

Carlson v Rockefeller Ctr. N., Inc.

2011 NY Slip Op 32553(U)

September 27, 2011

Supreme Court, New York County

Docket Number: 110191/07

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

MICHAEL CARLSEN and SUSAN CARLSEN,
Plaintiffs,
-against-

INDEX NO. 110191/07

001

ROCKEFELLER CENTER NORTH, INC., and
TISHMAN SPEYER PROPERTIES, L.P.,
Defendants

ROCKEFELLER CENTER NORTH, INC.,
Plaintiff,

INDEX NO. 591069/07

- against -

DAVID SHULDINER, INC.,
Defendant.

MOTION SEQ. NO. 009

DAVID SHULDINER, INC.,
Third-party Plaintiff,

INDEX NO. 591020/07

- against -

FILED

ISLAND RISK MANAGEMENT ASSOCIATES, INC.
Third-party Defendant.

OCT 03 2011

The following papers were read on this motion to dismiss by third-party defendant and cross-motion for summary judgment by third-party plaintiff.

NEW YORK
COUNTY CLERK'S OFFICE

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1, 2</u>
Answering Affidavits — Exhibits (Memo) _____	<u>3, 4, 5</u>
Replying Affidavits (Reply Memo) _____	<u>6, 7</u>

Cross-Motion: Yes No

Motion sequences 009 and 010 are consolidated for disposition.

These motions arise from a case involving an accident at a construction site owned by plaintiff Rockefeller Center North, Inc. ("Rockefeller"). At issue here is a dispute between the third party plaintiff, David Shuldiner, Inc. ("Shuldiner"), a contractor at the subject construction

site, and third party defendant Island Risk Management Associates, Inc. ("Island"), Shuldiner's insurance broker.

Rockefeller required Shuldiner to maintain a commercial general liability policy naming Rockefeller as an additional insured. "[A]t the end of 2006" (Shuldiner's Affirmation in Support of Cross-Motion at ¶ 47), Island procured a commercial general liability policy for the year 2007 from Nova Casualty Company ("Nova") on Shuldiner's behalf. Island also provided a certificate of insurance listing Rockefeller as an additional insured.

On June 1, 2007, the underlying accident occurred, in which one of Shuldiner's employees fell from a scaffold. On or about July 24, 2007, the injured employee served a summons and complaint upon Rockefeller for injuries sustained in the underlying accident. Rockefeller's insurance administrator, Chubb Services Corporation ("Chubb"), subsequently sent a tender letter, dated November 6, 2007, to Island and Shuldiner requesting coverage pursuant to Shuldiner's policy. Nova disclaimed coverage of the subject accident by letter to Chubb dated December 4, 2007. In that letter, Nova stated that it was denying coverage because there was no written agreement between Shuldiner and Rockefeller to the effect that Rockefeller must be added as an additional insured, and the policy requires such an agreement for an entity to attain additional insured status.

Meanwhile, on or about November 29, 2007, Rockefeller impleaded Shuldiner as a third-party defendant in the underlying action, and served an amended third party complaint on or about May 7, 2009. This third party action has since been severed, and is the main-titled action herein. In a decision dated December 14, 2009, Hon. Michael Stallman, J.S.C., granted summary judgment to Rockefeller on its cause of action alleging breach of contract for Shuldiner's failure to procure insurance. The December 14, 2009 judgment was filed January 14, 2010. Nearly 11 months after the December 14, 2009 decision was rendered, on or about November 8, 2010, Shuldiner served a third party summons and complaint upon Island.

Shuldiner's third party complaint alleges three causes of action: 1) breach of contract; 2) negligent misrepresentation; and 3) negligence. Island answered the third party complaint on or about December 23, 2010, itemizing its denials for each paragraph of the third party complaint. However, Island's answer is silent as to paragraph 34 of the third party complaint, which alleges that Island "breached its contractual agreement with [Shuldiner] and failed to obtain and set up the correct type of insurance policy" (Shuldiner's Third Party Complaint at ¶ 34).

Island now moves, in motion sequence 009, seeking to dismiss Shuldiner's second and third causes of action for negligence. Island argues that Shuldiner's second and third causes of action are subject to the three year negligence statute of limitations, which accrued no later than June 1, 2007 and ran no later than June 1, 2010. Island's motion also seeks to: 1) dismiss Shuldiner's complaint in its entirety; or alternatively, 2) sever Shuldiner's action from the underlying personal injury and contract actions; 3) strike the note of issue; or 4) allow Island to conduct post-note of issue discovery. However, Island makes no argument in support of its request for dismissal of Shuldiner's first cause of action, for breach of contract, and that portion of its motion is therefore denied. The portions of the motion seeking to sever, strike the note of issue, or allow post-note of issue discovery have all been rendered moot as a result of this Court's decision, dated December 27, 2010, which severed Rockefeller's third party action from the underlying personal injury action. Therefore, those portions of Island's motion are also denied.

Shuldiner opposes, contending that its causes of action did not accrue until Shuldiner was injured, which occurred no earlier¹ than December 4, 2007, the date of the disclaimer of

¹Shuldiner also argues that its causes of action did not accrue until even later, on January 14, 2010. On that date, Shuldiner filed the December 14, 2009 decision and order that granted summary judgment to Rockefeller on its breach of contract claim against Shuldiner. This argument does not merit discussion. Shuldiner also argues that the causes of action for the torts of negligence and negligent misrepresentation sound in contract, and are therefore subject to a six year statute of limitations instead of the three year statute of limitations for tortious injury to

coverage letter from Nova. In reply, Island contends that Shuldiner's causes of action accrued either on the date in 2006 that the subject policy was procured, or, at the latest, June 1, 2007, the date of the injury that is the subject of the underlying action².

Shuldiner also makes a cross-motion seeking: 1) to amend its complaint to allege a fourth cause of action, for fraud; and 2) for summary judgment on its first cause of action, for breach of contract. In support of the portion of the motion seeking summary judgment, Shuldiner submits the deposition transcripts of Shuldiner's president, David Land, and vice president, Richard Land. In opposition to the cross-motion, Island contends that Shuldiner's proposed amended complaint fails to state a cause of action for fraud, as scienter is not alleged. Regarding summary judgment, Island notes that Shuldiner failed to submit an affidavit from a person with knowledge of the relevant facts in support of its motion for summary judgment. In reply, Shuldiner maintains that the proposed complaint alleges "that [Island] intentionally misrepresented the terms of the insurance policy in question, and that the statements were known to be false by [Island]" (Shuldiner's Reply Affirmation at ¶ 23).

In response to Shuldiner's cross-motion, Island also made an additional motion, motion sequence 010, seeking to amend its third-party answer to deny the allegations of paragraph 34 of Shuldiner's third-party complaint. Shuldiner opposes, contending that the typographical error in Island's third-party answer should be considered an admission, and also that Shuldiner will be prejudiced by Island changing its litigation strategy "mid-stream" (Shuldiner's Affirmation in Opposition to Motion Sequence 010 at ¶ 32). Shuldiner also contends that Island does not have a meritorious defense. In reply, Island contends that Shuldiner will suffer no prejudice if the motion is granted, that Island's typographical error should not be considered an admission,

property. This argument is equally meritless.

²Shuldiner inappropriately attempted to submit a sur-reply by including it within the reply papers for its cross-motion. This prompted Island to submit a sur-reply in response. Neither of these sur-replies were considered by the Court in rendering this decision.

and that Island does indeed have a meritorious defense. Island also notes that the cases cited by Shuldiner regarding this procedural issue are between 74 and 129 years old, and apply only to precursors to the Civil Practice Law and Rules.

Standards

Motion to Amend

CPLR § 3025(b) provides that “[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 Leave shall be freely given upon such terms as may be just” The law in New York is well settled that such leave shall be freely granted absent prejudice or surprise resulting from the delay (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003], citing *Crimmins Constr. Co. v City of New York*, 74 NY2d 166, 170 [1989] [“Leave to amend pleadings should, of course, be freely given.”]). The First Department has “consistently held, however, that in an effort to conserve judicial resources, an examination of the proposed amendment is warranted . . .” (*Ancrum*, 301 AD2d at 475). “Leave will be denied where the proposed pleading fails to state a cause of action, or is palpably insufficient as a matter of law (*Thompson v Cooper*, 24 AD3d 203, 205 [1st Dept 2005], citing *Ancrum*, 301 AD2d at 475, and *Davis & Davis, P.C. v Morson*, 286 AD2d 584, 585 [2001]). This essentially means that, upon a motion to amend or supplement a pleading, we must treat any opposition similarly to a motion to dismiss for failure to state a cause of action under CPLR § 3211(a)(7).

Motion to Dismiss - Statute of Limitations

CPLR § 3211(a) provides, in relevant part: “(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that . . . the action may not be maintained because of . . . statute of limitations[.]” Upon a 3211(a)(5) motion to dismiss a complaint as time barred under the applicable statute of

limitations, the initial burden is on the movant to make a prima facie showing that the time in which to bring the claim has run; “the burden then shifts to the plaintiff to aver establishing that his or her cause of action falls within an exception to the statute of limitations, or raising an issue of fact as to whether such an exception applies” (*Romanelli v Disilvio*, 76 AD3d 553, 554 [2nd Dept 2010]). “In general, a cause of action accrues, triggering commencement of the limitations period, when all of the factual circumstances necessary to establish a right of action have occurred, so that the plaintiff would be entitled to relief” (*Gaidon v Guardian Life Ins. Co. of Am.*, 96 NY2d 201, 210 [2001]).

When determining a CPLR § 3211(a) motion, “we liberally construe the complaint and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion” (*511 W. 232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d 144, 151-52 [2002]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, [2001]; *Wieder v Skala*, 80 NY2d 628, [1992]). “We also accord plaintiffs the benefit of every possible favorable inference” (*511 W. 232nd Owners Corp.*, 98 NY2d at 152; *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 414).

Motion for Summary Judgment

“The proponent of a summary judgment motion [pursuant to CPLR § 3212] 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” (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006]). The burden then shifts to the opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 228, 228 [1st Dept 2006]).

Discussion

Island’s Motion to Amend (Motion Sequence 010)

Island's motion to amend should be granted. Viewing Island's lack of response to ¶ 34 of Shuldiner's complaint in context, the Court believes that such silence is a typographical error, and Island should have a chance to remedy same. Shuldiner contends, conclusorily, that it will be prejudiced if the Court grants the motion to amend, but posits no explanation as to how it will be prejudiced. Even if the subject silence was not a mere typographical error, Shuldiner has not relied upon same beyond making its cross-motion for summary judgment. Island correctly notes that Shuldiner's statement that the instant litigation is "just out of the gates" belies its argument on this issue. Also, as noted by Island, ¶ 34 of Shuldiner's complaint merely alleges conclusions of law, rather than facts that can be admitted in an answer. Shuldiner's arguments based upon case law inapplicable to the CPLR need not be addressed.

Island's Motion to Dismiss Negligence Causes of Action (Motion Sequence 009)

Island's motion to dismiss Shuldiner's causes of action for negligence and negligent misrepresentation should also be granted. The relevant statute of limitations is CPLR § 214(4), which provides that "an action to recover damages for injury to property except as provided in section 214-c" must be commenced within three years. CPLR § 214-c provides for accrual upon discovery, but that section is irrelevant here³. The general rule therefore applies, meaning that the causes of action accrued when all factual circumstances necessary to establish those causes of action had occurred. The parties here dispute the date of injury, which was the last of the factual circumstances to occur here.

Shuldiner contends that the statute of limitations accrued on December 4, 2007, the date that Nova disclaimed coverage of the underlying accident. The Court rejects this view. Viewing Shuldiner's complaint in a light most favorable to third-party plaintiff Shuldiner, which requires the Court to accept the allegations of the complaint as true, Island had already

³Specifically, CPLR 214-c states that a cause of action for injury resulting from the latent effect of exposure to a toxic substance accrues as of the date that the injury is discovered or reasonably should have been discovered.

breached its duties and misrepresented the subject coverage to Shuldiner as of the time the underlying injury occurred on June 1, 2007. At that time, it became too late for Shuldiner to procure sufficient insurance to cover the underlying injury, and so Shuldiner's alleged injury also occurred no later⁴ than June 1, 2007. Therefore, all the elements of negligence and negligent misrepresentation were met by that time, and Shuldiner's cause of action accrued as of that date.

Alternatively, if we accept Shuldiner's position that its injury occurred on December 4, 2007, the Court must also accept the premiss that Island procured a sufficient insurance policy, and Nova nevertheless arbitrarily disclaimed coverage on that date. Accepting this premiss necessarily means that Shuldiner's complaint fails to state any cause of action against Island. Island's motion to dismiss Shuldiner's second and third causes of action is therefore granted.

Shuldiner's Motion to Amend (Motion Sequence 010)

Shuldiner's motion to amend should be denied. While Island would suffer no prejudice if the pleading was supplemented to include a new cause of action for fraudulent misrepresentation, the proposed third-party complaint fails to state a cause of action for fraud. The proposed complaint contains no allegations regarding what Island knew or did not know, and merely states, conclusorily, that Island intentionally misrepresented itself.

It is therefore,

ORDERED that the motion herein by third-party defendant David Shuldiner, Inc. for summary judgment dismissing the third and fourth causes of action of Rockefeller's amended third-party complaint is hereby granted, and those third and fourth causes of action are

⁴Island cites two cases in which the Appellate Division, Second Department held that, in an action alleging failure to procure sufficient insurance coverage, the correct accrual date is the date that the defendant procures the insufficient policy. It is unnecessary for the Court to determine whether those holdings apply herein.

dismissed with prejudice; and it is further

ORDERED that third-party defendant David Shuldiner, Inc.'s motion to sever the third-party action is hereby granted in its entirety, and Rockefeller's amended third-party complaint against David Shuldiner, Inc. is hereby severed from the primary action for all purposes, and shall proceed under its own caption with index number 591069/2007; and it is further

ORDERED that third-party defendant David Shuldiner, Inc.'s motion for leave to implead Island Risk Management Associates, Inc. is hereby granted; and it is further

ORDERED that the caption be amended to reflect the severance and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED, that the caption shall also be amended to reflect the stipulation, dated December 6, 2007, in the herein action, by which plaintiffs withdrew all claims as against defendant Tishman Speyer, L.P., and that all future papers filed with the Court bear the amended caption; and it is further

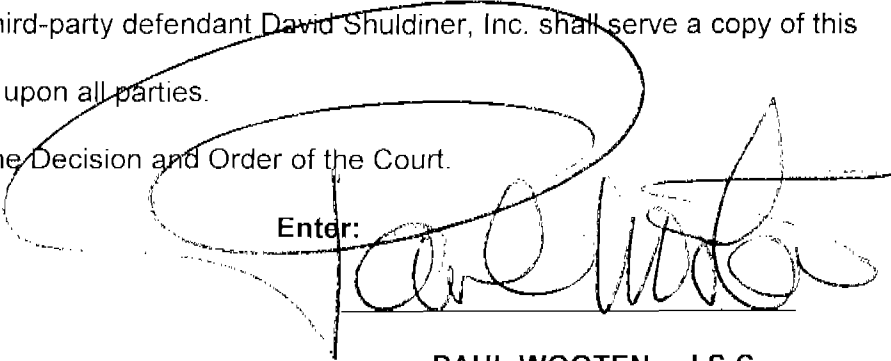
ORDERED that third-party defendant David Shuldiner, Inc. shall serve a copy of this order upon the County Clerk (60 Centre Street, Room 141B) and the Trial Support Office (60 Centre Street, Room 158), who are directed to mark the court's records to reflect the changes in the caption herein; and it is further,

ORDERED that third-party defendant David Shuldiner, Inc. shall serve a copy of this order with notice of entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 9-27-11

Enter:



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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OCT 03 2011

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