

Melendez v Chai 555 LLC
2024 NY Slip Op 35319(U)
January 5, 2024
Supreme Court, Bronx County
Docket Number: Index No. 812163/2021E
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

-----X
HENRY MELENDEZ,

Plaintiff,

DECISION & ORDER

-against-

Index No.: 812163/2021E

CHAI 555 LLC, ATOMIC CONSTRUCTION, INC.,
KP DEVELOPERS, BRENNAC CORP., BRENNAC
CONSTRUCTION INC., POWER SURGE ELECTRIC,
INC., and ATOMIC CONTRACTING INC.,

Motion Sequence No. 3

Defendants.

-----X
CHAI 555 LLC,

Third-Party Plaintiff(s),

-against-

ATOMIC CONTRACTING INC.,

Third-Party Defendant(s)

-----X
GUZMAN, J.

Plaintiff commenced this action on September 9, 2021, to recover damages for personal injuries he allegedly sustained as a result of a trip and fall accident on September 10, 2018, on the sidewalk abutting the premises at 2389-2399 Adam Clayton Powell, Jr. Boulevard, New York, New York. Plaintiff's bill of particulars alleges that he tripped over a metal nail that was protruding from a piece of plywood on the sidewalk.

At the time of the alleged accident, a construction project was underway at the location pursuant to a construction agreement between Defendant Chai 555 LLC, the project owner and owner of the property, and Atomic Contracting, Inc. ("ACI"), which served as the general contractor. However, Plaintiff did not name ACI as a direct defendant when it commenced this action. Instead, Plaintiff named Defendant Atomic Construction, Inc. as a direct defendant, however that corporation was not involved in the project. Atomic Construction, Inc. filed a motion to dismiss the complaint on January 18, 2023. Chai 555 LLC commenced a third-party action against ACI on February 13, 2023. Shortly thereafter, on February 17, 2023, Plaintiff

filed a supplemental summons and amended complaint adding ACI as a direct defendant.¹ By stipulation dated April 13, 2023, Plaintiff discontinued this action as to Atomic Construction, Inc. See NYSCEF Doc. 112.

On the motion now before the Court, ACI moves for an Order dismissing the amended complaint and all cross-claims asserted against it pursuant to CPLR §§ 3211(a)(5) and (8) on the grounds that (1) Plaintiff's claims against ACI are time barred; and (2) Plaintiff failed to comply with CPLR § 3025.

The statute of limitations for personal injury actions is three years. CPLR § 214 (5). As noted above, Plaintiff's alleged accident occurred on September 10, 2018, however Plaintiff filed his supplemental summons and amended complaint adding ACI as a direct defendant on February 17, 2023, beyond the three-year statute of limitations. With respect to CPLR § 3025, that section provides that a party may amend its pleading once without leave of Court within twenty days after its service, and a party may amend its pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, "at any time by leave of Court or by Stipulation of all parties." Here, however, Plaintiff did not seek leave of Court prior to filing the amended complaint.²

Plaintiff opposes the motion on the grounds that his claims are timely pursuant to the relation-back doctrine, and alternatively cross-moves for an Order granting Plaintiff leave to file an additional direct action against ACI, *nunc pro tunc*.

Where, as here, it has been established that the statute of limitations has run on a claim, the plaintiff bears the burden of demonstrating the applicability of the relation-back doctrine. *Garcia v. New York-Presbyt. Hosp.*, 114 A.D.3d 615, 981 N.Y.S.2d 84 (1st Dep't 2014). For a claim asserted against a new defendant to "relate back" to the date the claim was filed against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence; (2) the new defendant is "united in interest" with the original

¹ On or about March 9, 2023, ACI filed a verified answer to the amended complaint, asserting affirmative defenses based on the statute of limitations and improper service.

² However, the Court notes that on March 6, 2023, plaintiff re-filed his Supplemental Summons and Amended Complaint after his initial filing was apparently rejected, improperly, by the Clerk. CPLR § 1009 allows a plaintiff to amend its complaint as of right "[w]ithin twenty days after service of the answer to the third-party complaint upon plaintiff's attorney. . . to assert against the third-party defendant any claim plaintiff has against the third-party defendant." Nevertheless, CPLR § 1009 does not relieve a plaintiff from the operation of the statute of limitations applicable to the claims asserted. *Liverpool v. Arverne Houses, Inc.*, 67 N.Y.2d 878, 501 N.Y.S.2d 802 (1986).

defendant, and by reason of that relationship, can be charged with notice of the action such that it will not be prejudiced in maintaining its defense on the merits; and (3) the new defendant knew or should have known that, but for a mistake by the plaintiffs as to the identity of the proper parties, the action would have been brought against it. *See Buran v. Coupal*, 87 N.Y.2d 173, 638 N.Y.S.2d 405 (1995).

There is no genuine dispute that Plaintiff's claims arise from the same conduct, transaction or occurrence. Nevertheless, Plaintiff has failed to establish "unity in interest" between ACI and Atomic Construction, Inc. "[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff." *Connell v. Hayden*, 83 A.D.2d 30, 443 N.Y.S.2d 383, 393 (2d Dep't 1981). The requirement is "more than a notice provision." *Higgins v. City of New York*, 144 A.D.3d 511, 43 N.Y.S.3d 1 (1st Dep't 2016) (citation omitted). "The test is whether the interest of the parties in the subject-matter is such that they stand or fall together and that judgment against one will similarly affect the other." *Id.* (internal quotation marks and citation omitted). "Thus, unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other." *Id.*

Here, Plaintiff contends that ACI and Atomic Construction are united in interest based solely on the fact that they are both owned by a sole shareholder, Ryan Pedram, and both have a principal place of business at 182-11 Union Turnpike, Fresh Meadows, New York. However, Plaintiff offers no facts or argument establishing that ACI and Atomic Construction would have identical defenses such that they would "stand or fall together," or that one is vicariously liable for the acts of the other. *See Mitzmacher v. Bay Country Owners*, 211 A.D.3d 1025, 182 N.Y.S.3d 127 (2d Dep't 2022) ("[i]n a negligence action, the defenses available to two defendants will be identical, and thus their interests will be united, only where one is vicariously liable for the acts of the other") (internal quotation marks and citations omitted). Indeed, in Atomic Construction's prior motion to dismiss, it argued that it did not render any work or services for the construction project at 2389-2399 Adam Clayton Powell, Jr., nor was it party to any contract with any entity pertaining to the project; instead, ACI served as the general contractor pursuant to a written agreement with Chai 555 LLC. *See* NYSCEF Doc. 52. Here, Plaintiff has presented no evidence that would support the conclusion that ACI and Atomic

Construction, Inc. had a relationship with each other which would make them vicariously liable for the other's negligence.

As noted above, Plaintiff also seeks an Order pursuant to CPLR § 205 granting him leave to file an additional direct action against ACI.³ CPLR § 205 (a) provides:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the Defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the Plaintiff, or, if the Plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon Defendant is effected within such six-month period. (Emphasis added.)

“The effect of the statute is quite simple: if a timely brought action has been terminated for any reason other than one . . . specified in the statute, the plaintiff may commence another action based on the same transactions or occurrences within six months of the dismissal of the first action” and obtain the benefit of the prior timely filing for statute of limitations purposes.” *ACE Sec. Corp. v. DB Structured Prods., Inc.*, 38 N.Y.3d 643, 176 N.Y.S.3d 590 (2022), *quoting* *George v. Mt. Sinai Hosp.*, 47 N.Y.2d 170, 175, 417 N.Y.S.2d 231 (1979).

Here, Plaintiff contends that he mistakenly named Atomic Construction, Inc. as the general contractor, this “mistake” was excusable and reasonable under the circumstances, and “a technical error relating to the corporate entity name in this action will not bar recommencement of the action pursuant to CPLR § 205.” Nevertheless, CPLR § 205 (a) is not available to Plaintiff because the action against ACI was not timely commenced. *See Maldonado v. Maryland Rail Commuter Serv. Admin.*, 91 N.Y.2d 467, 672 N.Y.S.2d 831 (1998). Accordingly, for the foregoing reasons, it is hereby:

ORDERED AND ADJUDGED that the motion filed by Defendant Atomic Contracting, Inc. to dismiss Plaintiff's amended complaint insofar as asserted against it is GRANTED; and it is further

³ To the extent that Plaintiff's affirmation in opposition to ACI's motion to dismiss and in support of his cross-motion references names, individuals, facts, and dates that have nothing to do with this lawsuit, such facts have been disregarded by this Court.

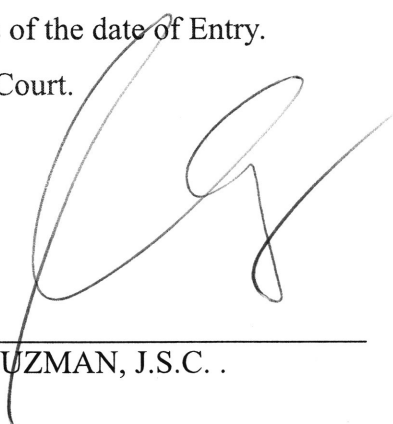
ORDERED AND ADJUDGED that Plaintiff's cross-motion to deem the supplemental summons and amended complaint timely filed, *nunc pro tunc*, is DENIED and it is further

ORDERED AND ADJUDGED that Plaintiff's cross-motion for leave to commence a new action against Defendant Atomic Contracting, Inc. is denied; and it is further

ORDERED AND ADJUDGED that Plaintiff shall serve a copy of this Decision & Order with Notice of Entry upon Defendants within thirty days of the date of Entry.

The foregoing constitutes the Decision & Order of the Court.

Dated: Bronx, New York
January 5, 2024



HON. WILMA GUZMAN, J.S.C. .