

Delos Santos v 500 C.S. Realty Corp.

2007 NY Slip Op 31176(U)

April 30, 2007

Supreme Court, New York County

Docket Number: 0400012/2005

Judge: Marcy S. Friedman

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SCANNED ON 5/11/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **Hon. Marcy S. Friedman**
Justice

PART 57

De Los Santos

INDEX NO. 400012105

MOTION DATE _____

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

- v -

500 CS.

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

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

PAPERS NUMBERED

1-5
2-5
6-10

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross motions are
determined pursuant to decision dated 4-30-07
filed in De Los Santos v Strauss, Index No.
107053/05, Seq. No. 1.

FILED
MAY 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4-30-07

[Signature]
J.S.C.

Hon. Marcy S. Friedman

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ROBERTO DELOS SANTOS, infant by his mother
and natural guardian, SENEIDA DELOS SANTOS,
individually,

Index No.: 400012/05

Petitioners,

- against -

500 C.S. REALTY CORP., et al.,

Respondents.

_____ x

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

ROBERTO DELOS SANTOS, infant by his mother
and natural guardian, SENEIDA DELOS SANTOS,
individually,

Index No.: 107053/05

Plaintiffs,

- against -

WALTER STRAUSS, AS RECEIVER, L.W.L.
ASSOCIATES, and J.R. PROPERTY,

DECISION/ORDER

Defendants.

_____ x

FILED
MAY 11 2007
NEW YORK
COUNTY CLERK'S OFFICE

This is a proceeding for an order vacating an April 14, 1994 order of this Court discharging Walter Strauss as the receiver for a premises located at 400 West 143rd Street, New York, New York, and granting petitioners leave to commence a personal injury action, based on alleged lead paint poisoning of the infant petitioner, against Walter Strauss as receiver. Petitioners/there plaintiffs previously commenced a personal injury action, based on the lead paint poisoning (DeLos Santos v 500 C.S. Realty Corp., Sup Ct, New York County, Index No. 400012/05), against LWL Associates, Inc., sued as L.W.L. Associates (“LWL”) and J.R. Properties, sued as J.R. Property (“JR”), managing agents for the premises during the receivership (collectively “managing agents”). The instant proceeding also seeks an order granting leave of court nunc pro tunc to sue the managing agents in the prior action. The managing agents have moved in the prior action for summary judgment dismissing the action on the ground, among others, that plaintiffs failed to obtain leave of court prior to commencing the action. Plaintiffs cross-moved in the prior action to stay the motions for summary judgment pending hearing of the instant petition. The petition and the motions in the prior action are consolidated for disposition.¹

The receiver and managing agents oppose the petition primarily on the ground of laches. Petitioners allege that during the period of the receivership, between 1991 and 1994, the infant,

¹This proceeding and the motions in the prior action were assigned to this Part on January 2, 2007 and submitted after oral argument on February 8, 2007. This proceeding was initially returnable on April 9, 2005. The receiver requested reference of the proceeding to Justice Martin Schoenfeld of this Court who had issued an order, filed on July 12, 1990, appointing Walter Strauss as receiver, and an order, dated April 14, 1994, relieving Mr. Strauss as receiver and appointing a substitute receiver. (See Jennifer-Alissa Corp. v Hamilton Assocs., Sup Ct, New York County, Index No. 2260/90.) By order dated November 29, 2006, Justice Schoenfeld recused himself in this matter.

It is unclear from the court file whether the instant proceeding and prior action were previously consolidated. This decision will be filed under Index No. 107053/05, Seq. No. 1.

Roberto De Los Santos, sustained lead poisoning as a result of his ingestion of paint chips in the apartment in which he resided at the premises. The infant has not yet reached the age of majority, and it is undisputed that the statute of limitations has not yet passed on his claim.

The procedural history of this matter is also undisputed: In 1997, petitioners commenced a personal injury action (Delos Santos v 500 C.S. Realty Corp., Sup Ct, New York County, Index No. 113941/97) based on the alleged lead paint poisoning. In the first action, petitioners/there plaintiffs named but never served Mr. Strauss, but did serve LWL and JR, the managing agents. By order filed on December 26, 2000, this Court (Solomon, J.) dismissed the action based on plaintiff's failure to appear at a "blockbuster" conference call. Plaintiffs' subsequent motion to vacate the dismissal was denied by order of the same Justice, dated January 29, 2001. The order expressly provided: "New action against any proper [defendant] may be commenced." Petitioners then commenced a second action based on the same lead poisoning (DeLos Santos v 500 C.S. Realty Corp., Sup Ct, New York County, Index No. 400012/05) ("prior" or "second" action) which named, among other parties, Walter Strauss as receiver and LWL and JR. Petitioners/there plaintiffs did not serve Walter Strauss in the second action, but did serve the managing agents. The instant proceeding, brought approximately eight years after the commencement of the 1997 action and eleven years after the discharge of the receiver, marks the first occasion on which petitioners have sought to vacate the discharge of the receiver and to obtain leave to assert claims for personal injury against the receiver and his managing agents.

It is well settled that leave of court must be obtained before suing a receiver appointed in a mortgage foreclosure for personal injury incurred by a plaintiff during the period of the receivership. However, the court has discretion to grant leave nunc pro tunc, even after discharge

of the receiver. (See Copeland v Salomon, 56 NY2d 222 [1982]; North Side Savings Bank v Arieh, 234 AD2d 169 [1st Dept 1996]. See also Columbus Realty Inv. Corp. v G&S Winding Rd., L.P., 257 AD2d 592 [2d Dept 1999].)

In opposition to the instant petition, both the receiver and managing agents argue that the relief now sought by petitioner is barred by laches. Laches is an “equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party.” (Saratoga County Chamber of Commerce, Inc. v Pataki, 100 NY2d 801, 816 [2003].) Here, petitioners have not offered a reasonable or, indeed, any plausible excuse for their inordinate delay of eight years since the commencement of the first personal injury action in seeking leave to sue the receiver. Petitioners’ claim that they could not locate the receiver, who was a licensed attorney registered with the Office of Court Administration, is wholly unpersuasive and justifies the “inference that the delay was attributable to plaintiff’s delinquency in investigating the facts.” (See Haughton v Merrill Lynch, Pierce, Fenner & Smith, 305 AD2d 214, 215 [1st Dept 2003], lv denied 100 NY2d 608.) Further, it is undisputed that the receiver did not have notice of the personal injury actions until 2005. Under these circumstances, the court declines to exercise its discretion to vacate the discharge of the receiver and to grant leave to sue him. (See Collins v Vickers, 296 AD2d 320 [1st Dept 2002], lv denied 98 NY2d 615.)

The court reaches a different conclusion as to the branch of the petition for leave to sue the managing agents, LWL and JR. The managing agents were first served with the personal injury action in 1997, actively litigated the first action until its dismissal, and have been actively litigating the second action. They have provided plaintiffs with discovery in the second action and, in fact, submitted to depositions in 2004. They do not claim that petitioners’ delay in seeking

leave to sue them has caused them any prejudice in defending the action. On this record, there is no reason why leave should not be granted to maintain the second action against the managing agents. The court finds, however, that petitioners' request that the court re-open the receivership and grant leave to sue the managing agents should be made in the mortgage foreclosure action, so that parties who may be interested in that action have an opportunity to be heard on the impact, if any, of the relief sought. The petition will therefore be denied without prejudice to a motion for such relief in the foreclosure action.²

Plaintiffs' motion in the prior action for leave to add Robert Cohen as a party will be denied. At this late stage of the case, "[d]efendants would be prejudiced by the need to prepare a defense on behalf of the additional part[y]." (See Haughton, 305 AD2d at 215; Konrad v 136 E. 64th St. Corp., 246 AD2d 324 [1st Dept 1998].) Defendant JR has been defending the personal injury action in its capacity as managing agent. Plaintiff seeks to sue Mr. Cohen, the president of JR, in his individual capacity. The defense of Mr. Cohen would thus raise materially different issues than defendant has previously addressed.

The court now turns to the branch of LWL's motion and JR's cross-motion in the prior action for summary judgment dismissing the complaint, on the ground that they may not be held liable in their own right because they acted as agents for a disclosed principal. It is well settled that a managing agent may be held liable for affirmative acts of negligence, but "may be held liable for non-feasance only if it is in complete and exclusive control of the management and operation of the building." (German v Bronx United In Leveraging Dollars, 258 AD2d 251 [1st

²In contrast, the denial of the petition as to the receiver will not be without prejudice because, as held above, the circumstances shown on this record do not warrant a grant of leave to sue the receiver.

Dept 1999] [finding triable issue of fact as to extent of managing agent's control in lead paint case]; Ionnidou v Kingswood Mgt. Corp., 203 AD2d 248 [2d Dept 1994]. Compare Pelton v 77 Park Ave. Condominium, 38 AD3d 1 [1st Dept 2006][managing agent held exempt from liability as agent of disclosed principal where record showed lack of authority to make alterations at issue]; Crimmins v Handler & Co., 249 AD2d 89 [1st Dept 1998].)

In the instant case, LWL and JR both fail to demonstrate as a matter of law that they did not exercise sufficient control over the premises during the period in which the infant plaintiff allegedly sustained injury to support imposition of liability against them for failure to abate lead paint in plaintiffs' apartment.

As between LWL and JR, there are also issues of fact as to which entity had control over the making of repairs. It is undisputed that JR was appointed by the receiver as managing agent and served in that capacity from sometime in 1990 to 1991. (Cohen Dep. at 7-8 [Ex. F to P.'s Aff. in Opp. to JR Motion].) LWL was appointed as receiver at least as of October 10, 1991 (see Notice to Attorn [Ex. B to Leitner Reply Aff. in Prior Action]) and served in that capacity until 1995. JR therefore claims it cannot be held liable for the lead paint condition because it was not the managing agent in 1993 when the City of New York placed violations for the condition in plaintiffs' apartment. LWL claims in response that throughout the time LWL was managing agent, Mr. Cohen controlled whether to make repairs at the premises. (See Dep. of Leonard Geller [LWL's President] at 15-16, 33 [Ex. F to P.'s Aff. in Opp. to JR Motion].) While Mr. Cohen denied that he was involved in the management of the premises after LWL was appointed (Cohen Dep. at 9), he acknowledged that, in his capacity as an employee of JR, he inspected plaintiff's apartment in 1993 after the lead paint violation was placed, and that JR subsequently

repaired the condition. (Id. at 38-39.) On this record, the court cannot find as a matter of law that either managing agent lacked the control necessary to support imposition of liability against it for personal injury for negligence or non-feasance in abating the lead paint.

The final branch of the managing agents' motions for summary judgment seeks dismissal of plaintiff mother's derivative claim on the basis that it is barred by the negligence statute of limitations. The toll that applies to an infant's claim does not apply to the parent's claim. (See Cruz v City of New York, 200 AD2d 407 [1st Dept 1994].) Plaintiff mother's claim must accordingly be dismissed as untimely.

It is accordingly hereby ORDERED that the petition (Index No. 107053/05) is denied in its entirety and the proceeding is dismissed, without prejudice to a motion in the mortgage foreclosure action (Jennifer-Alissa Corp. v Hamilton Assocs., Sup Ct, New York County, Index No. 2260/90) for leave to maintain the prior action (Index No. 400012/05) nunc pro tunc against LWL and JR only. Provided that: any such motion shall be made within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the motion of LWL and the cross-motion of JR in the prior action (Index No. 400012/05) for summary judgment are granted only to the extent of dismissing the derivative claims of plaintiff Seneida De Los Santos; and the Clerk shall enter judgment accordingly, and it is further

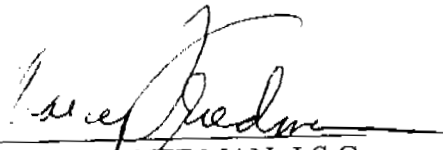
ORDERED that the remaining claims in the prior action are severed and shall continue; and it is further

ORDERED that the cross-motions of plaintiffs in the prior action for a stay of defendants' summary judgment motions are denied as moot; and it is further

ORDERED that the cross-motion of plaintiffs in the prior action for leave to commence an action against Robert Cohen is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
April 30, 2007


MARCY FRIEDMAN, J.S.C.

FILED
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