

Minkoff v Action Remediation, Inc.

2009 NY Slip Op 33151(U)

December 21, 2009

Supreme Court, Nassau County

Docket Number: 559/06

Judge: Daniel R. Palmieri

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Sum

SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
DIANE B. MINKOFF and LAWRENCE A. MINKOFF,

Plaintiff,

-against-

**ACTION REMEDIATION, INC.,
THE SPORICIDIN and SPORICIDIN
INTERNATIONAL,**

Defendants.

-----x
ACTION REMEDIATION, INC.,

Plaintiff,

-against-

**AMERICAN SAFETY CASUALTY INSURANCE
COMPANY, DIANE B. MINKOFF and LAWRENCE
A. MINKOFF, and THE SPORICIDIN COMPANY,**

Defendants.

-----x

TRIAL TERM PART: 47

Action No. 1

INDEX NO.: 559/06

**MOTION DATE: 8-31-09
SUBMIT DATE: 12-16-09
SEQ. NUMBER - 003
004**

**MOTION DATE: 9-29-09
SUBMIT DATE: 12-16-09
SEQ. NUMBER - 005**

**MOTION DATE: 12-16-09
SUBMIT DATE: 12-16-09
SEQ. NUMBER - 006**

Action No. 2

INDEX NO.: 08175/06

The following papers have been read on this motion:

Notice of Motion, dated 7-31-09.....	1
Affirmation in Opposition, dated 8-20-09.....	2
Reply Affirmation, dated 9-9-09.....	3
Notice of Motion, dated 9-8-09.....	4
Affirmation in Opposition, dated 10-22-09.....	5
Reply Affirmation, dated 10-28-09.....	6
Notice of Cross Motion, dated 8-20-09.....	7
Affirmation in Opposition, dated 9-10-09.....	8
Reply Affirmation, dated 10-22-09.....	9
Affirmation in Further Opposition, dated 10-28-09.....	10
Notice of Cross Motion, dated 12-8-09.....	11
Affirmation in Opposition, dated 12-14-09.....	12
Reply Affirmation, dated 12-15-09.....	13
Letter dated 12-15-09.....	14

The motions (Seqs 3 and 5) of the defendants to amend their answers to assert as affirmative defenses the failure of plaintiffs to mitigate their damages, is granted, and the answers of these moving defendants shall be deemed amended to include such defenses. To the extent the proposed amended answers annexed to the moving papers contain any other changes from the original answers of these defendant, their motions are denied. The moving notices of motion and supporting affirmations refer only to the mitigation defenses and not to any other changes that might be contained in the annexed proposed new pleadings. *See, Vanek v Mercy Hosp.*, 135 AD2d 707 (2d Dept. 1987); *Collins v Tashjian*, 128 AD2d 629, 631 (2d Dept. 1986).

Briefly summarized, plaintiffs are homeowners who engaged defendant Action Remediation Inc., (Action) to treat their home for the presence of mold with products manufactured by the Sporocidin, co-defendants. They allege that as a result of the conduct of the defendants, their entire home and contents were contaminated and must be replaced

in their entirety. Third-party defendant American Safety Casualty Insurance Company is the insurer of Action who has declined coverage as to Action. Plaintiffs' own insurance carrier, Great Northern Insurance Company (Great Northern), also declined coverage as to first party benefits to plaintiffs. The issue of that coverage is the subject of a separate action in a Federal Court.

The basis for the amendment is that the defendants only learned in March 2009 of the existence of a written document signed by the then attorney representing plaintiffs and an attorney for Great Northern. The document was referenced and marked as an exhibit at the deposition of one of the plaintiffs, and defendants contend that the document discloses the possibility of remediation that can be accomplished at a lesser cost than is now claimed, and by not completing or performing the actions called for in the document, the plaintiffs did not mitigate their damages.

Leave to amend pleadings is usually freely given unless the proposed amendment will prejudice or surprise the opposing party or the proposed amendment is patently insufficient or devoid of merit. *Unger v. Leviton*, 25 AD3d 689 (2d Dept. 2006). Mere lateness is not a barrier. However, lateness coupled with significant prejudice to the other side, the very element of the laches doctrine is a bar. *St. Paul Fire and Marine Insurance Company v. Town of Hempstead*, 291 AD2d 488 (2d Dept. 2002). The legal sufficiency or merits of a proposed amendment to a pleading will not be examined unless the insufficiency or lack of merit is clear and free from doubt. *Lucido v. Mancuso*, 40 AD3d 220, 227 (2d Dept. 2008).

Prejudice to the nonmoving party is shown where that party is hindered in the preparation of its case or has been prevented from taking some measure in support of its

position. *AnCor, Inc. v. BSB Bank & Trust Company*, 34 AD3d 1282 (4th Dept. 2006). Here, the plaintiffs have not demonstrated significant prejudice as to the proposed defenses. They were of course aware of the document, they were requested prior to these motions to stipulate to the requested amendments and the plaintiff was questioned about the document at his oral deposition. That plaintiffs dispute whether the document does not represent what defendants say it represents can hardly be deemed to be reflective of surprise or prejudice to them and it is not necessary for the purposes of this motion to determine the merits of the defense.

Parties generally have a duty to mitigate damages, the satisfaction of which generally presents an issue of fact. Plaintiffs have not shown that the mitigation defense is inadequate on its face (*Bernstein v. Freudman*, 180 AD2d 420 [1st Dept. 1992]), and courts have granted motions to amend pleadings to assert the defense of failure to mitigate. *Nab Construction Corp. v. Consolidated Edison Company of New York, Inc.*, 242 AD2d 480 (1st Dept. 1997). Hence, even if the document that defendants say is an agreement had not been propounded, defendants would have had the right to assert the defense of failure to mitigate.

Compensatory damages, by their very nature, are awarded to make a plaintiff whole, and they are restricted in amount to the actual losses sustained. It is beyond dispute that New York requires injured parties to take reasonable steps to minimize damages, and no recovery may be had for losses which the person injured might have prevented by reasonable efforts and expenditures. *Middle East Banking Company v. State Street Bank International*, 821 F.2d 897, 902 (2d Circuit 1987) [citations omitted].

The Court notes that the document which the defendants have annexed, and which

they contend is an agreement between plaintiffs and Great Northern to remediate by means of partial deconstruction, is incomplete and seems to be missing a page or pages. Although the Court has called this to the attention of all counsel and has asked for a complete document, none has been received. Rather, by letter the Court has been informed that the document was obtained from Great Northern in the same state as it is presented to the Court.

Although this deficiency is not an impediment to deciding the motions to amend the answers of defendants, its absence makes it impossible to decide the cross motions of plaintiffs (Seqs. 4 and 6) because the Court cannot be expected to rule on the admissibility of an incomplete document. This Court would be reluctant to make a trial evidence ruling in any event. Such rulings necessarily are affected not only by the nature of the disputed document itself, but by the context in which that document is offered. This might include other evidence offered to prove the fact(s) advanced by the proponent of the document.

Accordingly, the cross motions by plaintiffs (Seqs. 4 and 6) are denied with leave to renew before the trial court.¹

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 21, 2009



ENTERED DONALD L. PALMIERI
Acting Supreme Court Justice

DEC 23 2009

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**

¹ The Court notes that plaintiffs have submitted two sets of papers from two separate law firms. Henceforth, for purposes of clarity of the record, plaintiffs shall submit one set of papers from one, or jointly from both, of its attorneys. CPLR §2214.

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