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5/26/10

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

PRESENT: EMILY JANE GOODMAN Justice PART 17

Index Number : 402630/2008
METROPOLITAN TRANSPORTATION
vs
KEYSPAN CORP.
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, ____ s motion to/for _____

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

Cross-Motion: ☐ Yes ☑ No

Upon the foregoing papers, it is ordered that this motion is decided per attached

FILED
MAY 06 2010
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/30/10

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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METROPOLITAN TRANSPORTATION AUTHORITY and LONG ISLAND RAILROAD COMPANY,

Plaintiffs,

- against -

Index No. 402630/2008

KEYSPAN CORP., KEYSPAN ENERGY CORP., KEYSPAN ENERGY SERVICES INC., KEYSPAN ENERGY SOLUTIONS, LLC, KEYSPAN ENERGY SERVICES NEW JERSEY, LLC, KEYSPAN ENGINEERING ASSOCIATES, INC., KEYSPAN GAS EAST CORP., KEYSPAN ISLANDER EAST PIPELINE, LLC, KEYSPAN PLUMBING AND HEATING SERVICES, INC., KEYSPAN PLUMBING SOLUTIONS, INC., KEYSPAN ENERGY MANAGEMENT, LLC, KEYSPAN SERVICES, INC., JASON PALAZZO, KEYSPAN ENGINEERING SERVICES, INC., KEYSPAN GENERATION LLC, KEYSPAN HOME ENERGY SERVICES, LLC, KEYSPAN IGTS CORP., KEYSPAN TECHNOLOGIES, INC., KEYSPAN UTILITY SERVICES, LLC, KEYSPAN LNG, LP, KEYSPAN LNG, LP, LLC, NATIONAL GRID COMMUNICATIONS, INC., NATIONAL GRID CORPORATE SERVICES LLC, NATIONAL GRID ELECTRIC SERVICES LLC, NATIONAL GRID ENGINEERING & SURVEY INC., NATIONAL GRID GENERATION LLC, NATIONAL GRID HEATING INC., NATIONAL GRID IGTS CORP., NATIONAL GRID TECHNOLOGIES INC., NATIONAL GRID USA SERVICE COMPANY, INC., NATIONAL GRID UTILITY SERVICES LLC and NATIONAL GRID PLC,

Defendants.

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EMILY JANE GOODMAN, J.S.C.:

In this action to recover damages for injury to property, defendants move for an order, pursuant to CPLR 3211, dismissing: (a) the initial complaint, on the ground that, because that complaint was not served, the court lacks personal jurisdiction over the defendants that are named therein; and (b) the amended complaint, on the grounds that the claims asserted therein are barred by the applicable statute of limitations and that plaintiffs failed to seek leave of court to add the additional defendants that are named therein. The motion presents questions of legal procedure that

are fit for commentary by Professor David D. Siegel, who has written numerous Practice Commentaries for the McKinneys Consolidated Laws of New York, Civil Practice Law and Rules.

BACKGROUND

On October 26, 2005, plaintiffs Metropolitan Transportation Authority and Long Island Railroad reported a gas leak at their premises in Mineola, New York to defendants. One of the defendants sent its employee, defendant Jason Palazzo, to investigate, and plaintiffs escorted Palazzo to the premises. Approximately five minutes after Palazzo was left alone to work, there was allegedly an explosion at the premises which caused extensive damage. Plaintiffs allege that the explosion was caused by defendants' negligent, knowing, willful, reckless, unlawful, and/or wrongful conduct.

On Friday, October 24, 2008, plaintiffs filed the original summons and complaint, which asserted six causes of action alleging: (1) tortious conduct, (2) violation of Public Service Law § 65, (3) strict liability for ultra hazardous activity, (4) breach of express and implied warranties, (5) failure to perform work in a good and workmanlike manner, and (6) breach of contract. The original complaint sought general damages of more than $125,000, and punitive damages of more than $500,000, and named the first 13 of the defendants listed in the caption above (the Original Defendants) as defendants.

On Monday, October 27, 2008, plaintiffs filed an amended summons and an amended complaint which asserted the same six causes of action as the original complaint, and was substantially similar to the original complaint, except that it (a) sought general damages of more than $400,000 and punitive damages of more than $800,000, and (b) added the last 19 of the defendants listed in the caption above (the Added Defendants) as defendants.[1] On or about January 23, 2009,

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[1]Defendants assert in their moving papers that plaintiffs never filed the amended summons and complaint (*see* Popadiuk Affirm. in Supp., ¶ 5). However, plaintiffs have submitted evidence with their opposition papers which indicates that they filed the amended summons and complaint

without having served any of the defendants with a copy of the original summons and complaint, plaintiffs served defendants with the amended summons and complaint.

DISCUSSION

Defendants' motion is denied.

Defendants argue that the court lacks personal jurisdiction over the Original Defendants because the original summons and complaint were not served within 120 days after they were filed, as required by CPLR 306-b.[2] Defendants contend that the amended complaint never became effective because: (i) a pleading may be amended, and parties may be added, without leave of court, only after the pleading which is sought to be amended has been served, and the original summons and complaint were not served prior to the purported amendment; and (ii) plaintiffs never obtained leave of court to amend the original complaint or to add the Added Defendants as parties. Defendants assert that, even if the amended summons and complaint were deemed to be effective, the claims which the amended complaint asserts against the Added Defendants would be barred by the applicable statute of limitations.

Defendants' assertions to the contrary notwithstanding, the amended complaint effectively amended the original complaint. CPLR 3025 (a) provides that "[a] party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it." CPLR 1003 -- which was amended in 1996 to "reduce the need for motion practice and harmonize the rule on adding new parties with CPLR 3025's rule on amending the pleadings" (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C1003:2) -- provides that "[p]arties may be added ... once without leave of court within twenty days after service of the original

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on October 27, 2008 (*see* Chin Affirm., ¶¶ 8-9 and Exs. 4, 5), and defendants' reply papers do not challenge that evidence or dispute that the amended summons and complaint were filed on that date.

[2]CPLR 306-b provides, in relevant part, that "[s]ervice of the summons and complaint ... shall be made within one hundred twenty days after the filing of the summons and complaint ... ."

summons or at anytime before the period for responding to that summons expires or within twenty days after service of a pleading responding to it." Defendants note that the first and third situations specifically refer to the term "service" and argue that the second situation "at any time before the period for responding to it expires" implies that service is required because a defendant only responds to a summons after the defendant is served. Omission of the term "service" in the second scenario is notable, especially where it is specifically mentioned in the first and third scenarios. However, the Court need not address this issue any further because the Appellate Division Second Department has recently held that where a summons and complaint was merely filed (but not served), service of an amended complaint, without leave of court, under the same index number was proper as it was served "before the period for responding to the original complaint expires" (*O'Keefe v Baiettie*, ___ AD3d ___, 2010 NY Slip Op 03296, *1 [2d Dept 2010]).[3] Thus, the amended complaint was a timely amendment of the original complaint without leave of court under CPLR 3025 (a), and a timely addition of the Added Defendants without leave of court under CPLR 1003, because it was filed and served before defendants' period for responding to the original complaint had expired.[4]

When plaintiffs filed the amended summons and complaint on the first business day after they had filed the original summons and complaint, the original summons and complaint not yet having been served, the amended complaint "superseded the original complaint and became the only complaint in the action" (*Hummingbird Assoc. v Dix Auto Serv.*, 273 AD2d 58, 58 [1st Dept 2000]),

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[3]No other appellate authority has been found.

[4]CPLR 305 (a) provides that, "[w]here, ... as of right pursuant to section 1003, a new party is joined in the action ..., a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party." However, while a new defendant should properly be joined by means of a supplemental summons rather than an amended summons, defendants do not assert, and it does not appear, that any of defendants has been prejudiced in any manner by plaintiffs' denomination of the summons by means of which the Added Defendants were added as an amended summons rather than a supplemental summons. Defendants' counsel, in fact, refers to the latter summons as a "supplemental summons" (*see* Popadiuk Affirm. in Supp., ¶ 16)

rendering the original complaint "without legal effect" (*Nimkoff Rosenfeld & Schechter, LLP v O'Flaherty*, 71 AD3d 533, 533 [1st Dept 2010]). Thus, the amended summons and complaint that were served upon defendants conformed to the papers that had been properly filed (*see Matter of Gershel v Porr*, 89 NY2d 327, 332 [1996]; *O'Keefe v Baiettie*, 2010 NY Slip Op 03296, at *1).

Defendants concede that they were served with the amended summons and complaint on or about January 23, 2009, and that that service was within the time when service of the original summons and complaint would have been required under CPLR 306-b, i.e., 120 days after October 24, 2008, when plaintiffs filed the original summons and complaint (*see* Def. Reply Mem. of Law, at 7). Accordingly, the court obtained personal jurisdiction over defendants when they were served with the amended summons and complaint during the time when service of the original summons and complaint would have been required under CPLR 306-b (*see O'Keefe v Baiettie*, 2010 NY Slip Op 03296, at *1 [finding that the Supreme Court had erred in granting a defendant's motion to dismiss an amended complaint on the ground of lack of personal jurisdiction, where the plaintiff had filed an original complaint, filed the amended complaint without leave of court, and then served that defendant with the amended complaint but not the original complaint]).[5]

Even assuming, arguendo, that service of the amended summons and complaint were not deemed effective to confer jurisdiction over defendants, defendants were, in any event, served with the original summons and complaint on March 18, 2009 -- 145 days after the original summons and complaint were filed on October 24, 2008 -- when plaintiffs included them in their papers in opposition to defendants' motion to dismiss. Defendants do not assert that they suffered any

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[5]"New York's commencement-by-filing system is modeled on its federal counterpart" (*Jones v Bill*, 10 NY3d 550, 555 [2008]), and the result reached herein is consistent with determinations made by federal courts (*see e.g. Witchard v Montefiore Med. Ctr.*, 2006 WL 2773870, *4, 2006 US Dist LEXIS 72819 [SD NY 2006] [stating that "(s)ervice of an amended complaint within 120 days of filing suit has been held to satisfy (Federal Rules of Civil Procedure) Rule 4 (m), even though a defendant has not been served with the original complaint," and noting that, "(if a) plaintiff amends his complaint, to require service of the original complaint rather than the amended complaint would promote a useless exercise and exalt form over substance" (citations and internal quotation marks omitted)]; *Bakal v Ambassador Constr.*, 1995 WL 447784, *2, 1995 US Dist LEXIS 10542 [SD NY 1995]).

prejudice as a result of their not having been served with the original summons and complaint sooner, and, "in their totality, the present circumstances [would] constitute good cause under CPLR 306-b for extending plaintiff[s'] time to serve" the original summons and complaint to the time when they were served as part of plaintiffs' opposition papers (*Spitzer v Dewar Found.*, 280 AD2d 385, 386 [1st Dept 2001]).

Defendants argue that, even if the court deems the amended summons and complaint to be effective, the amended complaint's claims against the Added Defendants are barred by the applicable statute of limitations, because those claims were only interposed after the limitations period had expired, when the Added Defendants were served with the amended summons and complaint.

Defendants' argument based upon the statute of limitations fails, first, because defendants have failed to satisfy their initial burden, as the proponents of a motion to dismiss on that ground, of "establishing prima facie that the time in which to sue has expired" (*Sabadie v Burke*, 47 AD3d 913, 914 [2d Dept 2008] [citation and internal quotation marks omitted]). Defendants have not identified either the particular limitations period or periods which they believe should be applied to the various claims that are asserted in the amended complaint, or the date or dates upon which they believe any of those claims should be deemed to have accrued, so as to commence the running of the relevant limitations period. Defendants have, thus, failed to demonstrate that the time in which to sue has expired for any of the claims asserted in the amended complaint.

Moreover, assuming, arguendo, that plaintiffs' claims against the Added Defendants do not "relate back" to the filing of the original summons and complaint, those claims would be deemed to have been interposed -- for purposes of tolling the statute of limitations on those claims -- not, as defendants contend, when the Added Defendants were served with the amended summons and complaint, but, rather, when plaintiffs filed the amended summons and complaint on October 27, 2008 (*see Matter of Williams v County of Genesee*, 306 AD2d 865, 867 [4th Dept 2003]; *see also* Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C305:2, C1003:2; *cf. Hirsh v Perlmutter*, 53 AD3d 597, 599 [2d Dept 2008] [holding, as regards a defendant

who established that the pleading in which he was first joined as a defendant in the action had not been filed before the expiration of the applicable limitations period, that the burden had shifted to the plaintiff to prove that the "relation-back" doctrine applied]).

Plaintiffs appear to concede that a three-year limitations period applies to all of the claims in the amended complaint (*see e.g.* Pl. Mem. of Law, at 2 [stating that "October 26, 2008, the last day normally to file an action in this matter, was a Sunday"], 3), although it is not clear to the court that that is the case, inasmuch as the amended complaint asserts claims for, inter alia, breach of contract and breach of warranty. Plaintiffs, nevertheless, maintain that their filing of the amended summons and complaint on October 27, 2008 was timely, because, although the limitations period would otherwise have expired on October 26, 2008, that was a Sunday, and October 27, 2008 was the next succeeding business day thereafter. Defendants, in their reply papers, do not dispute plaintiffs' contentions that the filing of the amended summons and complaint on October 27, 2008 constituted a timely interposition of plaintiffs' claims against the Added Defendants for purposes of the applicable statute of limitations with respect to those claims. Accordingly, defendants have failed to establish that the amended complaint's claims against the Added Defendants are time-barred.

Defendants argue, in their affirmation in support of their motion, that the amended complaint should be dismissed on the ground that its allegations fail to satisfy CPLR 3013, which requires that a complaint's allegations "shall be sufficiently particular to give the court and parties notice of ... the material elements of each cause of action." Defendants list the causes of action that are alleged in the amended complaint and assert: that the amended complaint "fails to contain statements sufficiently particular to notify the court and the parties of the material elements of each cause of action"; that plaintiffs have "fail[ed] to support any of the[] purported causes of action with particular allegations or facts"; and that plaintiffs have "done nothing more than compile a list of unsupported and unsubstantiated legal theories" (Popadiuk Affirm., ¶¶ 18, 19).

Defendants' argument based upon CPLR 3013 is procedurally improper. CPLR 2214 (a)

requires that a notice of motion "shall specify ... the relief demanded and the grounds therefor," but defendants' notice of motion does not indicate that relief is being sought on the ground of CPLR 3013. However, even assuming, arguendo, that defendants' argument premised upon CPLR 3013 were procedurally proper, defendants have failed to establish that the amended complaint should be dismissed on that ground.

Defendants assert conclusorily, without addressing any of the amended complaint's causes of action individually, that the causes of action fail to allege claims with sufficient particularity and to allege the material elements of each claim. However, defendants have not established their entitlement to dismissal of any of the amended complaint's causes of action on those grounds, because defendants have not identified -- with respect to any particular cause of action -- any specific factual averment, or any material element of any claim, which should have been alleged but has not been (*see e.g. Cottone v Selective Surfaces, Inc.*, 68 AD3d 1038, 1038-39 [2d Dept 2009] [stating that the Supreme Court should not have dismissed the complaint pursuant to CPLR 3211 (a) (7), on the ground that it was "conclusory and lacking in specificity to inform defendants of the basic facts upon which a dispute exists," because the defendants had not set forth "particularized arguments" as to why eight of the 12 causes of action that were asserted in the complaint failed to state a cause of action]).

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the motion is denied.

Dated: April 30, 2010

ENTER:

J.S.C.

EMILY JANE GOODMAN