

Andrucki v Alcoa, Inc.
2011 NY Slip Op 32742(U)
September 7, 2011
Supreme Court, New York County
Docket Number: 190377/10
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

MARY ANDRUCKI, as Administratrix for the Estate of
GEORGE ANDRUCKI, and MARY ANDRUCKI, Individually,

INDEX NO. 190377/10

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 009

- v -

MOTION CAL. NO. _____

ALCOA, INC., f/k/a ALUMINUM COMPANY
OF AMERICA, et al.,

Defendants.

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing, it is ordered that this motion is
decided in accordance with the memorandum decision
dated September 7, 2011 and annexed hereto.

FILED

SEP 09 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Sept 7, 2011


SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
MARY ANDRUCKI, as Administratrix for the Estate of
GEORGE ANDRUCKI, and MARY ANDRUCKI,
Individually,

Index No. 190377/10
Motion Seq. 009

Plaintiff,

DECISION AND ORDER

against

FILED

ALCOA, INC., f/k/a ALUMINUM COMPANY
OF AMERICA, et al.,

SEP 09 2011

Defendants.

NEW YORK
COUNTY CLERK'S OFFICE

----- X
SHERRY KLEIN HEITLER, J.:

In this asbestos-related personal injury action, defendant Port Authority of New York and New Jersey ("Port Authority") moves pursuant to CPLR 3211(a)(2) to dismiss all claims and cross-claims asserted against it on the ground that plaintiffs' failure to satisfy the conditions precedent necessary to commence this action against it as set forth in McKinney's N.Y. Unconsol. Laws ("NYUL") §§ 7101, 7107, and 7108 deprives this court of subject matter jurisdiction. Plaintiffs assert that they properly and timely filed and served a notice of claim, supplemental summons, and amended complaint upon the Port Authority in full compliance with NYUL § 7107 and the rules governing New York City Asbestos Litigation ("NYCAL"). For the reasons set forth below, Port Authority's motion is denied.

The Port Authority, an agency of the state governments of New York and New Jersey, possessed sovereign immunity from suit until 1951, when both New York and New Jersey consented to suits against it provided that the litigants satisfied several conditions precedent. (See NYUL § 7101; L. 1950, ch. 301, § 7). These prerequisites to suit are set forth in relevant

part in NYUL § 7107, which provides that the Port Authority's consent to suit is premised upon the condition that any action against it must be "commenced within one year after the cause of action therefor shall have accrued," and further that, in a suit for monetary damages, "a notice of claim shall have been served upon the port authority by or on behalf of the plaintiff or plaintiffs at least sixty days before such suit, action or proceeding is commenced." The failure to satisfy these conditions results in the "withdrawal of defendant's consent to suit and compels the dismissal of the action for lack of subject matter jurisdiction." *Lyons v Port Auth.*, 228 AD2d 250, 251 (1st Dept 1996); *see also Ofulue v Port Auth.*, 307 AD2d 258, 259 (2d Dept 2003); *Giannone v Port Auth. of New York & New Jersey*, 127 AD2d 818, 819 (2d Dept 1987).

Here, the facts are not in dispute. Plaintiffs' cause of action for personal injuries accrued in April of 2010 when plaintiffs' decedent was diagnosed with mesothelioma. Pursuant thereto, on October 4, 2010, the Port Authority was served with a valid notice of claim pursuant to NYUL §§ 7107, 7108. Plaintiffs' counsel then filed a summons and complaint in this court on October 5, 2010 ("Complaint") against 17 defendants, including the Port Authority.¹ The Complaint, which is submitted as defendant's exhibit B, alleges that each of the defendants named therein is responsible for plaintiffs' decedent's injuries. However, it was filed less than 60 days following service of the notice of claim. *See* NYUL § 7107. Service on the remaining 16 defendants was properly effectuated. Accordingly, the action was effectively commenced against all defendants except the Port Authority, against whom service was defective. *Id*; *see also Lyons, supra*, 228 AD2d at 251.

Mr. Andrucki passed away on November 27, 2010 due to complications from

¹ The Port Authority was served with such process on November 12, 2010.

mesothelioma. Significantly, the parties agree that “at decedent’s death, no personal injury action was commenced or pending against the Port Authority.” (Defendant’s Memorandum of Law, dated July 7, 2011, at 12). On January 18, 2011, plaintiffs herein filed a supplemental summons and verified amended complaint (“Amended Complaint”)², which added the Port Authority as a party to this action as well as a new cause of action for wrongful death against the 16 defendants who were properly served with the initial Complaint. This process was timely commenced pursuant to CPLR § 7107. The Port Authority did not interpose an answer to such process and is now in default.

This motion was filed on July 11, 2011, the same day on which jury selection began in this case before Justice Martin Shulman of this court. It was fully submitted on August 2, 2011 after oral argument, during which defendant’s counsel advised that the Port Authority would not appear at the trial of this action, which had already commenced in late July.³ At trial, Plaintiff settled its claims against all parties then remaining except the Port Authority. An inquest has thus been scheduled by Justice Shulman to determine Port Authority’s damages.

Defendant contends that the Amended Complaint was not a proper vehicle by which to commence this action against it because it relates back to pleadings which were neither properly filed nor served. Defendant argues that since the Amended Complaint relates back to a nullity, any supplemental pleadings which refer to it are inherently defective and null. In this regard, the Port Authority contends that plaintiffs could have cured this defect only by filing a new action

² Under Section VI, para. E of the September 20, 1996 Case Management Order, as amended May 26, 2011, which governs all NYCAL cases, plaintiffs are empowered to add parties to their suits without leave of the court.

³ Indeed, the Port Authority did not appear at trial.

and by purchasing a new index number. In opposition, plaintiffs assert that the Amended Complaint was filed and served while the Port Authority was amenable to suit and argues that any challenge to such service has been waived as the issues herein relate to personal jurisdiction, not subject matter jurisdiction

Determinative of this motion is that plaintiffs have complied with all of the requirements of NYUL §§ 7107 and 7108. Indisputably, Mr. and Mrs. Andrucki served the Port Authority with a valid notice of claim on October 4, 2010. More than 60 days later, and less than one year after the accrual of Mr. and Mrs. Andrucki's cause of action, plaintiffs herein explicitly added the Port Authority to this action via supplemental summons and Amended Complaint. The supplemental summons was filed with the New York County Clerk's office on January 18, 2011 and served upon the Port Authority on January 31, 2011 pursuant to CPLR 305(a).⁴ Also on January 31, 2011, the Amended Complaint was personally served on the Port Authority as a new party by service upon its managing agent at its NY office. In an abundance of caution, all references to the Port Authority in the Amended Complaint are in bold type to indicate its addition as a defendant. Accordingly, the supplemental summons and Amended Complaint were proper vehicles by which plaintiffs were permitted to commence this action against the Port Authority as an additional defendant herein. Such pleadings served merely as an "amendment" with respect to the other 16 defendants who were properly named in and served with the original Complaint, and against whom plaintiffs added an additional cause of action.

⁴ CPLR 305(a) provides in relevant part that where "a new party is joined in the action and the joinder is not made upon the new party's motion, a supplemental summons specifying the pleading which the new party must answer shall be filed with the clerk of the court and served upon such party."

Defendant's reliance on the "relation-back" doctrine is misplaced. The relation-back doctrine, which is codified in CPLR 203(f), allows a plaintiff in a pending litigation to assert new claims, which might otherwise be untimely, if such claims arise from the same transaction or occurrence as the causes of action which were timely plead. In this regard, the relation-back doctrine is not applicable to these proceedings. The Amended Complaint was filed on January 18, 2011, well within the one-year time restriction of NYUL § 7107. More importantly, as all sides agree that the initial Complaint against the Port Authority was a nullity, the Amended Complaint did not and could not relate back to claims which, for all intents and purposes, never existed.

Moreover, contrary to defendant's unsupported assertion plaintiffs were under no obligation to file a new action against the Port Authority or to obtain a new index number. NYUL § 7107 does not require it, nor would same promote the statute's purpose. Indeed, the legislature's intent to condition the waiver of sovereign immunity solely on compliance with specific temporal restrictions and the filing of a notice of claim is very clear.⁵

⁵ New Jersey cases analyzing the concurrent New Jersey statute (N.J. Stat. § 32:1-163 [2011]) suggest that the conditions precedent found therein are intended to provide "adequate time for investigation and reasonable opportunity for the preparation of its defense", as well as a "reasonable opportunity to effect a settlement before the institution of suit." *Zamel v Port of New York Auth.*, 56 NJ 1, 6 (NJ 1970); see also *Pardo v Port Auth. of New York and New Jersey, et ano.*, 08-CV-1311, 2009 US Dist. LEXIS 18192, at *8-9 (DNJ Mar. 9, 2009).

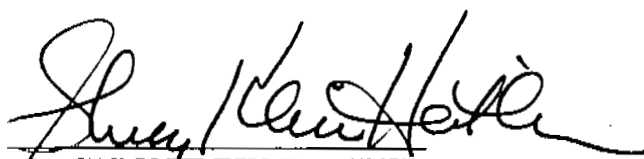
In light of the foregoing, I find that plaintiffs have complied with the conditions precedent set forth in NYUL §§ 7107 and 7108. Accordingly, this court has subject matter jurisdiction with regard to all of plaintiffs' claims over the Port Authority herein.

Accordingly, it is hereby

ORDERED that the Port of Authority of New York and New Jersey's motion to dismiss is denied.

This constitutes the decision and order of the court.

DATED: September 7, 2011


SHERRY KLEIN HEITLER
J.S.C.

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