SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND PART DCM 3

Index No.: 103936/07
Motion No.: 1

SHOP RITE SUPERMARKETS, INC., t/a SHOP RITE OF FOREST AVENUE, STATEN ISLAND and WFC-1 REALTY CORP.,

Plaintiffs,

against

DECISION & ORDER

HON. JOSEPH J. MALTESE

MASON AVENUE HOLDINGS CORP. and ONE BEACON INSURANCE GROUP,

Defendants.

The following items were considered in the review of this motion to dismiss:

Papers	Numbered
Notice of Petition and Affidavits Annexed	**1**
Answering Affidavits	**2**
Replying Papers	**3**
Exhibits	**Attached to Papers**

Upon the foregoing cited papers, the Decision and Order on this Motion is as follows:

Defendant, Mason Avenue Holdings Corp. ("Mason"), seek an order pursuant to CPLR §§3211(a)(5) and/or 3211(a)(7), dismissing all claims asserted against Mason, treating the motion as one for summary judgment pursuant to CPLR §3211(c). In addition, Mason seeks to sever the claims asserted against Mason from all remaining claims and amending the caption to remove all reference to Mason.

Background

The underlying personal injury action of *Connelly v Shop Rite*, Index Number 13783/02 arose out of an alleged slip and fall accident that occurred the morning of December 2, 2000, in the loading area at the rear of the Shop Rite store located on Forest Avenue in Staten Island, New York. Plaintiff, Connelly, alleged he slipped on black ice while making a bread delivery to defendant Shop Rite. Shop Rite, as a

tenant and sub-lessee, and WFC-1, as a tenant and sub-lessor, leased a portion of the premises from Mason pursuant to a written lease agreement. Plaintiffs sought insurance coverage, including legal defense, for the claims made by plaintiff Connelly. By order dated September 15, 2005, the court denied summary judgment in favor of Shop Rite and WFC-1 and granted summary judgment in favor of Mason, dismissing all claims and cross-claims asserted against it. The Appellate Division, Second Department, issued an order affirming the September 15, 2005 order.

This instant matter arises out of the lease agreement between plaintiffs, Shop Rite and WFC-1, and defendant Mason. Plaintiffs seek a judgment declaring that the defendant is obligated to defend and indemnify the plaintiff in the underlying action for contractual indemnification and to recover damages for breach of contract. Defendants are moving to dismiss based on two arguments (1) plaintiffs' claims are barred by the doctrines of *res judicata* and/or collateral estoppel, and (2) the breach of contract claims alleging failure to procure insurance are barred by the statute of limitations. Defendants' arguments will be addressed in turn.

Discussion

Contrary to the plaintiffs' contentions, the doctrine of *res judicata* bars plaintiffs' present action.[1] This doctrine "precludes litigation of matters that could or should have been raised in a prior proceeding between the parties arising from the same factual grouping, transaction or series of transactions."[2] As in this case, claims may be precluded even if based on different legal theories and if different remedies are sought.[3] Shop Rite, WFC-1 and Mason were all parties in the previous action. The plaintiffs here were seeking indemnification from it for the *Connelly* action. In other words, plaintiffs had an opportunity to bring its present claims in the previous action, which involved the same accident and the same insurance policy, yet it failed to do so. Therefore, the instant action is barred by the doctrine of *res judicata*.

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[1] *See* CPLR §3211(a)(5).

[2] *DeSanto Construction Corp. v Royal Ins. Co. of America,* 278 AD2d 357 [2d Dept 2000], citing *Matter of New York State Dorm. Auth. v Bd. of Trustees of Hyde Park Fire & Water Dist.,* 239 AD2d 501, 502, *O'Brien v City of Syracuse,* 54 NY2d 353, 357.

[3] *Id., see also, O'Brien v City of Syracuse, supra.*

Briefly, this court will address defendant Mason's argument that this action is barred by the statute of limitations as well as plaintiffs' incorrect argument in opposition. An action for indemnification or contribution is considered to be one for express or implied contractual rights and is therefore governed by the six year statute of limitations of CPLR §213(2) governing actions based on contractual obligations. The cause of action is not complete until the party seeking indemnification, suffers a loss. In other words, the action accrues upon payment of judgment by the plaintiffs seeking the contribution or indemnification.[4] This rule applies irrespective of whether the underlying claim for which indemnification is sought is a tort claim.[5]

In applying these principles in this case, plaintiffs' cause of action against the defendants did not accrue until the plaintiffs made a payment of judgment. Therefore, contrary to Mason's argument that the statute of limitations began to run on the date of the underlying accident on December 2, 2000, and plaintiffs' argument that the statute of limitations began to accrue when the complaint in *Connelly* was filed against plaintiffs on November 27, 2002, plaintiffs' cause of action against Mason did not accrue until the claimant was compelled to pay the injured person in the underlying claim.[6] If the rule was otherwise, a tortfeasor who defended an action in good faith and in the belief that he or she was not liable to the injured party would, upon the recovery of a judgment against him or her, often be deprived of recourse against one more culpable.[7]

Accordingly, it is hereby:

ORDERED, that the defendant, Mason Avenue Holdings Corp.'s motion pursuant to CPLR §3211 dismissing all claims asserted against it, is granted; and it is further

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[4]*McDermott v City of New York,* 50 NY2d 211 [1980].

[5]*Id.*

[6]*See*, *Ralston Purina Co v Arthur G. McKee & Co.,* 174 AD2d 1060 [4th Dept 1991].

[7]*See, Wattecamps v Artkraft Strauss Sign Corp.,* 75 Misc 2d 934 [City Civ. Ct. 1973].

ORDERED, that the caption of this proceeding is amended to reflect the exclusion of said defendant and the Clerk of the Court and the Clerk of the Trial Support Office, upon service of each of them of a copy of this order with notice of entry, shall mark their records to reflect the amendment; and it is further

ORDERED, that all remaining parties return to DCM Part 3 on **Thursday, May 15, 2008** at 9:30AM for a conference.

ENTER,

DATED: April 22, 2208

Joseph J. Maltese
Justice of the Supreme Court