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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

Present: **HON. RANDY SUE MARBER**

JUSTICE

TRIAL/IAS PART 13

X

ELENA DREDGER and HENRY DREDGER,

Plaintiffs,

Index No.: 008602/12

Motion Sequence...04

Motion Date...05/12/14

-against-

114 OLD COUNTRY ROAD, LLC., SUTTON &
EDWARDS, INC., ARMAND REGATEIRO
CONTRACTORS, LTD, PINE DRIVE
CONSTRUCTION, LLC, and THE ESTATE OF
ARMAND REGATEIRO, by Armand Regateiro,
III, as Administrator,

Defendants.

X

114 OLD COUNTRY ROAD, LLC.,

Third-Party Plaintiff,

-against-

ARMAND REGATEIRO and PINE DRIVE
CONSTRUCTION,

Third-Party Defendants.

X

Papers Submitted:

Notice of Motion.....X

Affirmation in Opposition.....X

Reply Affirmation.....X

Upon the foregoing papers, the motion by the Plaintiffs, ELENA DREDGER and HENRY DREDGER, seeking and order: (1) granting leave, pursuant to CPLR §§ 3025(b) and 1003, to add "COLLIERS INTERNATIONAL LI MANAGEMENT, LLC F/K/A SUTTON & EDWARDS MANAGEMENT, LLC" (hereinafter "Sutton LLC") as a party and to serve the annexed Proposed Supplemental Summons and Amended Verified Complaint on that entity; or (2) alternatively, pursuant to CPLR §§ 3025 (b), 305 and 2001, granting leave to amend the Complaint to substitute Sutton LLC in place of the named party "SUTTON & EDWARDS, INC." (hereinafter "Sutton Inc.") and to serve the annexed Proposed Supplemental Summons & Amended Verified Complaint on that entity; or (3) alternatively, pursuant to CPLR §§ 3025(b) and 1003, granting leave to add the entity, Sutton LLC, as a party and to serve the annexed Proposed Supplemental Summons and Amended Verified Complaint on that entity and Equitably Estopping that entity from pleading the defense of the Statute of Limitations; or (4) alternatively, Equitably Estopping Defendant, 114 OLD COUNTRY, (hereinafter "114 Old Country") from raising any defense for which they can claim that Sutton LLC is liable to Plaintiff instead of Old Country; and (5) pursuant to CPLR § 3025 (b), permitting the Plaintiff to Amend her Verified Complaint with regard to Defendants, ARMAND REGATEIRO CONSTRUCTION (hereinafter "Regateiro Construction"), ARMAND REGATEIRO and PINE DRIVE CONSTRUCTION, LLC. (hereinafter "Pine Drive"), to reflect their liability due to the negligent repair they made to the area where Plaintiff was caused to fall and sustain serious injuries; and (6) pursuant to

CPLR § 3025 (b), permitting Plaintiff to amend her Bill of Particulars to allege negligence on the part of the Defendants due to insufficient lighting in the area where Plaintiff fell and became injured, is determined as hereinafter provided.

The Plaintiff, Elena Dredger, (hereinafter the "Plaintiff") commenced this action (hereinafter referred to as Action No. 1) on June 9, 2010 against the Defendant, 114 Old Country, seeking damages for injuries she allegedly sustained as a result of a trip and fall accident in a parking lot located at 114 Old Country Road, Mincola, New York. The Defendant, 114 Old Country, served a Third-Party Complaint against Third Party Defendant, Armand Regateiro and Pine Drive on June 10, 2011.

On February 29, 2012, Action No. 1 was certified. The Plaintiff was produced for a deposition in Action No. 1 on August 29, 2012. However, discovery in this action is still ongoing.

On July 9, 2012, the Plaintiff commenced a separate action (hereinafter Action No. 2) to include the Defendants, Sutton and Armand Contractors, which was based on the same trip and fall incident.

On November 16, 2012, the parties entered into a Preliminary Conference Order in Action No. 2. The Plaintiff alleges that on December 27, 2012, the Plaintiffs' counsel was informed that the Defendants' counsel in Action No. 1 would not be producing their clients for depositions scheduled for December 28, 2012 because they did not want to produce their clients for multiple depositions. Accordingly, the Plaintiffs' counsel cancelled

the deposition of the Plaintiff's husband, Henry Dredger.

On January 3, 2013, the Plaintiff filed a Motion to Consolidate Actions No. 1 and No. 2. By Order by the Honorable John Galasso, J.S.C., dated February 5, 2013, the two actions were consolidated under Index No. 8602/2012 and the caption was amended. (*See* Order by the Honorable John Galasso, J.S.C., dated February 5, 2013, annexed to the Affirmation in Support of Motion as Exhibit "L")

The instant motion was filed on March 29, 2013 with an original return date of April 30, 2013. However, the action was stayed due to the death of the Defendant, Armand Regateiro. The Estate of Armand Regateiro, by Armand Regateiro, III, as Administrator, was substituted in place of Armand Regateiro, individually. The stay was lifted pursuant to an Order by the Honorable Thomas P. Phelan, J.S.C., dated April 29, 2014 and the caption was amended accordingly.

The Plaintiffs move, *inter alia*, to add Sutton LLC as a Defendant to this action. The Plaintiffs allege that Sutton LLC, which up until recently was known as Sutton & Edwards Management, LLC., maintains the premises at 114 Old Country Road, owned by the Defendant, 114 Old Country. The Plaintiffs contend that the Defendant, 114 Old Country, waited until the statute of limitations expired to exchange a management agreement, which was, in essence, a maintenance agreement, in an apparent attempt to mislead the Plaintiffs from learning the Defendant, Sutton's role due to common ownership and officers of the two entities.

Specifically, in support of its motion, the Plaintiffs argue that the Defendant, 114 Old Country, served its untimely responses to discovery demands on November 20, 2012, wherein it provided the management agreement, which identified Sutton LLC, for the first time. The Plaintiffs contend that the Defendant, 114 Old Country, served this document for the first time even though the action was two years old and the Plaintiffs previously requested "copies of third-party contracts for maintenance of the subject premises" in its initial Notice of Combined Demands. (*See* Notice of Combined Demands dated, November 19, 2010, annexed to the Affirmation in Support as Exhibit "M")

The Plaintiffs further contend that at some time after the incident, the Defendant, Sutton, changed its name to Sutton LLC and is currently operating under that name. The Plaintiffs argue that despite it being past the three year statute of limitations for negligence claims, they should be permitted to add Sutton LLC as a defendant in this action because it is a party united in interest with the Defendant, 114 Old Country, who was timely served before the expiration of the statute of limitations. The Plaintiffs argue that the relation back doctrine should apply because: (1) the claims arise out of the same incident; (2) 114 Old Country and Sutton LLC are united in interest in that they are both liable for failing to maintain the premises in a reasonably safe condition and neither party could have a defense that the other does not and there is not prejudice because discovery is in its infancy; and (3) but for the mistake in identity, the Plaintiffs would have brought this action against Sutton LLC as well. The Plaintiffs contend that based on the commonality of ownership, it appears

that the Defendant, 114 Old Country, engaged in deliberate conduct to keep the Plaintiffs from learning of the existence of the agreement between the Defendants, 114 Old Country and Sutton LLC.

The Plaintiffs contend the Defendant, 114 Old Country's deliberate action is evidenced by its failure to disclose the management agreement in a timely manner and the fact that it impleaded two parties, but failed to implead Sutton LLC, the party it contracted to manage and maintain the property, which are the same claims it brought against the Third-Party Defendants.

The Plaintiffs argue that based on the foregoing, this Court should permit them to serve a Supplemental Summons and Verified Complaint on Sutton LLC and find it as timely served.

In the alternative, the Plaintiffs argue that it should be permitted to substitute Sutton LLC in place of Sutton Inc. pursuant to CPLR § 305 (c). The Plaintiffs argue that the Summons and Complaint was served on Sutton Inc., in what was then considered Action No. 2, on July 16, 2012, which was before the statute of limitations expired. The Plaintiffs assert that Sutton Inc. was properly served at 1981 Marcus Avenue, Lake Success, New York 11042, which is the same location designated with New York State Division of Corporations for service of process by Sutton LLC. The Complaint clearly set forth that a person was injured at the premises located at 114 Old Country Road and that Sutton Inc. operated, managed, maintained and controlled those premises. The Plaintiffs contend that these

allegations were sufficient to inform Sutton LLC that, as the party that had maintenance obligations on the premises, it was the intended defendant in this action.

The Plaintiffs further contend that there is an undeniable connection between ownership, officers and management of Sutton Inc., 114 Old Country and Sutton LLC. The Plaintiff contends that Alan Rosenberg, who signed a leasing contract between 114 Old Country and Sutton Inc., on behalf of Sutton Inc., also signed a management contract between 114 Old Country and Sutton LLC, on behalf of Sutton LLC, and is the registered agent on behalf of 114 Old Country. The Plaintiffs contend that it meant to sue the managing agent for the premises owned by 114 Old Country and that it was not until November 26, 2012 that the Plaintiffs were provided with the management agreement and realized that Sutton LLC should be a party to this action.

The Plaintiffs contend that it met both prongs necessary to substitute a party. First, the Plaintiffs argue that it acquired jurisdiction over the intended misnamed Defendant, Sutton LLC, in that it was fairly apprized it was the intended party because Alan Rosenberg is affiliated with both entities, service of process was made at the address for both parties and the Summons and Complaint made clear that the Plaintiffs were seeking to sue the party contracted to manage and maintain the property. Second, the Plaintiffs contend that Sutton LLC will not be prejudiced as discovery is in its infancy and its related entities have already taken part in the discovery that has already been completed.

In another alternative argument, the Plaintiffs contend that if the Court does

not find that Sutton LLC and 114 Old Country Road are united in interest, it should be permitted to add Sutton LLC as a party and Sutton LLC should be estopped from pleading the Affirmative Defense of the Statute of Limitations due to the Defendants allegedly deliberate failure to disclose the management agreement between 114 Old Country and Sutton LLC in response to the Plaintiffs' timely demand. The Plaintiffs contend that this Court should apply the doctrine of equitable estoppel because the Defendant, 114 Old Country, provided a misleading answer to the Plaintiff's initial demands and failed to disclose its relationship with Sutton LLC.

In a third alternative argument, the Plaintiffs request that the Defendant, 114 Old Country, be equitably estopped from raising the defense that Sutton LLC is liable. The Plaintiffs point to their allegations of the Defendant, 114 Old Country Road's misconduct and deception in regards to identifying Sutton LLC and failing to implead Sutton LLC as a Third-Party Defendant. The Plaintiffs argue that based on that conduct, the Defendant, 114 Old Country, should not be permitted to benefit from such conduct by raising any defense for which they claim that Sutton LLC is liable.

The Plaintiffs' instant motion also seeks to amend its Verified Complaint with respect to the allegations against the Defendants, Regateiro Construction, Armand Regateiro and Pine Drive. The Plaintiffs assert that based on the management agreement it appears that the negligence of the Defendants, Regateiro Construction, Armand Regateiro and Pine Drive stems from the negligent repair of the surface creating the dangerous condition. This was

different than what was suggested by the Defendant, 114 Old Country's response to the Plaintiffs' initial discovery demands. The Plaintiffs contend that there cannot be prejudice to the Defendants because they have not been deposed, they have engaged in virtually no discovery, they have been aware of their roles in the matter since before this action was commenced and the negligence alleged stems from the same facts as alleged in the original Verified Complaint.

Finally, the Plaintiffs request that they be permitted to amend their Bill of Particulars to add an allegation of negligence due to insufficient lighting in the area of the enclosed parking lot where the Plaintiff was allegedly caused to trip and fall and sustain serious physical injury. The Plaintiffs contend that they will be seriously and irrevocably prejudiced if not permitted to amend their Bill of Particulars because "the amendment to the Bill of Particulars in the respects requested is absolutely indispensable to a proper presentation of the Plaintiff's claim and is completely proper." (*See* Affirmation in Support of the Plaintiffs' Motion at ¶ 83)

In opposition to the Plaintiffs' motion, the Defendant, 114 Old Country, argues that the Relation Back Doctrine does not exempt the Plaintiffs' claim against Sutton LLC from the Statute of Limitations. The Defendant, 114 Old Country, further contends that it is not united in interest with Sutton LLC for the purposes of the Relation Back Doctrine because they have different defenses available to them. The Defendant, 114 Old Country, contends that the Plaintiffs' decision to sue Sutton Inc. and not Sutton LLC is not an

excusable mistake because they received a copy of the Incident Report in April 2011, which identifies Sutton LLC and its address as the management company.

The Defendant, 114 Old Country, also contends that it did not mislead or deceive the Plaintiffs, but answered the discovery demands served on it. The Defendant, 114 Old Country, contends that the Plaintiffs' initial demands merely asked for "copies of third-party contracts for maintenance of the subject premises" not management contracts. The Defendant, 114 Old Country, asserts that it responded to the demand provided and when the Plaintiffs served another demand requesting a "copy of agreement between agent and landlord", it provided such contract.

The Defendant, 114 Old Country, contends that the Plaintiffs cannot attack the substantive rights of Sutton LLC because it is not presently a party to this action and there is no jurisdiction over Sutton LLC at this time.

Further, the Defendant, 114 Old Country, contends that the Plaintiffs' request to bar it from relying on the "out-of-possession" contract should be denied because it did nothing willful or contumacious to justify such sanction. The Defendant, 114 Old Country, contends that it did not prevent the Plaintiffs from commencing a timely action against Sutton LLC and that a reasonably diligent inquiry into the documents already in the Plaintiffs' possession would have revealed the identity of the proper defendant.

Finally, the Defendant, 114 Old Country, argues that the Plaintiffs' request to amend the Bill of Particulars is devoid of merit in light of the Plaintiff, Elena Dredger's

deposition testimony. The Defendant, 114 Old Country, contends that the Plaintiff testified that she could see where she was able to see okay and that she could see where she was going. (See Affirmation in Opposition at ¶ 30 and EBT Transcript of the Plaintiff annexed to the Affirmation in Opposition as Exhibit "K", p. 75, l. 22-25, p. 76, l. 2-6) The Defendant, 114 Old Country, argues that the Plaintiff's sworn testimony establishes that lighting in the parking area where the incident occurred played no role in the accident. Accordingly, the Defendant, 114 Old Country, asserts that the amendment is not proper. Further, the Defendant, 114 Old Country, contends that it would suffer irreparable prejudice if the Plaintiffs were permitted to assert a claim for negligent lighting because four years have elapsed since the date of the alleged accident and any expert opinion as to the sufficiency of the lighting would be speculative and inadmissible.

The Defendant, 114 Old Country, does not set forth any arguments in opposition to the Plaintiffs' request to amend the complaint as against the Defendants, Regateiro Construction, Armand Regateiro and Pine Drive.

In their Reply in further support of the instant motion, the Plaintiffs argue that the Defendant, 114 Old Country, is not an out-of-possession landlord because it retained control over the property by requiring its approval of expenses over \$5,000.00 in any one accounting category of Sutton LLC's approved budget. The Plaintiffs argue that the Defendant, 114 Old Country, also failed to assert the out-of-possession landlord defense as an affirmative defense in its answer. Thus, the Plaintiffs argue that it could not have known

that the Defendant, 114 Old Country, had a management contract with a third party and the fact that the Defendant, 114 Old Country, only raised the out-of-possession landlord defense after the expiration of the statute of limitations bolsters the Plaintiffs' argument that the Defendant, 114 Old Country, was misleading the Plaintiffs by failing to disclose the management relationship with Sutton LLC. The Plaintiffs argue that despite the Defendant, 114 Old Country's contention that it sufficiently responded to the Plaintiffs' first demand, the demand for maintenance contracts would include management contracts because a management company contracts to maintain or repair a property.

Further, the Plaintiffs argue the Defendant, 114 Old Country, failed to oppose the Plaintiffs contention that its failure to name Sutton LLC as a party before the expiration of the statute of limitations was an excusable mistake. The Plaintiffs' contend that their error was not strategic or meant to disrupt the litigation.

With regard to the Defendant, 114 Old Country's contention that there is no jurisdiction over Sutton LLC, the Plaintiffs argue that Sutton LLC was properly served with the motion along with the proposed Amended Complaint, which gives the Court jurisdiction over it. However, Sutton LLC failed to submit opposition to the Plaintiffs' motion.

Finally, the Plaintiffs argue that it should be permitted to amend the Bill of Particulars regarding insufficient lighting because they have evidence of insufficient lighting. The Plaintiff, Henry Dredger, took photographs of the premises the day after the incident. The Plaintiffs allege that such photographs show the lighting insufficiency by comparing the

lighting inside the garage to the lighting in areas outside of the garage. (See Photographs annexed to the Reply Affirmation as Exhibit "E") The Plaintiffs contend that an expert report is not necessary to establish whether the lighting was sufficient because it is something that a jury can determine. The Plaintiffs argue that the Defendant, 114 Old Country, cannot claim prejudice because it has possession of all the maintenance records concerning the condition of the property.

The Plaintiffs contend that it is appropriate for them to add Sutton LLC based upon the "Relation Back Doctrine" since the statute of limitations has expired. For the rule allowing relation back to the date of service or filing of the original complaint under CPLR § 203 (b) or (c) to be operative in an action in which a party is added beyond the applicable limitations period, a plaintiff is required to prove 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 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." (*Austin v. Interfaith Med. Ctr.*, 264 A.D.2d 702, 703 [2nd Dept. 1999]; see *Buran v. Coupal*, 87 N.Y.2d 173, 178 [1995]; *Mondello v. New York Blood Ctr.-Greater N.Y. Blood Program*, 80 N.Y.2d 219, 226 [1992]; *Nani v. Gould*, 39 A.D.3d 508, 509 [2nd Dept. 2007]; *Brock v. Bua*, 83 A.D.2d 61,

69 [2nd Dept. 1981])

The Court having reviewed the cited case law and the facts outlined in the submitted papers finds that granting the Plaintiff leave to add the Defendant, Sutton LLC, to this action is appropriate. The claims against Sutton LLC are the same claims as against the other defendants, and arose out of the same conduct, transaction, or occurrence. Additionally, Sutton LLC's interest is united in interest with the Defendant, 114 Old Country, due to the commonality of its officers, and by reason of that relationship, Sutton LLC can be charged with notice of the institution of the action and Sutton LLC will not be prejudiced in maintaining its defense on the merits by the delayed commencement of the action against it. Further, there is nothing to show that the Plaintiffs' failure to name Sutton LLC as a defendant in the original Complaint was strategic or meant to delay this action. Thus, it is considered an excusable mistake. Accordingly, since the Court finds that the Plaintiffs' request to add Sutton LLC as a defendant in this action is appropriate, the three alternative arguments set forth in the Plaintiffs' motion are moot.

With regard to the Plaintiffs' request to amend the complaint, the Court finds that the Plaintiffs' proposed amendment is appropriate. The decision whether to allow a pleading to be amended rests within the sound discretion of the court. (*Pagan v. Quinn*, 51 A.D.3d 1299 [3rd Dept. 2008]; *Trataros Const. Inc. v. New York City School Const. Authority*, 46 A.D.3d 874 [2nd Dept. 2007]) Leave to amend a pleading will be freely granted where the proposed amendment is not palpably insufficient or patently devoid of merit, and

the eve of trial. Further, the Defendant, 114 Old Country's argument that it will be prejudiced because after four years an expert report will be speculative and inadmissible is without merit. The Defendant, 114 Old Country, has not established that the sufficiency of the lighting is an issue that must be determined by an expert as opposed to an issue to be determined by the jury. Therefore, the Plaintiffs' proposed Amended Bill of Particulars is appropriate.

Accordingly, it is hereby

ORDERED, that the Plaintiff shall serve the Supplemental Summons and Amended Verified Complaint and the Amended Bill of Particulars in compliance with the instant Order upon counsel for the Defendants by regular mail within twenty (20) days from the date of the entry of this Order and shall serve the newly added Defendant, COLLIERS INTERNATIONAL LI MANAGEMENT, LLC F/K/A SUTTON & EDWARDS, LLC, within twenty (20) days from the date of the entry of this Order pursuant to CPLR § 311; and it is further

ORDERED, that upon the filing of proof of service upon COLLIERS INTERNATIONAL LI MANAGEMENT, LLC F/K/A SUTTON & EDWARDS, LLC, the Clerk of the Court is directed to amend the caption in this matter to add COLLIERS INTERNATIONAL LI MANAGEMENT, LLC F/K/A SUTTON & EDWARDS, LLC as a defendant.

This constitutes the decision and order of this court.

All applications not specifically addressed herein are **DENIED**.

DATED: Mincola, New York
May 21, 2014



Hon. Randy Sue Marber, J.S.C.

ENTERED

MAY 23 2014

NASSAU COUNTY
COUNTY CLERK'S OFFICE