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| <b>Dier v Suffolk County Water Auth.</b>   |
| 2010 NY Slip Op 32060(U)   |
| July 29, 2010  |
| Sup Ct, Suffolk County   |
| Docket Number: 02201-2010  |
| Judge: Emily Pines   |
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SUPREME COURT - STATE OF NEW YORK  
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

*Present:* HON. EMILY PINES  
J. S. C.

Original Motion Date: 03-19-2010; 04-20-2010  
Motion Submit Date: 05-18-2010  
Motion Sequence : 001 MD  
002 MG

\_\_\_\_\_ X  
**ROBERT DIER,**

**Plaintiff,**

**-against-**

**SUFFOLK COUNTY WATER AUTHORITY,  
S & S WATER CONNECTION, INC.,  
McCARTHY MANAGEMENT INC., and  
THOMAS J. McCARTHY,**

**Defendants.**

\_\_\_\_\_ X

Attorney for Plaintiff Dier  
Lisa A. Bartholomeo, Esq.  
323 Mill Road  
Westhampton, New York 11978

Attorney for Defendants McCarthy  
Mgmt and T. McCarthy  
Judith Donnenfeld, Esq.  
Marshall Stern PC  
17 Cardiff Court  
Huntington Station, New York 11746

Attorney for Defendants S & S Water  
connection and SCWA  
Fiedelman & McGaw  
Two Jericho Plaza, Suite 300  
Jericho, New York 11753-1681

**ORDERED**, that the motion (motion sequence number 001) by defendants McCarthy Management Inc. and Thomas J. McCarthy pursuant to CPLR §§3211(a)(1) and (a)(4) to dismiss the Complaint against Thomas J. McCarthy, is denied; and it is further

**ORDERED**, that the cross-motion (motion sequence number 002) by defendant Suffolk County Water Authority pursuant to CPLR §3212 for summary judgment dismissing the Complaint for failure to file a timely Notice of Claim pursuant to General Municipal Law §50(e)(5) is denied; and it is further

**ORDERED**, that a preliminary conference is scheduled for August 10, 2010 at 9:30 a.m. before the undersigned.

### Background

Plaintiff commenced this action against all defendants by the filing of a Summons and Verified Complaint on January 14, 2010. The gravamen of the Complaint, which asserts a single cause of action against all defendants, arises out of water damage to plaintiff's property located at 355 Terry Lane, Southold, New York (the "subject premises"). Plaintiff alleges that on or about March 22, 2008, he entered into an agreement with defendant, Thomas J. McCarthy ("McCarthy") which gave him an exclusive right to sell the subject premises. Plaintiff claims that McCarthy recommended he undertake certain improvements to the subject premises, and they agreed that defendant McCarthy Management Inc. ("MMI"), would perform the work. Plaintiff alleges that the parties agreed the cost of the work would not exceed \$150,000, but McCarthy and MMI exceeded said amount, plaintiff refused to pay any additional amounts and these defendants ceased work on the subject premises. At the time the work was halted, plaintiff claims there was unfinished plumbing in the master bedroom and the plumbing had been "capped".

The Complaint does not indicate the time period during which the work was being performed or ceased. However, the Complaint further alleges that in or about October of 2008, defendant S & S Water Connection, Inc. ("S & S"), a subcontractor of defendant Suffolk County Water Authority ("SCWA") was performing a project in the neighborhood of the subject premises. Specifically, according to plaintiff, S & S was replacing an existing water main and thereafter reattaching the water main to the homes in the neighborhood, including the subject premises. Plaintiff claims that upon installation of the water main, its reconnection to the subject premises and repressurization resulting thereby, caused the plumbing caps placed on the rough plumbing by McCarthy and MMI to "pop off", resulting in water to run uncontrollably throughout the subject premises and causing substantial damage. Plaintiff states that he then discovered that McCarthy and/or MMI failed to obtain building permits for the renovations, he lacked the funds to repair the damage and consequently, sold the subject premises "as is" for a

sum substantially less than he would have received.

With regard to the filing of a Notice of Claim, plaintiff acknowledges in the Complaint that pursuant to GML §50-e, he was required to serve same on SCWA. He further admits that same was not filed within the statutorily proscribed ninety (90) day period, although he exchanged correspondence with SCWA during that period. Plaintiff claims that a hearing was held on his claim pursuant to GML §50-h on November 30, 2009.

#### McCarthy Motion to Dismiss

Defendant McCarthy now moves to dismiss the Complaint pursuant to CPLR §3211(a)(1) based on documentary evidence and pursuant to CPLR §3211(a)(4) based upon another action pending between the parties. Specifically, McCarthy relies on a one page document captioned “OFFICE EXCLUSIVE CERTIFICATION” (“listing agreement”) which indicated that “Thomas J. McCarthy Real Estate” had an exclusive listing for the subject premises. McCarthy argues that this document demonstrates that plaintiff’s claim is solely against the entity listed on the document and further that it was MMI that performed the work on the subject premises. Therefore, he claims the action should be dismissed against him individually.

With regard to the other action pending, McCarthy explains that on or about May 15, 2009, MMI commenced an action against plaintiff seeking damages for failure to pay for the construction work on the subject premises. McCarthy notes that while plaintiff filed an Answer in that case, he did not interpose any counterclaims regarding the water damages at the subject premises. McCarthy argues that the instant action should be dismissed because both cases involve MMI’s improvements to the subject premises and the Court can obtain jurisdiction over all of the parties. He asserts that there is no reason for both actions to proceed separately since they arise out of the same alleged wrongs. Thus, he urges the Court to dismiss this action based on the earlier pending action.

Both plaintiff and SCWA/S&S oppose the motion. Plaintiff argues that the documentary evidence, to wit, the listing agreement, fails to conclusively establish a defense for McCarthy. Plaintiff claims that such is insufficient because the Complaint alleges that all the defendants, including McCarthy, failed to properly perform construction work at the subject premises which caused the damages. Plaintiff argues that the listing agreement is not the subject of this litigation and the listing agreement does not address the work performed at the subject premises, which is the subject of this action. Plaintiff asserts that the Complaint alleges that McCarthy was negligent in undertaking and/or supervising the work at the subject premises and such was not refuted by the documentary evidence submitted by McCarthy and thus this argument must be rejected.

Likewise, plaintiff argues that the defense based upon another action pending must also be denied. Here, plaintiff asserts that the earlier action does not contain a claim by plaintiff against MMI or McCarthy to recover for his damages and he was not required to interpose a counterclaim under New York law. Thus, since the complaints seek different relief and are not for the same causes of action against the same parties, the Court must reject this argument as well.

SCWA/S&S also oppose McCarthy's motion to dismiss on the ground that the causes of action and the parties differ, although they recognize that perhaps the cases should be consolidated or joined for trial. Moreover, SCWA/S&S note that they have cross-claims against McCarthy and MMI for contribution and/or indemnity and the action should not be dismissed.

In reply, McCarthy reiterates that he did not enter into a listing agreement or provide construction services to plaintiff. Further, plaintiff admitted in the 2009 action that he was in partnership with MMI for the construction work. Therefore, McCarthy urges the Court to grant the motion to dismiss the Complaint against him.

SCWA Motion to Dismiss

SCWA moves for summary judgment dismissing the Complaint on the ground that plaintiff failed to timely file a Notice of Claim as required by GML §50-e. SCWA argues that pursuant to GML §50-e, plaintiff was required to serve a Notice of Claim within ninety (90) days of the event complained of and failed to do so. SCWA believes that the damage to the subject premises occurred on or about October 15, 2008 and thus the time to file the Notice of Claim expired on January 14, 2009. It asserts that plaintiff failed to request an extension of time to serve the Notice of Claim and that such request would have had to be made prior to the expiration of the statute of limitations, which is one year and ninety days. In this case, plaintiff purportedly served a Notice of Claim in October of 2009, one year after the damage occurred, yet never sought leave of the Court to file a late Notice of Claim. SCWA argues that the Court does not have authority to extend the time to file the Notice of Claim, the alleged Notice of Claim served in October 2009 is a nullity and the action must be dismissed against it.

Plaintiff opposes the motion and although he admits the Notice of Claim was untimely served, he argues that SCWA should be equitably estopped from raising the defense of untimely service of the Notice of Claim. Plaintiff argues that SCWA's actions, including holding a hearing pursuant to GML §50-h and failing to reject or otherwise object to the late service of the Notice of Claim. Plaintiff attaches correspondence his counsel sent to SCWA on or about October 5, 2009 wherein he served the Notice of Claim and requested they advise what their intentions were given that the time to serve had expired. In response, plaintiff advises that he received a "Notice of Municipal Hearing" pursuant to GML §50(h) and a hearing was held on November 30, 2009. Plaintiff argues that he was misled by SCWA into believing the late Notice of Claim was accepted and thus he did not file a motion seeking an extension of time to serve the late Notice of Claim. Plaintiff asserts that SCWA effectively waived any objections and also had actual notice of the facts constituting the claim within ninety (90) days of the incident. SCWA performed its own investigation, as did its contractor, S&S. In the report obtained by the

insurance company for S&S, which is annexed to the opposition papers, it indicates it was based on e-mails from SCWA. Based on all of the foregoing, plaintiff urges the Court to estop SCWA from raising the untimely filing of a Notice of Claim and deny the motion for summary judgment.

In reply, SCWA reiterates that the Court lacks authority to grant the request to extend the time to file the Notice of Claim. SCWA does not address the equitable estoppel argument.

Plaintiff submits a supplemental affirmation in opposition by his counsel and argues that if the Court rejects the equitable estoppel argument, the motion should still be denied. Plaintiff asserts that the information provided to SCWA should be deemed sufficient to meet plaintiff's burden of providing notice to SCWA. Alternatively, plaintiff asks the Court to treat the Verified Complaint, which was timely filed, as a motion to extend the time to serve the late Notice of Claim. Plaintiff notes that SCWA, in a letter to its insurance company dated December 12, 2008 recognized that a claim existed and thus was on notice within the ninety (90) day period. Additionally, a letter from S&S's insurance company dated January 26, 2009 also recognized that plaintiff was asserting a claim, even if he failed to submit a formal Notice of Claim. Plaintiff urges the Court to recognize that SCWA had a full opportunity to investigate his claim and even went to the subject premises on October 16, 2008 and took photographs. Therefore, plaintiff satisfied the purpose of the GML §50-e in that SCWA had notice of the claim and the opportunity to investigate the facts and circumstances within the ninety (90) day period surrounding the incident and thus, the motion for summary judgment should be denied.

#### Discussion

#### **McCarthy Motion to Dismiss**

CPLR Rule 3211(a)(1) provides that a party may move to dismiss a cause of action based upon documentary evidence. However, it is well settled that a motion to dismiss pursuant to

CPLR 3211(a)(1) will be granted “only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim”. *Fontanetta v. Doe*, 73 A.D.3d 78, 898 N.Y.S.2d 569 (2d Dept. 2010)(internal quotations omitted). The documentary evidence must conclusively establish a defense as a matter of law. *Suchmacher v. Grocery*, 73 A.D.3d 1017, 900 N.Y.S.2d 686 (2d Dept. 2010). *See also, Levenherz v. Povinelli*, 14 A.D.3d 658, 789 N.Y.S.2d 295 (2d Dept. 2005).

CPLR Rule 3211(a)(4) states that a party may move to dismiss a cause of action when “there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires”. A Court has broad discretion as to the disposition of an action when another action is pending and may dismiss where there is a substantial identity of the parties for the same cause of action. *Montalvo v. Air Dock Systems*, 37 A.D.3d 567, 830 N.Y.S.2d 255 (2d Dept. 2007). *See also, Mercado v. City of New York*, 68 A.D.3d 730, 889 N.Y.S.2d 664 (2d Dept. 2009). The motion should be granted “where an identity of parties and causes of action in two simultaneously pending actions raises the danger of conflicting rulings relating to the same matter.” *Diaz v. Philip Morris Companies, Inc.*, 28 A.D.3d 703, 815 N.Y.S.2d 109 (2d Dept. 2006).

In this case, the Court finds that the documentary evidence submitted by McCarthy does not conclusively dispose of plaintiff’s claim. The Complaint alleges McCarthy and MMI were involved in the construction project at the subject premises. The listing agreement deals exclusively with the sale of the house, which is not the subject of this litigation. Therefore, the motion to dismiss based upon documentary evidence is denied.

The motion to dismiss based upon another action pending is also denied except to the extent that these matter are joined for the purpose of discovery and trial. Although the actions arise out of the same incident and facts, the causes of action differ as do some of the parties. In the interest of judicial economy the matters are joined for purposes of discovery and trial.

### SCWA Motion to Dismiss

General Municipal Law §50-e(1)(a) requires that in any case “founded upon tort where a notice of claim is required by law as a condition precedent to the commencement of an action or special proceeding against a public corporation...the notice of claim shall be served...within ninety days after the claim arises...”. Pursuant to Public Authority Law §1089, a notice of claim is required as a condition precedent to the commencement of an action against a public benefit corporation such as the SCWA. GML §50-e(5) provides a procedure for seeking permission to serve a late notice of claim. That section states that:

Upon application, the court, in its discretion, may extend the time to serve a notice of claim specified in paragraph (a) of subdivision one. The subdivision shall not exceed the time limited for the commencement of an action by the claimant against the public corporation. In determining whether to grant the extension, the court shall consider, in particular, whether the public corporation or its attorney or its insurance carrier acquired actual knowledge of the essential facts constituting the claim within the time specified in subdivision one or within a reasonable time thereafter. The court shall also consider all other relevant facts and circumstances, including whether the claimant was an infant, or mentally or physically incapacitated, or died before the time limited for service of the notice of claim; whether the claimant failed to serve a timely notice of claim by reason of his justifiable reliance upon settlement representations made by an authorized representative of the public corporation or its insurance carrier; whether the claimant in serving a notice of claim made an excusable error concerning the identity of the public corporation against which the claim should be asserted; and whether the delay in serving the notice of claim substantially prejudiced the public corporation in maintaining its defense on the merits.

Notwithstanding the foregoing proscriptions, “a municipality may be estopped from asserting plaintiff’s noncompliance with a notice of claim statute.” *Mohl v. Town of Riverhead*, 62 A.D.3d 969, 880 N.Y.S.2d 313 (2d Dept. 2010)(internal quotations omitted). The municipality may be estopped when its improper conduct induces reliance by a party who then changes his or her position to his or her detriment or prejudice. *Griffith v. Staten Island Rapid Transportation Operating Auth.*, 269 A.D.2d 596, 703 N.Y.S.2d 270 (2d Dept. 2000). “To establish estoppel, the misconduct of the public agency must have induced justifiable reliance by a party who then changed his position to his detriment.” *In the Matter of Enforcement of Tax Liens by County of Orange*, \_\_ A.D.3d \_\_, 903 N.Y.S.2d 60 (2d Dept. 2010).

In this case, plaintiff admits he failed to timely serve a Notice of Claim as required by GML §50-e. However, the Court agrees that the facts of this case warrant the application of the equitable estoppel doctrine to bar SCWA from raising the untimely Notice of Claim as a defense to this action. Although plaintiff did not move for leave to file a late Notice of Claim, upon plaintiff's service of the untimely Notice of Claim, SCWA responded by serving a demand for a hearing pursuant to GML §50-h and in fact, held such hearing. Additionally, SCWA clearly had notice of the facts and circumstances constituting the claim within ninety (90) days of the occurrence of the incident at issue and therefore was not prejudiced by the untimely service of the Notice of Claim. Plaintiff relied not only on SCWA's failure to object to or reject the Notice of Claim but their scheduling of a hearing as required under the General Municipal Law when a Notice of Claim is served. The Court finds that such reliance was justified and excused plaintiff's failure to seek permission to serve a late Notice of Claim. SCWA has not even addressed the issue of the §50-h hearing in its opposition papers. Based on the foregoing, the motion by SCWA for summary judgment dismissing the Complaint is denied.

A preliminary conference is scheduled for August 10, 2010 at 9:30 a.m. before the undersigned.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 29, 2010  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

NONFINAL