

Golanec v ELQ Indus., Inc.
2024 NY Slip Op 35237(U)
March 27, 2024
Supreme Court, Westchester County
Docket Number: Index No. 59356/2020
Judge: William J. Giacomo
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To commence the statutory time period for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.**

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CHAD A. GOLANEC,,

Plaintiff,

- against -

ELQ INDUSTRIES, INC., ABC CORPORATIONS #1 through #5, names being fictitious and unknown to the plaintiff, and JOHN DOES #1 through #5, names being fictitious and unknown to the plaintiff,

Defendants.
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Index No. 59356/2020

DECISION & ORDER

Motion Seq. 2 & 3

The following papers filed on NYSCEF as documents number 63-72,74-94 and 99-101 were read on the separate motions of defendant J. Fletcher Creamer & Son, Inc., sued as ABC Corporation #1, (Seq. no. 2) and defendant Consolidated Edison Company of New York, Inc., sued as ABC Corporation #2, (Seq. no. 3) for an order, pursuant to CPLR 3212 and 1024, granting summary judgment dismissing the complaint and all cross claims alleged against those defendants, and for such other and further relief.

Seq. no. 2

Notice of Motion/Statement of Material Facts/Affirmation in Support of
George L. Mahoney, Esq./Exhibits A-D
Memorandum of Law in Support
Plaintiff's Response to Statement of Material Facts
Affirmation in Opposition of Michael G. Del Vecchio, Esq. for Plaintiff
Affirmation in Opposition of Leslie G. Abele, Esq. for Defendant ELQ Industries
Reply Affirmation of George L. Mahoney, Esq.

Seq. no. 3

Notice of Motion/Affirmation in Support of Alexander Aviles, Esq.
Affirmation in Opposition of Michael G. Del Vecchio, Esq. for Plaintiff
Affirmation in Opposition of Leslie G. Abele, Esq. for Defendant ELQ Industries

Factual and Procedural Background

Plaintiffs commenced this action against ELQ Industries, Inc. (hereinafter Action no. 1) seeking damages for personal injuries allegedly sustained by plaintiff on April 26, 2018 as the result of a fall in a roadway due to an allegedly hazardous and dangerous defect consisting of an upraised and uneven condition. ELQ Industries, Inc. then commenced a third-party action against Heitkamp, a Division of Michels Corporation.

On April 23, 2021, plaintiff commenced a second action, under Index no. 55231/2021 (hereinafter Action no. 2), against ABC Corporations #1 through #5 and John Does #1 through #5 seeking damages for the personal injuries allegedly sustained in the same fall alleged in this action. Therein, plaintiff alleged that the defect in the roadway was caused, created, erected and otherwise existed by reason of the negligence of the defendants in the ownership, operation, management, maintenance, construction, demolition, direction, supervision, possession and control of the premises.

Thereafter, plaintiff served the summons and complaint in Action no. 2 on defendants J. Fletcher Creamer & Sons, Inc. (hereinafter "J. Fletcher Creamer") and Consolidated Edison Company of New York, Inc. (hereinafter "Con Ed") on August 18, 2021 and August 19, 2021, respectively. J. Fletcher Creamer served an answer in Action no. 2 on October 15, 2021.

On November 3, 2021, plaintiff served an amended complaint upon J. Fletcher Creamer and Con Ed, which identified those defendants in the body of the amended complaint. The caption was not amended to include those defendants.

Both defendants then served answers to the amended complaint. Con Ed served an answer to the amended complaint on November 8, 2021. J. Fletcher Creamer served an answer to the amended complaint on December 13, 2021.

By stipulation of discontinuance filed on December 29, 2021, the third-party action was discontinued.

By so-ordered stipulation entered on May 6, 2022, Action no. 2 was consolidated into Action no. 1 and the caption amended accordingly, including the removal the third-party action in light of the discontinuance. Plaintiff and defendants then engaged in discovery, attended compliance conferences, and a note of issue was filed by plaintiff after entry of a Trial Readiness Order by the Court. Plaintiff then filed a Note of Issue placing the case on the trial calendar.

Present Motion

Defendants J. Fletcher Creamer and Con Ed (hereinafter “moving defendants”) now move by separate motions for summary judgment dismissing the amended complaint and cross claims insofar as alleged against them. Moving defendants seek dismissal based upon plaintiff’s failure to amend the caption to name the actual defendants in the amended complaint in Action no. 2, despite identifying the defendants. Moving defendants also contend that plaintiff proceeded with CPLR 1024 service as to fictitious defendants without demonstrating a good faith effort to determine the existence of a party prior to commencing the action. To that end, moving defendants contend that plaintiff had more than six months to ascertain the identity of the defendants but, nonetheless, proceeded with CPLR 1024 service. Accordingly, moving defendants argue that plaintiff have failed to satisfy the three-year statute of limitations, which they assert expired on April 26, 2021. Moving defendants, therefore argue that they are entitled to dismissal of the amended complaint and cross claims insofar as alleged against them.

Plaintiff opposes defendants’ motions to dismiss based upon plaintiff’s alleged failure to satisfy the procedural requirements of CPLR 1024. Plaintiff argues that the motions are devoid of merit insofar as both moving defendants were identified, served and named in the amended complaint as the fictitious parties prior to the expiration of the statute of limitations. Plaintiff argues that although the original complaint in Action no. 2 was served within 3 years of the alleged incident, the statute of limitations actually did not expire until December 10, 2021. Plaintiff contends that the statute of limitations was tolled by the Governor’s Executive Orders during the COVID-19 pandemic from March 20, 2020 to November 3, 2020, a period of 228 days. Therefore, plaintiff asserts that moving defendants’ arguments based upon the contention that the statute of limitations expired on April 26, 2021 are without merit, and the CPLR 1024 arguments need not be reached. Plaintiff further argues that, although the moving defendants were not named in the caption of the amended complaint, they were clearly identified in the amended complaint as the fictitious corporations named in the caption.

Plaintiff also contends that, in any event, the requirements of CPLR 1024 were satisfied. Plaintiff argues, inter alia, that a good faith effort to identify the persons or entities who performed work in the area of plaintiff’s incident were made, but did not lead to the identities of those persons or entities prior to the expiration of the original statute of limitations. Plaintiff also asserts that, upon obtaining discovery from ELQ identifying the moving defendants as entities that may have

done work in the area where plaintiff's incident occurred, it timely effectuated service upon the moving defendants within 120 days of filing as required by CPLR 306-b.

Defendant ELQ, inter alia, adopts the arguments of plaintiff and notes that the moving defendants are not seeking summary judgment based on the facts of the claims or a lack of responsibility for the alleged condition. ELQ further asserts that insofar as moving defendants participated in discovery and court conferences after they were named in the amended complaint and they failed to move to strike the Note of Issue, they should not be able to avoid trial based on a procedural argument.

Discussion

CPLR 1024 permits a party to proceed against an unknown party "by designating so much of his name and identity as is known," and describe in the summons and complaint the unknown defendant in such a manner that the unknown defendant would understand that they are the intended defendant (*Bumpus v New York City Transit Auth*, 66 AD3d 26, 29 [2d Dept 2009]). CPLR 306-a, requires plaintiff to serve process upon the unknown defendant within 120 days of the filing of the summons and complaint, which may be extended by the court, upon motion (*id.* at 31). When the identity of the unknown defendant becomes known, the plaintiff then should amend the complaint.

In order to utilize CPLR 1024, however, the plaintiff must make a showing of the "exercise of due diligence, prior to the running of the statute of limitations, to identify the defendant by name and, despite such efforts was unable to do to" (*id.* at 29-30). In the absence of evidence that timely efforts were made to identify the defendants, the complaint is subject to dismissal (*id.* at 30).

In this action, plaintiff and defendant ELQ, correctly contend that the three-year statute of limitations applicable to this action was tolled from March 20, 2020 to November 3, 2020, a period of 228 days, as a result of the Governor's Executive Orders during the pandemic, and not merely suspended (*Brash v Richards*, 195 AD3d 582, 585 [2d Dept 2021]; accord *Murphy v Harris*, 210 AD3d 410, 411 [1st Dept 2022], see generally Executive Law § 29-a [2][d]). Accordingly, under the Executive Orders, the statute of limitations in this matter was tolled for 228 days from March 20, 2020 to November 3, 2020, such that the statute of limitations in this matter did not expire until December 10, 2021 (see *Chavez v Occidental Chem Corp*, 35 NY3d 492, 505 n 8 [2020]). Plaintiff's service of the amended complaint upon the moving defendants on November 3, 2021, therefore, was prior to the expiration of the statute of limitations.

Accordingly, on this motion, as argued by plaintiff, plaintiff is not required to demonstrate that it satisfied the requirements of CPLR 1024. The Court, therefore, does not need to consider the contentions of the moving defendants with respect to CPLR 1024 and plaintiff's alleged failure to demonstrate due diligence in identifying the moving defendants prior to the expiration of the statute of limitations.

Finally, although plaintiff failed to include the moving defendants in the caption of the amended complaint, this mistake does not require dismissal of the amended complaint insofar as alleged against the moving defendants as there has been no showing of prejudice.

"It is elementary that mistakes or irregularities not affecting a substantial right of a party are not fatal" (*Covino v Alside Aluminum Supply Co.*, 42 AD2d 77, 80 [4th Dept 1973]). Generally, in the absence of prejudice to a substantial right of a party, substance should be recognized over form and a defect in form can be disregarded by the court (*see* CPLR 2001; *Covino v Alside Aluminum Supply Co.*, 42 AD2d at 80; *see generally Natl Bank of N Am v State Tax Commn*, 106 AD2d 377, 378 [2d Dept 1984] [misnomer of garnishee in income execution ignored]). In relevant part, CPLR 2001 provides that, "[a]t any stage of an action, including the filing of a summons with notice, summons and complaint or petition to commence an action, the court may permit a mistake, omission, defect or irregularity, ... to be corrected, upon such terms as may be just, or, if a substantial right of a party is not prejudiced the mistake, omission, defect or irregularity shall be disregarded"

Moreover, the courts have held that an error in a caption, even the failure to name a party, is not a jurisdictional defect and can be disregarded where the defect did not cause any substantial prejudice (*Matter of Great Eastern Mall, Inc. v Condon*, 36 NY2d 544 [1975]; *Schwartzberg v State*, 121 Misc2d 1095 [Ct Claims 1983], *aff'd* 98 AD2d 902 [1983]). In *Matter of Great Eastern Mall* (36 NY2d 544), the Court reinstated the denial of respondent's motion to dismiss a petition for review of assessment of real property and held that the defect in the petition of naming only one of three assessors and failing to name the town would be disregarded as there was no evidence that the town and unnamed assessors did not receive actual notice and there is no allegation, let alone proof, of any prejudice.

Here, as in *Matter of Great Eastern Mall*, the moving defendants fail to claim any prejudice as a result of the plaintiff's failure to add the moving defendants' names to the caption in place of the fictitious companies. Moreover, there is no showing of prejudice. The moving defendants were clearly aware that they were being named as defendants in the amended complaint as they

were specifically identified in the body of the amended complaint, they served answers to the amended complaint and they also participated in discovery and the proceedings in this matter.

In any event, this Court finds that the moving defendants waived any objection to the defect in the form of the caption as they failed to specifically object to the form of the caption when the amended complaint was filed and served. Instead, the moving defendants fully participated in this proceeding for years after the service of the amended complaint and only raised the issue after the filing of the note of issue.

Accordingly, it is hereby

ORDERED that the moving defendants' motions are denied; and it is further

ORDERED that the parties are directed to appear for a virtual settlement conference on April 15, 2024 at 11:30 subject to confirmation by the virtual conference link emailed by this Court.

ORDERED that, within ten (10) days of entry, the moving defendants shall serve a copy of this Decision and Order, with notice of entry; and it is further

ORDERED that the moving defendants shall file an affidavit/affirmation of service on NYSCEF within five (5) business days of service.

The foregoing constitutes the Decision and Order of the Court

Dated: White Plains, New York
March 27, 2024



HON. WILLIAM J. GIACOMO, J.S.C.