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SHORT FORM ORDER

INDEX No. 08-14988

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 24 - SUFFOLK COUNTY

PRESENT:

Hon. PETER FOX COHALAN
Justice of the Supreme Court

MOTION DATE 11-25-09 (#003)
MOTION DATE 12-15-09 (#004)
ADJ. DATE 4-7-10
Mot. Seq. # 003 - MotD
004 - MotD

LUYE LUI and ROBERT MILLER,

Plaintiffs,

- against -

TOWN OF EAST HAMPTON, EAST HAMPTON TOWN FIRE MARSHALL'S OFFICE, MONTAUK FIRE DEPARTMENT/ MONTAUK VOLUNTEER FIRE DEPARTMENT & AMBULANCE SQUAD, JOHN ECKER, INC., JOHN ECKER, NEW YORK CENTRAL MUTUAL FIRE INSURANCE COMPANY, NORTH ELECTRIC COMPANY, and METRODIAL CORPORATION, INC.,

Defendants.

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Upon the following papers numbered 1 to __43__ read on this motion and cross motion __for summary judgment; amend pleading__; Notice of Motion/ Order to Show Cause and supporting papers (003) 1-11 __; Notice of Cross Motion and supporting papers (004) 12-21 __; Answering Affidavits and supporting papers __22-25;26-27; 28-30; 31-32; 33-34__; Replying Affidavits and supporting papers 35-36; 37-43; Other___; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion (003) by the defendant, John Ecker, pursuant to CPLR §3212 for summary judgment dismissing all claims against him, individually, is denied without prejudice to renewal upon the completion of discovery and the filing of the Note of Issue and Certificate of Readiness; and for further order dismissing plaintiffs' fifth cause of action for the alleged violation of General Business Law §349 is granted and the fifth cause of action is dismissed as a matter of law as asserted against the Ecker defendants; and it is further

ORDERED that this motion (004) by the defendant, North Electric Company, pursuant to CPLR §3025(b) granting permission to serve an amended answer to the amended complaint to include affirmative defenses and a cross-claim is granted and the proposed amended answer is deemed served; and for further order pursuant to CPLR §3126 to compel a response to its demand for a Bill of Particulars is denied, and to compel all parties to appear for depositions is granted to the extent that all party depositions be completed by August 1, 2011, that outstanding discovery demands be made within 45 days of completion of all depositions, and response to those demands for discovery be complied with within 45 days of the date of service of the demands.

The plaintiffs are the owners of real property and attendant structures at 82 Laurel Drive, Montauk, Suffolk County, Long Island, New York. The plaintiffs claim that in about 1999, they completed construction on said property, including, among other things, a dwelling, building, tennis court, pool, and pool shed. On March 22, 2007 at approximately 7:00 a.m., a fire alarm was triggered at the premises. The defendant, Metrodial Corporation, Inc., (hereinafter Metrodial) notified the defendants Town of East Hampton (hereinafter Town), East Hampton Town Fire Marshal's Office (hereinafter Marshal), Montauk Fire Department/Montauk Volunteer Fire Department & Ambulance Squad (hereinafter Fire Department) of the alarm, who then responded to the plaintiffs' premises but left between 7:15 a.m. and 8:30 a.m. without notifying the plaintiffs of the alarm or determining what caused the alarm to trigger. Thereafter, the premises became engulfed in flames, and at 8:30 a.m., another alarm was triggered at the premises. At 8:30 a.m., a 911 call was placed by a neighbor who observed the fire, and again, the Town, Marshal and Fire Department defendants responded to the plaintiffs' premises. The premises was ultimately destroyed by the fire during that period of time between the first and second alarms.

A first cause of action alleges negligence and gross negligence and breach of duty and special duty against the Town, the Marshal and the Fire Department. A second cause of action alleges that the Town, Marshal, and Fire Department are vicariously liable pursuant to General Municipal Law §205b for the negligence of their agents, employees, members in their conduct within the scope of their employment and/or agency agreement, in their failure to identify and extinguish the fire prior to the destruction of the premises. A third cause of action alleges that the plaintiffs procured homeowner's insurance coverage for the full and real value of the premises, personal property and contents from John Ecker Inc., (hereinafter Ecker, Inc.), John Ecker

(hereinafter Ecker), agents of New York Central Mutual Fire Insurance Company (hereinafter NYCMFIC) for the period of August 10, 2006 through August 10, 2007 (policy #4226325) and also purchased additional replacement and/or cost of repair protection in excess of the stated coverage, and that the policy was insufficient to cover the losses due to the fire because of the negligence of Ecker Inc., Ecker and NYCMFIC. A fourth cause of action alleges that Ecker, Inc., Ecker and NYCMFIC breached the contract/ agreement in providing inappropriate insurance to the plaintiffs. A fifth cause of action alleges that Ecker Inc., Ecker and NYCMFIC violated General Business Law §349 (hereinafter GBL) by engaging in deceptive acts and practices in their failure to provide an insurance policy for the full replacement value despite the agreement to do so. A sixth cause of action alleges that the defendant North Electric Corporation (hereinafter NEC) breached its agreement with the plaintiffs by failing to notify the plaintiffs, or others as to the alarm's priority contract list, until well after the premises became engulfed in flames, and failed to provide the key to the premises to provide unfettered access to permit fire investigation at the site. A seventh cause of action alleges that NEC outsourced or subcontracted the fire alarm monitoring services to Metrodial which breached the contract to maintain a "central station fire alarm" monitoring service for the plaintiffs' fire alarm system, and that the plaintiffs were in privity to that agreement. An eighth cause of action, alleges that NEC and Metrodial were responsible for the maintenance of the fire alarm at the premises and guaranteed its proper functioning but were negligent in that monitoring. A ninth cause of alleges against all the defendants that the plaintiffs have suffered severe and permanent injuries of an emotional and mental nature as a result of the defendants' negligence and reckless conduct.

In motion (003), Ecker seeks summary judgment dismissing all claims against Ecker, individually, and for further order dismissing plaintiff's fifth cause of action for the alleged violation of GBL §349.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. To grant summary judgment it must clearly appear that no material and triable issue of fact is presented (***Sillman v Twentieth Century-Fox Film Corporation***, 3 NY2d 395, 165 NYS2d 498 [1957]). The movant has the initial burden of proving entitlement to summary judgment (***Winegrad v N.Y.U. Medical Center***, 64 NY2d 851, 487 NYS2d 316 [1985]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v N.Y.U. Medical Center***, *supra*). Once such proof has been produced, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form sufficient to require a trial of any issue of fact (***Joseph P. Day Realty Corp. v Aeroxon Prods.***, 148 AD2d 499, 538 NYS2d 843 [1979] , ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]).) and must assemble, lay bare and reveal his proof in order to establish that the matters set forth in his pleadings are real and capable of being established (***Castro v Liberty Bus Co.,*** 79 AD2d 1014, 435 NYS2d 340 [1981]). Summary judgment shall only be granted when there are no issues of material fact and the evidence requires the Court to direct a judgment in favor of the movant as a matter of law (***Friends of Animals v Associated Fur Mfrs.,*** 46 NY2d 1065, 416 NYS2d 790 [1979]).

In support of motion (003), Ecker has submitted his affidavit, copies of the summons and complaint, supplemental summons and amended complaint, answer of Ecker Inc. and Ecker to the amended complaint; answers to the complaint served by NEC, Metrodial, the Fire Department; and a copy of the insurance policy for the subject premises. However, Ecker has not submitted the answers to the amended complaint served by the co-defendants and therefore this Court cannot determine if there are cross-claims asserted by the co-defendants against Ecker, individually. Therefore, the motion fails to comport with CPLR §3212.

Even if Ecker submitted copies of the answers to the amended complaint, his affidavit states in conclusory terms that the procurement of the insurance coverage was performed in furtherance of the business Ecker, Inc. and not in his individual capacity. There are no evidentiary submissions for this Court to conclude that the complaint must be dismissed against Ecker in his individual capacity as the circumstances concerning the procurement of the insurance cannot be determined based upon the paucity of evidentiary proof submitted. Additionally, it appears that much relevant discovery is outstanding and depositions have not been conducted (see, ***Bustillo v Tuckahoe Development, LLC et al,*** 300 AD2d 272, 750 NYS2d 767 [2nd Dept 2002]). In opposing summary judgment, the plaintiffs have submitted an attorney's affirmation, with no affidavits or other evidentiary submissions.

Accordingly, that part of motion (003) which seeks dismissal of the complaint as asserted against Ecker in his individual capacity is denied with leave to renew upon the completion of discovery and the filing of the Note of Issue and Certificate of Readiness.

Ecker also seeks dismissal of the fifth cause of action premised upon the alleged violation of GBL §349. In ***Gaidon et al v Guardian Life Insurance Company of America, et al,*** 94 NY2d 330, 704 NYS2d 177 [1999], the Court of Appeals stated that GBL §349 was enacted initially to give the Attorney General enforcement power to curtail deceptive acts and practices-wilful or otherwise-directed at the consuming public. In 1980, the Legislature expanded the statute's enforcement scheme by allowing a private cause of action.

GBL §349(a) prohibits deceptive acts or practices in the conduct of any business, trade, or commerce, or in the furnishing of any service. As stated in ***Parrino v Sperling et al,*** 232 AD2d 618, 648 NYS2d 702 [2nd Dept 1996], a plaintiff claiming the benefit of the statute must demonstrate that the acts or practices have a broader impact on consumers at large. Private contract disputes, unique to the parties, would not fall within the statute. In ***Depasquale v Allstate Insurance Company,*** 179 Fsupp 51, 2002 U.S. Dist Lexis 770 [United States District Court for the Eastern District of New York 2002], the Court said that to state a claim pursuant to GBL §349, a plaintiff must show (1) acts or practices that are consumer oriented, (2) that such acts or practices are deceptive or misleading in a material way, and (3) that plaintiff has been injured by reason of those acts. The Court further stated that the consumer oriented prong of a GBL §349 claim requires a plaintiff to show that the practices complained of have a broad impact on consumers at large; private contract disputes unique to the parties do not fall within the ambit of the statute. In ***United Knitwear Co., Inc. et al v North Sea Insurance Company, et al,*** 203 AD2d 358, 612 NYS2d 596 [2nd Dept 1994], the Court stated that to constitute a violation of GBL §349(a) the deceptive acts or practices must be of a recurring nature and harmful to the public at large.

Based upon a review of the copy of the insurance policy submitted as exhibit E in motion (003), the Court determines that the policy was issued for the premises located at 82 Laurel Drive, Montauk, New York by NYCMFIC and the agent was John Ecker, Inc.. It covered the date of loss. Specific policy coverage limits and premiums are stated with particularity as to coverage A-F. As a matter of law the Court finds that this is a private contract between the parties and a dispute unique to the parties concerning that contract. Disputes between policy holders and insurance companies concerning the scope of coverage are nothing more than private contractual disputes that lack the consumer impact necessary to state a claim pursuant to GBL §349 (see, ***Depasquale v Allstate Insurance Company***, supra).

Accordingly, that part of motion (003) which seeks dismissal of the fifth cause of action as asserted against the Ecker defendants is dismissed as a matter of law.

In motion (004), NEC seeks permission to serve an amended answer to the amended complaint to include affirmative defenses; a further order pursuant to CPLR §3126 to compel a response to its demand for a Bill of Particulars and a further order to compel all parties to appear for depositions. NEC has submitted a copy of the summons and complaint, supplemental summons and amended complaint, and its answers to the summons and complaint and the supplemental summons and amended complaint. NEC also has submitted a copy of the proposed amended answer which sets forth 12 affirmative defenses as well as a cross-claim for common law indemnification against co-defendants.

CPLR §3025(b) provides a "party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

Unless coupled with significant prejudice, even inordinate delay is not a barrier to a pleading's amendment (see, ***Goldstein et al v Brogan Cadillac Oldsmobile Corp. et al,*** 90 AD2d 512, 455 NYS2d 19 [2nd Dept 1982]; ***Endicott Johnson Corporation v Konik Industries, Inc. et al,*** 249 AD2d 744, 671 NYS2d 557 [3rd Dept 1998]; ***Rutz v Kellum et al,*** 144 AD2d 1017, 534 NYS2d 293 [4th Dept 1988]). A motion for leave to amend a pleading is left to the sound discretion of a trial court (***Oil Heat Institute of Long Island Insurance Trust v RMTS Associates, LLC et al,*** 4 AD3d 290. 772 NYS2d 313 [1st Dept 2004]). CPLR 3025(b) is explicit that a party may amend his pleading at any time by leave of court, and that leave shall be freely given upon such terms as may be just. The matter of allowing an amendment is committed almost entirely to the court's discretion to be determined on a sui generis basis, the widest possible latitude being extended to the courts (***Murry et al v City of New York,*** 43 NY2d 400, 401 NYS2d 773 [1977].

The plaintiffs oppose the NEC's motion to serve an amended answer to include the affirmative defenses as set forth in the proposed amended answer on the basis of laches, prejudice to all parties, and delay in the prosecution of this action. However, the plaintiffs do not state, except in conclusory terms, how all parties are prejudiced by the proposed amendment. To establish prejudice caused by a delay in seeking the amendment of a pleading, there must be

some indication that the plaintiffs or other defendants have been hindered in the preparation of their cases or have been prevented from taking some measure in support of their positions (***Oil Heat Institute of Long Island Insurance Trust v RMTS Associates, LLC et al,*** surpa; see also, ***Gongolewsky v Empire Insurance Company,*** 51 AD3d 720, 858 NYS2d 306 [2nd Dept 2008]). Here, no prejudice has been established. Discovery is not complete and depositions have not been conducted, so the action is not ready for the filing of the Note of Issue and Certificate of Readiness.

Accordingly, that part of motion (004) for leave to serve the proposed amended answer is granted and the proposed amended answer is deemed served.

NEC also seeks a response to a demand for a bill of particulars. The plaintiffs have provided a copy of the bill of particulars, dated December 29, 2009, rendering moot that part of NEC's motion.

Accordingly, that part of motion (004) which seeks an order compelling the service of the above mentioned bill of particulars is denied.

NEC also requests that this Court compel all parties to appear for depositions by a date certain, but has failed to provide a copy of the preliminary conference order, which has been provided by the plaintiffs. The plaintiffs and Metrodial contend they are ready and willing to be produced for depositions.

Accordingly, the Court orders that all party depositions be completed by August 1, 2011, that outstanding discovery demands be made within 45 days of completion of all depositions, and response to those demands for discovery be complied with within 45 days of the date of service of the demands.

Dated: September 28, 2010

J.S.C.

_____ FINAL DISPOSITION __X___ NON-FINAL DISPOSITION