

General Security Insurance Co. v Nir

2006 NY Slip Op 30184(U)

October 16, 2006

Supreme Court, New York County

Docket Number: 0102417/2003

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

GENERAL SECURITY INSURANCE COMPANY,
as subrogee of SUGAR REEF d/b/a GLOBAL 33,
Plaintiff,

Index No.: 102417/03

Motion Date: 05/17/06

- v -

ELIAHU NIR, BUCKMILLER AUTOMATIC SPRINKLER
CORP., and THE PETZVEL CORPORATION,
Defendants.

Motion Seq. No.: 02

Motion Cal. No.: _____

Index No.: 590450/03

BUCKMILLER AUTOMATIC SPRINKLER CORP.
and THE PETZVEL CORPORATION,
Third-Party

- v -

WILLIAM W. MOORHEAD, individually,
d/b/a WILLIAM W. MOORHEAD ARCHITECT
and SUGAR REEF INC. d/b/a GLOBAL 33,
Third-Party Defendants.

UNFILED JUDGMENT
This judgment has not been entered
and notice of entry cannot be served based hereon. To
obtain entry, counsel or party must
appear in person at the County Clerk's
office.

NY
the County Clerk's
office.

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

The following papers, numbered 1 to 4 were read on this motion for summary judgment, cross motions to amend complaint and for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Cross-Motion/Answering Affidavits - Exhibits _____
Cross-Motion/Replying Affidavits - Exhibits _____

PAPERS NUMBERED	
1	_____
2	_____
3, 4	_____

Cross-Motion: Yes No

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appear in person at the County Clerk's
office.

Upon the foregoing papers,
Third Party Defendant William W. Moorhead, individually and
d/b/a William W. Moorhead Architect (hereinafter collectively
"Moorhead") moves for summary judgment dismissing the third party
complaint for failure to state a cause of action. Defendants
Buckmiller Automatic Sprinkler Corp. ("Buckmiller") and Petzvel

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

Corporation ("Petzvel") cross-move for summary judgment dismissing the Complaint against them, arguing, inter alia, statute of limitations and spoliation of evidence. Plaintiff General Security Insurance Company a/s/o Sugar Reef d/b/a Global 33 ("General Security") cross-moves to amend its complaint. Defendant Eliahu Nir ("Nir") cross-moves to dismiss the complaint against him, which motion is unopposed.

Nir's cross-motion is unopposed and therefore must be GRANTED. Plaintiff General Security's cross-motion to amend its complaint and defendant Moorhead's cross-motion for summary judgment dismissing the third party complaint against him shall be GRANTED. Defendants Buckmiller and Petzvel's cross-motions to dismiss the Complaint must be DENIED.

The underlying action arises from a fire that took place at the Sugar Reef Restaurant d/b/a Global 33 on April 1, 2000. General Security, the insurance carrier for Sugar Reef, the tenant, commenced this action for property damage against Nir, the landlord of the premises, Buckmiller Automatic Sprinkler Corp., the entity that in 1992 installed the sprinkler system, and Petzel Corporation, the corporation that performed the inspections of the sprinkler system from March 1999 until the date of the loss. Buckmiller and Petzel commenced a third party action against William W. Moorhead, the architect, who more than sixteen years ago, was retained by the restaurant to prepare

plans for increasing the public assembly limitations for the restaurant. Moorhead subcontracted an engineer to assist in the preparation of those plans, which were approved by the New York City Department of Buildings.

Moorhead is correct that third party plaintiffs Buckmiller and Petzel set forth no cognizable claim against him. The third party plaintiffs allege no legal duty they were owed by Moorhead contractually or otherwise. The court concurs with Moorhead that the only duty it owed the restaurant was the preparation of architectural drawings, and it is uncontested that he performed such duty and that indeed, such plans were approved by the appropriate governmental agency. Thus, their third party complaint states no cause of action for contribution, since they are required to allege "that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought." Nassau Roofing & Sheet Metal Co., Inc. v. Facilities Development Corp., 71 N.Y.2d 599, 603 (1988), and assertions of such a breach are absent.

Nor do third party plaintiffs raise any issue of fact with respect to the absence of vicarious liability on the part of Moorhead from any wrong acts that plaintiff alleges against them. Neither has "a basis for claiming common law indemnification from [Moorhead] since the pleadings show that the plaintiff [General Security] does not claim that [Buckmiller and Petzvel are]

responsible for wrongs committed by [Moorhead]." Board of Education v. Mars Associates, 133 A.D.2d 800 (2nd Dept. 1987).

Likewise, third party plaintiffs' claims fail to rise to the standards that a noncontracting party must show to cast Moorhead in tort liability based on contractual breaches, since they assert no breach of contract. Even assuming arguendo some assertion of a breach, they have not shown that Moorhead's "performance of contractual obligations has induced their detrimental reliance on continued performance...and [that his] inaction would result in not merely withholding a benefit, but positively or actively in working an injury," which is "direct and demonstrable, not incidental and merely collateral." Cresvale International, Inc. v. Reuters America, Inc., 257 A.D.2d 502 (1st Dept. 1999). The court does not, however, find that third party plaintiff's assertion of claims against Moorhead to be so lacking in merit to warrant sanctions or costs.

Likewise, the cross-claims interposed by Nir against Moorhead fails. Such cross-claims are moot, in any event, since Nir's cross-motion to dismiss the Complaint against him shall be granted without opposition.

Defendant Buckmiller asserts the expiration of the statute of limitations as to the negligence claims interposed by plaintiff, but does not refute in its papers plaintiff's contention that Buckmiller performed work as late as April 1,

2000. Furthermore, as a contracting party, plaintiff's allegation that defendant Buckmiller's failure to install a working sprinkler system as it was obligated to provide in its contract may give rise to tort liability. The deposition testimony of Buckmiller's principal with respect to a prior failure of the sprinkler system to activate creates an issue of fact that a trier of fact must resolve. Melodee Lane Lingerie Co. V. American District Telegraph, 18 NY2d 57 (1966). The record also raises issues of fact with respect to defendant Petzvel's duty to perform monthly inspections under its contract with plaintiff's subrogor.

With respect to defendants argument that the Complaint should be dismissed for plaintiff's failure to preserve the sprinkler system, nowhere in its papers does plaintiff assert any efforts to inspect the sprinkler system, including seeking court orders directing such discovery. Based upon that inaction on its part, defendants are not entitled to dismissal of the Complaint on the ground of spoliation of evidence. Cf. Standard Fire Insurance Company v. Federal Pacific Electric Company, 14 A.D.3d 213 (1st Dept. 2004).

Finally, General Security's motion to amend its Complaint to assert breach of contract against defendants Buckmiller and Petzvel shall be granted. "It is essential that a party seeking leave to amend a complaint demonstrate the merit of the proposed

pleading." Peretich v City of New York, 263 A.D.2d 410 (1st Dept. 1999). General Security has stated a meritorious claim for breach of contract against Petzvel. General Security's subrogor, the tenant Sugar Reef, had a contract with Petzvel for inspection of the sprinkler system. General Security, as subrogor, has the right to subrogation not only as to claims of negligence on behalf of Sugar Reef, but also as to any breach of contract claim that Sugar Reef may assert against Petzel. See Viacom International, Inc. v. Midtown Realty Corporation, 235 A.D. 332 (1st Dept. 1997).¹ The facts here are distinguishable from Crestvale, supra, where the tenant was not a party to the contract in that case, which involved cleaning and security services, and was therefore not in privity with the company in question. Nor have defendants established any prejudice arising from plaintiff's three year delay in seeking the relief. However, given the plethora of parties and actions related to the loss, such relief is granted provided that plaintiff pay the costs and disbursements of this action within 20 days after service of the order allowing the amendment. Symphonic Electronic Corp. v. Symphonic Electronic Corp., 24 A.D.2d 746 (1965).

¹At oral argument on May 17, 2006, the court ruled differently from the decision herein on plaintiff's motion to amend its Complaint. Upon further deliberation, the court determines the motion in accordance with the herein decision and order.

Accordingly, it is

ORDERED and ADJUDGED that defendant Moorhead's motion for summary judgment is GRANTED, and the Clerk of the Court is directed to enter judgment in favor of third party defendant Moorhead, dismissing the third party complaint and any cross-claims against third party defendant Moorhead, with prejudice; and it is further

ORDERED that third party defendant Moorhead's motion to the extent that it seeks costs and sanctions against third party plaintiff's Buckmiller and Petzvel is DENIED, and it is further

ORDERED that defendants Buckmiller and Petzvel's cross-motions to dismiss is DENIED, and it is further

ORDERED and ADJUDGED that fourth party defendant Eliahu Nir's cross-motion for summary judgment is GRANTED without opposition, and the Clerk of the Court is directed to enter judgment in favor of fourth party defendant Eliahu Nir dismissing the complaint and action in its entirety as against defendants Eliahu Nir; and it is further

ORDERED that the cross-motion of plaintiff to amend its Complaint to assert a cause of action for breach of contract against defendant Petzvel is GRANTED, on condition that plaintiff pay the sum of \$2500 in costs, together with the costs and disbursements of this action to date, to be taxed by the Clerk,

within twenty days after service of the order to be entered herein.

This is the decision and order of the court.

Dated: October 16, 2006

ENTER:

Deera A. James
DEERA A. JAMES
J.S.C.
J.S.C.

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be given based hereon. To obtain entry, counsel must file a motion for entry and appear in person at the County Clerk's Office (Room 41B).

[79]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
GENERAL SECURITY INSURANCE COMPANY
a/s/o SUGAR REEF d/b/a GLOBAL 33,

Index No.: 102417/03

Plaintiff,

-against-

Order

ELIAHU NIR, BUCKMILLER AUTOMATIC
SPRINKLER CORP. and THE PETZVEL
CORPORATION,

rec'd 119 = 10-19-06

Defendants.

-----X
BUCKMILLER AUTOMATIC
SPRINKLER CORP. and THE PETZVEL
CORPORATION,

Third-Party
Index No.: 590450/03

Third-Party Plaintiffs,

-against-

WILLIAM W. MOORHEAD, individually
d/b/a WILLIAM W. MOORHEAD ARCHITECT
and SUGAR REEF INC. d/b/a GLOBAL 33

Third-Party Defendants.

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and notice of entry cannot be served based hereon. To
obtain entry, counsel for the party whose representative must
appear in person at the County Clerk's Desk (room
11B).

-----X
The third-party defendants, WILLIAM W. MOORHEAD,
individually and d/b/a WILLIAM W. MOORHEAD ARCHITECT (herein
after collectively "Moorhead"), having moved this Court pursuant
to CPLR §3212 for an order dismissing the third-party
plaintiffs' Complaint and any cross-claims against Moorehead and
the motion having been duly submitted on May 17, 2006 and the
Court having rendered its decision on the record May 17, 2006,
granting Moorhead's motion dismissing the third-party
plaintiffs' Complaint and any cross-claims against Moorehead and
directing that a settle order be submitted on five days notice,

NOW, upon motion of GOGICK & BYRNE & O'NEILL, attorneys for
Moorehead, it is

ADJUDGED, that the third-party complaint of the third-party
plaintiffs and any cross-claims against Moorehead are hereby

Dismissed with prejudice in all respects.

ENTER:

[Handwritten Signature]

J.S.C.

UNFILED
This judgment has not been entered by the clerk of court and notice of entry must be given to the party to obtain entry, and the party must appear in person at the clerk's office (see Rule 41B).