

Balbuca-Morocho v GPH Partners LLC

2010 NY Slip Op 33557(U)

November 3, 2010

Sup Ct, Queens County

Docket Number: 11673/2008

Judge: Augustus C. Agate

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This opinion is uncorrected and not selected for official publication.

Upon the foregoing papers the motion and cross motion are consolidated for the purpose of a single decision and are determined as follows:

Plaintiff Manuel Balbuca-Morocho alleges that he sustained personal injuries on May 20, 2005, during the course of his employment with Manhattan Demolition Co., Inc., third-party defendant herein. The subject premises, the Gramercy Park Hotel, are located at 2 Lexington Avenue, at the corner of the northwest side of East 21st Street, also know as Gramercy Park North, New York, New York. Plaintiff commenced the within action on May 9, 2008, and asserts claims for common-law negligence, and for a violation of Labor Law §§ 200, 240, and 241(6). Defendants served an answer and asserted eight affirmative defenses.

Defendants commenced a third-party action against Manhattan Demolition Co., Inc.(Manhattan Demolition), on September 12, 2008 and assert claims for contractual and common-law indemnification, and for breach of contract based upon an alleged failure to procure insurance naming the third-party plaintiffs as additional insureds, pursuant to a subcontract between the construction manager Bovis Lend Lease LMB, Inc.,I and Manhattan Demolition. Manhattan Demolition served an answer to the third-party complaint and interposed sixteen affirmative defenses.

Plaintiff was deposed on July 9, 2009. The parties, pursuant to the so-ordered preliminary conference, dated November 6, 2008, were required to move for summary judgment within 120 days after the filing of the note of issue. The note of issue and statement of readiness was filed on October 16, 2009. The parties thereafter were granted a further order pertaining to discovery. However, the parties neither requested nor were granted an extension of the 120 day period set forth in the November 6, 2008 order. The 120 time period thus ran from October 16, 2009 to February 13, 2010. However, as February 13, 2010 was a Saturday, the 120-day period expired on February 15, 2010. (*See* General Construction Law, §§ 24, 25-a.)

Defendants and third-party plaintiffs GPH Partners, The Lillian Goldman 2002 LLC, Jane Harriet Goldman, Allan Howard Goldman, and Louis Little as Co- Trustees of The Lillian Goldman Marital Trust under the Will of Sol Goldman, Jane H. Goldman, Allan H. Goldman, Amy P. Goldman, and Diane Goldman Kemper, as Co-Executors of the Estate of Lillian Goldman, deceased, and Jane H. Goldman, Allan H. Goldman, as Co-Executors of the Estate of Sol Goldman d/b/a Empire Associates Realty Co., now move for an order granting summary judgment dismissing the complaint and all cross-claims, and counterclaims.

This motion is moot as to defendants and third-party plaintiffs Jane Harriet Goldman, Allan Howard Goldman, and Louis Little as Co-Trustees of The Lillian Goldman Marital

Trust under the Will of Sol Goldman, Jane H. Goldman, Allan H. Goldman, Amy P. Goldman, and Diane Goldman Kemper, as Co-Executors of the Estate of Lillian Goldman, deceased, as this court in an order dated June 16, 2010, dismissed the complaint as to these defendants, and severed the action as to the remaining defendants.

As to GPH Partners, The Lillian Goldman 2002 LLC, and Jane H. Goldman, Allan H. Goldman, as Co-Executors of the Estate of Sol Goldman d/b/a Empire Associates Realty Co., the within motion for summary judgment was served on March 26, 2010, which was 159 days after the note of issue was filed and 39 days after the expiration of the 120-time period. Counsel for defendants in her affirmation in support of the motion recites the action's procedural history, without stating when the note of issue was filed, and proffers no excuse for this tardy motion.

Counsel for plaintiff, in opposition, asserts that this motion is untimely, and therefore should be denied. Counsel for defendants, in a reply affirmation asserts that plaintiff's counsel should be barred by the doctrine of laches, or waiver, from asserting the 120 time limit for summary judgment motions in view of the parties' stipulation extending plaintiff's time in which to respond to this motion. Defendant's counsel's assertions in this regard, are rejected. Plaintiff's counsel had no duty to apprise defendant's counsel that the motion was untimely and that he would raise this objection in his opposing papers. Rather, compliance with the 120-day period set forth in CPLR 3212(a), is statutorily mandated in the first instance and is not optional.

In *Brill v City of New York*, (2 NY3d 648, 652 [2004]), the Court of Appeals held that CPLR 3212(a) permits a late summary judgment motion upon the showing of good cause, which "requires . . . a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy No excuse at all, or a perfunctory excuse, cannot be good cause" (*see also Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725, 726, 727 [2004]).

Defendants' counsel asserts that good cause for the delay exists here as there was outstanding discovery at the time the note of issue was filed on October 16, 2009. On November 4, 2009 the court issued a so-ordered stipulation, in lieu of a motion to strike the note of issue, which required the plaintiff to respond to the defendants combined discovery demands dated July 17, 2009; required the third-party defendant to respond to the third-party plaintiffs' combined discovery demand of December 18, 2008 and provide an affidavit as to unavailable records; directed a deposition of the third-party plaintiffs and third-party defendant commencing on December 2, 2009; and permitted further discovery demands following these depositions; and directed a physical examination of the plaintiff within 30 days from the date of the stipulation.

Defendants assert that they made further discovery demands; that they made a motion to compel and preclude in January 2010; and that on February 16, 2010, they withdrew the motion as to the plaintiff as he had complied with the so-ordered stipulation. Defendants', however, have not demonstrated that their delay in seeking summary judgment was in fact due to outstanding discovery on the part of the plaintiff. Defendants' in support of the motion for summary judgment have submitted a copy of the parties' pleadings; the bill of particulars; a transcript plaintiff's deposition testimony of July 9, 2009; a transcript of the December 2, 2009 deposition testimony of Allan Parry; a deposition correction sheet executed by Allan Parry on March 18, 2010; and an affidavit from Mr. Parry, notarized on March 22, 2010.

The documentary evidence establishes that defendants were in possession of plaintiff's deposition transcript no later than August 14, 2009. Mr. Parry was deposed in accordance with the so-ordered stipulation of November 4, 2009 which directed the taking of depositions in the third-party action. No depositions were directed with respect to the parties to the main action. Defendants, thus, have not established that their delay in moving for summary judgment was the result of the plaintiff's late compliance with the outstanding discovery request. Mr. Parry appeared as a witness for the third-party plaintiffs. Defendants do not assert that Mr. Parry's deposition transcript was not available until after the expiration of the 120 period, or that his affidavit could not have been obtained prior the expiration of the 120 period. The court therefore finds that defendants have not established that good cause exists for their delay. The motion for summary judgment is denied, as it is untimely.

Plaintiff's cross motion to amend the bill of particulars and the complaint in order to interpose two additional sections of the Industrial Code, was served on May 21, 2010. "While leave to amend a bill of particulars is ordinarily freely given (*see* CPLR 3025[b]; *Cohen v Ho*, 38 AD3d 705 [2007]), where a motion for leave to amend a bill of particulars alleging new theories of liability not raised in the [claim] or the original bill is made on the eve of trial, leave of court is required, and judicial discretion should be exercised sparingly, and should be discreet, circumspect, prudent, and cautious (*see Cohen v Ho*, 38 AD3d at 705-706; *Lissak v Cerabona*, 10 AD3d 308, 309-310 [2004]; *Rosse-Glickman v Beth Israel Med. Ctr.-Kings Highway Div.*, 309 AD2d 846 [2003]; *Kassis v Teacher's Ins. & Annuity Assn.*, 258 AD2d 271 [1999]; *Volpe v Good Samaritan Hosp.*, 213 AD2d 398, 398-399 [1995]). Moreover, where there has been an unreasonable delay in seeking leave to amend, the [claimant] must establish a reasonable excuse for the delay, and submit an affidavit establishing the merits of the proposed amendment with respect to the new theories of liability (*see Arguinzoni v Parkway Hosp.*, 14 AD3d 633 [2005]; *Rosse-Glickman v Beth Israel Med. Ctr.-Kings Highway Div.*, 309 AD2d at 846). In exercising its discretion, the court should consider how long the party seeking the amendment was aware of the facts upon which the motion was predicated, whether a reasonable excuse for the delay was offered, and whether prejudice resulted therefrom "(*Cohen v Ho*, 38 AD3d at 706)" (*Navarette v*

Alexiades, 50 AD3d 869 [2008]). Moreover, once discovery has been completed and the case has been certified as ready for trial, the party will not be permitted to amend the bill of particulars "except upon a showing of special and extraordinary circumstances" (*McLeod v Duffy*, 53 AD2d 1011, 1012 [1976]; *see also Reynolds v Towne Corp.*, 132 AD2d 952 [1987]).

Here, plaintiff's counsel, in support of the cross motion, merely asserts that during the preparation of the papers in opposition to defendants' motion he realized that he had inadvertently omitted from the bill of particulars and the complaint, two sections of the Industrial Code with respect to the Labor Law § 241(6) cause of action. This action was commenced on May 9, 2008, plaintiff was deposed on July 9, 2009, the parties were provided with a copy of the deposition transcript on August 14, 2009, and the note of issue was filed on October 16, 2009. Plaintiff's counsel thus has been long aware of the circumstances surrounding plaintiff's accident, and has failed to demonstrate the existence of special and extraordinary circumstances which would warrant the amendment of the bill of particulars and the complaint at this juncture. Plaintiff's cross motion, therefore, is denied.

In view of the foregoing, defendants' motion for summary judgment dismissing the complaint is denied, and plaintiff's cross motion for leave to amend the bill of particulars and complaint is denied.

Dated: November 3, 2010

AUGUSTUS C. AGATE, J.S.C.