

**Silver Galore, Inc. v New Generation Realty, LLC**

2017 NY Slip Op 30253(U)

January 27, 2017

Supreme Court, New York County

Docket Number: 650403/13

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, PART 11

-----X  
SILVER GALORE, INC. and DEEPAK PARWANI,

Index No.650403/13

Plaintiffs,

-against-

NEW GENERATION REALTY, LLC, ALL-  
BORO TANK TESTING, CASTLE OIL  
CORPORATION, S.J. FUEL CO., INC.  
d/b/a S.J/ FUEL TRANSPORTATION,  
DAVID HADAD, JOHN and JANE DOES  
1-10 (fictitious names), ABC CORPORATIONS  
1-10 (fictitious entities),

Defendants.

-----X  
NEW GENERATION REALTY, LLC.

-against-

CASTLE OIL CORPORATION,

Third-party Defendant

-----X  
JOAN A. MADDEN, J.:

Defendant All-Boro Tank Testing (“All-Boro”) moves for an order (i) pursuant to CPLR 3215 (c) dismissing the complaint against All-Boro for failure to move for a default judgment within one-year, (ii) pursuant to CPLR 3211(a)(1) and (7) dismissing the complaint and all cross claims against All-Boro for failure to state a cause of action and based on documentary evidence, or, in the alternative, (iii) treating the motion as one for summary judgment pursuant to CPLR 3211(c) and granting summary judgment to All-Boro. Plaintiffs oppose the motion and defendant Castle Oil Corporation (“Castle Oil”), opposes the motion to the extent that it seeks to dismiss Castle Oil’s cross claims against All-Boro. New Generation adopts the arguments in Castle Oil’s opposition to argue that its cross claims asserted against All-Boro are not subject to

dismissal.

This action arises out of an oil spill that occurred shortly after an oil tank was refilled on November 21, 2012, in the basement of the premises located at 35 West 30<sup>th</sup> Street, New York, New York (“the Building”). Specifically, it is alleged that on the date of the accident, a 5,000 gallon oil tank located in the Building’s basement was overfilled causing the tank to burst and discharge oil throughout the basement, and to release toxic fumes and smoke throughout the Building. Plaintiff Silver Galore, Inc. (“Silver Galore”) rented space on the main floor and the basement of the Building for operation of its wholesale jewelry business pursuant to a lease with defendant New Generation Realty Inc. (“New Generation), which owns the Building. Plaintiff Deepak Parwani owns Silver Galore. Defendant David Hadad (“Hadad”) is the President of New Generation. Defendant Castle Oil was retained by New Generation to refill the oil tank and, Castle Oil subcontracted this obligation to defendant S.J. Fuel Co., Inc. d/b/a S.J. Fuel Transportation (“SJ Fuel”). All-Boro was retained by New Generation pursuant to an oral contract to conduct remediation of the oil spill. Plaintiffs allege, *inter alia*, that the oil spill damaged its business and caused the loss of merchandise stored in the basement and exposed Silver Galore’s employees to toxic and hazardous fumes causing injuries. Following the oil spill, New Generation commenced eviction proceedings against Silver Galore based on a failure to pay rent and in February 2013, Silver Galore was evicted from the Building.

The original summons and complaint was served on All-Boro on March 8, 2013. With respect to All-Boro, the original complaint alleged, upon information and belief, that All-Boro is “in the business of oil testing, remediation, soil sampling, and repairs...[and that] it was retained to remediate the oil spill and allegedly removed merchandise from the basement that was covered in oil.” (Complaint, ¶’s 4, 8). The third count, for negligence, alleged that “ABC Corporation

acted negligently, recklessly, and/or carelessly in refilling the 5,000 gallon tank,” and “[b]y reason of the facts and circumstances as stated above, as a proximate cause of All-Boro’s negligence, Silver Galore suffered property damage” (Id ¶’s 27, 29). Count Seven alleged that All-Boro “attempted remediate the oil spill during Silver Galore’s business hours causing damage to Silver Galore’s business,...upon information and belief [All Boro] has not remediated the oil spill...All-Boro acted negligently in failing to remediate the oil spill is a timely manner..[and that] b]y reasons of the facts and circumstances above, All-Boro is liable for negligence ”(Id ¶’s 44-47).

All-Boro failed to answer, move or otherwise respond to the complaint within twenty days, or by March 28, 2013. Plaintiffs never moved for a default judgment against All-Boro. In June 2015, plaintiffs filed a motion seeking to amend the complaint to add certain claims and to add Castle Oil, S.J. Fuel and Hadad as defendants.<sup>1</sup> The proposed amended complaint did not contain any specific allegations of negligence or other basis for liability against All-Boro, but merely alleged that it was retained to remediate the oil spill. By decision and order dated August 25, 2015, the court granted plaintiffs’ motion to amend to the extent of permitting plaintiffs to add Castle Oil, S.J. Fuel and Hadad as defendants and to permit the assertion of claims for negligence and strict liability under Article 12 of the Navigation Law as against Castle Oil and S.J. Fuel and a fraud claim as against Hadad, and directed that within 30 days of e-filing the decision and order, that plaintiffs serve a supplemental summons and amended complaint consistent with the decision and order. On September 10, 2015, plaintiffs served an amended

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<sup>1</sup>At the time plaintiffs moved to amend, Castle Oil was named as a third party defendant and S.J. Fuel was named as a second third-party defendant. Castle Oil subsequently discontinued its second-third party claims against SJ Fuel.

complaint as per the court's August 25, 2015 decision and order.<sup>2</sup>

All-Boro now moves to dismiss the complaint and all cross claims against it, arguing that plaintiffs' failure to move for a default judgment within a year of its default, without any acceptable excuse, requires dismissal of the action against it. All-Boro alternatively argues that the complaint fails to state a cause of action against it and that documentary evidence, including a remediation report documenting All Boro's work on the Building, demonstrates that it was not negligent. As for the amended complaint, All-Boro notes that it contains no counts directed at it, and provides an affidavit from its Managing Member, Christopher Quintana ("Quintana") stating that All-Boro was not served with the amended complaint. Alternatively, All-Boro argues that the court should consider the evidence in the record and grant it summary judgment dismissing any claims against it. As for the cross claims, All-Boro argues that dismissal of the complaint requires dismissal of the various cross claims asserted against it for common law contribution and indemnification and that, in any event, the boilerplate allegations in the cross claims are insufficient.

Plaintiffs oppose the motion, arguing that since it served an amended complaint on September 10, 2015, the amended complaint is now the operative pleading, and since a year has not elapsed from All-Boro's default in answering the amended complaint, dismissal is not warranted. Plaintiffs also argue that the deposition testimony of plaintiff Deepak Parwani provide a basis for a claim based on All-Boro's negligent removal during the remediation process of plaintiffs' property that was still salvageable.

As for Castle Oil, it opposes the motion, arguing that even if the complaint against All-

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<sup>2</sup>It appears from the court's electronic record of the action, the amended complaint was not successfully e-filed.

Boro is dismissed, its cross claims against All-Boro for contribution and indemnity based on allegations that All-Boro removed salvageable property have potential merit or, alternatively, should be converted to a third-party claims. New Generation adopts Castle Oil's arguments and assert that its cross claims are potentially meritorious.

#### Discussion

The first issue to be addressed is whether pursuant to CPLR 3215(c),<sup>3</sup> the complaint should be dismissed as abandoned based on a plaintiffs' failure to seek a default judgment within a year of All-Boro's default. There is no dispute that All-Boro defaulted on March 28, 2013, when it failed to appear, move or otherwise respond to the complaint served on it twenty days earlier, or that plaintiffs failed to seek entry of a judgment on the default within a year of such default, or at any time thereafter.

It is well established that when, as here, a plaintiff fails to seek a default judgment within a year of a default in answering, the plaintiff "has the burden to show lack of intent to abandon the action ...and to demonstrate both a reasonable excuse for the period of non-prosecution and merit to the action." Sports Legends, Inc. v. Carberry, 38 AD3d 470 (1<sup>st</sup> Dept 2007)(internal citations omitted); see also Broder v. City of New York, 178 AD2d 308 (1<sup>st</sup> Dept 1991)(noting that CPLR 3215(c). "requires dismissal of the complaint as abandoned, unless sufficient cause is shown why the complaint should not be dismissed").

Here, plaintiffs offer no explanation for their failure to move for a default within a year. Instead, plaintiffs argue that the amended complaint dated September 10, 2015, or approximately

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<sup>3</sup>CPLR 3215(c) provides that "[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed."

two and a half years after All-Boro's default, supercedes the original complaint and that All-Boro's failure to timely answer the amended complaint re-starts the time for plaintiffs to move for a default. This argument is without any legal or factual basis. In fact, the amended complaint appears to support a finding that plaintiffs have abandoned their claims against All-Boro. Specifically, as noted above, while named as a defendant in the amended complaint and identified as a defendant charged with remediation of the oil spill and removal of merchandise, the amended pleading, unlike the original one, is devoid of any specific allegations against All-Boro in connection with the claims asserted. Moreover, while All-Boro provides proof that it has not been served with the amended complaint, plaintiffs submit no evidence to the contrary, such as an affidavit of service. Under these circumstances, the motion to dismiss for failure to move for a default within a year is granted. Pack v. Saldana, 178 AD2d 123 (1<sup>st</sup> Dept 1991); Staples v. Jeff Hunt Developers, Inc., 56 AD3d 459 (2d Dept 2008).

The remaining issues concern the viability of the cross claims asserted against All-Boro by Castle Oil and New Generation. As a preliminary matter, contrary to All-Boro's position, the dismissal of the complaint against it based on plaintiffs' failure to timely move for the entry of judgment upon a default under CPLR 3215 (c) does not also require dismissal of the cross claims since with respect to cross claims (or third party claims), the one-year period for entry of judgment does not begin to run until there is a determination as to liability in the main action. IMP Plumbing and Heating Corp v. 317 East 34<sup>th</sup> Street, LLC, 89 AD3d 593 (1<sup>st</sup> Dept 2011); Multari v. Glalin Arms Corp., 28 AD2d 122 (2d Dept 1967), appeal dismissed 23 NY2d 470 (1968). Moreover, a dismissal pursuant to CPLR 3215(c) is not on the merits so the dismissal of the main action on this ground would not be determinative of the validity of the cross claims, which can be converted to third party claims upon dismissal of All-Boro as a defendant in the

main action. See Rodrigues v. Samaras, 117 AD3d 1022, 1024 (2d Dept 2014)(a dismissal of an action as abandoned pursuant to CPLR 3215 (c) is not an adjudication on the merits unless the court specifically states that it is a merits based dismissal); Cole v. Mraz, 77 AD3d 526 (1<sup>st</sup> Dept 2010)(following dismissal of main complaint, cross claims were properly converted to third-party claims). As for All-Boro's argument that it is immune from liability under Navigation Law, such argument is unavailing since the cross claims are not based on an alleged violation of the Navigation Law, which is not an exclusive remedy.<sup>4</sup> See White v. Long, 229 AD2d 178, 179 (3d Dept 1997).

That said, however, the court finds that the cross claims asserted by All Castle and New Generation must be dismissed as the record is devoid of evidence to support these claims, which are based solely on a theory that during its performance of remediation work after the oil spill, All-Boro negligently removed salvageable property belonging to plaintiffs. In support of their dismissal motion, All-Boro submits the affidavit of its managing member, Quintana, who supervised All-Boro's activities with regard to the remediation of the oil spill. According to Quintana, pursuant to an oral agreement with New Generation and Hadad, All-Boro "was tasked with conducting remediation consistent with All-Boro's and New Generation's lawful obligations under the supervision of the New York State Department of Environmental Conservation ("NYDEC") ..[which] entailed securing the contaminated area, removing the oil contaminants located there, as well as removing the ruptured tank, surrounding the building foundation and any materials in the vicinity contaminated by the presence of oil itself or toxic

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<sup>4</sup>This argument is also without statutory support. Section 178-a(2)(a), relied on by All-Boro, applies to "responses to a discharge or threatened discharge of petroleum in navigable waters," which is not at issue here, nor is All-Boro entitled to the immunity afforded the State or its agents under section 176(2)(b).



particulate of the same” (Quintana Aff. ¶ 3). Quintana states that All-Boro was at the Building “solely for oil spill remediation from approximately November 20, 2012 to April 22, 2013” (Id). Quintana states that “All-Boro is not currently in possession of any goods of plaintiffs. As indicated in the Remediation Report<sup>5</sup> all contaminated substances removed from [the Building] were collectively disposed of, with the last landfill deposit occurring on March 6, 2013. As also detailed in the Remediation Report, All-Boro did not categorize the contaminated goods disposed of in any manner other than general load description which included weight and depository information” (Id ¶ 12).

Quintana also states that “[a]lthough All-Boro did conduct general cleaning activities at [the Building] during the remediation, any materials that could not be decontaminated, regardless of their nature, were removed from [the Building] for disposal in accordance with New York’s Navigation Law” (Id ¶ 13). He further states that “All Boro was never provided with an inventory of the plaintiff’s goods allegedly stored at the contamination area prior to the oil spill occurring, and did not create the list as part of the remediation. All Boro was retained solely to remediate the spill and to dispose of contaminants on the premises. The agreement with New Generation featured no provision for cataloging or other administrative services” (Id ¶ 14).

To counter Quintana’s affidavit, Castle Oil and New Generation rely solely on the deposition testimony of Silver Galore’s owner, Mr. Parwani, which fails to raise a triable issue of fact as to All-Boro’s alleged negligence. Mr. Parwani testified that shortly after the oil spill, All-Boro arrived to remediate the spill. According to Mr. Parwani when he went into the basement at noon on the day of the spill he saw that it was flooded with two feet of oil which covered the

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<sup>5</sup> A copy of the Remediation Report, which was provided to the NYDEC on April 3, 2013, as part of NYDEC’s application for a NYDEC determination that the remediation work was complete, is submitted in support of the motion.

goods on the floor of the basement where he stored certain boxes of merchandise (Parwani Dep, 5/27/15, at 89, 111-113). Mr. Parwani further testified that individual named Chris (Quintana) from All-Boro instructed him to keep a list of merchandise damaged by oil in the basement and to give it to him and that he would “take care of it” (Id, at 111). He later testified that at Quintanta’s request he faxed the list to Hadad (Id, at 135), and also gave it to Quintanta (Parwani Dep 2/23/16, at 78). He further testified that All-Boro and its employees worked on the clean up for four to six weeks and removed items in drums, which he described as containing “whatever was damaged and lying on the floor” (Id, at 116-117). He also testified that undamaged merchandise was in boxes on racks about two feet off the ground (Id, at 114; Parwani Dep 2/23/16, at 13-14). Significantly, Mr. Pawani did not testify that these boxes were removed by All-Boro (Id.). Instead, he testified that the unstained boxes “were safe” and still on the shelves after Silver Galore left the Building (Parwani Dep, 5/27/15, at 114; Parwani Dep 2/23/16, at 225), and that he was unsure whether he asked All Generation to return the unstained boxes from the basement (Id at 231).

Thus, the record is devoid of evidence that All-Boro removed any salvageable items during its remediation of the oil spill or that any such removal was caused by All-Boro’s negligence. In particular, under the circumstances here, where All-Boro was hired to remove and dispose of contaminated items from the basement, evidence of All-Boro’s presence in the basement at the time of clean-up and All-Boro’s alleged receipt of an itemized list of damaged goods from Silver Galore, does not give rise to a logical inference that All-Boro’s negligence resulted in plaintiffs’ loss of salvageable items, particularly in the absence of any evidence that All-Boro disposed of the undamaged merchandise that Silver Galore left in the basement following its eviction. See Benzaken v. Verizon Communications Inc., 21 AD3d 864, 865 (2d

Dept 2005)(holding that defendant was entitled to summary judgment dismissing claims based on allegations that defendant was responsible for the disappearance of jewelry where plaintiffs' evidence was based on "pure speculation").

Conclusion

Accordingly, it is

ORDERED that the motion by All-Boro Tank Testing is granted and the complaint and all cross claims asserted against it are dismissed; and it is further

ORDERED that the caption is amended to reflect the dismissal of the complaint and cross claims against All-Boro Tank Testing; and it is further

ORDERED that counsel for All-Boro Tank Testing shall serve a copy of this order with notice of entry upon the County Clerk (room 141B) and the Clerk of the Trial Support Office (room 158), who are directed to mark the court records to reflect the change in caption herein.

Dated: January 27, 2017

  
HON. JOAN A. MADDEN  
J.S.C.