

Friedman v A.I. Friedman, L.P.

2011 NY Slip Op 32740(U)

October 17, 2011

Supreme Court, New York County

Docket Number: 190263/09

Judge: Sherry Klein Heitler

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

~~HON. SHERRY KLEIN HEITLER~~

PART 30

Index Number : 190263/2009

FRIEDMAN, ROBERTA

VS.

A.L. FRIEDMAN, L.P.

SEQUENCE NUMBER : 007

SUMMARY JUDGMENT

INDEX NO. 190263/09

MOTION DATE _____

MOTION SEQ. NO. 007

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is denied as per the memo decision

10-17-11

FILED

OCT 20 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 10.17.11

HON. SHERRY KLEIN HEITLER ^{J.S.C.}

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
In re: New York City Asbestos Litigation

----- X
ROBERTA FRIEDMAN and STUART FRIEDMAN,

Plaintiffs,

- against -

A.I. FRIEDMAN, L.P.; et al.

Defendants.

----- X
THERMWELL PRODUCTS, INC.,

Third Party Plaintiff,

- against -

NITTO DENKO AMERICA, INC.,
NITTO DENKO AUTOMOTIVE, INC.,
PERMACEL KANSAS CITY, INC.,
MARTIN MARIETTA MATERIALS, INC.,

Third Party Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Motion sequence Nos. 007 and 008 are consolidated herein for disposition.

In this asbestos personal injury action, third party defendants Nitto Denko America, Inc., Nitto Denko Automotive, Inc., Permacel Kansas City, Inc. (collectively "Nitto Denko, et al.") and Martin Marietta Materials, Inc. ("Martin Marietta Materials"), respectively, move pursuant to CPLR 3212 and 3211(a) for summary judgment dismissing the third party complaints against them.

Index No. 190263/09
Motion Seq. 007, 008

TP Index No. 590306/11

DECISION AND ORDER

FILED

OCT 20 2011

NEW YORK
COUNTY CLERK'S OFFICE

In motion sequence 008, third party plaintiff Thermwell Products, Inc. ("Thermwell") cross-moves pursuant to CPLR 3025(b) for leave to deem its third party complaint timely served and to amend the complaint to add an additional third party defendant. For the reasons set forth below, this cross-motion is denied and the third party complaints as against the third party defendants herein are dismissed without prejudice.

BACKGROUND

Plaintiffs Roberta and Stuart Friedman filed the instant action against various defendants in April 2009 alleging injuries from exposure to asbestos and asbestos-containing products between approximately 1956 and 1970. Thereafter, plaintiffs amended their complaint to add Thermwell as a defendant alleging exposure to asbestos contained in its product "Frost King Rope Caulk." Plaintiffs effected service on Thermwell's corporate offices on December 14, 2009. Under the New York City Asbestos Litigation ("NYCAL") Case Management Order, dated September 20, 1996, as amended February 19, 2003 ("CMO"), plaintiffs' case was assigned to the April 2010 Accelerated Trial Cluster which dictated a January 19, 2010 deadline within which to file third party complaints. Almost a year and a half later, on April 6, 2011, Thermwell filed the third party complaint at issue against the third party defendants herein based on common-law indemnity, i.e., that Thermwell purchased its Frost King Rope Caulk from another manufacturer, Presstite Engineering Company, and that the named third party defendants were successors in interest to Presstite. Thermwell claims that it did not alter the rope caulk product that it so purchased in any manner prior to distribution.

In motion sequence # 007, third party defendants, Nitto Denko, et al., move for summary judgment pursuant to CPLR 3212 on grounds that they acquired the Presstite trademark free and clear of any and all liabilities as part of an asset purchase transaction in the 2002 Chapter 11

bankruptcy proceeding of Acoustiseal, Inc. In support of their motion, Nitto Denko, et al. produced both the Asset Purchase Agreement and the bankruptcy order approving the sale. In opposition, Thermwell asserts that Nitto Denko, et al.'s motion is premature and that discovery is necessary to establish what liabilities, if any, were retained in the asset purchase.¹

In motion sequence # 008, third party defendant Martin Marietta Materials moves for summary judgment predicated both on defective service under CPLR 3211(a)(8) and merit-based arguments under CPLR 3212. In opposition, Thermwell claims that service on Martin Marietta Composites constitutes service upon Martin Marietta Materials under the "corporate presence doctrine." Martin Marietta Materials further claims that when it was spun off from its predecessor (Martin Marietta Corporation) in 1993, it did not acquire any liabilities associated with the Presstite trademark. Thermwell claims that notwithstanding the language in the transfer and assumption agreements, questions of fact remain as to which corporate entity retained liability for claims arising out of ownership of the Presstite mark. In addition to its request to deem its third party complaint timely served, in motion sequence # 008 Thermwell also cross moves for leave to amend its third party complaint to add Martin Marietta Corporation's successor Lockheed Martin as a third party defendant.

Significantly, Thermwell's third party complaint was filed more than a year after the deadline specified in the Discovery Schedule established pursuant to the CMO. Thermwell also failed to seek permission from this court in accordance with the CMO to file its untimely third party complaint. Section XV.E.2.f. of the CMO provides that a party seeking to file a third party complaint after the Discovery Schedule deadline must make application to the court therefor,

¹ Nitto Denko, et al. did not raise the issue of the untimeliness of Thermwell's third party complaint in its motion papers, though it did so in response to Thermwell's cross-motion for leave to amend the complaint as part of motion sequence # 008.

and “include an affidavit stating when the information used to substantiate the filing of the third party complaint became available and that such information was not reasonably available prior to the filing deadline.” (Id.)

In support of its cross-motion, Thermwell contends that it only learned about Presstite’s manufacture of the subject Rope Caulk during the deposition of a Thermwell employee in January 2011. Furthermore, Thermwell claims it did not retain its outside counsel until February 11, 2010, after the deadline to file third party complaints had already passed. The third party defendants urge this court to discredit Thermwell’s explanation for the delay because all of the information Thermwell relied upon to implead them is publicly available. All third party defendants argue that Thermwell’s dilatory practices unfairly prejudiced them because they face the prospect of trying, on the eve of trial, to catch up on more than a year of prior litigation in this action.

DISCUSSION

Thermwell’s cross-motion for leave to amend the third party complaint is opposed by all third party defendants on the grounds that such complaint, which was filed without leave of the court more than 15 months after the deadline, violates the dictates of the CMO and prejudices them. CMO § XV.E.2.f provides in relevant part:

“Third-party complaints not filed on or before the filing deadline set forth in the discovery order may only be filed upon motion and with permission of the Special Master or the Court after appeal of a ruling by the Special Master. Any motion to file a third-party complaint after the filing deadline shall be made upon notice to all remaining parties and putative third-parties. The motion must include an affidavit stating when the information used to substantiate the filing of the third-party complaint became available and that such information was not reasonably available prior to the filing deadline.”

This court notes that one of the underlying objectives of the CMO, which was the product of mutual collaboration between the court and plaintiffs’ and defendants’ counsel, is to address the

6]

need for firm scheduling in an effort to expedite the disposition of cases. As the Court of Appeals recently explained, “[I]tigation cannot be conducted efficiently if deadlines are not taken seriously, and we make clear again, as we have several times before, that disregard of deadlines should not and will not be tolerated” (citations omitted).” Gibbs v St. Barnabas Hosp., 16 NY3d 74, 83 (2010); see also Kihl v Pfeffer, 94 NY2d 118, 123 (1999) (complaint dismissed with prejudice for failure to comply with court ordered disclosure); accord Citibank, N.A., etc. v Murillo, 30 Misc.3d 934, 937 (Sup. Ct. Kings Cty. Jan. 7, 2011) (“Failure to comply with court-ordered time frames must be taken seriously . . . It cannot be ignored . . .”).

In the present case, Thermwell’s failure to follow the requirements of the CMO overrides its proffered justifications for the late filing of its third party complaint. Thermwell alleges that its late complaint should be deemed timely because it was not added as a defendant until December 2009, did not retain outside counsel until February 2010, and further was unaware that Thermwell had purchased the alleged asbestos-containing rope caulk from Presstite Engineering Corporation until it deposed its own Executive Vice President, Vince Giarratana, in January 2011. However, Thermwell’s first application therefor (the cross motion herein) was not filed until July 21, 2011, seven months after Mr. Giarratana’s deposition, and motion sequence # 008 was not fully submitted to this court until September 13, 2011.

Given Thermwell’s extended violation of the outlined procedures, and mindful of the importance of the expeditious resolution of cases under the CMO and the discretionary authority of this court under CPLR 1010,² I find that Thermwell’s application for leave to deem its third

² CPLR § 1010 provides that this court has the discretion to “dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just.”

7]

party complaint timely filed and to amend the third party complaint to add an additional third party defendant is untimely in the extreme. In this regard, the third party complaint is hereby dismissed without prejudice and with leave to refile its indemnification action in the proper form in the event that a judgment is entered against Thermwell in the underlying action.³

CONCLUSION

For the reasons stated herein, it is hereby

ORDERED that third party plaintiff Thermwell Products, Inc's cross-motion for leave to deem its third party complaint timely filed and to amend the third party complaint to add an additional third party defendant is denied with leave to refile its indemnification action, and it is further

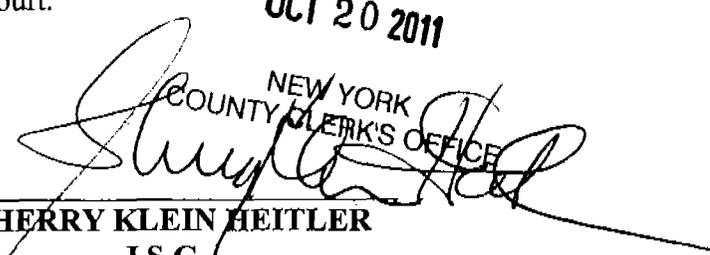
ORDERED that the third party complaint is hereby dismissed without prejudice as against all third party defendants named herein; and it is further

ORDERED that the third party defendant Martin Marietta Materials' summary judgment motion sequence # 008 and third party defendants Nitto Denko, et al.'s summary judgment motion sequence # 007 are denied as moot.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: October 17, 2011

FILED
OCT 20 2011
NEW YORK
COUNTY CLERK'S OFFICE

SHERRY KLEIN HEITLER
J.S.C.

³ A cause of action sounding in indemnity is governed by six-year statute of limitations and does not accrue until actual payment of the judgment is made. Emil v James Felt & Co., 45 AD2d 677 (1st Dept 1974).