

Corey v HRH Constr., LLC

2010 NY Slip Op 33475(U)

December 13, 2010

Sup Ct, NY County

Docket Number: 115948/07

Judge: Marylin G. Diamond

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: HON. MARYLIN G. DIAMOND **PART 48**
Justice

RICHARD COREY,

Plaintiff,

-against-

HRH CONSTRUCTION, LLC, 155 WEST 21ST STREET
HOLDINGS, LLC, and KEVIN LALEZARIAN,

Defendants.

FILED 115-948/07
INDEX NO. 115498/07

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NEW YORK
COUNTY CLERK'S OFFICE
MOTION SEQ. NO. 004

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: Motion sequence numbers 004, 005, 006 and 007 are consolidated herein for decision. This dispute involves a construction project at 155-163 West 21st Street in Manhattan (the "construction site"). The plaintiff Richard Corey, along with his wife Lien Corey, reside in a residential brownstone located next door at 165 West 21st Street (the "Premises"). The plaintiff is the sole owner, member and officer of Red Mountain Realty Corp., a New York corporation which holds the actual title to the Premises. The owner of the property at the construction site is the defendant 155 West 21st Street, LLC ("155 West 21st"), which retained the defendant HRH Construction, LLC to perform the construction work.

At some point prior to the start of the construction work, Red Mountain entered into an agreement with 155 West 21st in which Red Mountain agreed to grant 155 West 21st various easements to the Premises in order to assist 155 West 21st and HRH Construction in their activities. On its part, 155 West 21st agreed to ensure that any construction work would be performed in a manner that would protect against any physical damage to the Premises. It also agreed that the work was to be performed in accordance with good construction practices and would not impose an excessive load on the roof of the Premises.

In this action, Corey alleges that 155 West 21st and/or HRH Construction violated several of the provisions in the agreement and caused damage to the premises in excess of \$503,000.00. The original complaint contained ten causes of action. The first cause of action was for negligence in causing damage to the Premises. The second cause of action was for negligence in causing the Premises to become flooded. The third and fourth causes of action were for trespass. The fifth cause of action was for harassment. The sixth cause of action alleged intentional infliction of emotional distress. The seventh cause of action was for nuisance. The eighth cause of action alleged prima facie tort. The ninth cause of action alleged breach of contract. The tenth cause of action sought a permanent injunction barring the defendants from entering the Premises.

In May, 2008, 155 West 21st brought a third-party action against Red Mountain seeking various forms of relief. It subsequently moved, by order to show cause, for an order directing Red Mountain to allow it access to the Premises, pursuant to section 881 of the Real Property Actions and Proceedings Law. The motion was denied by decision and order dated March 13, 2009. Thereafter, 155 West 21st amended its third-party complaint so as to add various insurance carriers as third-party defendants. It seeks a declaration that these carriers have a duty to defend or indemnify it as an additional insured in the main

action. These carriers include American International Group, Inc., American International Insurance Company, American International Companies, Illinois National Insurance Company, QBE Insurance Co., Zurich Insurance Company, American Guarantee and Liability Insurance Company, Endurance American Insurance Company, Endurance American Specialty Insurance Company, and Trader and Pacific Insurance Company.

At some point, this proceeding was stayed on account of HRH Construction having filed a petition for bankruptcy. After the automatic stay was lifted, HRH Construction brought a second third-party action against FMC Construction, LLC for indemnification. The plaintiff later served an amended complaint naming FMC as a direct defendant.

In motion sequence number 004, FMC moves for summary judgment dismissing the plaintiff's complaint as against it. In motion sequence 005, the plaintiff moves to amend his complaint so as to add Red Mountain as a plaintiff in this action. 155 West 21st cross-moves for summary judgment dismissing the complaint or, in the alternative, for an order, pursuant to CPLR 3042, striking and/or vacating the plaintiff's bill of particulars. In motion sequence number 006, third-party defendant QBE moves to dismiss the third-party action as against it, pursuant to CPLR § 3211(a)(1) and (7), on the ground that its defense is established by documentary evidence and that the third-party complaint fails to state a cause of action as against it. Alternatively, QBE seeks an order, pursuant to CPLR §§ 603 and 1010, severing the third-party action and directing that it be tried separately from the main action. The third-party defendants Endurance American Insurance Company, Endurance American Specialty Insurance Company and Trader and Pacific Insurance Company (collectively "Endurance") cross-move to dismiss the third-party action as against them on the grounds that (1) the court lacks personal jurisdiction over them because they were never properly served with the summons and/or third-party complaint and (2) the third-party complaint fails to state a cause of action. In motion sequence number 007, third-party defendants American International Group, Inc. American International Insurance Company, AIG, American Companies and Illinois National Insurance Company (collectively "AIG") move for an order dismissing the third-party action as against them for failure to state a cause of action or, in the alternative, severing the third-party action and directing that it be tried separately from the main action.

Discussion

A. Plaintiff's Motion to Amend -- In motion sequence number 005, the plaintiff moves to amend his complaint so as to add Red Mountain as a plaintiff in this action. As already noted, Red Mountain is the actual owner of the premises where plaintiff and his wife reside.

It is well settled that leave to amend should be freely given in the absence of prejudice to the other party. *See Frankfurt Furniture Staten Island, Inc., v. Forest Mall Associates*, 159 AD2d 322, 323 (1st Dept. 1990); *Bellini v. Gersalle Realty*, 120 AD2d 345, 347 (1st Dept. 1986). An amendment which merely shifts a claim from a party who arguably lacks standing to another party clearly able to assert that claim is entirely appropriate since it does not result in any surprise or prejudice to the defendants who had prior knowledge of the claim and a full opportunity to prepare a proper defense. *See JCD Farms v. Juul-Nielsen*, 300 AD2d 446 (2nd Dept. 2002); *Frankfurt Furniture Staten Island, Inc., v. Forest Mall Associates*, 159 AD2d at 323. Since discovery has not yet even begun and the defendants may obtain through that process any information they need to defend against Red Mountain's claims, they will not be prejudiced by the addition of Red Mountain as a plaintiff. The plaintiff's motion to amend must therefore be granted.

B. 155 West 21st's Cross-Motion to Amend - - 155 West 21st has cross-moved for summary judgment dismissing the complaint on the ground that plaintiff Corey lacks standing to sue. In view of this court's order herein granting plaintiff's motion to add Red Mountain as a plaintiff, the motion must be denied. In any event, 155 West 21st has not even addressed the fact that many of the causes of action asserted in the complaint belong to Corey as well as Red Mountain since, as a resident of the Premises, he is clearly an interested party. Moreover, the causes of action for intentional infliction of emotional distress and harassment belong exclusively to Corey.

155 West 21st alternatively seeks an order, pursuant to CPLR 3042, striking and/or vacating the plaintiff's bill of particulars on the ground that it improperly contains boilerplate language to the effect that the plaintiff reserves the right to assert additional claims. The application is denied. The cited language is, at worst, harmless surplusage. Indeed, the plaintiff is entitled, under CPLR 3042(b), to amend his bill of particulars once as of course prior to the filing of the note of issue and may do so at any time with leave of court.

C. FMC's Motion for Summary Judgment - - On its motion for summary judgment, FMC argues that the complaint should be dismissed as against it because (1) plaintiff Corey is not the actual owner of the Premises and therefore lacks standing to sue, (2) the claims asserted against FMC are barred by the statute of limitations and (3) the court lacks personal jurisdiction over FMC because the plaintiff failed to properly serve it with the summons and amended complaint. Alternatively, FMC seeks the dismissal of the cause of action for prima facie tort for failure to state a valid cause of action.

For the reasons already discussed, FMC's claim that Corey lacks standing is now moot and otherwise without merit. As to personal jurisdiction, FMC has since conceded that service upon it was proper and has withdrawn this branch of its motion.

As to the statute of limitations, FMC claims that the plaintiff alleges in his various complaints that the "occurrence" took place in December, 2004, more than five years prior to the date, March 8, 2010, that FMC was brought into this action. Since the statute of limitations for asserting a claim of negligence for property damages and/or personal injury is three years from the date of the occurrence, *see* CPLR 214, FMC argues that the plaintiff's claims against it are time-barred. The problem with this argument is that the complaint does not actually allege a specific time period but, rather, asserts that the damage to the Premises was ongoing from December, 2004 through sometime in 2008. Thus, any cause of action against FMC which accrued on or after March 8, 2007 would be timely. *See Duffy v. Horton Memorial Hospital*, 66 NY2d 473, 478 (1985). Although FMC has submitted documentary evidence which suggests that its involvement at the construction site ended in 2005, this evidence is not conclusive. Since there has been virtually no discovery in this action in three years, it would be premature for this court to declare that the plaintiff's claims against FMC are time-barred.

Nevertheless, the court agrees that the cause of action for prima facie tort should be dismissed. The elements of a claim of prima facie tort are (1) intentional infliction of harm, (2) resulting in special damages, (3) without an excuse or justification and (4) by an act or series of acts which would otherwise be lawful. *See, e.g., Golub v. Esquire Publishing Inc.*, 124 AD2d 528, 529 (1st Dept. 1986). In order to properly plead a cause of action for prima facie tort, it is necessary to allege that the conduct complained of was solely motivated by malice or "disinterested malevolence." *Id.* Here, FMC was a construction company working for HRH that was merely performing work near the plaintiff's building. It had no other relationship with Corey or Red Mountain. Since the plaintiff cannot allege that the complained of conduct was motivated solely by malice, his claim for prima facie tort must be dismissed.

D. QBE's Motion and Endurance's Cross-Motion to Dismiss - - Third-party defendant QBE has moved for an order, pursuant to CPLR § 3211(a)(1) and (7), dismissing the third-party complaint as against it on the grounds that its defense is established by documentary evidence and that the third-party complaint fails to state a cause of action. The third-party Endurance defendants cross-move to dismiss the third-party complaint as against them on the grounds that the court lacks personal jurisdiction over them because of ineffective service and that the third-party complaint fails to state a cause of action.

As to failure to state a cause of action, both QBE and Endurance claim that the third-party action is barred under the terms of the applicable insurance policies which they issued. Both policies contain language which prohibits any person or organization from joining the carrier as a party or otherwise bringing it into a lawsuit which seeks damages against an insured. This clause has been referred to as a "no action/no impleader clause." The insurers claim that this clause is enforceable and that if 155 West 21st wishes to pursue its claims against them for a defense and/or indemnification, it must do so in a separate declaratory judgment action.

In moving to dismiss, QBE relies on two fifty-year old cases, *Aulisio v. California Oil Co.*, 202 Misc 1050 (Sup Ct Ulster Co 1952) and *Litman v. Garfinkle*, 193 Misc 256, 258 (Sup Ct Kings Co 1948), which found that similar no action/no impleader clauses were enforceable. In *Litman v. Garfinkle*, 193 Misc at 258, the court found that there was no public policy reason why resort to impleader could not be waived. In its opposing papers, 155 West 21st also relies on two fifty-year old cases. See *Adelman Manufacturing Corp. v. New York Wood Finisher's Supply Co.*, 277 App Div 1117 (2nd Dept. 1950); *Brooklyn Yarn Dye Co. v. Empire State Warehouses Corp.*, 276 App Div 611 (2nd Dept. 1950). Although the Second Department, in both cases, held that the language at issue therein was void, this language was substantially different and far more ambiguous than the language in the QBE and Endurance policies. Indeed, the Second Department in those cases did not hold that an insured may never waive its right to implead its insurer. On the contrary, in *Brooklyn Yarn*, the court indicated that an insurer could prohibit impleader by its insured if the policy clearly so stated. See *Brooklyn Yarn Dye Co. v. Empire State Warehouses Corp.*, 276 App Div at 613. In view of the fact that 155 West 21st may bring a declaratory judgment action to resolve the insurance issues raised herein and that this third-party action would, in any event, be severed at or before trial in order to avoid prejudice to the insurers, there is no underlying public reason for declining to enforce the no action/no impleader clause. See *Chunn v. New York City Housing Authority*, 55 AD3d 437, 438 (1st Dept. 2008); *Cruz v. Ttaino Constr. Corp.*, 38 AD3d 391, 392 (1st Dept. 2007). Under the circumstances, QBE's motion and Endurance's cross-motion to dismiss the third-party action as against them must be granted.

E. AIG's Motion to Dismiss - - - In moving to dismiss the third-party complaint as against them, the third-party AIG defendants have submitted documentary evidence which establishes that American International Group, Inc., American International Insurance Company, AIG, and American International Companies are holding companies which did not issue any insurance policies to HRH that would be involved in this action. The third-party complaint must therefore be dismissed as against them. As to Illinois National, although not discussed by the parties, its policy contains the same no action/no impleader clause as the policies issued by QBE and Endurance. For the same reason which the court applied to those policies, this clause is enforceable and requires dismissal of the third-party action as against Illinois National.

Accordingly, in motion sequence number 004, FMC's motion for summary judgment is granted to the extent that the cause of action for prima facie tort is hereby dismissed. The motion is otherwise denied.

In motion sequence 005, the plaintiff's motion to amend the complaint is hereby granted. The supplemental summons and amended complaint, in the form attached to the plaintiff's motion papers, shall be deemed served upon service upon all parties herein with a copy of this order with notice of entry. All defendants shall serve an answer or responsive motion to the amended complaint within 20 days from the date of said service. The cross-motion by 155 West 21st for summary judgment or for an order striking and/or vacating the plaintiff's bill of particulars is denied .

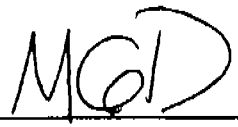
In motion sequence number 006, QBE's motion to dismiss the third-party action as against it is granted and the third-party action is hereby dismissed as against this party. The cross-motion to dismiss by third-party defendants Endurance American Insurance Company, Endurance American Specialty Insurance Company and Trader and Pacific Insurance Company is granted and the third-party action is hereby dismissed as against these parties.

In motion sequence number 007, the cross-motion to dismiss by third-party defendants American International Group, Inc. American International Insurance Company, AIG, American Companies and Illinois National Insurance Company is granted and the third-party action is hereby dismissed as against these parties.

ENTER ORDER

Dated: 12-13-10

Check one: FINAL DISPOSITION



MARYLIN G. DIAMOND, J.S.C.
 NON-FINAL DISPOSITION

FILED

DEC 20 2010

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