By Order of the Court, ***GRANTED***. *Presiding Judge Robert C. Naraja*

FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

NAHIDUL ISLAM, Plaintiff, vs. EDWIN PANGELINAN, JR., SAIPAN RADIO CAB COMPANY, ASIA PACIFIC HOTELS, INC. *dba* SAIPAN GRAND HOTEL, SALI SECURITY SERVICES, TRIPLE S SECURITY SERVICES, LLC, CARRIE SALI, LHENG SALI and DOES 1-5, Defendants.	CIVIL ACTION NO. 05-0263A **ORDER GRANTING SALI DEFENDANTS' MOTION FOR SUMMARY JUDGMENT**
SALI SECURITY SERVICES, TRIPLE S SECURITY SERVICES, LLC, CARRIE SALI, and LHENG SALI, Cross-Plaintiffs, vs. EDWIN PANGELINAN, JR., SAIPAN RADIO CAB COMPANY, ASIA PACIFIC HOTELS, INC. *dba* SAIPAN GRAND HOTEL, and DOES 1-5, Cross-Defendants.	

I. INTRODUCTION

Nahidul Islam ("Plaintiff") brings this personal injury action against Edwin Pangelinan, Jr. ("Pangelinan"), Saipan Radio Cab Company ("Radio Cab"), Asia Pacific Hotels, Inc. d/b/a Saipan Grand Hotel ("SGH"), and Sali Security Services ("Sali Security"), Triple S Security Services ("Triple S"), Carrie Sali ("Carrie"), and Lheng Sali ("Lheng"), (collectively, "Sali Defendants") alleging, *inter alia,* that he was violently assaulted while on SGH premises.

Presently before the Court is Sali Defendants' Motion for Summary Judgment, (hereafter, "Motion"). The Court conducted a hearing on September 1, 2010 at 9:00 a.m. in Courtroom 202. Plaintiff was represented by Victorino Torres. Sali Defendants were represented by Ramon K. Quichocho. Steven P. Pixley, attorney for SGH, was also present.

Based on the papers submitted to date and oral arguments of counsel, the Court GRANTS Sali Defendants' Motion for Summary Judgment.

II. BACKGROUND

A. Factual Background

In a Fourth Amended Complaint filed on October 8, 2009, Plaintiff alleges as follows:

Plaintiff is a Bangladeshi citizen residing in the CNMI. Plaintiff owns Southwest Island Tours, a company that provides sightseeing services to tourists including guests of SGH. Defendant Pangelinan is an employee of Defendant Radio Cab, a family owned business. Defendant SGH is a CNMI corporation. Defendant Sali Security was a business organized and operated, at the time of the incident, under CNMI law. Defendant Triple S is a business organized under CNMI law. Defendants Carrie and Lheng are both U.S. citizens residing in CNMI and co-owners of Sali Security and Triple S.

On February 3, 2005, Plaintiff went to SGH to pick up two clients. Upon escorting his clients to the car, Plaintiff found that his car was blocked by three taxicabs owned by Radio Cab. Pangelinan, an employee of Radio Cab, started shouting at Plaintiff and asking Plaintiff why he was taking customers from SGH. Sensing hostility from Pangelinan, Plaintiff proceeded to SGH's front desk to seek assistance. Despite his request to the front desk attendant to call security, the attendant did not call security.

Pangelinan and three John Does followed Plaintiff into the SGH lobby where Pangelinan instructed one of the John Does to "kill" Plaintiff. Upon Pangelinan's instruction, one of the John Does punched Plaintiff on the right side of his head causing him to fall to the lobby floor and become unconscious. Plaintiff later regained consciousness in the hospital.

At the time of the incident, Sali Security Services, owned by Carrie Sali and Lheng Sali, was under a contract with SGH to provide security services to SGH.

B. Procedural Background

Plaintiff first filed a Complaint on June 30, 2005 naming Pangelinan, Radio Cab, SGH, and John Does 1-5 as defendants. In the Complaint, Plaintiff alleges, among other things, that SGH breached its duty by failing to have adequate security on the premises, failing to have security guards or adequately trained or competent personnel on duty at the time of the attack, failing to adequately respond to Plaintiff's cries for assistance or adequately investigate the incident, and failing to provide a reasonably safe place for its patrons.

On July 15, 2005 Plaintiff filed a First Amended Complaint, alleging facts substantially similar to those alleged in the original Complaint. On August 12, 2005 Defendants Pangelinan and Radio Cab filed answers to the First Amended Complaint. On August 17, SGH filed its answer. The parties proceeded to conduct pre-trial discovery.

On March 11, 2009, nearly four years after the first complaint was filed, Plaintiff filed a Second Amended Complaint, adding Sali Security as a defendant. The allegations against Sali Security are similar to those against SGH, namely that Sali Security had a contract with SGH to provide security services but failed to provide adequate security services on the day of the incident to protect Plaintiff from harm. SGH filed an answer to the Second Amended Complaint.

On April 22, 2009 Plaintiff filed a Third Amended Complaint, adding Triple J Security Services, Carrie and Lheng as defendants alleging that they failed to provide adequate security to protect Plaintiff. This time, both SGH and the Sali Defendants filed answers.

Finally, on October 8, 2009 Plaintiff filed a Fourth Amended Complaint, replacing Triple J Security with Triple S as a defendant. Before the Court is Sali Defendants' motion for summary judgment. Sali Defendants contend that Plaintiff's claims against them have expired.

III. STANDARDS

A. Summary Judgment

Summary judgment is appropriate where the materials submitted to the Court demonstrate "that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." NMI R. Civ. P. 56(c); e.g. *In re Estate of Roberto,* 2002 MP 23 ¶14. The purpose of summary judgment "is to isolate and dispose of factually unsupported claims or defenses." *Celotex v. Catrett*, 477 U.S. 317, 323-24 (1986).

The moving party always bears the initial burden of informing the court of the basis for its motion and identifying the evidence which it believes demonstrates the absence of a genuine issue of material fact. *Id.* at 323. The non-moving party must then identify specific facts "that might affect the outcome of the suit under the governing law," thus establishing that there is a genuine issue for trial. NMI R. Civ. P. 56(e).

In deciding a summary judgment motion, a court must construe the evidence and inferences drawn from the underlying facts in the light most favorable to the non-moving party. *Santos v. Santos,* 4 NMI 206, 209 (1995) *(citing Rios v. Marianas Pub. Land Corp.,* 3 NMI 512, 518 (1993)); *Anderson v. Liberty Lobby Inc.,* 477 U.S. 242, 248 (1986).

B. Amendment under Rule 15(a)

When a party can no longer amend a pleading as a matter of right under Rule 15(a), the party must either petition the court for leave to amend or obtain consent from the adverse parties. NMI R. Civ. P. 15(a).[1] Leave shall be freely given when justice so requires. *Id.* "This policy is to be applied with extreme liberality." *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003).

However, leave is not automatic. Case law outside the Commonwealth has shaped a multi factor test to determine whether leave should be granted in the interest of justice. Leave to amend need not be granted where the amendment: (1) prejudices the opposing party; (2) is sought in bad faith; (3) produces an undue delay in litigation; or (4) is futile. *Amerisource Bergen Corp. v. Dialysist West, Inc.*, 465 F.3d 946, 951 (9th Cir. 2006); *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999). Prejudice to the defendant is the most important factor. *See*

[1] While Plaintiff did not seek leave to file its 2009 amended complaints, Defendants have not objected to the amendments until now.

Eminence Capital, 316 F.3d at 1052; *Keniston*, 717 F.2d at 1300. The burden of showing prejudice rests on the party opposing amendment. *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir.1987).

IV. DISCUSSION

A. Triple S

In its motion, Sali Defendants set forth evidence that Triple S did not exist prior to July 2006. (Declaration of Carrie Sali in Support of Motion for Summary Judgment ¶ 2, hereafter, "Carrie Decl.") A certificate of organization shows that Triple S came into existence no earlier than May 2006. (Carrie Decl. Ex. 1.) Plaintiff claims that Triple S and Sali Security are the same type of business and have the same owners. (Fourth Amended Complaint ¶ 7.) However, Plaintiff does not contend nor does he offer evidence that Triple S and Sali Security are the same company, that Triple S assumed any of the liabilities of Sali Security, or that Triple S had any involvement in the events giving rise to Plaintiff's cause of action. Given the uncontroverted evidence that Triple S did not exist until 2006, summary judgment is appropriate in favor of Triple S on all of Plaintiff's claims against it.

B. Statute of Limitations and Rule 15(c)

The Sali Defendants contend that claims against them are barred because they were not sued within the applicable statute of limitations.

A civil action must be commenced within the period specified by the applicable statute of limitations, and "a civil action is commenced by filing a complaint with the court." NMI R. Civ. P. 3. When the statute of limitation period has run, the only vehicle through which plaintiff may amend his complaint to accurately name a defendant is Rule 15(c). *G.F. Co. v. Pan Ocean Shipping Co.,* 23 F.3d 1498, 1501 (9th Cir. 1994); *Korn v. Royal Caribbean Cruise Line, Inc.,* 724 F.2d 1397, 1399 (9th Cir. 1984).

Here, Plaintiff's cause of action accrued on February 3, 2005, the day he was assaulted at SGH. Under Commonwealth laws, actions for assault and battery and actions for personal injury must "be commenced only within two years after the cause of action accrues." 7 CMC § 2503(a) and (d). Therefore, the statute of limitations would have run on February 2, 2007.

Plaintiff timely filed his original complaint on June 30, 2005. However, Plaintiff did not add the first Sali Defendant until March 2009, after the statute of limitations had expired. Plaintiff concedes that no exceptions apply to toll the statute of limitations on Plaintiff's cause of action. Thus, unless Plaintiff satisfies the relation back requirements of Rule 15(c), the amended complaints adding the Sali Defendants would be barred by the statute of limitations.

C. Relation Back under Rule 15(c)(3)

The Court looks to Rule 15(c)(3) to determine whether claims against the Sali Defendants can overcome the statute of limitations.[2]

An amendment relates back to the date the original complaint was filed if:

> . . . (3) the amendment changes the party or the naming of the party against whom a claim is asserted if the foregoing provision (2) is satisfied[3] and, within the period provided by Rule 4(m) for service of the summons and complaint, the party to be brought in by amendment (A) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (B) knew or should have known that, but for the mistake concerning the identity of the proper party, the action would have been brought against the party.

NMI R. Civ. P. 15(c)(3). Relation back, therefore, allows a case to proceed against a new or changed party even if the amendment is made after the time period set forth by the statute of limitations has expired.

As a threshold issue, Sali Defendants contend that Rule 15(c)(3) does not apply to Plaintiff's amended complaints because Sali Defendants were added as new parties rather than substituted for any "John Doe" defendants. (Motion at 7.)[4] They argue that Plaintiff's amendments did more than "merely change the party or naming of the party" within the meaning of Rule 15(c). (*Id.*) Although Rule 15(c) only refers to an amendment "changing the

---

[2] Contrary to Plaintiff's contentions, Rule 15(c)(2) cannot be used for relation back purposes when new defendants are added after the statute of limitations has run. *Arreola v. Godinez,* 546 F.3d 788, 796 (7th Cir. 2008); *Asher v. Unarco Material Handling, Inc.,* 596 F.3d 313, 318 (6th Cir. 2010).

[3] Provision (2) requires that "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings." NMI R. Civ. P. 15(c)(2).

[4] Sali Defendants continuously refer to the fact that "the same five 'John Doe' defendants were named" in every amended complaint filed by Plaintiff. (Motion at 3.) Plaintiff is not attempting to replace the Doe defendants with the Sali Defendants. Thus, Sali Defendants' focus on that fact is irrelevant to the relation-back question.

party," the federal courts[5] have consistently held that the rule extends to the "addition" of parties also. *Raynor Bros. v. American Cyanimid Co.*, 695 F.2d 382, 384 (9th Cir. 1982). The circumstance of a plaintiff filing an amended complaint seeking to bring in a new defendant is the "typical case" of Rule 15(c)[3]'s applicability. *Krupski v. Costa Crociere S. p. A.,* 130 S. Ct. 2485, 2493 n.3, 177 L. Ed. 2d 48, 57 (2010). Thus, Rule 15(c)(3) applies provided its three requirements are met.

1. Provision (2) of Rule 15(c)

The first element of Rule 15(c)(3) requires that "the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleadings." NMI R. Civ. P. 15(c)(2). Plaintiff's amended complaints indisputably satisfy the first requirement because they simply add the names of the newly discovered defendants without altering the underlying cause of action stated in the original complaint. Specifically, Plaintiff alleges that he was assaulted at SGH on February 3, 2005. Further, both SGH and Sali Defendants are alleged to have failed to provide adequate security services to Plaintiff and as a result of such failure, Plaintiff has suffered harm. (Complaint ¶ 19; Fourth Amended Complaint ¶ 36.) Thus, the claims in the amended complaints clearly arise out of the same occurrence set forth in the original complaint.

2. Notice

The second element requires that Sali Defendants receive notice of the institution of the action within the time prescribed by Rule 4(m) of the Commonwealth Rules of Civil Procedure. NMI R. Civ. P. 15(c)(3)(A). As the U.S. Supreme Court noted in discussing Rule 15(c), "[t]he linchpin is notice, and notice within the limitations period." *Schiavone v. Fortune*, 477 U.S. 21, 31 (1986). The limitations period under Rule 4(m) is 240 days from the date the original complaint was filed. NMI R. Civ. P. 4(m).

Here, Plaintiff's service of the summons and Third Amended Complaint less than twenty days after it was filed in April 2009, but nearly four years from the date of the original

---

[5] Where the Commonwealth rules are substantially patterned after the federal rules, it is appropriate to look to federal case law construing the federal rules for guidance in interpreting our local counterpart. *See Ishimatu v. Royal Crown Ins. Corp.,* 2010 MP 8 ¶ 60; *Commonwealth v. Jai Hoon Yoo,* 2004 MP 5 ¶ 8 n.1 (*citing Commonwealth v. Ramangmau,* 4 NMI 227, 233 n.3 (1995)). The relevant portions of Rule 15(c) exactly mirror the corresponding Federal Rules of Civil Procedure. Thus, federal court decisions interpreting Federal Rule 15(c) are instructive.

complaint, does not satisfy the notice requirement within the *4(m)* period. However, the U.S. Supreme Court has rejected the suggestion that Rule 15(c) requires actual service of process. *See Krupski,* 130 S. Ct. at 2497 n.5. The rule simply requires that the prospective defendant receive sufficient "notice of the action" within the *Rule 4(m)* period that he will not be prejudiced in maintaining his defense on the merits. *Id.* Thus, the notice required by Rule 15(c) can be formal or informal, actual or constructive. *Craig v. United States*, 479 F.2d 35, 36 (9th Cir. 1973); *Miller v. Hassinger,* 173 Fed. Appx. 948, 955 (3rd Cir. 2006).

a. Actual Notice

Sali Defendants maintain that they first received notice of the lawsuit in May 2009, when they were added as defendants. (Carrie Decl. ¶ 6; Declaration of Service, e-filed May 8, 2009.) Plaintiff contends that Sali Defendants should have been aware of the lawsuit within the 4(m) period because they have provided written reports concerning the incident.

Sali Defendants might have been in the position where they would have participated in the pending lawsuit because at least one Sali Security officer was present around the time of the alleged assault. For instance, Sali Defendants may have engaged in the discovery process by answering interrogatories or attending depositions within the *4(m)* period, in which case, they would have had actual notice of the lawsuit. However, the fact that Sali Defendants provided written reports to SGH or to the police concerning the assault on Plaintiff does not by itself show that they were aware that Plaintiff had indeed filed a lawsuit. Notice of the incident giving rise to the cause of action is insufficient to give notice of the action itself. *See Korn*, 724 F.2d at 1400. Without more, the Court cannot find that Sali Defendants had actual notice of the pending lawsuit.

b. Constructive/ Imputed Notice

Plaintiff further contends that knowledge of the lawsuit should be imputed on Sali Defendants by virtue of their contractual relationship with SGH. (Plaintiff's Opposition to Defendant's Motion for Summary Judgment at 6, hereafter, "Opposition.")

Imputing knowledge of the action from the original defendants to the prospective defendant is justified when there is "sufficient community of interest" between the two entities. *Korn,* 724 F.2d at 1401. However, such a community, or identity, of interests exists between two companies only when "the parties are so closely related in their business operations or

other activities that the institution of an action against one serves to provide notice of the litigation to the other." *G.F. Co. v. Pan Ocean Shipping Co.*, 23 F.3d 1498, 1503 (9th Cir. 1994) (quoting 6A Charles Miller, et al., *Federal Practice and Procedure* § 1499 at 146 (2d ed. 1990).

> Although the relationship needed to satisfy the identity of interest test varies somewhat depending on the underlying facts, some general observations may be made. An identity of interest has been found between a parent and a wholly owned subsidiary, as well as between related corporations whose officers, directors, or shareholders are substantially identical and who may have similar names or conduct their business from the same offices.

6A Charles Alan Wright, et al., Federal Practice and Procedure § 1499 at 146 (2d ed. 1990). In *Pan Ocean,* the Ninth Circuit found such a close relationship between a company and its agent that notice to the agent could be imputed to the principal company. Courts have also found constructive notice where there was "some communication or relationship" between the attorney for the named defendants and the parties sought to be added as defendants. *See Singletary v. Pennsylvania Dep't of Corrections*, 266 F.3d 186, 196-97 (3rd Cir. 2001); *Garvin v. City of Philadelphia*, 354 F.3d 215, 225 (3rd Cir. 2003).

Here, Plaintiff does not allege that there is a parent-subsidiary or other similarly close business relationship between SGH and Sali Defendants. Neither is there evidence of any communication or relationship between the Defendants' attorneys. Plaintiff argues instead that the Court should impute notice to Sali Defendants because of their contractual relationship. Plaintiff contends the community of interest here is that Sali Defendants have a contractual obligation to SGH to provide security services and keep the premises safe. (Opposition at 6.)

"Contractual relationships, by themselves, are insufficient to demonstrate a community of interest justifying an imputation of knowledge." *Bailey v. United States,* 289 F. Supp. 2d 1197, 1208 (D. Haw. 2003). In *Bailey,* the court found that while notice to one Shell defendant may have provided notice to another Shell defendant, the fact that a Shell defendant had contractual relationships with unrelated companies that knew of the action did not impute that knowledge on that Shell defendant.

In *Brooks v. ComUnity Lending, Inc.* the plaintiff argued that notice should be imputed on the new defendant because the named defendant in the original action, ComUnity, was contractually obligated to put the new defendant on notice of the suit. *Brooks v. ComUnity*

Lending, Inc., 2009 U.S. Dist. LEXIS 91455 (N.D. Cal., September 29, 2009). The court found that even though the named defendant had such an obligation to inform the new defendant of the lawsuit, absent allegations supporting a finding of the kind of "community of interest" sufficient for constructive notice, the plaintiff cannot satisfy Rule 15(c). *Id.*

Here, SGH had no obligation to notify Sali Defendants of the lawsuit. Sali Security is a private company providing security services to SGH, a hotel business. SGH and Sali Security are not related businesses outside of this contractual relationship. In fact, the two companies appear to have an adverse relationship as evidenced by the cross claims Sali Defendants have brought against SGH. Absent other circumstances that permit the inference that notice was actually received, Sali Security, as an independent contractor does not share a sufficient nexus of interests with SGH that would justify imputing knowledge of such a lawsuit on Sali Defendants for Rule 15(c)(3) purposes.

Plaintiff asserts that because Sali Security has promised to indemnify SGH,[6] Sali Defendants should have been aware of the lawsuit. In *Bailey,* the Plaintiff represented to the court that the contract between Activity World and the Shell Defendants indicated that the Shell Defendants would indemnify Activity World if Activity World were sued. *Bailey,* 289 F. Supp. 2d at 1208. The court found that such an indemnity clause was insufficient to impute knowledge of the action on the new defendants. *Id.* Likewise, Plaintiff's claim that there is a provision in the contract requiring Sali Defendants to indemnify SGH is insufficient. SGH was indeed sued in this lawsuit, but there is no evidence that SGH ever offered its defense to the Sali Defendants or made any mention of the existence of this lawsuit to the Sali Defendants.

Accordingly, Sali Defendants did not have constructive notice of the action prior to the expiration of the *4(m)* period.

c. Prejudice

Prejudice to the prospective defendant is a main concern when determining whether the relation back doctrine applies. *Korn,* 724 F.2d at 1400; NMI R. Civ. P. 15(c)(3)(A). Timely

---

[6] The indemnification clause provides that Sali Security will hold SGH harmless "from and against any damages loss or liability to property or persons, however caused and arising because of the negligence on the part of [Sali Security], its employees, representatives, and agents in providing security services under this contract." (Opposition, Ex. A.)

notice assures that the party to be added has received ample opportunity to pursue and preserve the facts relevant to various avenues of defense. *Id.*

Plaintiff has failed to show that Sali Defendants received notice of the action within the required time period. Because notice cannot be imputed to them as of the time SGH received notice, Sali Defendants have not had the adequate time to prepare their defense. The case is in the late stages of discovery and trial is set for December 13, 2010. With the passage of time, valuable evidence may have been lost or witnesses have become unavailable. Even if SGH preserved all the evidence through active litigation in the last five years, because they have interests adverse to Sali Security, it cannot be said that Sali Defendants would not be prejudiced in maintaining their defense to the action.

Plaintiff has not provided any evidence to show that Sali Defendants received actual or constructive notice of the action prior to the expiration of the 240-day period following the filing of the original complaint as required by Rule 13(c)(3). Sali Defendants will suffer unfair prejudice if they are forced to defend a case that is now five years old. Furthermore, in light of the fact that they did not have proper notice of the action, it would be impossible for Sali Defendants to know that but for the mistake concerning the identity of the proper party, the action would have been brought against them under the third element of Rule 15(c)(3). NMI R. Civ. P. 15(c)(3)(B).

Accordingly, the Second, Third, and Fourth Amended complaints cannot relate back to the filing date of the original complaint.

V. CONCLUSION

For the forgoing reasons, Defendant's Motion for Summary Judgment is GRANTED. The Sali Defendants are hereby dismissed.

SO ORDERED this 4th day of October, 2010.

/s/
ROBERT C. NARAJA
Presiding Judge