

| |
|--|
| Admiral Indem. Co. v Wynne Group, Ltd. |
| 2007 NY Slip Op 32073(U) |
| June 27, 2007 |
| Supreme Court, New York County |
| Docket Number: 0108163/2006 |
| Judge: Doris Ling-Cohan |
| Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: Hon. DORIS LING-COHAN, Justice

PART 36

ADMIRAL INDEMNITY COMPANY A/S/O
THE FRANKLIN TOWER CONDOMINIUM,

Plaintiff,

- v -

THE WYNNE GROUP, LTD. and THEODORE
WAGNER PLUMBING & HEATING CORP.,

Defendants.

INDEX NO. 108163/06
MOTION DATE
MOTION SEQ. NO. 001
MOTION CAL.NO.

FILED

JUL 06 2007

NEW YORK
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 4 were read on this motion to/for : Leave to answer

| <u>Papers</u> | <u>Numbered</u> |
|--|-----------------|
| Notice of Motion/Order to Show Cause - Affidavits - Exhibits | <u>1,2</u> |
| Answering Affidavits - Exhibits (Memo) _____ | <u>3</u> |
| Replying Affidavits (Reply Memo) _____ | <u>4</u> |
| Cross Motion: [] Yes [X] No | |

Upon the foregoing papers, it is ordered that this motion is denied, for the reasons set forth below.

Background

Plaintiff Admiral Indemnity Company brings this action to recover for property damage sustained by its subrogor, Franklin Tower Condominium (Franklin Tower), on or about April 2, 2005, when a water tank located on the premises malfunctioned and overflowed, releasing large quantities of water into the building. The verified complaint asserts two causes of action against defendants The Wynne Group, Ltd. and Theodore Wagner Plumbing & Heating Corp.(Wagner Plumbing): (1) negligence, carelessness and recklessness in renovating and repairing the water tank responsible for the damage; and (2) breach of a contract to renovate and repair the water tank (Affirmation of Steven R. Kartznel, Esq. in Support of Defendant's Motion [Kartznel Aff. in Support, Ex. A [Verified Complaint]).

Defendant Wagner Plumbing moves, pursuant to CPLR 3025 (b), for an order granting

leave to amend its answer to assert the affirmative defense of statute of limitations with respect to both the negligence and breach of contract causes of action. The motion is supported only by the affirmation of defendant Wagner's attorney and copies of the pleadings and plaintiff's Verified Supplemental Bill of Particulars. Defendant has not submitted a proposed amended answer.

Discussion

Leave to amend pleadings is generally freely granted, absent prejudice and surprise resulting from the delay (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *Antwerpse Diamantbank, N.V. v Nissel*, 27 AD3d 207, 208 [1st Dept 2006]; *Bolanowski v Trustees of Columbia Univ.*, 21 AD3d 340, 341 [2d Dept 2005]). Nevertheless, in determining whether to grant leave to amend, a court must examine the merits of the proposed amendment in order to conserve judicial resources (*Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [1st Dept 2001]; *Non-Linear Trading Co. v Braddis Assocs., Inc.*, 243 AD2d 107, 116 [1st Dept 1998]; *Wieder v Skala*, 168 AD2d 355 [1st Dept 1990]). A motion for leave to amend pleadings must be accompanied by an affidavit of merits and evidentiary proof that could be considered on a motion for summary judgment (*see Marinelli v Shifrin*, 260 AD2d 227, 229 [1st Dept 1999]; *Non-Linear Trading Co. v Braddis Assocs., Inc.*, 243 AD2d at 116; *Nab-Tern Constructors v City of New York*, 123 AD2d 571, 572 [1st Dept 1986]). An affirmation of an attorney who lacks personal knowledge of the facts is insufficient to support a motion to amend pleadings (*Marinelli v Shifrin*, 260 AD2d at 229; *Guzman v Mike's Pipe Yard*, 35 AD3d 266 [1st Dept 2006]). Leave to amend a pleading should be denied where the proposed amendment clearly lacks merit (*see Peach Parking Corp. v 346 W. 40th St., LLC*, ___ AD3d ___, 2007 N.Y. Slip. Op. 03859 [1st Dept, May 3, 2007]; *Davis & Davis, P.C. v Morson*, 286 AD2d at 585).

Defendant Wagner Plumbing asserts that the three-year limitations period for the property damage cause of action sounding in negligence and other torts (*see* CPLR 214 [4]), began to run in or about November 2001, when plaintiff asserts that Wagner completed its work on the premises (*see* Kartzinel Aff. in Support, Ex. F [Plaintiff's Verified Supplemental Bill of Particulars]).

Therefore, according to Wagner, the limitations period for the negligence cause of action expired in or about November 2004, prior to the commencement of the action, in June 2006. As plaintiff correctly points out, however, the three-year limitations period for property damage claims sounding in tort begins to run on the date of the damage or injury, in this case on April 2, 2005 (*see Verizon-New York, Inc. v Reckson Assocs. Realty Corp.*, 19 AD3d 291 [1st Dept 2005]; *Manhattanville Coll. v James John Romeo Consulting Engr., P.C.*, 5 AD3d 637, 641 [2d Dept 2004]; *Brooklyn Union Gas Co. v Hunter Turbo Corp.*, 241 AD2d 505 [2d Dept 1997]). Accordingly, defendant Wagner Plumbing's proposed statute of limitations affirmative defense clearly lacks merit, with respect to the tort cause of action, and, thus, this branch of defendant's motion is denied (*see Peach Parking Corp. v 346 W. 40th Street, LLC, supra*; *Davis & Davis, P.C. v Morson*, 286 AD2d at 585).

The only support for a statute of limitations affirmative defense with respect to the breach of contract cause of action in defendant Wagner's moving papers is the assertion by counsel that he does not possess any information with regard to the alleged contract between Wagner Plumbing and Franklin Tower and, thus, "cannot formulate an opinion as to the timeliness of that cause of action" (Kartzinel Aff. in Support, at ¶ 11). This unsubstantiated assertion by an attorney is insufficient to allow the amendment, with respect to the breach of contract claim (*see Marinelli v Shifrin*, 260 AD2d at 229; *Guzman v Mike's Pipe Yard*, 35 AD3d at 266). Defendant Wagner's reply papers include a document entitled, "Response to Preliminary Conference Order", dated December 22, 2006, in which plaintiff's counsel states, among other things, that "[p]laintiff is not currently in possession of any contracts between [Wagner Plumbing and Franklin Tower] for work performed, or to be performed at [Franklin Tower]" (Reply Affirmation of Steven R. Kartzinel, Esq. [Kartzinel Reply Aff.], Ex. A [Plaintiff's Response to Preliminary Conference Order]¹)

¹ In the Response to Preliminary Conference Order, plaintiff's counsel further states that plaintiff is not in possession of any correspondence between Wagner Plumbing and Franklin Tower, or any records maintained by Franklin Tower, concerning work performed by Wagner Plumbing. Plaintiff has, however, produced documents from the New York City Department of Buildings concerning work performed by Wagner Plumbing at Franklin Tower. Defendant

[parenthetical supplied]). Wagner’s counsel further asserts that it is defendant’s position “that there was never a contract between Wagner Plumbing and Heating Corp. and the plaintiff” (Kartzinel Reply Aff., at ¶ 3). Defendant Wagner has improperly submitted new material in its reply papers, the Response to Preliminary Conference Order, which was available at the time the motion was filed, and, thus, this material is not entitled to consideration (*see Guzman v Mike’s Pipe Yard*, 35 AD3d at 266). Even if considered by this Court, the statement by plaintiff’s counsel that plaintiff is not currently in possession of a contract between Wagner Plumbing and Franklin Tower is not directly relevant to a statute of limitations defense, with respect to the breach of contract cause of action. Accordingly, defendant Wagner Plumbing has failed to adequately support the application for leave to amend its answer to assert an affirmative defense of statute of limitations, with respect to the breach of contract cause of action, and the application is denied.

Accordingly, it is

ORDERED that the motion of defendant Theodore Wagner Plumbing and Heating Corp. for leave to amend its answer is denied; and it is further

ORDERED that, within 30 days of entry, plaintiff shall serve upon all parties to this action, a copy of this decision and order, together with notice of entry.

This constitutes the Decision and Order of the Court.

Dated: 6/21/07

ENTER: 
Doris Ling-Cohan, JSC

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If Appropriate: DO NOT POST REFERENCE

H:\Supreme Court\Amend Pleadings\Admiral Indem.Wynne & Wagner - amend answer - stat lim - lack of merit.wpd

Wagner has, not however, annexed these documents to its motion papers.