

Resnick v West 60th St. Assoc., LLC

2023 NY Slip Op 32080(U)

June 21, 2023

Supreme Court, New York County

Docket Number: Index No. 161289/2020

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO PART **33M**

Justice

-----X

JENNIFER R. RESNICK,

Plaintiff,

- v -

WEST 60TH STREET ASSOCIATES, LLC, ALGIN
MANAGEMENT CO., LLC,

Defendant.

-----X

WEST 60TH STREET ASSOCIATES, LLC, ALGIN
MANAGEMENT CO., LLC

Plaintiff,

-against-

BISCUITS & BATH MIDTOWN WEST LLC

Defendant.

-----X

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595321/2022

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for AMEND CAPTION/PLEADINGS

Upon the foregoing documents, Plaintiff Jennifer R. Resnick’s motion seeking leave to amend the caption/pleadings to include Third-Party Defendant Biscuits & Bath Midtown West LLC (“Third-Party Defendant”) is granted.

This action arises out of an alleged trip and fall which allegedly occurred on February 14, 2019 (NYSCEF Doc. 1 at ¶ 20). Plaintiff commenced this action via summons and Complaint on December 28, 2020 (*id.*). Defendants did not answer until June 23, 2021 (NYSCEF Doc. 6). Plaintiff did not serve her bill of particulars until January 17, 2022, at which time an RJI was filed requesting a preliminary conference (NYSCEF Docs. 10-11). The Defendants filed their Third-

Party Summons and Complaint on April 19, 2022, naming Biscuits & Bath Midtown West LLC as a Third-Party Defendant (NYSCEF Doc. 14). The Third-Party Defendant did not file its Answer to the Third-Party Complaint until January 20, 2023 (NYSCEF Doc. 21). Plaintiff did not file the instant motion seeking leave to amend until February 19, 2023 (NYSCEF Doc. 26). A preliminary conference was scheduled for February 22, 2023, but it appears the parties failed to enter a preliminary conference order.

Plaintiff concedes that it could have filed an amended complaint as of right up to February 9, 2023, pursuant to CPLR § 1009 (NYSCEF Doc. 27 at ¶ 9). Plaintiff's counsel states that it failed to do so because his partner who originated the case died suddenly and unexpectedly on November 29, 2022, and Plaintiff's counsel has been extremely busy in sorting out his deceased partner's cases (*id.* at ¶¶ 6 and 10). Plaintiff asks this Court to exercise its discretion under CPLR 3025(b) in granting leave to amend since it made this motion only ten days after she would have been allowed to do so without leave pursuant to CPLR § 1009 (*id.* at ¶¶ 10 and 12).

Third-Party Defendant filed opposition on March 1, 2023 (NYSCEF Doc. 36). Third-Party Defendant argues that the instant motion must be denied because it violates the statute of limitations. Third-Party Defendant notes that the statute of limitations expired on February 14, 2022. Moreover, CPLR § 1009 does not apply because the 20-day period allotted by that rule expired on February 10, 2023, four days after Plaintiff filed this motion.

Plaintiff filed her reply on March 5, 2023 (NYSCEF Doc. 37). Plaintiff argues that her delay was *de minimis* and that Third-Party Defendant will not be prejudiced by granting leave to amend as there has yet to be a preliminary conference and it will remain in this action as a result of the Third-Party Complaint.

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]).

Plaintiff's direct claims relate back, for statute of limitations purposes, to the date of service of the third-party complaint against third-party defendant (*see* CPLR § 203[f]; *see also* *Herrera v Highgate Hotels, L.P.*, 213 AD3d 455 [1st Dept 2023] citing *Duffy v Horton Mem. Hosp.*, 66 NY2d 473, 476-477 [1985]). Moreover, Plaintiff would have been able to amend as of right pursuant to CPLR § 1009, but missed that deadline by a mere few days as a result of being inundated by the handling partner's sudden and unexpected death. Therefore, based on binding precedent, the CPLR, in an exercise of its discretion, and in the interests of justice, the Court rejects Third-Party Defendant's arguments related to timeliness.

Likewise, the Court rejects Third-Party Defendant's arguments regarding prejudice and the merits of Plaintiff's action. Third-Party Defendant will face little to no prejudice as it has been a party to the preliminary conference and all other discovery to date. Moreover, Third-Party Defendant will have to defend and participate in this action regardless due to its status as a Third-Party Defendant. Further, contrary to Third-Party Defendant's contentions, failure to provide an affidavit of merit, or even proposed amended pleadings, is not fatal to granting leave to amend (*see Johnson v Montefiore Med. Ctr.*, 203 AD3d 462, 463 [1st Dept 2022]). All that must be shown is that the proposed pleadings are not patently devoid of merit. As it is plausible that Third-Party Defendant may be directly liable to Plaintiff as a result of their alleged negligence, for purposes of

this motion, the proposed pleadings are not patently devoid of merit. Therefore, Plaintiff's motion is granted.

Accordingly, it is hereby,

ORDERED that the plaintiff's motion for leave to amend the complaint herein is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

ORDERED that the Defendants shall serve an Answer to the Amended Complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that this action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X

JENNIFER R. RESNICK,
Plaintiff,

Index No.: 161289/2020

-against-

WEST 60TH STREET ASSOCIATES, LLC,
ALGIN MANAGEMENT CO., LLC, and
BISCUITS & BATH MIDTOWN WEST LLC,
Defendants

-----X

WEST 60TH STREET ASSOCIATES, LLC, and
ALGIN MANAGEMENT CO., LLC
Third-Party Plaintiffs,

-against-

BISCUITS & BATH MIDTOWN WEST LLC
Third-Party Defendant

-----X

And it is further,

ORDERED that Biscuits & Bath Midtown West LLC be added to the caption in this matter as a Defendant and that the parties and the Clerk of the Court are to ensure that the caption is amended on any future filings accordingly, and it is further

ORDERED that the parties are directed to appear for an in-person discovery conference with the Court on August 9, 2023 at 9:30 a.m. in Room 442, 60 Centre Street. If the parties agree to a proposed discovery schedule prior to the conference, they are directed to submit it via e-mail to SFC-Part33-Clerk@nycourts.gov, which may obviate the need to appear for the conference; and it is further

ORDERED that within ten days of entry, counsel for Plaintiff shall serve a copy of this Decision and Order, with notice of entry, on all parties to this action.

This constitutes the Decision and Order of the Court.

6/21/2023
DATE

Mary V Rosado
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE