

Kingstone Ins. Co. v Marton Pharm. Inc.

2022 NY Slip Op 34877(U)

July 12, 2022

Supreme Court, Bronx County

Docket Number: Index No. 805682/2021E

Judge: Leticia M. Ramirez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART IA-8

C

KINGSTONE INSURANCE COMPANY a/s/o
LOS TRES HERMANOS LAUNDROMAT INC.

Index No. : 805682/2021E

-against-

Hon. Leticia M. Ramirez

MARION PHARMACY INC., 3 SISTERS PIZZA
INC., TOTALCARE PHARMACY MANAGEMENT
INC., and MARION AVENUE MANAGEMENT LLC.

Acting Justice Supreme Court

The following papers numbered 14 to 35 on NYSCEF were read on this motion (Seq. No. 1)
for Motion to Dismiss originally noticed on April 6, 2022 and adjourned by stipulation to May 4, 2022.

Table with 3 columns: Description, No(s), and Page Range. Includes rows for Notice of Motion, Answering Affidavit, and Replying Affidavit.

Upon the foregoing papers, it is ordered that defendant's motion to dismiss is hereby
denied. Plaintiff's cross motion to amend the pleadings is also hereby denied.

See Decision and Order attached.

Motion is Respectfully Referred to Justice:
Dated:

Dated: July 12, 2022

Hon. [Signature]
Leticia M. Ramirez, AJSC

- 1. CHECK ONE... CASE DISPOSED IN ITS ENTIRETY X CASE STILL ACTIVE
2. MOTION IS... GRANTED X DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE
FIDUCIARY APPOINTMENT REFEREE APPOINTMENT

C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - PART 8

-----X
KINGSTONE INSURANCE COMPANY a/s/o
LOS TRES HERMANOS LAUNDROMAT INC.
Plaintiff

against

INDEX # 805682/2021E
DECISION AND ORDER

MARION PHARMACY INC., 3 SISTERS PIZZA
INC., TOTALCARE PHARMACY MANAGEMENT
INC., and MARION AVENUE MANAGEMENT LLC.

Defendant

-----X

Recitation, as required by CPLR§ 2219(a), of the papers considered in the review of this motion for
summary judgment

Notice of Motion.....	14 - 20
Affidavit in opposition.....	23 - 34
Affidavit in further support (reply).....	35

Plaintiff commenced this action as Subrogee to recover from Defendants monies paid to plaintiff's policy holder for property damage from a fire. Defendant Marion Avenue Management (hereinafter "defendant") moves, pursuant to CPLR §§ 214(4) and 3211(a)(5) to dismiss the amended complaint arguing that the suit is time barred due to the Statute of Limitations. Plaintiff opposes and files a cross motion seeking leave to further amend its complaint to add a cause of action against defendant pursuant to CPLR §3025(b). Defendant opposes plaintiff's cross motion.

Motion to Dismiss

Defendant seeks dismissal of the amended complaint, dated November 30, 2021, which names them for the first time arguing that the statute of limitations has passed. Specifically, the allegations derive from a fire that occurred on defendant's property on April 24, 2018 and resulted in property damage. The statute of limitations for such action is three (3) years; which gave plaintiff until April 24, 2021 to file a complaint.

Plaintiff's first argument is that the amended complaint was timely filed as a result of Governor Cuomo's Executive Orders covering the period of March 20, 2020 until November 3, 2020. This Court finds that argument to be without merit since the tolling applied to deadlines

that were due during the 288 day period. *Gordon L. Firm, P.C. v. Doha*, 74 Misc. 3d 1204(A), 158 N.Y.S.3d 818 (N.Y. Sup. Ct. 2022); *Brash v Richards*, 195 AD3d 582, 584-585 (2d Dept 2021). Here, the statute of limitations deadline was April 24, 2021; more than five months after the toll ceased.

Plaintiff's alternative argument is that, since the relation back doctrine applies, the amended complaint should be deemed timely filed.

The relation-back doctrine codified in CPLR 203(f) 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. Metropolitan Transp. authority*, 154 AD 3d 83, 86 (1st Dept. 2017). The relation-back 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" (emphasis added). *Buran v. Coupal*, 87 N.Y.2d 173, 180-81 (1995).

"[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 ... 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". *Brock v. Bua*, 83 A.D.2d 61, 69 (2nd. Dept. 1981)

With respect to the third prong, the Court of Appeals has held that "excusability of the mistake is not an absolute requirement under New York law". *Buran, supra at 179*. In fact, "requiring courts to determine in each case whether the plaintiff's mistake was "excusable" unwisely focuses attention away from what *Brock* assumed to be the primary consideration in such cases—whether the defendant could have reasonably concluded that the failure to sue

within the limitations period meant that there was no intent to sue that person at all". *Buran, supra at 180–81, relying on Brock*. Therefore, only a showing of mistake was necessary.

A review of the record shows that plaintiff has met all three prongs. First, the proposed new claims in the amended complaint against defendant arise out of the same conduct, transaction or occurrence as those against the original defendant in the original complaint filed; *to wit*, a fire on April 24, 2018 which damaged property. The original complaint was filed within the statute of limitations and identified the defendant as owner of the property.

Secondly, defendant is united in interest with the original defendants in that they were the owners of the property rented by the original defendants which was damaged by fire in April 2018. This relationship is further evidenced by defendant's own complaint filed on or about January 5, 2021 in Bronx County under index 800098/2021E wherein they seek relief against the City of New York stemming from the April 24, 2018 fire. This Court finds that the defendant suffers no prejudice in allowing the complaint to be amended. Moreover, since discovery on this matter has not even commenced, defendant is not "hindered in the preparation of [their] case". *O'Halloran, supra at 89*.

Lastly, plaintiff "upon further investigation" filed a supplemental summons naming the defendant on May 21, 2021 and amended complaint on November 30, 2021, a mere 27 and 220 days respectively after filing the initial complaint. Plaintiff's failure in not including the defendant in the original complaint, although acknowledging they were the owners of the property, falls squarely within the exceptions allowed in *Buran*. Furthermore, defendant should have known that an action would have been brought against him.

For the reasons mentioned above, this Court finds that, for purposes of applying the relation back doctrine codified in CPLR § 203(f), the salient inquiry on the issue of notice "is not whether defendant had notice of the claim, but whether, as the statute provides, the original pleading gives 'notice of the transactions, occurrences ... to be proved pursuant to the amended pleading'" (*Giambrone v Kings Harbor Multicare Ctr., 104 AD3d 546, 548 547 (1st Dept 2013)*). Therefore, defendant's motion to dismiss is denied.

Leave to Amend

Plaintiff, in its cross motion, moves to further amend the complaint to add the cause of action of breach of contract against defendant. Defendant opposes on the grounds that the proposed cause of action is without merit and prejudicial to defendant.

It is well established that leave to amend a pleading pursuant to CPLR 3025(b) should be freely given absent "prejudice to the other party traceable to the omission from the original pleading". *Bellini v. Gersalle Realty Corp.*, 120 AD 2d 345,347 (1st Dept 1986).

As discussed above, 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". *O'Halloran v. Metropolitan Transp. authority*, 154 AD 3d 83, 86 (1st Dept. 2017). The relation-back 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" (emphasis added). *Buran v. Coupal*, 87 N.Y.2d 173, 180-81 (Ct. of Appeals, 1995).

Given that this Court has determined that the relation back doctrine applies in this case, the question left to determine is whether the breach of contract cause of action against the defendant is meritorious.

When seeking to amend a complaint the plaintiff must proffer evidence establishing that the proposed amendment has merit (*Long v. Long*, 281 AD2d 324, 325 (1st Dept. 2001) and the motion to amend should be granted "unless the insufficiency or lack of merit is clear and free from doubt" (*Weider v Skala*, 168 AD2d 355, 355 (1st Dept. 1990). Here, the cause of action against the defendant in the amended complaint pertains to negligence in its "use, operation, maintenance, control, occupation of the propert[y] ... in failing to repair, maintain, control, inspect, notify of the defects that resulted in the April 24, 2018 fire loss". By contrast, the proposed cause of action falls under breach of contract in that defendant was the subrogor's landlord and breached the duty to "maintain, repair and operate the ...property in a safe and reasonably good condition".

In order for plaintiff to have established its *prima facie* case for breach of contract, the plaintiff must prove the existence of a contract, the plaintiff's performance thereunder, the

defendant's breach, and damages. *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 A.D.3d 804 (2nd Dept 2011). In the instant matter, plaintiff fails to provide sufficient proof of the existence of a contract and whose terms were allegedly breached as well as defendant's specific breach which led to damages.

Accordingly, Defendant's motion to dismiss the amended complaint is hereby denied. Plaintiff's cross motion to further amend the pleadings is also denied.

This constitutes the Decision and Order of this Court.

Dated: July 12, 2022

Hon.



Leticia M. Ramirez, AJSC