

**Garcia v Cali CW Realty Assoc. L.P.**

2022 NY Slip Op 34818(U)

September 30, 2022

Supreme Court, Westchester County

Docket Number: Index No. 68297/2019

Judge: Sam D. Walker

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.

To commence the statutory time 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. SAM D. WALKER, J.S.C.

-----X  
MARISELA GARCIA,

Plaintiff,

DECISION & ORDER  
Index No. 68297/2019  
Motion Sequence 1 & 2

-against-

CALI CW REALTY ASSOCIATES L.P. and ABC, INC.,  
  
Defendants.

-----X

The following papers were reviewed on the defendants' motion to dismiss, pursuant to CPLR 3211:

- Notice of Motion/Affidavit/Exhibits A-C
- Affirmation in Support/Exhibits 1-20
- Memorandum of Law in Support
- Notice of Cross-Motion/Affirmation//Exhibit A
- Memorandum of Law in Opposition and in Support of Cross-Motion
- Affirmation in Opposition to Cross-Motion
- Affirmation in Further Support of Motion & in Reply to Opposition
- Memorandum of Law in Opposition to Cross-Motion

Based upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiff, Marisela Garcia ("Garcia/plaintiff"), commenced this action by filing a summons and complaint on November 5, 2019, against the defendants, Mack-Cali CW Realty Associates LLC s/h/a Cali CW Realty Associates L.P. ("Mack-Cali") and ABC, Inc. ("ABC"), alleging that she was injured on September 18, 2013, at 399 Executive Blvd, Elmsford, New York 10523. The building at that location was owned by Mack-Cali at the time of the alleged incident and leased to Town Sports International, LLC ("TSI"), the plaintiff's employer. Prior to the commencement of this action,

Mack-Cali sold the premises and assigned its lease with TSI to Clearbrook Cross LLC.

Mack-Cali served and filed an answer asserting that the plaintiff's claims were time barred by the statute of limitations, in that, the alleged incident occurred more than three years prior to filing of the actions. Mack-Cali also asserted affirmative defenses that the plaintiff's alleged injuries were caused by others over whom Mack-Cali has no control and/or for whom Mack-Cali has no vicarious liability; that Mack-Cali cannot be held liable for acts of third persons who are not Mack-Cali's servant and/or employees; and Mack-Cali had no actual or constructive notice of any defect or dangerous condition.

The plaintiff now files the instant motion for an Order pursuant to CPLR 3211(a)(5), dismissing the complaint as to Mack-Cali, with prejudice and for such other and further relief as the Court may deem just, equitable, and proper. Mack-Cali argues that the complaint is barred by the applicable statute of limitations and granting the plaintiff leave to amend the complaint would be prejudicial to Mack-Cali.

On January 6, 2020, Garcia's counsel informed Mack-Cali that Garcia had retained new counsel, that the incident date as alleged in the complaint was incorrect and that it was her intention to amend the complaint to correct the incident date to May 6, 2017. Mack-Cali agreed to consider stipulating to the proposed amendment, but claims that Garcia ignored Mack-Cali's written requests for a draft amended complaint and responses to Mack-Cali's outstanding discovery requests.

TSI filed for bankruptcy on September 14, 2020, and in December 2020, TSI's assets, including its lease for the premises, were sold and assigned to a successor company free of any pre-existing obligations. Mack-Cali avers that it was not notified with the notice of bankruptcy filing, since it was no longer TSI's landlord. Mack-Cali further contends that the plaintiff's failure to amend her complaint prevented Mack-Cali from impleading TSI for breach of its lease agreements to defend and indemnify Mack-Cali; and from tendering its defense and indemnity to TSI's insurer, since the plaintiff's claims were facially time barred and any third-party pleading based on the plaintiff's time-barred complaint would be subject to dismissal and not covered by any insurer.

Mack-Cali contends that as of the date of the filing of the motion, the plaintiff had not yet moved for leave to file an amended complaint and any motion to amend should be denied with prejudice, because the plaintiff's failure to amend her complaint promptly, has substantially prejudiced Mack-Cali by preventing it from preparing its defense and taking measures to support its position, in that, TSI was solely responsible for the premises' condition on the day of the plaintiff's alleged fall and allowing the complaint to be amended would now required Mack-Cali to fund its defense with no ability to pursue its once viable claims for contractual defense and indemnity against a now bankrupt entity that was solely responsible for the premises' condition on the day of the plaintiff's alleged incident.

Garcia, by her attorney, opposes the motion and by cross-motion seeks an Order pursuant to CPLR 3025(b), denying Mack-Cali's motion to dismiss; granting Garcia leave to amend the complaint to correct the spelling of Mack-Cali's true name and the incident date; striking Mack-Cali's affirmative defense based on the statute of limitations' ordering Mack-Cali comply with the Preliminary Conference Order; remanding the matter to the discovery part so that a new discovery schedule can be instituted; and awarding any other relief the Court deems right and just.

The plaintiff's attorney argues that the bankruptcy regulations make clear that any creditor may file a claim even if his claim is contingent, unliquidated or disputed and the defendant's attorney did not have to wait for the complaint to be amended to file a claim with the bankruptcy court. The attorney contends that Mack-Cali's attorney should have filed with the bankruptcy court at the point when the parties consented between themselves to amend the complaint, if not earlier. The plaintiff's attorney contends that there is no reason Mack-Cali needed to wait for the amendment of the complaint to put the carrier on notice and the defendant should have notified the carrier about the incident once it learned about this lawsuit.

The plaintiff's attorney asserts that the parties were moving forward with the litigation, with all sides realizing that the complaint would need to be rectified regarding the misstated date of the incident and the mislabeled defendant, when in March 2020, the Covid-19 pandemic struck, bringing the litigation to a grinding halt. The governor directed that all non-essential businesses were to close and therefore, the plaintiff's law offices were closed. The attorney further asserts that the governor also tolled the statute of limitations and Chief Administrative Judge Lawrence K. Marks issued an Administrative Order (AO/78/20), directing that the county clerk or courts not to accept papers for filing. On May 20, 2020, Judge Marks directed that e-filing through the NYSCEF system would be restored in several counties, including New York City, as of May 25, 2020, but the Executive Order tolling all time limitations, was continued, ultimately expiring on November 3, 2020. The attorney states that their offices were constantly shutting down due to Covid-19 scares and the office suffered disruption due to personnel issues.

The plaintiff's attorney also contends that during such time, Mack-Cali's counsel ignored the Preliminary Conference Order and did not provide any of the discovery demanded, such as insurance information, witness identities, opposing party statements, photographs or the lease and never sought to move forward with depositions. The plaintiff's attorney argues that the defendant's attorney had every opportunity to move forward with the case, but instead chose to do nothing and any prejudice is caused by the defendant's attorney's inaction.

The plaintiff's attorney proffers that leave to amend a complaint is freely given and delay in making the application is not grounds for denying an application to amend,

but rather the focus is on whether the amendment would cause prejudice. To establish prejudice, there must be some indication that the opposing party has incurred some change in position or hindrance in the preparation of the case, which could have been avoided had the original pleading contained the proposed amendment. The attorney argues that where the party opposing the motion had actual notice of the grounds for which the application for the amendment is based, the amendment will almost always be permitted.

The plaintiff's attorney further argues that courts routinely permit parties to resolve mistakes in naming of a party; there was no loss of opportunity to file a claim with the bankruptcy court or to make a claim with the defendant's insurance carrier; the purported loss of the right to indemnification, to make a bankruptcy claim or to notify the insurance carrier, does not constitute prejudice as envisioned by CPLR 3025. The attorney also argues that CPLR 1003 permits parties to be added by leave of court at any stage of the action and CPLR 203, the relation back statute allows the addition of a party after the applicable statute of limitations has passed.

Mack-Cali opposes the cross-motion, arguing that the proposed amendment is patently devoid of merit and the relation-back doctrine does not allow the plaintiff to resurrect her time-barred claims. The defendant's attorney argues that the complaint was time-barred when filed and the plaintiff's attorney had actual knowledge of the defect in the pleading within two months of filing the complaint and four months remained to timely assert negligence based on the newly asserted incident date, but the plaintiff's attorney did nothing until Mack-Cali moved to dismiss and only then did the plaintiff's attorney cross-move to amend the complaint to assert a now time-barred cause of action. Mack-Cali argues that the plaintiff's attorney's delay in moving to amend the complaint, materially prejudiced Mack-Cali and caused Mack-Cali to forfeit third-party claims for contractual defense and indemnity against its tenant.

Mack-Cali contends that the plaintiff cannot rely on the relation-back doctrine, which permits a new theory of recovery if it arises from the same transactions alleged in the original complaint, because it cannot be argued that the plaintiff's new claim of May 6, 2017 arose out of the September 18, 2013 incident. Mack-Cali further contends that the proposed amendment is patently devoid of merit as a matter of law due to the cause of action being time-barred under the applicable statute of limitations. Mack-Cali argues that the plaintiff's attorney offers no credible reason for failing to amend the complaint in January 2020, when the error was first detected and before Covid-19 caused the courts to shut down, nor does the attorney explain why the motion to amend was not made when the courts re-opened.

Mack-Cali next reiterates that the plaintiff's attorney's delay in amending the complaint, caused Mac-Cali to forfeit its contractual defense and indemnity claims against its tenant and to assert a claim in the tenant's bankruptcy proceeding. The defendant's attorney argues that a third-party complaint based on a time-barred action would be dismissed and possibly subject to sanctions as frivolous. Mack-Cali states that

based on a May 6, 2017 incident date, when the tolling due to Covid-19 went into effect, the plaintiff had forty-six days to timely re-commence the action without the necessity of a motion and when the toll terminated on November 4, 2020, the plaintiff had forty-six days or until December 20, 2020, to recommence the action, but the plaintiff's attorney only provided a proposed amended complaint on December 22, 2020.

Defendant's counsel also avers that it tendered its defense and indemnity of the plaintiff's claims to National Casualty Company, by letter dated April 2, 2020, and the insurer denied any obligation, stating that the action alleges that the plaintiff's injury occurred on September 18, 2013 and the National Casualty Policy only potentially provides coverage for bodily injuries that occur during the period July 1, 2016 to July 1, 2017 and because the underlying action alleges that the injury occurred several years before the policy period, National Casualty has no obligation to defend and/or indemnify Cali CW, Mack-Cali or any other party in connection with the underlying action<sup>1</sup>.

### DISCUSSION

Rule 3211 of the Civil Practice Law and Rules provides, in relevant part that, [a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds;

(N.Y. Civ. Prac. L. & R. 3211[a][5]).

"In resolving a motion to dismiss pursuant to CPLR 3211(a)(5), this Court must accept the facts as alleged in the complaint as true and accord the plaintiff the benefit of every possible favorable inference" (*Elia v Perla*, 150 AD3d 962, 963 [2d Dept 2017]). The defendant bears the initial burden to demonstrate, prima facie, that the time within which to commence the action has expired. (*Plain v Vassar Bros. Hosp.*, 115 AD3d 922, 923 [2d Dept 2014]). "If the defendant satisfies this burden, the burden shifts to the plaintiff to raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period" (*Elia v Perla @ 964*).

Upon viewing the evidence in a light most favorable to the non-moving party (*Pearson v Dix McBride, LLC*, 63 AD3d 895, 895 [2d Dept 2009]), and upon bestowing the benefit of every reasonable inference to that party (*Rizzo v Lincoln Diner Corp.*, 215 AD2d 546, 546 [2d Dept 1995]), the Court finds for the defendant. In this case, the

---

<sup>1</sup> Plaintiff's attorney objected to Mack-Cali's inclusion of the letters requesting coverage and the denial, due to them being included in the reply for the first time. However, the Court has no issue with the inclusion of these letters, since the plaintiff's attorney specifically stated in the opposition to the motion to dismiss that the defendant's counsel failed to timely submit a request for coverage.

complaint alleged that the incident occurred on September 18, 2013, which made the action time barred due to the three-year statute of limitations. However, the plaintiff's incoming counsel informed Mack-Cali's attorney on January 6, 2020, that the date of the incident was incorrectly stated and the correct date was May 6, 2017, which is within the statute of limitations. The plaintiff's new attorney also filed a notice of appearance and consent to change attorney on January 6, 2020. Nevertheless, despite having informed the defendant's attorney of the error in the date and the intent to file an amended complaint, the attorney failed to file and serve an amended complaint, even after being served with three letters by the defendant's attorney in February 2020, March 2020 and April 2020 and it was not until after Mack-Cali's motion to dismiss was served and filed, that the plaintiff's attorney then filed a motion to amend the complaint. While the Court is sympathetic toward the plaintiff's attorney with regard to the Covid-19 and other personnel issues the office experienced, the Court also notes that it was almost three months from the plaintiff's attorney first appearing on the case before the courts were closed because of Covid-19, during which time the attorney not only failed to file an amended complaint, but failed to respond to the defendant's attorney's correspondence requesting a copy of an amended complaint.

Further, notwithstanding the plaintiff's attorney's assertion with regard to bankruptcy court, Mack-Cali had sold the property and assigned the lease, prior to the commencement of this action and was not a TSI creditor when TSI filed for bankruptcy, therefore, it received no notice of the bankruptcy filing. Additionally, even if Mack-Cali had notice of the bankruptcy filing, a time-barred complaint is an insufficient basis for a potential or contingent claim in the bankruptcy proceeding.

With regard to the plaintiff's motion to amend, "[a]pplications for leave to amend pleadings under CPLR 3025(b) should be freely granted unless the proposed amendment (1) would unfairly prejudice or surprise the opposing party, or (2) is palpably insufficient or patently devoid of merit," *Longo v. Long Island Railroad* 116 A.D.3d 676, 983 N.Y.S.2d 579 (2d Dept. 2014).

In this case, there is no dispute that the statute of limitations had expired by the time the plaintiff moved for leave to amend the complaint to modify the date of the incident. The plaintiff's attorney argues that CPLR 1003 permits the Court to add a party by leave of court, at any stage of the action and CPLR 203, the relation-back doctrine, allows the addition of a party after the applicable statute of limitations has expired, with the burden being on the plaintiff to establish that the doctrine applies" (*Rivera v Wyckoff Heights Medical Center*, 175 AD3d 522, 523-524 [2d Dept 2019]).

"To establish the applicability of the relation-back doctrine, a plaintiff must demonstrate that (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 notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her; 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 timely commenced against him or her as well" (*Id.* @ 524). "The "linchpin" of the relation back doctrine is whether the new defendant had notice within the applicable limitations period" (*Id.*).

The Court is unclear as to how the relation-back doctrine or CPLR 1003 may be utilized in this case. TSI has already been discharged in bankruptcy and therefore, Mack-Cali would not benefit by adding TSI as a third-party defendant. Also, the relation-back doctrine is not applicable, because the Mack-Cali and TSI are not united in interest, since "[p]arties are united in interest only where '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'" (*Gatto v Smith-Eisenberg*, 280 AD2d 640, 641 [2d Dept 2001]; *Desiderio v Rubin*, 234 AD2d 581, 583]). "Further, parties' interests are united only where one is vicariously liable for the acts of the other" (*Id.*). Mack-Cali and TSI are not united in interest and Mack-Cali would have brought a third-party claim against TSI for contractual indemnification, if TSI had not filed for bankruptcy. To the extent the plaintiff's attorney is suggesting that the relation-back doctrine and CPLR 1003 may be used to add Mack-Cali as the correct defendant instead of Cali CW Realty Associates L.P. as filed, such change does not address the issue of TSI's bankruptcy and the prejudice to Mack-Cali by the plaintiff's delay in amending the complaint. Therefore, the Court finds that Mack -Cali would be unfairly prejudiced by the granting of the motion to amend the complaint.

Accordingly, based on the foregoing, it is

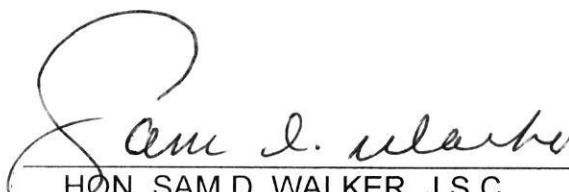
ORDERED that the defendant's' motion to dismiss is granted; and it is further

ORDERED that the plaintiff's motion for leave to amend the complaint is denied; and it is further

ORDERED that the action is dismissed.

The foregoing constitutes the Opinion, Decision and Order of the Court.

Dated: White Plains, New York  
September 30, 2022

  
HON. SAM D. WALKER, J.S.C.