

Downing v Long Is. Gen. Supply Co.
2007 NY Slip Op 31279(U)
May 18, 2007
Supreme Court, Queens County
Docket Number: 0021779/2002
Judge: Kevin J. Kerrigan
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE KEVIN J. KERRIGAN Part 10
Justice

-----X
ANNE M. DOWNING, individually and as
Administratrix of the Estate of
JOHN J. DOWNING, Deceased,

Index
Number: 21779/02

Plaintiff,

Motion
Date: 04/30/07

- against -

Motion
Cal. Number: 3

LONG ISLAND GENERAL SUPPLY CO.,
ROBIN GORDON and RANDY GORDON, each
individually and d/b/a/ LONG ISLAND
GENERAL SUPPLY CO., ALEC GORDON,
PEARL GORDON, THE CITY OF NEW YORK and
NEW YORK CITY DEPARTMENT OF
ENVIRONMENTAL PROTECTION,

Motion Seq No. 1

Defendants.

-----X
LONG ISLAND GENERAL SUPPLY CO.,
ROBIN GORDON and RANDY GORDON, each
individually and d/b/a/ LONG ISLAND
GENERAL SUPPLY CO. and PEARL GORDON,

Third-Party Plaintiffs,

-against-

A.O. SMITH CORPORATION,

Third-Party Defendant.

-----X

The following papers numbered 1 to 10 read on this motion by
plaintiff for leave to amend the complaint to join third-party
defendant as a direct defendant.

Papers
Numbered

Amended Notice of Motion-Affirmation-Exhibits..... 1-5
Affirmation in Opposition-Exhibits..... 6-8
Reply Affirmation..... 9-10

Upon the foregoing papers it is ordered that the motion is decided as follows:

This decision was referred to this Court pursuant to a memorandum of Justice Martin E. Ritholtz issued on April 30, 2007 and was received in chambers on May 1, 2007.

Motion by plaintiff to amend the complaint to join third-party defendant as a direct defendant is denied.

This is a wrongful death and personal injury action in which the decedent, a firefighter, was injured and died in the course of fighting a fire that took place on June 17, 2001 at the premises owned by defendant Long Island General Supply Company (hereinafter referred to as LIGS). Plaintiffs commenced a timely action against defendants by filing a summons and complaint on August 16, 2002. Defendants LIGS and the Gordons commenced a third-party action against AO Smith by filing a third-party summons and complaint on April 14, 2006. AO Smith interposed an answer to the third-party complaint that included an affirmative defense of statute of limitations.

The period of limitation for commencing a wrongful death action is two years from the date of death of the decedent (see EPTL §5-4.1). Plaintiffs, in their bill of particulars, assert that decedent died on June 17, 2001. Plaintiff's and third-party plaintiff's causes of action sounding in negligence are governed by the three-year statute of limitations of CPLR 214(4). Likewise, third-party plaintiff's cause of action sounding in strict products liability is also governed by the three-year period of limitation of CPLR 214(5).

Plaintiffs now move for leave to add AO Smith as a direct defendant. AO Smith opposes the motion on the ground that an action against it is barred by the statute of limitations. Plaintiffs contend that a direct claim against AO Smith is timely under the relation back doctrine. That doctrine allows a claim asserted against a defendant in an amended pleading to relate back in time for statute of limitations purposes to claims previously asserted against a co-defendant (see Buran v. Coupal, 87 NY 2d 173 [1995]).

In support of its argument that the relation-back doctrine applies to the facts of this case and that the Court should allow the joinder of AO Smith as a direct defendant, plaintiffs rely upon Duffy v. Horton Memorial Hosp. (66 NY 2d 473 [1985]), in which plaintiff was allowed to amend his complaint to assert a direct

claim against the third-party defendant that would otherwise have been time-barred. Duffy held that since the third-party defendant had been served with the third-party complaint and the pleadings in the main action and, thus, at that point, had actual notice of the underlying claim and was aware of the potential for a direct claim by plaintiff, it would not be violative of the policy considerations underlying the statute of limitations to deem the amended complaint to relate back to the date of commencement of the third-party complaint.

In the instant case, however, the third-party complaint was untimely, and, thus, a direct claim relating back to the untimely third-party action is unavailing. Since the third-party action was not commenced until after the statute of limitations had expired on the underlying claim, a direct claim against AO Smith is now, likewise, time-barred (see Mason v. Rodolitz Organization, 282 AD 2d 581 [2nd Dept 2001]; Zaveta v. Portelli, 127 AD 2d 760).

Plaintiffs contend that the relation-back doctrine still applies to allow them to join AO Smith. Plaintiffs argue that since AO Smith was a defendant in several other actions brought by different plaintiffs arising out of the same incident and, therefore, has participated in those actions, it would not be surprised or prejudiced by being joined as a defendant in the instant action. Plaintiffs' argument, while imaginative, is without merit. Plaintiffs cite no authority, and this Court is unaware of any, for the proposition that an untimely direct claim against a third-party defendant brought by one plaintiff may relate back to the timely commencement of a separate action brought by a different plaintiff.

Accordingly, the motion is denied.

Dated: May 18, 2007

KEVIN J. KERRIGAN, J.S.C

