

Brown v SLG 100 Park LLC

2011 NY Slip Op 31309(U)

May 16, 2011

Supreme Court, New York County

Docket Number: 105832/2008

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 105832/2008

BROWN, DON

vs

SLG 100 PARK LLC

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO.

105832/08

MOTION DATE

3/16/11

MOTION SEQ. NO.

003

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
3, 4, 5
6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

APPROVED BY THE COURT IN ACCORDANCE WITH
THE ANNEXED DECISION AND ORDER.

FILED

MAY 18 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/16/11

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: IAS PART 12

-----X

DON BROWN,
Plaintiff,

Index No. 105832/2008

-against-

Mots. Seq. Nos. 003, 004 & 005

SLG 100 PARK LLC and ARAGON, LLC,
Defendants.

Submission Date 3/16/2011

-----X

ARAGON, LLC,
Third-Party Plaintiff,

T.P. Index No. 590205/2009

-against-

PORT RICHMOND GLASS & STOREFRONTS, INC.,
Third-Party Defendant.

-----X

SLG 100 PARK LLC,
Second Third-Party Plaintiff,

2nd T.P. Index No. 590676/2009

-against-

GENERAL AMERICAN INVESTORS, INC. and PORT
RICHMOND GLASS & STOREFRONTS, INC.,
Second Third-Party Defendants.

-----X

Appearances:

Plaintiff Don Brown

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Defendant/T.P. Plaintiff Aragon, LLC

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2nd T.P. Defendant General American Investors

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T.P. Defendant/ 2nd T.P. Defendant Port Richmond

Marshall, Conway, Wright & Bradley, P.C.

By: Leonard S. Silverman, Esq. & Lauren Turkel, Esq.
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 New York, NY 10038
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Papers considered on review of these motions:

Mot. Seq. 003	General American's Notice of Motion, Affs., Exhibits, Memorandum of Law	1, 2
	Aragon's Aff. in Partial Opposition, Exhibits	3
	Port Richmond's Aff. in Opposition, Exhibit, Memorandum of Law	4, 5
	General American's Reply Aff., Exhibits	6
Mot. Seq. 004	SLG 100 Park LLC's Notice of Motion, Affs., Exhibits	1
	General American's Aff. in Opposition	2
	Port Richmond's Aff. in Opposition, Exhibits, Memorandum of Law	3, 4
	Aragon's Aff. in Opposition, Exhibits	5
	SLG 100 Park LLC' Reply Affs., Exhibits	6, 7, 8
Mot. Seq. 005	Aragon's Notice of Motion, Affs., Exhibits	1
	Port Richmond's Aff. in Opposition, Exhibit	2
	Aragon's Reply Aff.	3
All Three Motions	Transcript of Oral Argument of February 9, 2011 ¹	

PAUL G. FEINMAN, J.:

Motions bearing sequence numbers 003, 004 and 005 are consolidated for disposition.

This action has its origin in a construction site accident which occurred on December 14, 2007 in a 35th-floor hallway in the commercial building located at 100 Park Avenue in Manhattan. The building was owned by defendant/second third-party plaintiff SLG 100 Park LLC (SLG). On July 25, 2007, SLG entered into a lease agreement for the 35th floor with second third-party defendant General American Investors, Inc. (GA). Thereafter, GA retained defendant/third-party plaintiff Aragon, LLC (Aragon) as its general contractor to perform interior construction work for the entire 35th floor, and Aragon subcontracted the glass elements of the renovations to third- and second third-party defendant Port Richmond Glass & Storefronts, Inc. (PR). Plaintiff was an employee of PR.

On the day of the accident, glass panels had allegedly been improperly stored or placed in the hallway, such that, when plaintiff passed by, they fell on him, and he was injured. The sole

¹ At oral argument on February 9, 2011, the parties requested an adjournment of the motions to permit an attempt at mediation or settlement of the issues raised. After two adjournments (March 2nd and March 16th), the motions were marked submitted. The court has not been advised that any of the motions were withdrawn.

issues on these motions are the respective liabilities of the defendants and third-parties to each other for indemnification and reimbursement of attorneys' fees.

In motion sequence number 003, GA moves, pursuant to CPLR 3212, for: (1) summary judgment in its favor on its claims against PR; (2) summary judgment on its claims against Aragon; or, in the alternative, (3) conditional summary judgment on its claims against Aragon, along with attorneys' fees and defense costs, in the event that a judgment is eventually entered in favor of plaintiff. In motion sequence number 004, SLG moves, pursuant to CPLR 3212, for summary judgment in its favor on its contractual and common-law indemnification claims against Aragon, GA, and PR. Although not set forth in its notice of motion, at times SLG suggests in its papers that it is also seeking relief based on a failure to procure insurance, and attorneys' fees. In motion sequence number 005, Aragon seeks: (1) leave to file an untimely summary judgment motion; and (2) summary judgment on its claim for contractual indemnification against PR.

The Pleadings

In his complaint, plaintiff asserts two causes of action, for common-law negligence, and for violation of Labor Law §§ 200 and 241 (6).

SLG's answer alleges two cross claims against Aragon, sounding in common-law indemnification or contribution, and contractual indemnification, based on an alleged contract between SLG and Aragon (*see* SLG Answer, ¶ 16).

In its answer, Aragon alleges one cross claim against SLG, for contribution or common-law indemnification.

In its turn, Aragon brings a third-party complaint against PR, asserting six causes of action for: common-law indemnification; contribution; contractual indemnification, based on the Aragon/PR subcontract; breach of contract to procure insurance; common-law indemnification or

contribution, based on PR's alleged violation of its statutory and contractual duties to protect the health and safety of its workers (*see* Aragon Third-Party Complaint, ¶¶ 18-22); and contractual indemnification, for its defense and indemnification under the insurance policy procured by PR.

PR's third-party answer contains two counterclaims against Aragon, for contribution and common-law indemnification, and two cross claims against SLG, for contribution and common-law indemnification.

In its second third-party complaint, SLG brings four causes of action against GA and PR for: common-law indemnification; contribution; contractual indemnification, based on the SLG/GA "contract" and the Aragon/PR subcontract; and breach of contract to procure insurance, based on the SLG/GA "contract" and the Aragon/PR subcontract.

GA's second third-party answer includes three cross claims against Aragon for: contribution or common-law indemnification; contractual indemnification, based on the GA/Aragon contract; and breach of contract to procure insurance; and three cross claims against PR: for contribution or common-law indemnification; breach of contract to defend and indemnify GA pursuant to the Aragon/PR subcontract; breach of contract to procure insurance pursuant to the Aragon/PR subcontract; and one counterclaim against SLG for contribution or common-law indemnification.

In its second third-party answer, PR alleges two counterclaims against Aragon and SLG, for contribution and common-law indemnification; and two cross claims against GA, for contribution and common-law indemnification.

The court notes that no determinations have been made yet with respect to any of the claims set forth in plaintiff's complaint. Thus, any grant or denial of summary judgment in these motions would have to be conditioned on a finding of negligence, or lack thereof, following consideration of the complaint by the trier of fact. The court notes that each of the motions raises

an issue of whether it is timely filed.

GA's Motion for Summary Judgment (motion sequence number 003)

Aragon alleges that GA's motion was filed more than 60 days following the filing of the note of issue, and thus, should be denied as untimely.

Plaintiff's note of issue was filed on May 19, 2010. According to the May 6, 2009 Preliminary Conference Order, dispositive motions were to be *filed* within 60 days of the *filing* of the note of issue, in this case, on or before July 17, 2010, which was a Saturday. Pursuant to General Construction Law § 25-a (1):

When any period of time, computed from a certain day, within which or after which or before which an act is authorized or required to be done, ends on a Saturday, Sunday or a public holiday, such act may be done on the next succeeding business day

....

Thus, GA's motion needed to be filed on or before Monday, July 19, 2010. GA states that it served its motion on July 19, 2010 and "submitted it with a service to be filed with the Court" (*see* Keane 11/17/10 Reply Affirm., ¶ 20); however, the stamp of the Clerk's Office shows that GA's motion was filed on July 22, 2010, four days late. The purpose of the rule used by the court in the preliminary conference order is to avoid exactly the arguments made by movant, i.e., the motion is timely because it was either mailed or given to service within the deadline. As written, the court rule simply requires the court to obtain two dates from the court file and/or computer system. The date of filing of the note of issue and the date of filing of the notice of motion and supporting papers. As explained at oral argument, the court's rule is designed to eliminate the need for traverse hearings on whether service of a motion was timely "made," the term used in the CPLR. Because the court's rule was contained in the preliminary conference order and sets a deadline not greater than 120 days and not less than 30 days after the filing of the note of issue, it is an enforceable deadline. Indeed, the filing to filing deadline used by this court

* 7]
was upheld by the First Department in *Corchado v City of New York*, 64 AD3d 429 (1st Dept. 2009).

Simply put, the motion here is untimely, and GA's explanation of its purported "good cause" for the untimeliness was raised only for the first time in reply. GA tracks the efforts it made in the five months prior to the July 19 deadline to establish whether the insurers for Aragon and/or PR would take over GA's defense and indemnity (*see* Keane 11/17/10 Reply Affirm., ¶¶ 14-19). In the end, however, GA's excuse is that, after significant efforts, it was waiting for a promised letter from PR's insurer, accepting GA's tender, which letter "was to render motions for summary judgment moot but which letter never came" (*id.*, ¶ 25). The court does not deem GA's explanation to constitute good cause. All parties were made aware of the court's deadline at the outset of the litigation. All of the firms involved in this litigation regularly practice in this part. If the allegedly promised letter was not delivered in a timely fashion, the motion should have been filed in a timely fashion. GA's motion is untimely, and is denied as such. The court does not reach the merits.

SLG's Motion for Summary Judgment (motion sequence number 004)

SLG improperly attempts to seek relief on the basis of failure to procure insurance and attorneys' fees. However, these causes of action are neither alleged in SLG's answer nor in its second third-party complaint, and are not set forth in SLG's notice of motion.

While the general rule is that a party may not obtain summary judgment on an unpleaded cause of action, it is also true that summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice. As with a trial, the court may deem the pleadings amended to conform to the proof [internal citations omitted].

(*Weinstock v Handler*, 254 AD2d 165, 166 [1st Dept 1998]). In this matter, factual bases exist for the unpleaded claims, the parties have had notice of them in these motion papers, and have

had an opportunity to respond. Thus, no prejudice is found.

However, Aragon asserts that SLG has brought an untimely motion. As set forth above, plaintiff's note of issue was filed on May 19, 2010. According to the May 6, 2009 Preliminary Conference Order, dispositive motions were to be *filed* within 60 days of the *filing* of the note of issue, in this case, on or before July 17, 2010, which was a Saturday. Because a Saturday deadline actually falls on the following Monday, SLG had until July 19, 2010 to file its motion. The Clerk's office stamp shows that SLG's motion was filed on July 21st, three days late. SLG attests that it relied on a service company to file the motion, and the service company's report for July 15, 2010 indicates that on that date, the motion was "submitted for approval." Four other entries in the same report note that answers in other cases were "filed"; thus, if the service had "filed" the motion, the report would have so indicated.

SLG having proffered only the excuse of tardy service, the court finds that SLG has not shown good cause for its delay in filing its motion. Thus, its motion is denied as untimely (*see, Corchado v City of New York, supra*, 64 AD3d 429).

Aragon's Motion (motion sequence number 005)

Aragon seeks leave to file an untimely summary judgment motion, and seeks summary judgment on its contractual indemnification claim against PR.

Unlike GA, Aragon does address the lateness of its summary judgment motion in its moving papers. Very much like GA's experience, Aragon fruitlessly awaited delivery on the promise of PR's insurer that it would undertake the defense and indemnification of Aragon. That promise was not kept in time for Aragon to timely submit its motion. This is the sum and substance of Aragon's "good cause shown" for leave to file an untimely summary judgment motion. As with GA, the court finds that this is not sufficient good cause shown. If a promised letter did not arrive, the movant should have made the motion in a timely fashion within the court


ordered deadline. Accordingly, Aragon's motion to file a late summary judgment motion is denied and the court does not reach the merits (*see, Corchado, supra*).

Conclusion

Accordingly, it is

ORDERED that the three motions for summary judgment filed as motion sequence numbers 003, 004, and 005 are denied as untimely.

Dated: May 16, 2011



J.S.C.

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