22 Holding Corp. v Landmark Holding Co.
2005 NY Slip Op 30024(U)
January 18, 2005
Supreme Court, New York County
Docket Number:
Judge: Alice Schlesinger
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SCANNED ON 1/21/2005

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

PRESENT: ALICE SCHLESINGER PART 16A Part 15
Justice

22 Harbor Corp.

-v-

Landmark Harbor R.

INDEX NO. 113913/01

MOTION DATE

MOTION SEQ. NO. 003

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JAN 21 2005
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: JAN 18 2005

ALICE SCHLESINGER, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 16

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22 HOLDING CORP. And CHAMA HOLDING CORP., ASSOCIATION INC.,

Plaintiffs,

-against -

Index No. 113913/01
Motion Seq. No. 003

LANDMARK HOLDING COMPANY, YORK CLAIMS SERVICE and SOBEL AFFILIATES, INC.,

Defendants.

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FILED
JAN 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

SCHLESINGER, J:

This action, was commenced by 22 Holding Corp. and Chama Holding Corp., on July 19, 2001. The relief sought was in the nature of a declaratory judgment to the effect that Landmark Holding Company ("Landmark"), plaintiffs' insurer (for 3 liability policies issued between 1992 and 1995) of premises owned by them, 321 Edgecombe Avenue, New York City was obligated to indemnify them for claims they might be found liable for in another action, wherein they were named as defendants. That other action was a personal injury action entitled *Joel Rosario and Stephanie Rosario by their mother and Natural Guardian, Ramona Rosario,* index number 110832/96.[1] That action was commenced in New York Supreme Court on June 18, 1996. There the infant plaintiffs claim they suffered brain injury as a result of the ingestion of lead-based paint at the building premises.

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[1]This relief actually constituted the First Cause of Action in the complaint. The Second Cause of Action referenced another action, under index no. 114788/96 also filed in Supreme Court, New York County in August 1996. That action concerned the same premises and claims of lead-based poisoning but the plaintiffs were other children, living in another unit. They were Giselle and Jose Rosario and their mother/guardian was Aide Rosario. The similarity in the names did cause some confusion which will be addressed later on.

The event giving rise to the commencement of the declaratory judgment was Landmark's disclaimer of coverage under all three policies on June 7, 2001. The basis for disclaiming was late notice to them of these lead poisoning claims.

Defendant York Claims Service, Inc. ("York") served as a third-party administrator engaged by Baruch Greisman, former principal of 22 Holding and Chama, to perform claim-handling functions within the applicable self-insured retention. Defendant Sobel Affiliates, Inc. ("Sobel") was a licensed broker who had obtained these policies for the plaintiffs and continued to act as their broker.

These defendants are sued alternatively. In other words, the plaintiffs claim there should not have been a disclaimer and that Landmark breached the contracts of insurance by doing so. However, in the event that Landmark did not, in fact, receive timely notice as was required under the policies, then plaintiffs as the insured were looking to York and/or Sobel to indemnify them. This claim is based on plaintiffs' allegation that York and Sobel had been timely notified and had a duty in turn to notify Landmark.

At least the above is what this Court can glean from the complaint. It is poorly drafted and phrased in very general terms. It is probably for this reason, in part, that the instant motion was brought. It was brought by the infant plaintiffs, Joel Rosario and Stephanie Carrero, the plaintiffs in the underlying action referred to in the first cause of action. It is to amend that complaint, to add specifity and clarity, as well as to change the relief requested from a declaratory judgment to specific money damages.

Some intervening history is now necessary.

This action, although begun in 2001, was proceeding at a very slow pace. In fact, in September of 2003, depositions had still not been taken. Meanwhile, the Joel

Rosario/Stephanie Carrero matter had been resolved in the Civil Court, New York County. That action was settled, during trial on November 6, 2002, after the plaintiff had put on all of its witnesses. The parties then waived a jury and stipulated that the court would determine both liability and damages. The court's decision, vis-a-vis liability in relevant part found that 22 Holding was responsible for the elevated blood lead levels in both Joel Rosario and Stephanie Carrero from April 23, 1993 through August 1, 1995. As to damages, the court awarded Joel Rosario the aggregate amount in total present value of $2,234,145.25 and Stephanie Carrero the aggregate amount in total present value of $1,676,564.53. A judgment to that effect, as well as providing for the establishment of annuities for the plaintiffs and for the distribution of attorney's fees, was entered on July 22, 2003.

Another insurer, Generali, who had not disclaimed, satisfied $342,000 of Joel's judgment and $258,000 of Stephanie's. Therefore, on September 17, 2004, when this Court allowed Joel and Stephanie to intervene in this declaratory judgment action pursuant to §1013 of the CPLR, both had large unsatisfied judgments. Landmark had been notified of this fact. Under such circumstances, and pursuant to §3420 of the Insurance Law, plaintiffs did have a sufficient interest to maintain a direct suit against the defendants'/insureds' insurance company, as I so found.

However, it was not until June 17, 2004, anticipating the finalization of the infant compromise orders, that Joel and Stephanie obtained from 22 Holding and Chama an assignment of all of their claims and causes of action against Landmark, York and Sobel. That assignment agreement prompted the new plaintiffs/assignees to make the instant motion to amend this complaint.

As stated earlier, the proposed amendment attempts to delineate specific causes of action against the three defendants as well as give precise factual predicates for them. For example, it includes, in great detail, the full history of the underlying action. It also changes the remedy sought to money damages. The proposed amendment recites two causes of action against Landmark. The first is pursuant to §3420(a)(2) of the Insurance Law and alleges that this insurer did receive notice of the claim either from Sobel or York, or alternatively if notice was not received, the disclaimer was ineffective or untimely. The second cause of action sounds in breach of contract.

There are also two causes of action against the other defendants, Sobel and York. The first of these (third cause of action) sounds in breach of contract by not notifying the appropriate insurers (Landmark) of the claims filed on behalf of these infants. The second (mislabeled the "third", but actually is the "fourth") sounds in negligence based on the same allegations except that rather than breaching a contractual obligation as a broker, there is the allegation of a breach of a duty to exercise due care. The fifth and sixth causes of action against York (mislabeled the fourth and fifth causes of action) are the same as those stated against Sobel.

There is vigorous opposition from all three defendants. Each counsel argues prejudice and points to the age of the case and to the fact that a note of issue has already been filed. However, the prejudiced is not spelled out. For example, there is a statement that more discovery may now be necessary, discovery to which plaintiffs/assignees agree, but it is not clear precisely what that discovery would consist of.

The defendants also urge that the amended complaint lacks merit, specifically because both the contractual and negligence claims are untimely. On this point, I told the parties they could file supplemental papers. Counsel for the plaintiff and Sobel did. Sobel's position is that,

pursuant to CPLR §213, regarding the statute of limitations for breach of contract of six years, that the time here began to run in April of 1994 when Sobel was first notified of these children's claims.

However, plaintiff points out that it is far from clear when this actually happened because the April claim that Sobel references contains the name of a different child, Jose (not Joel) Rosario who lived in a different unit, apt 6Z in the same building. This boy, whose mother was Aide Rosario, not Romana Rosario, commenced his own action, the month after the same counsel filed Joel and Stephanie's action. It is plaintiff's position that there was no notification by assignor's principal Baruch Greisman of this claim until he referred this underlying summons and complaint to Sobel in June, 1996. If that is the time of the breach, then the breach of contract allegation would be timely as their failure to forward the papers to Landmark would have occurred on or about that date.

While it is true that Greisman testified that he thought the April 1994 notification referred to this action, his testimony is more indicative of confusion than of anything else. Therefore, there is a legitimate issue here as to when Sobel first became aware of this claim and had a corresponding obligation and/or duty to forward that notice. As to the negligence cause of action, that accrues when the injury occurred and arguably that was when Landmark disclaimed, in 2001.

Therefore, vis-a-vis the defendants' claim that the proposed amendment lacks merit, I cannot make that finding on the basis of these disputed facts. Amendments to complaints should be freely granted. The plaintiff seeking such relief does not have to prove his case. It is sufficient if the claims may be meritorious. If there are factual differences giving rise to different legal conclusions, those must be resolved at a later time.

Sobel also argues that no contract existed between it and the assignors. They rely for this argument on the following line from a short affidavit from Neil Unger, their Senior Vice President.

> Sobel did not have a contract with Baruch Greisman.

This conclusory statement cannot be the basis for a finding that the corporations in which Greisiman was the principal, the corporations which used Sobel as their insurance broker, did not have a contractual relationship wherein the latter was obligated to perform certain functions, on behalf of the insured, vis-a-vis the insurers.

York takes the position that the amendment lacks merit and is untimely because this is an entirely different theory of liability from the one originally asserted. Therefore, the amendment should not relate back to the time of the original complaint which was filed in 2001. Their counsel seems to acknowledge that the relevant date for a breach here would be January of 1997 when the assignor's law firm wrote a letter to Landmark in care of York Claims Service vis-a-vis the claims being made here. It is alleged York did not properly forward this letter to Landmark or follow up on it. The alleged breach would be in 1997 and a claim asserted after 2003 would be untimely unless it related back to the original complaint filed in 2001.

While the original complaint lacked detail, specified causes of action, and to a certain extent coherence, I still find that it put the defendants on notice that Sobel and York failed to meet their obligations to notify Landmark of these claims. Therefore, this new and improved, and excessively specific complaint (sounding almost like a bill of particulars)[2] should not have

[2]I have never seen the Bill of Particulars in this action. Frankly, I do not know if ones were even requested. Presumably, if they were and do exist, if they communicated significantly different claims, that would undoubtedly have been brought to my attention by defendants. It was not.

surprised anyone. Therefore, the Amended claims should relate back.

Landmark's opposition is limited to a complaint regarding a lack of clarity of the proposed amendment, particularly its paragraph 49. But this does not constitute meaningful opposition. Their counsel asks me, however, to vacate the note of issue.

The motion to amend the complaint by the plaintiffs/assignees is granted. However, defendants' objection to an award for attorney's fees, item "2", in the "wherefore" clause is correct. Under the rule articulated in *Mighty Midgets v. Centennial Ins. Co.*, 47 NY2d 12 (1979), an insured is only entitled to attorney's fees when it is cast in a defensive posture vis-a-vis its insurer. Here that is not the case as the assignors/insureds commenced the action and their assignees, of course, have no greater entitlements. Thus, that claim for damages is dismissed.

I am not prepared at this time to strike the note of issue and order more discovery, since it is unclear what that might be. Therefore, I am directing a conference at 10:00 on February 9, 2005 to settle the remaining issue. Meanwhile, I am deeming the proposed amendment served on the defendants and directing that they serve answers on or before January 25, 2005.

This decision constitutes the order of the Court.

FILED
JAN 21 2005
COUNTY CLERK'S OFFICE
NEW YORK

Dated: January 18, 2005

J.S.C.
ALICE SCHLESINGER