

Fireman's Fund Ins. Co. v Farrell

2007 NY Slip Op 32611(U)

August 13, 2007

Supreme Court, Suffolk County

Docket Number: 0005686/2000

Judge: Paul J. Baisley

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

INDEX NO.: 5686/2000

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FIREMAN'S FUND INSURANCE COMPANY,
and JOSEPH GAZZA, as Assignees of SIX G'S
CONTRACTING CORPORATION,

MOTION DATE: 11/3/2006

MOT. NO.: 009 MD
010 MOT D
011 MG

Plaintiffs,

-against-

JAMES P. FARRELL,

PLAINTIFFS' ATTORNEY:
LUSTIG & BROWN, LLP
Centerpointe Corporate Park
400 Essjay Road, Suite 200
Buffalo, New York 14221-9228

Defendant.

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DEFENDANT'S ATTORNEY:
MARSCHHAUSEN & FITZPATRICK,
P.C.
500 Old Country Road, Suite 103
Garden City, New York 11530

Upon the following papers numbered 1 to 54 read on this motion and cross-motion for summary judgment and cross-motion for leave to amend answer: Notice of Motion and Affirmation 1 to 11 and supporting papers; Notice of Cross-motion 12 to 31 and supporting papers; Notice of Further Cross-motion 32 to 34 and supporting papers; Affidavit in Further Support of Motion and In Opposition to Cross-motion 35 to 42 and supporting papers; Reply Affidavit 43 to 54; and after hearing the arguments of counsel in support of and opposed to the motions; it is

ORDERED that the motion (motion sequence no. 009) of defendant JAMES P. FARRELL for an order granting summary judgment dismissing the complaint is denied; and it is further

ORDERED that the motion (motion sequence no. 010) of plaintiffs FIREMAN'S FUND INSURANCE COMPANY and JOSEPH GAZZA, as assignees of SIX G'S CONTRACTING CORPORATION, for an order granting summary judgment on plaintiffs' second cause of action for legal malpractice, and dismissing all of the defendant's affirmative defenses, is granted in part and denied in part; and it is further

ORDERED that the cross-motion (motion sequence no. 011) of defendant JAMES P. FARRELL for an order pursuant to CPLR §3025(b) and (c) granting defendant leave to serve an amended answer to correct an inadvertent omission is granted.

Plaintiffs allege that defendant JAMES P. FARRELL, JR. ("FARRELL") committed legal malpractice when he failed to timely notify the State Insurance Fund ("SIF") of a third-party action commenced against his client, SIX G'S CONTRACTING CORPORATION ("SIX G'S"), by JOSEPH GAZZA ("GAZZA"). GAZZA was the owner of a building under construction who had been sued by a SIX G'S employee, JIMMY QUILES ("QUILES"), who was seriously injured at the construction site in January 1996. SIF had issued a worker's compensation policy to SIX G'S, which assertedly would have provided SIX G'S with coverage for defense and

indemnification in the third-party action. Defendant did not notify SIF of the third-party claim until February 1999, after QUILES had been granted partial summary judgment on liability on his Labor Law claim against GAZZA and GAZZA had been granted summary judgment on his third-party action for indemnification against SIX G'S. SIF disclaimed coverage on the basis of untimely notice, and QUILES' claim against GAZZA was ultimately settled for \$1.1 million, of which SIF contributed \$400,000.00, without, however, withdrawing its disclaimer. SIX G'S thereafter assigned its legal malpractice claim against defendant to GAZZA and FIREMAN'S FUND INSURANCE COMPANY (GAZZA's general liability insurer), who commenced the instant action, alleging that as a result of defendant's failure to timely notify SIF of the third-party action, SIX G'S was left without insurance to cover the judgment obtained against it by GAZZA.

Defendant's prior motion to dismiss the complaint and plaintiffs' cross-motion for summary judgment were denied by this Court (GERARD, J.), pursuant to an order dated December 6, 2000.¹ Upon the completion of discovery herein the parties interposed the instant motions for summary judgment.

The record reflects that although the third-party action herein was commenced on or about September 30, 1996, defendant did not notify SIF of the third-party action until February 19, 1999. On February 25, 1999, SIF sent a reservation-of-rights letter predicated on late notice and requested additional information regarding insurance coverage. SIF thereafter requested a copy of the litigation file in connection with the underlying action, which Farrell turned over on March 19, 1999. The litigation file reflected that summary judgment on liability had already been granted against SIF's insured more than a year earlier. In light of the foregoing, SIF's disclaimer of coverage, predicated on late notice of the lawsuit, seven days later, on March 26, 1999, was not unreasonable or untimely as a matter of law.² *Argo Corp. v. Greater New York Mutual Ins. Co.*, 4 N.Y.3d 332, 794 N.Y.S.2d 704 (2005); *Matter of Brandon v. Nationwide Mutual Insurance Co.*, 97 N.Y.2d 491, 743 N.Y.S.2d 53 (2002).

Moreover, the submissions do not establish defendant's claim that SIF waived its disclaimer when it agreed to contribute \$400,000.00 toward a global settlement of the underlying personal injury action and third-party action. In reviewing this Court's (GERARD, J.) denial of defendant's prior motion to dismiss the complaint, the Appellate Division, Second Department, held that "the issue of whether SIF waived its disclaimer cannot be decided as a matter of law, as the evidence in the record does not establish unequivocal conduct by SIF inconsistent with its disclaimer." *Fireman's Fund Insurance Co. v. Farrell*, 289 A.D.2d 286, 734 N.Y.S.2d 217 (2d Dept. 2001). As the Court noted, SIX G'S was aware that SIF refused to withdraw its disclaimer, and acknowledged the likelihood that any action against SIF for full indemnification under the policy would not succeed. Although discovery has now been completed and the record is more expansive than what was before the Court on defendant's motion to dismiss, the only additional evidence submitted and relied upon by defendant to establish his claim that SIF's offer of

¹ The order was subsequently affirmed by the Appellate Division, Second Department, in *Fireman's Fund Insurance Co. v. Farrell*, 289 A.D.2d 286, 734 N.Y.S.2d 217 (2d Dept. 2001).

² SIF's disclaimer notice reflected that "Nearly two and a half years elapsed before [SIF] received notice of the pendency of this action. Moreover, there was a delay of a year between the order granting summary judgment and provision of the order to [SIF]." SIF went on to state, "Please note that notice of the underlying accident is not equivalent to notice of the impleader action" (citing *Thomson v. Power Authority of the State of New York*, 217 A.D.2d 495, 629 N.Y.S.2d 760 (1st Dept. 1995)).

\$400,000.00 to settle the underlying action was inconsistent with its prior disclaimer is excerpts of the deposition testimony of Edward Hiller, in-house counsel for SIF. Contrary to defendant's assertion, those selected excerpts do not unequivocally establish conduct by SIF inconsistent with its disclaimer. Rather, the full transcript of Mr. Hiller's deposition, annexed to plaintiffs' cross-motion, together with the documentary evidence, reflects that SIF did not withdraw its disclaimer but agreed to contribute towards a global settlement in order to forestall the possibility of further litigation regarding the validity of its disclaimer and to protect itself, as well as its insured, by capping SIF's potential liability at \$400,00.00. Defendant's further arguments regarding SIF's alleged failure to "reserve its right to disclaim" when it participated in settlement discussions is without merit. In light of the foregoing, defendant's motion for summary judgment dismissing the complaint, predicated on plaintiffs' asserted inability to establish the elements of a cause of action for legal malpractice, is denied.

The cross-motion of plaintiff for summary judgment on its second cause of action (for legal malpractice), predicated on defendant's failure to deny or otherwise respond to the allegations of such second cause of action, is denied, and the cross-motion of defendant for leave to serve an amended answer is granted. The submissions establish that defendant's failure to deny the allegations of legal malpractice in paragraphs 47 through 53 of plaintiffs' verified complaint in his verified answer was inadvertent and did not reflect an intention to admit the allegations therein. Defendant has vigorously contested plaintiff's claims throughout the protracted course of this litigation, and both sides have proceeded as if the central issue of whether defendant committed legal malpractice was in dispute. The belated discovery by plaintiffs of defendant's pleading error should not result in a windfall for plaintiffs, who have made no showing that they would be prejudiced by the proposed amendment. *Tittman v. Rappaport*, 287 A.D.2d 709, 732 N.Y.S.2d 87 (2d Dept. 2001).

Plaintiff also moves for an order dismissing defendant's affirmative defenses pursuant to CPLR R. 3211(b). In reviewing a motion to dismiss affirmative defenses, all of the defendant's allegations are deemed to be true and the defendant is entitled to all reasonable inferences to be drawn from the proof submitted. *Abney v. Lunsford*, 254 A.D.2d 318, 678 N.Y.S.2d 292 (2d Dept. 1998). The movant has the burden of demonstrating that the defenses are without merit as a matter of law, and if there is any doubt as to its availability, an affirmative defense should not be dismissed. *Warwick v. Cruz*, 170 A.D.2d 255, 565 N.Y.S.2d 1013 (2d Dept. 2000). Applying the foregoing standard to the fourteen affirmative defenses asserted by defendant, plaintiff's motion is granted to the extent that all of defendant's affirmative defenses are dismissed.

As has been previously been determined by this Court (GERARD, J.), and as was affirmed by the Appellate Division, Second Department, plaintiff's complaint "sufficiently state[s] the elements of an action to recover damages for legal malpractice." *Fireman's Fund Insurance Co., supra*, 289 A.D.2d at 287, 734 N.Y.S.2d at 219. Defendant, both in support of his motion for summary judgment and in opposition to plaintiffs' motion for summary judgment, has not proffered any evidence, documentary or otherwise, that negates any of the pleaded elements of plaintiffs' claims. Accordingly, the first and second affirmative defenses that plaintiff's claims fail to state a cause of action or are barred by documentary evidence are dismissed as without merit.

Defendant has proffered no evidence of a release running in his favor. Moreover, the settlement of the underlying personal injury action and third-party action, and the resultant release in favor of SIF, "was not an intervening cause barring a claim of legal malpractice." *Fireman's*

Fund Ins. Co., supra, 289 A.D.2d at 288, 734 N.Y.S.2d at 219. In light of the foregoing, there is no merit to defendant's third and fourth affirmative defenses and they are dismissed.

Defendant has proffered no evidence to establish that the assignment to plaintiffs of SIX G'S' claims against FARRELL for malpractice is invalid, or that it was unsupported by consideration. It is well established that a claim for legal malpractice may be assigned. *Greevy by Greevy v. Becker, Isserlis, Sullivan & Kurtz*, 240 A.D.2d 539, 658 N.Y.S.2d 693 (2d Dept. 1997). The fact that SIX G'S – against whom summary judgment indemnifying GAZZA had already been granted – was relieved of liability to indemnify GAZZA for his contribution to the settlement, and avoided exposure to potential liability of \$1.1 million, provides ample consideration for the assignment. It is irrelevant that a formal money judgment had not been entered against SIX G'S. The fifth and sixth affirmative defenses are dismissed.

As noted above, the submissions establish that SIF did not waive its disclaimer by agreeing to participate in the settlement but agreed to compromise its position in order to avoid further litigation and to minimize its and its insured's potential liability. In light of the foregoing, the motion to dismiss defendant's seventh affirmative defense is granted.

There is no factual or legal basis for defendant's assertions that plaintiffs must pursue their claims against SIF before their claims against defendant "ripen" and that SIF is a necessary party to this action; accordingly, defendant's eighth and ninth affirmative defenses are dismissed.

Similarly, there is no apparent merit to defendant's claim that plaintiffs failed to mitigate their damages, or that the damages sought are speculative and uncertain. As noted by the Appellate Division, Second Department, "Six G's suffered ascertainable damages due to [FARRELL's] alleged negligence in March 1999, when SIF disclaimed coverage. Six G's faced the cost of pursuing an action against SIF regarding the validity of the disclaimer and lacked insurance coverage for any judgment against it in the third-party action." *Fireman's Fund Ins. Co., supra*, 289 A.D.2d at 288, 734 N.Y.S.2d at 219. In light of the foregoing, the tenth and eleventh affirmative defenses are dismissed.

Defendant has offered no legal or factual support for his twelfth, thirteenth and fourteenth affirmative defenses alleging lack of proximate cause, justification and statute of frauds. Affirmative defenses that are pled as legal conclusions which are not supported by factual allegations are insufficient. *Petracca v. Petracca*, 305 A.D.2d 566, 760 N.Y.S.2d 513 (2d Dept. 2003). The pleading defects are not remedied by defendant's submissions in opposition to the motion. Accordingly, the twelfth, thirteenth and fourteenth defenses are also dismissed as without merit.

Dated: August 13, 2007

HON. PAUL J. BAISLEY, JR.

J.S.C.

CHECK ONE: _____ FINAL DISPOSITION X NON-FINAL DISPOSITION