

101465 Realty Inc. v V&F Greenwich Vil. Inc.

2007 NY Slip Op 33908(U)

November 28, 2007

Supreme Court, New York County

Docket Number: 0105559/2007

Judge: Edward H. Lehner

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
EDWARD H. LEHNER

PART 19

Index Number : 105559/2007

101465 REALTY INC

vs
V&F GREENWICH VILLAGE INC

Sequence Number : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

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| |
| |

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

_____ motion is decided in accordance
with accompanying memorandum decision

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

Dated: NOV 28 2007

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE MD AT

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
101465 REALTY, INC. and
ONEBEACON INSURANCE COMPANY,

Plaintiffs,

INDEX NO.
105559/07

- against -

V&F GREENWICH VILLAGE, INC.
d/b/a FAMOUS RAY'S PIZZA, and
SENECA INSURANCE COMPANY, INC.

Defendants.

-----X
EDWARD H. LEHNER, J.;

Before the court are individual motions by defendants V&F Greenwich Village, Inc. ("V&F") and by its insurer, Seneca Insurance Company, Inc. ("Seneca") to dismiss the complaint pursuant to CPLR 3211(a). Both defendants are represented by the same counsel.

V&F is a tenant of plaintiff 101465 Realty, Inc. ("Realty"), the landlord of the building at 465 Sixth Avenue. Plaintiff OneBeacon Insurance Company, Inc. ("OneBeacon") issued a general liability policy to Realty. On July 14, 2000, a delivery person (Edwin Ramirez) asserts he was injured as a result of a slip and fall on the stairs of the subject premises, and he commenced an action in Bronx County against both Realty and V&F claiming a defective condition.

The lease between Realty & V&F required V&F to name Realty as an additional insured under its liability policy. However, rather than name Realty on the V&F liability policy, Seneca named the principal of Realty, Mario Di Rienzo, individually as “landlord.” Di Rienzo had, at some prior period, owned the premises individually. Thus, since Realty is not named on the Seneca policy and Di Rienzo is not a defendant in the Ramirez action, Seneca has declined to provide coverage to Realty, which is defending the Ramirez action by attorneys retained by OneBeacon.

In this action, plaintiffs seek a declaration that Seneca is required to provide defense and indemnity to Realty in the Ramirez action, and that V&F is liable to plaintiffs for expenses incurred, including attorneys' fees, due to the failure of V&F to provide coverage to Realty in the policy issued by Seneca.

V&F asserts that the action, which was commenced this year, is time-barred because the breach of the lease in not providing the proper insurance occurred in 1997 when the current lease was signed and the policy obtained by V&F failed to insure Realty. Seneca maintains that plaintiffs lack standing to commence this action as neither is an insured under the policy it issued to V&F.

While plaintiffs maintain that a mutual mistake resulted in Di Rienzo being named as the additional insured on the Seneca policy and request the court to remedy the error, there is no cause of action alleged herein seeking reformation. Accordingly,

since Realty is not a named additional insured under the Seneca policy, Seneca's motion is granted and it is declared that it has no present duty to provide Realty a defense or indemnity in the Ramirez action, and the action against it for damages is dismissed. However, this is without prejudice to an application to amend the complaint or to commence a separate action seeking reformation of the Seneca policy to correct the asserted mutual mistake.

Regarding the damage claims of Realty, the Court of Appeals has held that when a tenant breaches an obligation to obtain insurance coverage naming the landlord as an additional insured, the tenant's liability, in instances where the landlord procured its own coverage, is "limited to out-of-pocket damages caused by the tenant's breach," which the court referred to as "the premiums and any additional costs it incurred such as deductibles, co-payments and increased future premiums"[*Inchaustegui v. 666 5th Avenue Limited Partnership*, 96 NY2d 111, 114 (2001)]. See also, *Trokie v. York Preparatory School, Inc.* 284 AD2d 129, 130 (1st Dept. 2001); *Yofi Book Publishing, Inc. v. Wil-Brook Realty Corp.*, 287 AD2d 712 (2nd Dept. 2001). While Realty has not specifically sought such damages (see tr. p. 10), such relief is encompassed within the general damages sought in the complaint. Since the breach in failing to name Realty as an insured was a continuing breach, as it occurred each year that V&F renewed its liability policy without adding Realty as an additional insured, the action for damages is not barred by the Statute of

Limitations. Accordingly, the motion to dismiss Realty's damage claim against V&F is denied.

This decision constitutes the order of the court. The Clerk shall enter judgment dismissing the action against Seneca unless plaintiffs move to amend the complaint, as authorized above, within 20 days of service of a copy of this order.

Dated: November 28, 2007



J.S.C.

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