Commesso v City of New York
2022 NY Slip Op 35097(U)
May 20, 2022
Supreme Court, Queens County
Docket Number: Index No. 709331/2018
Judge: Kevin J. Kerrigan
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE **KEVIN J. KERRIGAN** Justice   Part **10**

---------------------------------------X

Angela Commesso,

Plaintiff,

- against -

The City of New York and Mark R. Madonna and Enrico J. Madonna as Trustees on behalf of the Madonna Family Trust,

Defendants.

---------------------------------------X

Index Number: 709331/18

Motion Date: 5/2/22

Motion Seq. No.: 7

The following papers numbered E119-E131, E139-E140 & E145-E147 read on this motion by defendants, Mark R. Madonna and Enrico J. Madonna as Trustees on behalf of the Madonna Family Trust, for an order to dismiss.

	Papers Numbered
Notice of Motion-Affirmation-Exhibits................	E119-131
Affirmation in Opposition............................	E139-140
Reply-Exhibits.......................................	E145-147

Upon the foregoing papers it is ordered that the motion is decided as follows:

Motion by defendants, Mark R. Madonna and Enrico J. Madonna as Trustees (Trustees") on behalf of the Madonna Family Trust ("Trust"), for an order pursuant to CPLR §3211 to dismiss the action.

This action seeks recovery for personal injuries allegedly sustained by plaintiff when she was caused to trip and fall on the sidewalk and driveway area in front of 157-28 100th Street, County of Queens ("Premises"), on April 2, 2017.

In support of the motion Trustees submits, inter alia, the affirmation of its attorney, the pleadings, the deed to the Premises, the deposition transcript of plaintiff Angela Commesso and a copy of the Madonna Family Trust.

In opposition to the motion plaintiff submits, inter alia, the affirmation of her attorney, and photographs of the Premises.

It is undisputed that plaintiff was injured on April 2, 2017, and plaintiff timely commenced suit against defendant Mark R.

Madonna on June 18, 2018; that plaintiff filed her motion to amend the complaint to add the Trustees as defendants on December 21, 2021, and filed the amended verified complaint on February 25, 2022. It is also undisputed that the three-year statute of limitations for negligence expired as against the Trustees on April 2, 2022.

CPLR § 214(5) provides, in part:
The following actions must be commenced within three years:
5. an action to recover damages for a personal injury...

Based on CPLR §214(5) the Trustees aver that since plaintiff served the amended complaint more than three years after the date of incident, plaintiff failed to properly commence the action within the statute of limitations and is barred from bringing an action against the Mark R. Madonna and Enrico J. Madonna, as trustees on behalf of the Madonna Family Trust.

In opposition plaintiff avers that, even though the three-year statute of limitations for negligence has run for commencing a new action against the Trustees of The Madonna Family Trust, plaintiff's action is timely interposed pursuant to CPLR §203(f).

CPLR 203(f) provides, in part:
"Claim in amended pleading. 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, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading."

The relation-back doctrine of CPLR 203(f), therefore, applies where a claim is sought to be interposed by way of amendment of the original, timely-commenced complaint, after the statute of limitations would have ordinarily run on that new claim.

The relation-back doctrine would allow plaintiff to add a new defendant to an action even after the statute of limitations has run against the new defendant provided "(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 the new party will not be prejudiced in maintaining its defense on the merits by the delayed, otherwise stale, commencement, and (3) the new party 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 that party as well." (See Pansini Stone Setting Inc., v. Crow Sutton Assoc. Inc., 46 A.D.3d 784, 786, 850 N.Y.S.2d 133 2d Dept. [2007], Buran v. Coupal, 87 N.Y.2d 173, 661 N.E.2d 978, 683 N.Y.S.2d 405 N.Y. [1995], Roseman v. Baranowski, 120 A.D.3d 482, 990 N.Y.S.2d 621 2d Dep't [2014]).

The burden is on the plaintiff to establish the applicability of the relation-back doctrine once a defendant has demonstrated that the statute of limitations has expired. The relation-back doctrine enables a plaintiff to correct a pleading error by adding either a new claim or a new party after the statute of limitations period has expired. (See Rivera v. Fishkin, 48 A.D.3d 487, 488, 852 N.Y.S.2d 284 2d Dept. [2008])

In the instant matter plaintiff has demonstrated that: (1) her claims against Mark R. Madonna, as alleged in the timely-filed complaint, are identical to her claims against the Trustees in the verified amended complaint and that both claims arose out of the same occurrence. The sole allegation that plaintiff has changed in the verified amended complaint is the allegation that the subject premises are owned by the Trust rather than Mark R. Madonna, individually; (2) it is undisputed that Mark R. Madonna and his brother Enrico J. Madonna are Trustees of The Madonna Family Trust and that the Trust is the owner of the subject premises. The Trustees and the Trust are united in interest with Mark R. Madonna, who is one of the Trustees, and by reason of that nexis can be charged with notice of the action and will not be prejudiced in maintaining their defense on the merits by the delayed commencement of the action as against the Trustees; and (3) Madonna, as a Trustee of the Trust, knew that the subject premise were owned by the Trust and not him individually, and thus, but for plaintiff's mistake in originally failing to name the Trustees, knew or should have known the action would have been brought also against the Trustees.

It is disingenuous for counsel for the Trustees to aver that a simple deed search would have allowed plaintiff to determine the true and accurate owner of the subject property. The deed lists Mark R. Madonna, as Trustee and Enrico J. Madonna, as Trustee and alternately Mark R. Madonna, as Trustee and Enrico J. Madonna, as Trustee of the Madonna Family Trust, when the holder of the subject Premises is the Madonna Family Trust and the Trustees are named co-trustees, but from time to time called Trustee, with authority to act on behalf of the trust.

On this record plaintiff has met her burden to establish each of the requisite elements to apply the relation-back doctrine pursuant to CPLR 203(f) and the branch of the motion pursuant to CPLR §214(5) dismissing the action against the Trustees as being untimely filed after the expiration of the applicable statute of limitations is denied.

The branch of the Trustees motion pursuant to CPLR §3211 seeking dismissing the action against Mark R. Madonna and Enrico J. Madonna, as Trustees on behalf of the Trust as no action lies against them in their representative capacity is denied.

The Trustees argue that the amended verified complaint is contrary to the terms of the Trust which allegedly insulates the Trustees from the bringing of claims, such as the instant matter. The Court finds this without merit.

The terms of the Trust provide, in relevant part, "No Trustee shall be liable or responsible for any loss or damage arising by reason of any act or omission to or by the Trustee… except for the Trustee's own gross negligence, willful neglect or unlawful act." This language in the trust, the private agreement among the creators of the trust and the agents of the trust, only serves to insulate the Trustees from personal liability to the trust for the Trustee's 'own gross negligence, willful neglect or unlawful act' in the performance of their duties to the trust and in no way absolves a property owner of the general duties which it owes to the public.

It is a well-settled that trustees of a trust which owned residential property, where plaintiff allegedly slipped, fell and was injured, could be sued as representatives of the trust. (See Liveo v. Hausman, 61 Misc.3d 1043, 86 N.Y.S.3d 378 Kings. Co. Sup. Ct., [September 28, 2018])

A property owner has a duty to keep the property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others (See Craig v Meadowbrook Pointe Homeowner's Assn., Inc., 158 AD3d 601, 602, 70 NYS3d 557 [2d Dept 2018], Basso v Miller, 40 NY2d 233, 241, 352 NE2d 868, 386 NYS2d 564 [1976]). Here, the trusts are the property owners. A trust, however, is a legal fiction, and cannot sue or be sued itself (Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC, 149 AD3d 127, 132, 50 NYS3d 13 1st Dept [2017]). Instead, trustees, as representatives of the trust, act on behalf of the trust to bring legal action, and can also be sued in situations where the trust may be liable. (See Raymond Loubier Irrevocable Trust v Loubier, 858 F3d 719, 722, 730 2d Cir [2017]; Ronald Henry Land Trust v Sasmor, 44 Misc 3d 51, 52, 990 NYS2d 767 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2014]). Accordingly, defendants, as trustees of the trusts, and not in their individual capacity, have a duty to keep the property in a reasonably safe condition. It would appear from defendants' motion that, if they are successful, no one is responsible for keeping the property reasonably safe. Furthermore, delegating such responsibility is contrary to the basic duty of a trustee, which is to preserve and maintain the trust assets (See Central States, Southeast & Southwest Areas Pension Fund v Central Transport, Inc., 472 US 559, 572, 105 S Ct 2833, 86 L Ed 2d 447 [1985] at 1044 -1145). On this record, the Trustees are properly named defendants in their capacity as co-trustees of the Trust, the owner of the Premises.

Accordingly, for the reasons stated above, the motion is denied.

Serve a copy of this order with notice of entry without undue delay.

Dated: May 20, 2022

KEVIN J. KERRIGAN, J.S.C.