

Kenny v Turner Constr. Co.

2012 NY Slip Op 33195(U)

April 20, 2012

Supreme Court, New York County

Docket Number: 603387/2006

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X

PATRICIA KENNY,

Plaintiff,

-against-

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Index № 603387/06

TURNER CONSTRUCTION COMPANY, RICHARD
MEIER & PARTNERS, MICHAEL HARRIS SPECTOR,
AIA, P.C. a/k/a and d/b/a THE SPECTOR GROUP and
SPECTOR GROUP HOME, LLC and SPECTOR
ASSOCIATES LLP, THE CORPORATE SOURCE INC.,
YSRAEL A. SEINUK, P.C., SYSKA & HENNESSY, INC.,
NELSON & POPE, LLP, KINGS COUNTY
WATERPROOFING INC., L. MARTONE & SONS INC.,
MACEDOS CONSTRUCTION CO., INC., FRANCIS
BROTHERS SEWER and DRAINAGE, INC. and COKEN
COMPANY, INC.,

Defendants.

-----X

TURNER CONSTRUCTION COMPANY,

Third-Party Plaintiff,

-against-

Third-Party

Index № 590746/07

THE CORPORATE SOURCE, INC.,

Third-Party Defendant.

-----X

MACEDOS CONSTRUCTION CO., INC. of NEW
JERSEY n/k/a FLEMINGTON CONSTRUCTION INC.
and s/h/a MACEDOS CONSTRUCTION CO., INC.,

Second Third-Party Plaintiffs,

-against-

Second Third-Party

Index № 590556/10

J & A CONCRETE CORP.,

Second Third-Party Defendant.

-----X

THE CORPORATE SOURCE, INC.,

Third Third-Party Plaintiff,

-against-

Third Third-Party
Index № 590556/10

LEHRER McGOVERN BOVIS, INC., BOVIS LEND
LEASE LMB, INC., HIGH CONCRETE STRUCTURES,
INC., HIGH CONCRETE GROUP LLC and MUESER
RUTLEDGE CONSULTING ENGINEERS,

Third Third-Party Defendants.

-----X

THE CORPORATE SOURCE, INC.,

Fourth Third-Party Plaintiff,

-against-

Fourth Third-Party
Index № 590556/11

MUESER RUTLEDGE CONSULTING ENGINEERS,

Fourth Third-Party Defendant.

-----X

HIGH CONCRETE STRUCTURES, INC. and
HIGH CONCRETE GROUP, LLC,

Fourth Fourth-Party Plaintiffs,

-against-

Fourth Fourth-Party
Index № 590243/11

PRECAST SERVICES, INC.,

Fourth Fourth-Party Defendant.

-----X

HIGH CONCRETE STRUCTURES, INC. and
HIGH CONCRETE GROUP, LLC,

Second Fourth-Party Plaintiffs,

-against-

Second Fourth Fourth-Party
Index № 590243/11

A.H. SAMPLE, INC.,

Second Fourth-Party Defendant.

CAROL R. EDMEAD, J.:

Fourth third-party defendant Mueser Rutledge Consulting Engineers (Mueser Rutledge), a licensed professional engineering firm, moves, under motion sequence 004, for an order, pursuant to CPLR 3211 (a) (7) and (h) and CPLR 214-d, dismissing the fourth third-party complaint.

Familiarity with prior motions, decisions and orders relating to this action is presumed. The facts, as relevant to the instant motion, are as follow.

Plaintiff Patricia Kenny (Kenny) commenced her “slip and fall” action to recover damages for the injuries she allegedly sustained on January 19, 2005, when she was caused to slip and fall due to the presence of black ice in a parking garage (Garage) at the United States Federal Courthouse in Central Islip, Long Island (Courthouse). Kenny’s allegations involve the structure and pitch of the Garage. Issues with the structure and pitch have, over the years, allegedly caused problems with the expansion joints in the upper level of the Garage, which, in turn, have caused, or allowed, water to drip. In January 2005, the dripping water accumulated, froze, and, according to Kenny, caused her to slip and fall.

Both the Courthouse and the Garage were constructed in the 1990's (the Courthouse/Garage Project). Prosecuting plaintiff’s relatively simple slip and fall action has been

complicated by the addition of multiple entities, either as direct or third-party defendants, who were involved in various aspects of the planning, building, repair and maintenance of the Garage over the years.

As relevant here, in or about August 2007, the general construction contractor (General Contractor) for the Courthouse/Garage Project, defendant Turner Construction Company (Turner), impleaded The Corporate Source (Corporate Source), a janitorial provider whose responsibilities in January 2005 included maintaining the Garage in a safe condition, and in or about November 2010, Corporate Source attempted to implead Mueser Rutledge. Mueser Rutledge acknowledges that it had been retained by project architects, defendant The Spector Group, to provide certain geotechnical engineering services in connection with the Garage's foundation, and that it did so some 13 years prior to the commencement of the third third-party action. Corporate Source does not dispute that Mueser Rutledge completed its work at the Courthouse/Garage Project in 1997.

Following service of the third third-party complaint, Mueser Rutledge made a motion for an order dismissing the complaint as against it based upon Corporate Source's failure to serve a notice of claim upon it (Mueser Rutledge) at least 90 days prior to the commencement of the action. The motion was made pursuant to CPLR 3211 (a) (7), (h) and CPLR 214-d, which mandate the timely service (at least 90 days prior to the commencement of an action) of a notice of claim upon a professional engineer/firm, such as Mueser Rutledge, whose alleged negligent services were performed more than 10 years prior to the commencement of the third-party action against it.

By order dated April 6, 2011 (Prior Order), this court granted Mueser Rutledge's motion and dismissed the third third-party complaint as against it and without prejudice to Corporate

Source “to recommence the action, in compliance with the CPLR § 214-d (1) requirements, within the six-month grace period pursuant to CPLR § 205 (a).” The Prior Order also ordered that “the notice of claim annexed to Corporate Source’s motion papers as Exhibit A shall be deemed served upon Mueser Rutledge Consulting Engineers upon service of a copy of this order with notice of entry.” Notice of entry occurred on April 7, 2011.

Thereafter, on or about August 12, 2011, Corporate Source sought, once again, to implead Mueser Rutledge. Seeking contribution, Corporate Source alleges that “if plaintiff sustained injuries other than through her own negligence and culpability, then those injuries and damages were caused by reason of the carelessness, recklessness, negligence, or other fault of [Mueser Rutledge] its agents, servants and/or employees without any negligence or fault of the part of [Corp Source]” in performance of services at the Garage (*see* Fourth Third-Party Complaint).

Mueser Rutledge responded, once again, by moving (herein) for an order dismissing the fourth third-party complaint pursuant to CPLR 3211 (a) (7), (h) and 214-d. Mueser Rutledge contends that: (1) Corporate Source has failed to comply with the notice requirement; and (2) the complaint lacks adequate detail as to what aspect or aspects of Mueser Rutledge’s geotechnical engineering services were negligently performed and proximately caused Kenny to slip and fall. Corporate Source opposes the motion, and for the following reasons, the motion to dismiss the complaint is denied.

Pursuant to the Prior Order, the notice of claim annexed to Corporate Source’s was deemed served on Mueser Rutledge, upon service of a copy of the order with notice of entry, which, as noted above, occurred on April 7, 2011. Corporate Source recommenced the action within the six-month grace period, pursuant to CPLR 205 (a), and has pled compliance with

CPLR 214-d. Accordingly, that aspect of Mueser Rutledge's motion which asserts that the fourth third-party complaint should be dismissed based upon Corporate Source's purported failure to comply with the procedural requirements of CPLR 3211 (h) and 214-d, must be denied.

With respect to the more substantive aspect of the motion, Mueser Rutledge asserts that, as a licensed professional engineering firm which completed its work at the Courthouse/Garage Project in 1997, it falls under the protections of CPLR 3211 (h) and CPLR 214-d. Therefore, the allegations contained in a third-party action against it must contain sufficient factual detail to meet the heightened standard of proof required to defeat a motion to dismiss under CPLR 3211 (h). According to Mueser Rutledge, the subject complaint does not meet this standard as it lacks detailed allegations to what engineering services it provided, how such services were negligently performed, and/or how its engineering services contributed to Kenny's alleged injuries.

Mueser Rutledge also contends that the work it performed with respect to the Garage was neither negligent, nor a proximate cause of Kenny's alleged injuries, and it relies on the sworn affidavit of professional engineer Joel Moskowitz (Moskowitz) to support this position. Moskowitz's affidavit, which was submitted in connection with Mueser Rutledge's earlier motion, is accompanied by copies of the contract and proposal letter between Mueser Rutledge and The Spector Group, detailed subsurface investigation reports dated March 25, 1993 and February 3, 1994, and signed off by Moskowitz, and Mueser Rutledge's October 1997 invoice (see Movant's Exhibit C). In his affidavit Moskowitz explains the scope of Mueser Rutledge's services:

as reflected in the contracts and the geotechnical reports involved subsurface investigations and analysis, preparation of boring location plans and specifications for soil and rock sampling, test pit layouts, evaluations of subsurface soil and

ground water conditions, recommendations for foundation design and other geotechnical engineering services relating to the subsurface of the site.

He emphasizes that Mueser Rutledge had completed its work by the end of September 1997, which was prior to the time when the concrete for the top deck of the Garage structure was poured (by summer of 1998), and prior to the time that caulking was completed for the top half of the Garage (by January 1999). His apparent suggestion is that if there was any negligence in the construction of the Garage which may have led to plaintiff's injuries, the negligence must have occurred during those latter services, and not as a result of Mueser Rutledge's earlier services.

Finally, Mueser Rutledge points out that Corporate Source did not accept its offer to produce its entire file for examination, or to pursue pre-suit discovery between April 7, 2011 (date of notice of entry) and August 22, 2011 (commencement of the fourth third-party action against Mueser Rutledge), as was its statutory right under CPLR 214-d (4). Mueser Rutledge contends that, by forgoing this period of discovery, Corporate Source missed its opportunity to determine whether a claim against it had any merit, and if so, to provide substantive proof in support of that claim.

In opposition, Corporate Source contends that its third-party complaint is sufficiently pled because, in addition to alleging that if Kenny sustained injuries other than through her own negligence, she did so as a result of the negligence of Mueser Rutledge, and incorporating other pleading documents, Corporate Source asserts that it has met the heightened pleading standard by including its sufficiently detailed notice of claim. The notice of claim provides, in pertinent part:

Mueser Rutledge [] created, prepared, evaluated, and issued geotechnical reports, subsurface investigations and analyses, subsurface soil and ground water conditions, boring location plans, soil and rock sampling, test pit layouts, construction considerations, and recommendations to Defendants . . .

Mueser Rutledge [] informed, advised, and cautioned the defendants in the civil action through correspondence and reports of the existence of certain groundwater elevations and other geotechnical issues that would need to be addressed while designing and constructing the [Garage].

Pursuant to the subcontract with The Spector Group, Mueser Rutledge [] advised the design team of the proper foundation for the [Garage]. Mueser Rutledge [] designed or substantially contributed to the design of the foundation of the [Garage]. The foundation was the proximate cause of excessive shifting of the [Garage]. This excessive shifting led to cracking and water accumulation in the [Garage]. This water accumulation, which led to ice conditions, caused the accident alleged in the complaint.

According to Corporate Source, the information contained in the above-referenced contract documents, correspondence and reports (*see* Moskowitz's affidavit at Movant's Exhibit C) supports the allegations against Mueser Rutledge.

With respect to Mueser Rutledge's contentions that the pleading is deficient because it lacks 'substantive proof,' and that it waived its opportunity to uncover such proof, Corporate Source refers movant (and the court) to the court's order dated June 6, 2011. Corporate Source contends that, because the order specifically directed the parties not to pursue discovery relating to Mueser Rutledge until issue had been joined by Mueser Rutledge, its failure to pursue CPLR 214-d (4) discovery prior to recommencing the action was neither wilful, nor a relinquishment of that right, nor a basis for dismissing the third-party complaint.

CPLR 3211 (h) sets forth the standards for a dismissal of actions involving certain professionals, including licensed engineers. This statute requires the movant to establish that the action is one in which a notice of claim must be served, pursuant to CPLR 214. CPLR 3211 (h) also provides that the motion:

shall be granted unless the party responding to the motion demonstrates that a

substantial basis in law exists to believe that the performance, conduct or omission complained of such licensed . . . engineer . . . as set forth in the notice of claim was negligent and that such performance, conduct or omission was a proximate cause of personal injury, wrongful death or property damage complained of by the claimant

CPLR 214-d, which sets forth the condition precedent for commencing an action against one of the enumerated professionals, provides, in relevant part, that:

[a]ny person asserting a . . . third-party claim for contribution or indemnification arising out of an action for personal injury, wrongful death or property damage, against a licensed . . . engineer . . . which is based upon the professional performance, conduct or omission by such licensed . . . engineer . . . occurring more than ten years prior to the date of such claim, shall give written notice of such claim . . . at least ninety days before the commencement of any action or proceeding The notice of claim shall identify the performance, conduct or omissions complained of, on information and belief, and shall include a request for general and special damages.

It is well settled that, unlike a motion under CPLR 3211 (a) (7), “a court reviewing the sufficiency of a complaint under CPLR 3211 (h) must look beyond the fact of the pleadings to determine whether the claim alleged is supported by such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact” (*Castle Vil. Owners Corp. v Greater N.Y. Mut. Ins. Co.*, 58 AD3d 178, 183 [1st Dept 2008] [internal citation and quotation marks omitted]). It is also well settled that “CPLR 3211 (h) was intended to heighten the court’s scrutiny of the complaint and thereby make it easier to dismiss a CPLR 214-d action than other types of negligence actions” (*id.*, citing Alexander, Practice Commentaries, McKinney’s Cons Laws of NY, Book 7B, CPLR 214-d, at 460). While it is questionable whether Corporate Source has met the heightened proof criterium, it would, nevertheless, be inappropriate to grant the motion prior to a period of discovery.

Any failure by Corporate Source to provide substantive evidence “as a reasonable mind

may accept as adequate to support a conclusion or ultimate fact” (*id.*) that Mueser Rutledge was negligent in the performance of its geotechnical services, does not, under the circumstances, constitute a basis for dismissing the complaint at this juncture. Notwithstanding Mueser Rutledge’s arguments to the contrary, the parties were directed, by order dated June 6, 2011, not to serve discovery demands involving Mueser Rutledge until Corporate Source had “serve[d] its summons and complaint on Mueser Rutledge on or after July 5, 2011 and issue is joined by Mueser Rutledge.” The summons and complaint were served on or about August 12, 2011, and rather than joining issue by serving an answer, Mueser Rutledge responded with the instant motion. It would be inconsistent with the court’s objective of streamlining discovery efforts in this multiparty action to penalize Corporate Source for complying with that order, and, as suggested by Mueser Rutledge, to deny Corporate Source an opportunity to conduct discovery with leave to re-plead thereafter.

For the purpose of CPLR 3211 (a) (7), Mueser Rutledge has been adequately apprised of the performance, conduct and/or omissions which are the subjects of the third-party action against it. The issue of whether Corporate Source is able to meet the heightened pleading standard required under CPLR 3211 (h) and 214-d is held in abeyance following a period of discovery, after which the parties may seek appropriate relief.

Accordingly, it is

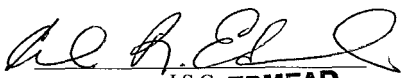
ORDERED that the motion to dismiss pursuant to CPLR 3211 (h) and CPLR 214-d is denied without prejudice to renew upon completion of discovery; and it is further

ORDERED that fourth third-party defendant Mueser Rutledge Consulting Engineers is directed to serve an answer to the fourth third-party complaint within 20 days after service of a

directed to serve an answer to the fourth third-party complaint within 20 days after service of a copy of this order with notice of entry.

Dated: April 20, 2012

ENTER:


HON. CAROL EDMEAD