

Alrose Oceanside, LLC v Mueller

2009 NY Slip Op 32675(U)

November 2, 2009

Supreme Court, Nassau County

Docket Number: 3247/07

Judge: Arthur M. Diamond

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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----x
**ALROSE OCEANSIDE, LLC AND SIDNEY
MAUTHNER**

**TRIAL PART: 19
NASSAU COUNTY**

Plaintiffs,

INDEX NO: 3247/07

-against-

**RYAN MUELLER, FRANK MUELLER, MARIE
MUELLER, JOSHUA PERTICAROA,
MICHAEL BAUMANN, DONNA BAUMAN,
CHRISTOPHER PERTICAROA, AND CANDI
ACKER, individually, MICHAEL BAUMANN
by his guardians MICHAEL BAUMANN AND
DONNA BAUMANN, MICHAEL BAUMANN
individually and DONNA BAUMANN, individually
Defendants.**

MOTION SEQ. #: 3,4,5,6,7

SUBMIT DATE: 9/25/09

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The following papers having been read on this motion:

**Notice of Motion..... 1
Cross-Motion.....2-7
Opposition and Reply.....8-11**

Defendants Michael Baumann by his guardians Michael and Donna Baumann [hereinafter the Baumann defendants], and Michael and Donna Baumann, individually move pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiffs' complaint together with any and all cross claims asserted against them. (Sequence #003). These defendants additionally move to amend their original application under above-noted sequence #003, to add an additional basis for dismissal sounding in a violation of the statute of limitations. (Sequence #007).

Defendants Joshua Perticararo by his guardians Christopher Perticararo and Candi Acker, and Christopher Perticararo and Candi Acker individually [hereinafter the Perticararo defendants], cross-move pursuant to CPLR §3212 for an order granting summary judgment dismissing the plaintiffs'

complaint, together with any and all cross-claims asserted against them. (Sequence #004).

Plaintiffs, move pursuant to CPLR §3025 for an order granting leave to amend the complaint to add a theory of concerted action liability and pursuant to CPLR §3212 granting summary judgment in favor of the plaintiff as to the issue of defendants' negligence. (Sequence #005).

Defendant Ryan Mueller, Frank Mueller and Marie Mueller [hereinafter the Mueller defendants] move pursuant to CPLR 3212 for an order dismissing the plaintiffs' complaint, together with any and all cross-claims asserted against them. (Sequence #006).¹

Plaintiff, Alrose Oceanside, LLC is the owner of property located at 2715 Long Beach Road, Oceanside, New York (*see* Nicolini Affirmation in Support at Exhs. A, C). Said property was an abandoned and empty supermarket (*id.* at Exhs. F,G, H). Plaintiff, Sidney Mauthner, is the owner of property located at 2743 Long Beach Road, Oceanside, New York (*id.* at Exh. C). On November 13, 2005, a fire occurred at the premises owned by the plaintiff Alrose which thereafter spread to the premises owned by plaintiff Mauthner (*id.*). This fire and the damage which followed are alleged to have resulted from the negligence of defendants Michael Baumann, Ryan Mueller and Joshua Perticarò, all of whom were minors at the time of the incident (*id.*).

As a consequence of this fire, these properties sustained damages for which the owners were reimbursed by Indian Harbor Insurance Company (*id.* at ¶5).² The within litigation thereafter ensued and is a subrogation/property damage action brought on behalf of the insurance company and seeks reimbursement for the monetary claims it paid to the plaintiffs (*see* Nicolini Affirmation in Support at ¶¶3,5; *see also* Exhs. A).

Initially, the Court addresses the cross-motion interposed by the Baumann defendants which seeks to add a violation of the applicable statute of limitations as an additional basis for

¹ The Court notes that counsel for the plaintiffs' concedes that "the moving defendant parents are not liable" and accordingly the Court hereby GRANTS those branches of the motions interposed by the Baumann, Perticarò and Mueller defendants which particularly seek dismissal of the action as against the parents of the three minor defendants, together with any and all cross-claims asserted against them. (*see* Leavy Affirmation in Support of Cross-Motion at ¶27).

² The property owners have brought this action on behalf of the insurance company pursuant to CPLR 1004.

the dismissal of the plaintiffs' complaint. Inasmuch as the cross-motion seeks to amend the original motion to add a theory which is identical to that proffered in the timely cross-motion interposed by the Perticaro defendants, the application is accordingly GRANTED (*Bressingham v Jamaica Hospital Medical Center*, 17 AD3d 496 [2d Dept 2005]). (Sequence #007) .

As to the substance of the argument, same will be addressed below in that section devoted to the summary judgment motion submitted by the Perticaro defendants.

Turning now to the motion for summary judgment, counsel for the Baumann defendants argues that minor defendant, Michael Baumann, was not acting in concert with either of his co-defendants and accordingly no liability may attach warranting dismissal of the plaintiffs' complaint (*id.* at ¶¶28,29,35,36,37,38,40,41,42). Specifically, counsel asserts that the record unequivocally demonstrates that defendant Baumann did not ignite the fire, that there was no agreement between defendant Baumann and his co-defendants to start such fire and that defendant Baumann did not lend either aid or encouragement to defendants Mueller or Perticaro in igniting the subject fire (*id.*).

Counsel additionally argues that given the absence of any special relationship between either defendant Baumann and the plaintiffs or defendant Baumann and his co-defendants, he had no duty to prevent defendants Mueller or Perticaro from starting the fire (*id.* at ¶¶ 23,24,26,27).

Counsel defendant Perticaro argues that as his own deposition testimony unequivocally demonstrates the he did not play any role in starting the fire he therefore cannot be found negligent (*see* Dorry Affidavit at ¶15). Counsel further contends that defendant Perticaro was not under any duty to prevent either of his co-defendants from acting in a tortious manner and therefore he may not be held liable to the plaintiff warranting dismissal of the complaint (*id.* at ¶16).

Alternatively, counsel argues that if the Court accepts the veracity of the deposition testimony of co-defendants Baumann and Meuller provided herein, the actions undertaken by defendant Perticaro were not negligent but rather constituted an intentional tort, a cause of action for which must have been commenced within one year of November 13, 2005 (*id.* at ¶17). Counsel concludes that as the within action was commenced in February 2007, the action is time

barred and must be dismissed on that basis (*id.* at ¶¶17,19,20).³ While conceding that a cause of action predicated upon injury to property can be governed by a three year statute of limitations as provided in CPLR §214[4], counsel posits that said section of law only governs claims for injury to property “based upon acts of negligence, not intentional torts.” (*see* Dorry Affidavit in Opposition to Plaintiffs’ Cross-Motion and in Reply to Plaintiffs’ Opposition to Perticaro’s Cross-Motion at ¶¶26,27).

Counsel for the Mueller defendants also contends that the facts as adduced in the deposition transcripts clearly establish that the subject incident was the result of an intentional act of arson and accordingly the within action was not timely commenced warranting dismissal (*see* Martyn Affirmation at ¶¶11,12,13,14,16).

The plaintiffs oppose all of the foregoing applications interposed by the respective defendants.

The Court initially addresses the argument posited by all three of the moving defendants, that the within action is barred by the statute of limitations as provided in CPLR §215. In determining the statute of limitations applicable to a particular action, the Court is required to examine the essence of the claim asserted and “not the form in which it is pleaded” (*State v Cortelle Corp.*, 38 NY2d 83 [1975]). Here, a review of the complaint clearly indicates that the plaintiffs’ action is one to recover for property damage resulting from the events of November 13, 2005. Pursuant to CPLR §214 “an action to recover damages for an injury to property” must be commenced within three years of the injury. While counsel for defendant Perticaro argues that the three year statute of limitations contained in the CPLR §214 is only applicable to actions for property damage resulting from negligent conduct, a reading of the express language thereof reveals that no such distinction is embodied therein. Moreover, the Court of Appeals has held that property damage which has been sustained as a result of an intentional act of starting a fire is governed by the three year statute of limitations as is provided in CPLR §214[4] (*Hartford Fire Insurance Company v Advocate*, 78 NY2d 1038 [1991]).

³ Counsel for the Baumann defendants expressly adopts these argument set forth by counsel for the Perticaro defendants and asserts that the actions in which defendant Baumann is alleged to have engaged were intentional and thus governed by a one year statute of limitations as embodied in CPLR 215 (*see* Nicolini Affirmation in Support of Cross-Motion at ¶5).

Therefore, based upon the foregoing those branches of the motions interposed by the Baumann and Peticaro defendants which sought dismissal of the within complaint based upon the ground of the statute of limitations are hereby DENIED and inasmuch as the only basis for dismissal of the plaintiffs' complaint proffered by the Mueller defendants was the purported expiration of the statute of limitations, that application is accordingly DENIED in its entirety. The Court now turns to the summary judgment applications interposed by the Baumann and Peticaro.

It is well settled that a motion for summary judgment is a drastic remedy that should not be granted where there is any doubt as the existence of a triable issue of fact (*Sillman v Twentieth Century Fox*, 3 NY2d [1957]; *Bhatti v Roche*, 140 AD2d 660 [2d Dept 1998]). To obtain summary judgment, the moving party must establish its claim or defense by tendering sufficient evidence, in admissible form sufficient to warrant the Court, as a matter of law, to direct judgment in the movant's favor. Such evidence may include deposition transcripts as well as other proof annexed to an attorney's affirmation (CPLR §3212 [b]; *Olan v Farrell Lines*, 64 NY2d 1092 [1985]).

If a sufficient *prima facie* showing is demonstrated, the burden then shifts to the non-moving party to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial (*Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). It is incumbent upon the non-moving party to lay bare all of the facts which bear on the issues raised in the motion (*Mgrditchian v Donato*, 141 AD2d 513 [2d Dept 1998]). Conclusory allegations are insufficient to defeat the application the opposing party must provide more than a mere reiteration of those facts contained in the pleadings (*Toth v Carver Street Associates*, 191 AD2d 631 [2d Dept 1993]).

Defendant Baumann

As noted above, defendant Baumann is moving for summary judgment on the basis that he did not act in concert with either of the minor co-defendants. A theory of liability premised upon concerted action "provides for joint and several liability on the part of all defendants having an understanding, express or tacit, to participate in a 'common plan or design to commit a

tortious act” (*Hymowitz v Lilly & Co.*, 73 NY2d 487 [1989] quoting Prosser and Keeton, Torts §46, at 323 [5th ed]; *see also Rastelli v Goodyear Tire & Rubber Company*, 79 NY2d 289 [1992]). In order for liability to attach, “it is essential that each defendant charged with acting in concert have acted tortiously and that one of the defendants committed an act in pursuant of the agreement which constitutes a tort” (*Rastelli v Goodyear Tire & Rubber Company*, 79 NY2d 289 [1992], *supra*).

In the instant matter, having reviewed the record that Court finds that defendant Baumann has met his burden of demonstrating his *prima facie* entitlement to judgment as a matter of law (*Sillman v Twentieth Century Fox*, 3 NY2d [1957], *supra*; *Friends of Animals v Associated Fur Manufacturers, Inc.*, 46 NY2d 1065[1979]). The deposition testimony of defendant Baumann, as well as that of defendants Perticaro and Mueller do not evince any evidence whatsoever that defendant Baumann was in any respect involved in lighting the fire which resulted in damage to the plaintiffs’ property. Moreover, a review of the testimony as adduced herein reveals no evidence of any agreement, tacit or express, as between defendant Baumann and co-defendants Mueller and Perticaro to light the fire (*Rastelli v Goodyear Tire & Rubber Company*, 79 NY2d 289 [1992], *supra*). Defendant Baumann testified that he did not discuss lighting the fire with either of the co-defendants and such testimony is echoed by defendant Mueller, who specifically testified that there was no discussion amongst the three co-defendants with respect to starting a fire (*see* Baumann Deposition Transcript at p.24,26; *see* Mueller Deposition Transcript at p. 27).

In opposing the application, the plaintiff has failed to raise a triable issue of fact that defendant Baumann played any role in igniting the fire or was acting in accordance with an agreement between himself and defendants Perticaro and Meuller, to ignite the fire from which the damage sustained to the plaintiffs’ property resulted (*Zuckerman v City of New York*, 49 NY2d 557 [1980]; *Hymowitz v Lilly & Co.*, 73 NY2d 487 [1989], *supra*; *see also Herman v Westgate*, 94 AD2d 938 [4th Dept 1983]).

Thus, based upon the foregoing, the motion interposed by defendant Baumann for an order granting summary judgment dismissing the plaintiffs’ complaint together with any and all cross claims asserted against him is accordingly GRANTED. (Sequence #003).

Defendant Perticaro

Defendant Peticaro moves for summary judgment on the basis that his deposition testimony establishes that his actions on the day in question were not negligent. However, while defendant Peticaro indeed testified that he did not partake in the lighting of the fire, defendant Baumann testified that while defendant Mueller initially started the fire, defendant Peticaro and Mueller were equally responsible for adding fuel thereto and that both Peticaro and Mueller started a second fire in an empty shopping cart with defendant Peticaro spraying the flames with WD-40 (*see* Baumann Deposition Transcript at pp. 29, 30,31).

Thus, as there are clearly material questions of fact as to the extent of defendant Peticaro's involvement in the events of November 13, 2005, as well as with respect to that of defendant Mueller, summary judgment is therefore inappropriate and the motion is DENIED (*Sillman v Twentieth Century Fox*, 3 NY2d [1957], *supra*; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1980]). (Sequence #004).

The Court finally addresses the plaintiffs' cross-motion for leave to amend the complaint to add a theory of concerted action liability and for an order granting summary judgment in favor of the plaintiff as to the issue of defendants' negligence.

In moving for leave to amend the complaint, the plaintiffs' contend that such relief should be granted as there has been no showing of prejudice which will be borne by the defendants in permitting the amendment (*see* Leavy Affirmation in Opposition to Summary Judgment Motions and in Support of Plaintiffs' Cross Motion at ¶28).

A review of the record herein reveals that the within action was commenced in February 2007 after which the complaint was amended in or about September 2008 (*see* Nicolini Affirmation in Support at Exhs. A, C). The record further indicates that the case has been certified for trial.

As a general proposition amendments to pleading shall be freely granted (CPLR 3025[b]; *Gallo v Aiello*, 139 AD2d 490 [2d Dept 1988]). However, where, as here, the within action has been certified for trial, "judicial discretion in allowing such amendments should be 'discreet, circumspect, prudent and cautious'" (*id.* quoting *Perricone v City of New York*, 96 AD2d 531 [2d Dept 1983]). Moreover, where a party delays and does not move expeditiously for leave to amend "the court should insure that the amendment procedure is not abused by requiring a

reasonable excuse for the delay and an affidavit of merit" (*id.*).

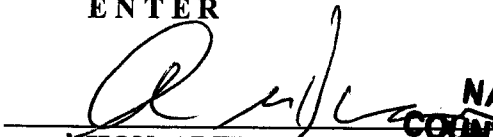
In the instant matter, the plaintiffs' have not provided a reasonable excuse for the delay to add an additional theory of liability notwithstanding that the facts upon which they base the amendment were know to them in October 2008, when all of the co-defendants were deposed. Accordingly, the application is hereby DENIED. (Sequence #005).

With respect to that branch of the plaintiffs' application seeking summary judgment as to the negligence of the defendants, given the above determinations same is hereby DENIED as moot with respect to defendant Baumann, and as to defendants Perticaro and Mueller, given this Court's finding that the record reveals questions of fact as to the degree of their respective involvement, the application as to those defendants is similarly DENIED. (Sequence #005).

This constitutes the decision and order of this Court.

DATED: November 2, 2009

ENTER


HON. ARTHUR M. DIAMOND
J.S.C.

ENTERED

NOV 09 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

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