SHORT FORM ORDER.01

SUPREME COURT - STATE OF NEW YORK

PRESENT: HON. PETER B. SKELOS,
Justice.

TRIAL/IAS PART 26
NASSAU COUNTY

ROBERT YOPP, JR.,

Plaintiff,

-against-

MOTION # 03
INDEX #1891/97
MOTION SUBMITTED:
NOVEMBER 24, 2000

BRETT BLONDER, CARL BLONDER, JUDY BLONDER and STEPHEN QUINN

Defendant(s).

The following papers read on this motion:

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Notice of Motion/Order to Show Cause.....1
Cross Motion/Answering Affidavits........2,3
Reply Affidavits.........................4
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Defendant, Stephen Quinn ("Quinn"), moves for an order: (1) granting him leave to serve and file an amended answer to the amended complaint pursuant to CPLR 3025(b); (2) deeming the amended answer served upon plaintiff and filed with the Court via service of the instant motion; and (3) dismissing the complaint and all cross-claims pursuant to CPLR 3212 on the grounds that all are barred by the statute of limitations. The motion is granted in part and denied in part as set forth below.

Plaintiff, Robert Yopp, Jr., commenced this action following an incident that occurred on July 23, 1995, at a keg party held at the home of defendant, Brett Blonder ("Blonder"). An altercation occurred at the keg party and plaintiff sustained a stab wound in his chest. The plaintiff commenced this action on January 23, 1997 (approximately 18 months after the assault) against Brett Blonder, Carl Blonder and Judy Blonder. By order dated October 13, 1998, the matter was dismissed as to Carl Blonder and Judy Blonder.

At the time of commencement, plaintiff included a "John Doe" defendant in his caption since he was not clear who caused him to suffer the injury. The Blonder defendants commenced their third-party action in July 1998. In August 1999, they served the third-party complaint on Stephen Quinn, the alleged perpetrator of the assault. The plaintiff then successfully sought permission to include Quinn as a named defendant in the original action. He claims that Quinn is the John Doe identified in the complaint.

Plaintiff served Quinn with a copy of the amended summons and complaint on October 28, 1999. Quinn answered. Plaintiff contends that the original answer did not assert an affirmative defense that plaintiff's causes of action were barred by applicable statutes of limitation. Thereafter, on October 26, 2000, Quinn served plaintiff with an amended verified answer. This amended answer asserted an affirmative defense relative to the running of the statutes of limitation. Plaintiff rejected the amended answer and

the present motion ensued.

Plaintiff pleads causes of action sounding in negligence, statutory violations, and assault. The operative statute of limitations relative to the negligence cause of action is three years. See CPLR 214(5). The operative statute of limitations relative to the alleged violation of the Dram Shop Act under General Obligations Law §11-101 is also three years. See CPLR 214(2). The operative statute of limitations relative to the alleged assault is one year. See CPLR 215(3). Based on the date of the incident, July 23, 1995, Quinn argues that all the above statutes of limitation had expired by the time the third-party action was commenced against him in 1999.

Plaintiff counters that the third-party complaint was dated July 1998, but was not served on Quinn until September 1999, indicating difficulty in effectuating service. Plaintiff's amended summons and complaint was served on Quinn shortly thereafter on October 28, 1999. Quinn did not serve an answer until June 27, 2000. Plaintiff argues that Quinn's attempt to amend his answer on the eve of trial is prejudicial and that he should not escape liability for his actions just because he successfully alluded service for months. Plaintiff contends he has spent much time and effort to prepare his case against Quinn and that Quinn should not be able to amend his answer at this late date to defeat plaintiff's causes of action.

More persuasively, plaintiff also argues the causes of action against Quinn relate

back to the original summons and complaint served upon the Blonder defendants because Quinn and Brett Blonder were "united in interest". Under this theory, the statutes of limitations applicable to Quinn would be measured from the date the original action was commenced against Blonder.

It is well settled that in the absence of prejudice or surprise leave to amend a pleading shall be freely given by the Court. (**Fahey v County of Ontario**, 44 NY2d 934.) The fact that a motion to amend is made on the eve of trial is, in and of itself, an insufficient basis to deny the motion since lateness alone is not a barrier to the amendment. (**Edenwald Contracting Co., Inc. v City of New York**, 60 NY2d 957.) Likewise, a trial court retains discretion to grant leave to assert a statute of limitations defense in an amended answer absent prejudice or surprise to the plaintiff. (**Alber Investment Company v Chatsworth Realty Corporation**, 186 AD2d 92; **Seda v New York Housing Authority**, 181 AD2d 469.) The prejudice contemplated by the courts is that akin to a special right lost, a change in position or some trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add. (**Barbour v Hospital for Special Surgery**, 169 AD2d 385.)

Applying these standards to the present case, the Court finds that the plaintiff has failed to demonstrate that he would be unfairly prejudiced by consideration of Quinn's amended answer. The applicability of statutes of limitation is a question of law. The

mere fact that the proposed amendment may defeat the plaintiff's cause of action is an insufficient basis for denying leave to amend. (**DeGradi v Coney Island Medical Group, P.C.**, 172 AD2d 582.)

Accordingly, Quinn should be permitted to serve his amended answer as set forth in Exhibit G annexed to his notice of motion. The amended answer is deemed to have been served on plaintiff and filed with the Court at the same time as the instant motion.

In deciding Quinn's motion to dismiss the complaint and cross-claims as barred by the applicable statutes of limitation, analysis of the "united in interest" concept is required. This theory rests on the assumption that where parties are united in interest, their defenses will be the same and they will either stand or fall together with respect to the plaintiff's claim. (See **Mondello v NY Blood Center**, 80 NY2d 219; **Brock v Bua**, 83 AD2d 61.) Under this theory, claims interposed after the expiration of a relevant statute of limitations may relate back to the commencement of an underlying action if that is when a party united in interest with the original defendants was apprised of the claim. (**Hemmings v St. Marks Hous.**, 169 Misc2d 155, appeal dismissed 242 AD2d 284.)

In determining whether parties are united in interest, the Court must consider whether a party sought to be added had timely notice of the underlying dispute which forms the basis of the claims set forth in the amended pleading. Here, Blonder was

having the keg party. By Quinn's own deposition, he was hired for the Blonder keg party to collect money and watch the Blonder house. (See Exhibit 5, pp. 14, 15, annexed to plaintiff's affirmation in opposition). Quinn recruited persons to work as bouncers for the party (pp. 17, 18). Quinn stated that most of the estimated 150 people at the party were intoxicated (p. 31, 43) and that at some point "there were just fists flying everywhere" (p. 36, lines 22-23). At one point, Quinn estimated that 25 to 30 people were fighting with the bouncers (p. 43). Quinn was informed afterwards that someone had been stabbed at the party (p. 53). Quinn denied he brought a knife or weapon to the party (p. 53). Later, Quinn was told by one "Buddha" - known to both Quinn and the plaintiff - that plaintiff thought Quinn had stabbed him. (pp. 57-58).

It is clear from Quinn's deposition that, at the very least, there is a question of fact as to whether Quinn and Blonder are united in interest such that the statutes of limitation were tolled when the action was originally commenced against Blonder and "John Doe." Plaintiff, a mere guest at the keg party, did not know the name of the bouncer, Quinn, at the time he commenced this action, and his failure to name Quinn as an original defendant was attributable only to his ignorance as to the bouncer's true identity. By Quinn's own admission, he was aware that plaintiff suspected him as the tortfeasor.

The standards of summary judgment are well settled. A court may grant summary judgment where there is no genuine issue of a material fact, and the moving party is,

therefore, entitled to judgment as a matter of law (**Alvarez v Prospect Hosp.**, 68 NY2d 320). When faced with a summary judgment motion, a court's task is not to weigh the evidence or to make the ultimate determination as to the truth of the matter; its task is to determine whether or not there exists a genuine issue for trial (**Miller v Journal-News,** 211 AD2d 626). Thus, the burden on the party moving for summary judgment is to demonstrate a **prima facie** entitlement to judgment as a matter of law by tendering sufficient evidence to demonstrate the absence of any material issue of fact (**Ayotte v Gervasio**, 81 NY2d 1062).

Here, Quinn has failed to meet this burden. As indicated above, there is a question of fact as to whether he and Blonder are "united in interest" such that the statutes of limitation were tolled for Quinn when the suit was originally interposed against Blonder. Since such a finding would render the causes of action sounding in negligence and statutory violation viable, Quinn's motion to dismiss those causes of action (each with a three year statute of limitations) is denied.

However, even if Quinn and Blonder are ultimately found to be "united in interest," the statute of limitations on the assault cause of action would have run before the original action was interposed against Blonder. The incident giving rise to this action took place on July 23, 1995, yet the action was filed on January 23, 1997 -- more than a year later. Quinn is correct in asserting that the assault cause of action is time

barred.

Accordingly, that branch of Quinn's motion seeking to serve an amended answer is granted. The amended answer set forth in Exhibit G annexed to Quinn's notice of motion is deemed to have been served on plaintiff and filed with the Court as of the date of service of the instant motion.

That branch of Quinn's motion seeking summary judgment on the assault cause of action is granted. That branch of the motion seeking summary judgment on the negligence and statutory violation causes of action is denied. The motion is denied in all other respects.

This constitutes the decision and order of the Court.

Dated: March 1, 2001

PETER B. SKELOS, J.S.C.