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4-22-10

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 103566/2009

AGUDELO, MARIA

VS.

EMTEQUE CORP

SEQUENCE NUMBER : 001

DISMISS ACTION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

FILED

APR 22 2010

COUNTY CLERK'S OFFICE NEW YORK

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

Dated: April 19, 2010

J.S.C.

HON. JOAN A. MADDEN

Check one: [X] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST [ ] REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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MARIA AGUDELO, et al.,

Index No. 103579/09

Plaintiffs,

-against-

EMTEQUE CORPORATION; AND
LANE ASSOCIATES CONSULTING ENGINEERS, P.C.

Defendants.

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JOAN A. MADDEN, J.:

Defendant Emteque Corporation ("Emteque") moves, pursuant to CPLR 3012(b), to dismiss on the grounds that Plaintiffs failed to timely file a complaint. Plaintiffs oppose the motion and cross move for an order (i) consolidating this action with Munoz v. BR Fries, Emteque Corporation, and Lane Associates Consulting Engineers, P.C., Index No. 103566/09 ("the Munoz action")[1]; (ii) finding that plaintiffs' notice of voluntary discontinuance is valid under CPLR 3217(a); or in the alternative, (iii) granting voluntary discontinuance pursuant to CPLR 3217(b), including any conditions the court deems appropriate. Emteque opposes the cross motion.

BACKGROUND

This action arises out of injuries allegedly sustained by Plaintiffs while working as office cleaners at buildings near the World Trade Center site after the terrorist attacks on September 11,

[1]The court declines for the reasons below to formally consolidate the two actions. However, as the motion and cross-motion in this action and the motion in Munoz action raise identical issues, and upon the consent of the parties, the court will consolidate the motions and cross motion in the two actions for the purpose of disposition.

2001. Plaintiffs allege exposure to toxic particulate matter, smoke and vapors due to Emteque's failure to provide proper personal protective equipment.

The Air Transportation Safety and System Stabilization Act, Pub. L. 107-42, § 408(b)(3), 115 Stat. 230, 241 (2001), provides that "The United States District Court for the Southern District of New York shall have original and exclusive jurisdiction over all actions brought for any claim (including any claim for loss of property, personal injury, or death) resulting from or relating to the terrorist-related aircraft crashes of September 11, 2001." Special dockets have been created for these claims (In re World Trade Center Lower Manhattan Disaster Site Litigation). One such docket, 21 MC 102 (AKH), handles claims for injuries suffered near the World Trade Center site (see In re World Trade Center Disaster Site Litigation, 467 F. Supp. 2d 372, 373 [S.D.N.Y. Dec. 4, 2006]), such as the claim brought here by Plaintiffs. Plaintiffs are already plaintiffs in the federal court action. Plaintiffs' counsel is the plaintiffs' liaison counsel in that federal court action. The allegation that plaintiffs were not provided with proper equipment is an allegation in the Master Complaint against all named defendants.

Plaintiffs sought to add the defendants in this action and the Munoz action as defendants in the federal court action through a proscribed pleading amendment procedure, but that request was initially denied by the defendants' liaison counsel. Apparently in order to toll the statute of limitations in the federal action, Plaintiffs filed this action and the Munoz action in this court, with the intention that the actions would be removed to federal court upon acceptance of defendants into the collective defendant pool in the federal court action. The removal of these actions, however, never occurred.

The record indicates that Plaintiffs filed a summons with notice in this court on March 13, 2009. However, it was not until July 7, 2009, that Plaintiffs served the summons with notice

on Defendants.[2] Emteque served a notice of appearance and demand for complaint on Plaintiffs on July 16, 2009. On August 6, 2009, Emteque informed Plaintiffs that if a complaint was not immediately served, Emteque would file a motion to dismiss the action. It was also on August 6, 2009, that Plaintiffs transmitted the notices of voluntary discontinuance at issue in this action and the Munoz action to Emteque.[3] On August 14, 2009, Emteque [4] filed its motion to dismiss in this action and the Munoz action. Plaintiffs have opposed the motions in both actions and in this action have also cross moved for an order inter alia, stating that the actions have been voluntarily discontinued pursuant to CPLR 3217(a) or, alternatively, granting their request to voluntarily discontinue the actions pursuant to CPLR 3217(b).

Emteque argues that this action and the Munoz action should be dismissed pursuant to CPLR 3012(b), as the complaints in the actions were not filed within twenty days of Emteque's demands for a complaint on July 16, 2009. Moreover, Emteque argues that the notices of voluntary discontinuance filed by Plaintiffs pursuant to CPLR 3217(a) are invalid because their conditions – that the discontinuance is subject to any prior stipulations and that upon re-filing this claim against Emteque in federal court, the date of filing will relate back to the commencement date of this action – are an "impermissible reservation of rights." Aff. of Steven Kent in Support of Mot. to Dismiss, at ¶10.

Plaintiffs cross move for an order consolidating this action with the Munoz action and either declaring that the notice of voluntary discontinuance served on Emteque was valid under

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[2] The delay in serving the summons on Defendants was due to protracted efforts over several months by the Federal court to obtain a Special Master for the dispute over adding Defendants to the defendant pool in the federal action. According to Plaintiffs, those efforts ultimately failed, and so Plaintiffs proceeded to serve the summons at that time.

[3] Plaintiffs claim that they were ordered to voluntarily discontinue this action and the Munoz action by the Federal District Court after the defendants' liaison counsel in the federal action moved the District Court for an order sanctioning the plaintiffs' liaison counsel for filing these actions in state court and directing the discontinuance of these state actions.

[4] Emteque is the only defendant that has appeared by counsel in these actions.

CPLR 3217(a) or granting an order of voluntary discontinuance pursuant to CPLR 3217(b). Plaintiffs argue the notice of discontinuance filed in each of the actions was valid under CPLR 3217(a) because they were served before Emteque gave any answer to the pleading. Plaintiffs alternatively argue that the court should grant voluntary discontinuance with any conditions deemed proper by the court, pursuant to CPLR 3217(b), and that Emteque will suffer no prejudice.

DISCUSSION

A party may voluntarily discontinue an action without a court order by "serving upon all parties to the action a notice of discontinuance at any time before a responsive pleading is served or within twenty days after service of the pleading asserting the claim, whichever is earlier, and filing the notice with proof of service with the clerk of the court." CPLR 3217(a)(1). For the purposes of this provision, filing a summons with notice, as Plaintiffs did here, does not constitute a pleading that would activate the twenty day time limit contained in CPLR 3217(a) David D. Siegel, Practice Commentaries, C3217:4, CPLR, Vol. 7B, McKinney's Consol. Laws of NY Ann. (2004 Main Edition). Moreover, at the time Plaintiffs filed the notices of discontinuance no responsive pleading has been filed. As such, Plaintiffs had the right to voluntarily discontinue the action without a court order.

While Plaintiffs' notice of voluntary discontinuance was timely, it was filed subject to certain conditions. Specifically, it was conditioned on:

> a finding or agreement among counsel for any defendant that if and when a federal court action is commenced by these plaintiffs against these defendants in the United States District Court for the Southern District of New York, the commencement date of the federal action will relate back to the commencement date of this state court action for purposes of calculating the statute of limitations.

As Emteque notes this condition is apparently at odds with CPLR 205(a), which provides that when the original action is terminated by voluntary discontinuance it is not given the benefit of the six month tolling provision.[5] That being said, however, this court cannot determine whether any subsequent effort to file an action on Plaintiffs' behalf in federal court will be timely or subject to any tolling provision since that issue is for the Federal District Court Judge to decide.

Nonetheless the court finds that the conditions imposed by plaintiffs were improper. Whereas the court is given broad discretion to attach terms and conditions to an order of voluntary discontinuance pursuant to CPLR 3217(b), no such allowance exists for a notice of voluntary discontinuance filed by a party pursuant to CPLR 3217(a). Although Plaintiffs claim there is not "a single case where the Courts have held that a plaintiff may not condition her voluntary discontinuance on prior agreements, stipulations or court orders. Indeed, just the opposite" (Aff. of Denise Rubin in Support of Cross Motion, at ¶19), Plaintiffs fail to provide any authority for the proposition that CPLR 3217(a) allows for such conditions. In any event, in this case the condition is not based on any agreement by the parties or a court order, but rather is a condition imposed unilaterally by Plaintiffs. As such, the court denies plaintiffs' cross-motion to the extent it seeks an order finding that the notices of voluntary discontinuance filed in this action and the Munoz action on August 6, 2009 are valid pursuant to CPLR 3217(a).

However, a court order for voluntary discontinuation requires a different analysis. "The authority of a court to grant or deny an application of voluntary discontinuance pursuant to

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[5] CPLR 205(a) provides:

If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, a dismissal of the complaint for neglect to prosecute the action, or a final judgment upon the merits, the plaintiff, or, if the plaintiff dies, and the cause of action survives, his or her executor or administrator, may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period.

CPLR 3217(b) is within the court's sound discretion ... and discontinuance should be granted absent special circumstances, such as a particular prejudice to defendant or other improper circumstances flowing from the discontinuance." Leites v. Leites, 104 AD2d 342, 345 (1st Dep't 1984) (citations omitted). CPLR 3217(b) provides that the court may order a voluntary discontinuance "upon terms and conditions, as the court deems proper."

Here, there will be no prejudice to Emteque or the other defendants, nor will improper circumstances flow from a voluntary discontinuance. If plaintiffs were to commence an action against the defendants in this action and the Munoz action based on the allegations that are the subject of this action in the Federal District Court, the defendants will be able to argue whether such action is timely in that court. Additionally, this court may attach conditions to the voluntary discontinuance, which will further serve to ensure the defendants suffer no prejudice or improper circumstances. The court therefore grants plaintiffs' cross-motion to the extent of granting a voluntary discontinuance of this action, without prejudice to the parties raising any issues, including the issue of statute of limitations in any subsequent action.[6]

As to Emteque's argument that this action and the Munoz action should be dismissed because plaintiffs did not timely file a complaint, the court finds that in light of the court's grant of the motion to discontinue this action and the Munoz action, this issue is moot. As the court is granting plaintiffs permission to voluntarily discontinue this action and the Munoz action, there is no reason to consolidate the two actions except for the purpose of motion disposition. Finally, Emteque's request for attorneys' fees is denied under the circumstances here.

[6] Emteque also argues that Plaintiffs should not be provided relief with a court ordered voluntary discontinuance because they have filed duplicitous actions, are forum shopping, and have violated Judge Hellerstein's orders not to file claims in New York Supreme Court. However, the issue of whether Plaintiffs violated Judge Hellerstein's orders is for Judge Hellerstein to decide. In any event, any alleged violation of Judge Hellerstein's orders does not directly impact on whether plaintiffs should be permitted to voluntarily discontinue this action and the Munoz action.

CONCLUSION

In light of the above, it is

ORDERED that plaintiffs' notice of voluntary discontinuance pursuant to CPLR 3217(a) is invalid and is hereby vacated; and it is further

ORDERED that the cross motion to voluntarily discontinue this action is granted pursuant to CPLR 3217(b), without prejudice to the parties raising any issues, including the issue of statute of limitations in any subsequent action; and it is further

ORDERED that this action and the Munoz action (Index No. 103579/09) shall be discontinued in accordance with the foregoing upon service of a copy of this decision and order with notice of entry upon the Clerk of the Court; and it is further

ORDERED that Emteque's separate motions to dismiss this action and the Munoz action are denied, and it is further

ORDERED that except for the purpose of disposition of the motions in this action and the Munoz action, the cross motion to consolidate the this action and the Munoz action is denied as moot in light of the court's grant of permission to plaintiffs to voluntarily discontinue the actions.

DATED: April 19, 2010

J.S.C.

HON. JOAN A. MADDEN
J.S.C.