39 residential apartments on floors 2 through 8), which are beneficially owned by The Balton LLC and The Balton Affordable, respectively.

The Balton, LLC and The Balton Affordable LLC designated and established The Board of Managers of The Balton Condominium in 2009. The Board of Managers is responsible for maintaining the sidewalks appurtenant to the building.

DISCUSSION

The Balton LLC Owed No Duty to Plaintiff and Is Not An Owner for Purposes of The Administrative Code

The Board of Managers of The Balton Condominium was required to maintain and repair the Common Elements of The Balton Condominium, including the sidewalk adjacent to the condominium where plaintiff alleges the accident took place. "In keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well

established that a claim arising from the condition or operation of the common elements does not lie against the owners of the individual units; the proper defendant on such a claim is the board of managers.” *See, Jerdonek v. 41 West 72 LLC*, 143 A.D.3d 43 (1st Dept. 2016).

Therefore, it is well-settled that “a statute imposing obligations or liabilities upon the ‘owner’ of real property does not give rise to a claim against the owners of individual condominium units where the claim arises from the common elements or concerns a duty not connected with any individual unit.” (*Id.*) *Araujo v. Mercer Square Owners Corp.* is directly on point. In *Araujo*, a plaintiff slipped and fell on a public sidewalk in front of a condominium consisting of a residential unit and a commercial unit. The First Department held that the commercial unit owners’ motion for summary judgment should have been granted because “indeed the condominium declaration provided that the board of managers of the condominium was required to maintain and repair the common elements of the condominium, including the public sidewalk ‘outside of and immediately appurtenant’ to the building.” *See, Araujo v. Mercer Square Owners Corp.*, 95 A.D.3d 624 (1st Dept. 2012).

The binding precedent set forth above establishes that The Board of Managers of The Balton Condominium is responsible for the common elements, inclusive of the sidewalk adjacent to The Balton Condominium. The plaintiff’s Complaint alleges that her fall occurred on the sidewalk abutting the property of The Balton Condominium, which is explicitly identified as a common element within the declaration. It is, therefore, clear from the Declaration and accompanying By-Laws that The Board of Managers of The Balton Condominium bears responsibility for the maintenance and repair of the sidewalk adjacent to The Balton Condominium, and not individual unit owners. As such, The Balton LLC was not the landowner of the area where plaintiff’s alleged accident occurred, nor did it have any responsibility to

maintain the sidewalk adjacent to The Balton Condominium. Thus, as a matter of law, the within lawsuit must be dismissed against The Balton LLC because it owned no duty of care to the plaintiff.

Nor is a commercial unit owner of a condominium an owner for the purposes of § 7-210 of the New York City Administrative Code. *See, Rothstein v. 400 East 54th Street Co.*, 51 A.D.3d 431 (1st Dept. 2008); *see also, Keech v. 30 East 85th Street Co., LLC*, 154 A.D.3d 504, 61 N.Y.S.3d 499 (1st Dept. 2017).

While plaintiff alleges that The Balton LLC owned the building at issue based upon a search of the deeds on file with the New York City Register's office, this is a misstatement. The Deed plaintiff relies upon unequivocally establishes that The Balton LLC owned one unit within the entire Condominium.

As the court has granted the motion to dismiss based on the first prong, the court need not address the alternative basis for dismissal set forth in plaintiff's papers.

Plaintiff's Motion for Leave to Amend the Complaint is Granted

Plaintiff moves to amend the complaint to add The Board of Managers of The Balton LLC, and the President and/or Treasurer of the Board as party defendants, and to direct the defendants to provide the plaintiff with the names of the President and Treasurer of the Board or to allow plaintiff to sue those defendants under pseudonyms.

It is conceded that the statute of limitations has passed but plaintiff relies on the relation back doctrine.

Aimed at liberalizing the strict, formalistic pleading requirements of the past century (*see, Shaw v. Cock*, 78 N.Y. 194; *Harriss v. Tams*, 258 N.Y. 229, 179 N.E. 476) or the "sporting theory of justice" condemned by Roscoe Pound (*see, Schiavone v. Fortune*, 477 U.S. 21, 32–33, 106 S.Ct. 2379, 2386, 91 L.Ed.2d 18 [Stevens, J., dissenting]), while at the same time respecting the important policies inherent in statutory repose (*see, Duffey v. Horton Mem. Hosp.*, 66 N.Y.2d 473, 476–477, 497 N.Y.S.2d 890, 488 N.E.2d 820), the doctrine 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. The doctrine thus gives courts the “sound judicial discretion” (*Duffy*, 66 N.Y.2d at 477, 497 N.Y.S.2d 890, 488 N.E.2d 820) 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 (Lewis, *The Excessive History of Federal Rule 15(c) and Its Lessons for Civil Rules Revision*, 85 Mich.L.Rev. 1507, 1512 [1987]).

Buran v. Coupal, 87 N.Y.2d 173, 177–78 (1995).

The three conditions that must be satisfied in order for claims against one defendant to relate back to claims asserted against another: “(1) the causes of action arose out of the same conduct, transaction or occurrence; (2) the new party is united in interest with one or more of the original defendants, and by reason of that relationship can be charged with such notice of the institution of the action that he or she will not be prejudiced in maintaining his or her 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 him or her as well.” (*Ramirez v. Elias-Tejada*, 168 AD3d 401 [1st Dept. 2019]; *Petruzzi v. Purow*, 180 AD3d 1083, 1084 [2d Dept. 2020]; *see also*, *Rivera v. Wyckoff Hgts. Med. Ctr.*, 175 AD3d 522, 524 [2d Dept. 2019]; *Wilson v. Southampton Urgent Med. Care, P.C.*, 129 AD3d 531 [1st Dept. 2015]; *Roseman v. Baranowski*, 120 AD3d 482, 483-484 [2d Dept. 2014]).

The parties agree that the first prong is met but defendant argues that plaintiff’s papers do not specifically establish the issues of unity in interest and notice.

However, in reviewing the record before the Court, the court finds that said prongs are established. The condominium declaration establishes that there are two-unit owners represented by the Board, one of which is the defendant ((NYSCEF Doc. No. 55). The summons and complaint were delivered to an employee at the Subject Building (NYSCEF Doc. No. 3). In its answer defendant admitted ownership of the premises and the defenses asserted in defendant’s answer (NYSCEF Doc. No.15) are all defenses which would be applicable to the Board. Indeed,

the fact that defendant makes argues on behalf of the Board in opposing the proposed amendment is further evidence that the parties are united in interest.

Finally, it would be unfair to allow defendant to wait, as it did in this action, until after the expiration of the statute of limitations, to point out that plaintiff had mistakenly sued the wrong entity.

WHEREFORE it is hereby:

ORDERED that the motion of The Balton LLC to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, upon defendant providing to plaintiff the names of the President and the Treasurer of the Board of Managers of The Balton Condominium which defendant is directed to do within 10 days or receipt of this decision and order; and upon proof of compliance, the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

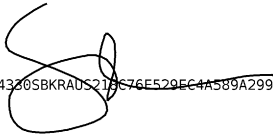
ORDERED that plaintiff's motion to amend is granted and plaintiff shall serve the supplemental summons and amended complaint on the proposed additional defendant pursuant to the CPLR; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

<u>11/28/2022</u>			
<u>DATE</u>		<u>SABRINA KRAUS, J.S.C.</u>	
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