Atlantic Elec., Inc. v Center Moriches Fire Dist.
2013 NY Slip Op 32372(U)
September 24, 2013
Sup Ct, Suffolk County
Docket Number: 06-2495
Judge: W. Gerard Asher
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[* 1]

SHORT FORM ORDER

INDEX No. 06-2495
CAL. No. 13-00097OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 32 - SUFFOLK COUNTY

PRESENT:

Hon. W. GERARD ASHER
Justice of the Supreme Court

MOTION DATE 4-23-13 (#003)
MOTION DATE 4-4-13 (#004)
ADJ. DATE 6-4-13
Mot. Seq. # 003 - MG
004 - MD

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ATLANTIC ELECTRONICS, INC. and PETER KROMHOUT and MARY KROMHOUT,

Plaintiffs,

- against -

CENTER MORICHES FIRE DISTRICT, DEVENDRA K. INC. and GALLAWAY'S INC., d/b/a BUCKLEY'S IRISH PUB,

Defendants.

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Upon the following papers numbered 1 to 42 read on this motion to dismiss and motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 10, 15 - 32 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 11 - 12, 33 - 36 ; Replying Affidavits and supporting papers 13 - 14, 37 - 42; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the defendant Center Moriches Fire District for an order pursuant to CPLR 3211 (a) (7) dismissing the complaint for failure to state a cause of action, and for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint, is granted to the extent of dismissing the complaint pursuant to CPLR 3211 (a) (7), and is otherwise denied; and it is further

9-25-13

ORDERED that this motion by the defendants Devendra K. Inc. and Gallaway's Inc. doing business as Buckley's Irish Pub pursuant to CPLR 3212 for summary judgment dismissing the complaint is denied without prejudice to renew, and the law office of Purcell and Ingrao, P.C. is disqualified from representing the defendants Devendra K. Inc. and Gallaway's Inc. doing business as Buckley's Irish Pub. This matter is stayed for sixty days to permit said parties to each retain new and different counsel to represent them in this action. Counsel for the moving defendants is directed to serve a copy of this order with notice of entry upon all parties including the defendants Devendra K. Inc., Gallaway's Inc. doing business as Buckley's Irish Pub and the Clerk of the Court, within fifteen days of the date of this order.

This is an action to recover damages for property damage, loss of business, and personal injuries allegedly suffered as a result of a fire at the building owned by the plaintiff Peter N. Kromhout. The plaintiffs Peter N. Kromhout (Kromhout) and Mary Kromhout are principals in the plaintiff Atlantic Electrics Inc.(AEI), and they operated the business of AEI out of the building owned by Kromhout located at 390 Main Street, Center Moriches, New York (the plaintiffs' building). The plaintiffs' building adjoined the building owned by the defendant Devendra K. Inc. (Devendra) located at 386 Main Street, Center Moriches, New York (386 Main), the east wall of the plaintiffs' building being a common wall with 386 Main. At the time of the fire, the defendant Gallaway's Inc. doing business as Buckley's Irish Pub (Buckley) leased the first floor of 386 Main pursuant to a written lease with Devendra. On July 3, 2005 at approximately 4:25 a.m., a fire alarm was dispatched to the defendant Center Moriches Fire District (District) regarding a fire at 386 Main. The district responded to the alarm, and after calling in aid from other fire districts, the fire was put out approximately four to four and one-half hours later. Both 386 Main and the plaintiffs' building were ultimately destroyed by the fire.

In their complaint, the plaintiffs set forth nine causes of action sounding in negligence against the defendants. In the first three causes of action against the District, the plaintiffs allege that the District failed to contain, manage and control the fire to prevent its spread to the plaintiffs' building. In the first cause of action, AEI alleges, among other things, that the District's negligence resulted in a loss of business. In the second cause of action, Kromhout alleges that the District's negligence resulted in damage to his property. In the third cause of action, Kromhout and Mary Kromhout allege that the District's negligence caused them emotional distress. The fourth, fifth and sixth causes of action repeat the aforementioned causes action against Devendra, and the seventh, eighth and ninth causes of action repeat said causes of action against Buckley.

The District now moves to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, and/or for an order pursuant to CPLR 3212 granting it summary judgment dismissing the complaint and all cross claims against it.[1] Pursuant to CPLR 3211 (a) (7), pleadings shall be liberally construed, the facts as alleged accepted as true, and every possible favorable inference given

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[1] The District has not submitted the second amended answer of its co-defendants. CPLR 3212 (b) requires that a motion for summary judgment be supported by a complete set of the pleadings (***Liberty Doorworks, Inc. v Baranello***, 83 AD3d 1011, 921 NYS2d 561 [2d Dept 2011]). Under different circumstances, the Court would deny the motion without prejudice to renewal upon proper papers (***Sendor v Chervin***, 51 AD3d 1003, 857 NYS2d 500 [2d Dept 2008]).

to plaintiffs (***Leon v Martinez***, 84 NY2d 83, 614 NYS2d 972 [1994]). On such a motion, the Court is limited to examining the pleading to determine whether it states a cause of action (***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]). In examining the sufficiency of the pleading, the Court must accept the facts alleged therein as true and interpret them in the light most favorable to the plaintiff (***Pacific Carlton Development Corp. v 752 Pacific, LLC***, 62 AD3d 677, 878 NYS2d 421 [2d Dept 2009]; ***Gjonlekaj v Sot***, 308 AD2d 471, 764 NYS2d 278 [2d Dept 2003]). On such a motion, the Court's sole inquiry is whether the facts alleged in the complaint fit within any cognizable legal theory, not whether there is evidentiary support for the complaint (***Leon v Martinez***, *supra*; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 1017, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Lucia v Goldman***, 68 AD3d 1064, 1066, 893 NYS2d 90 [2d Dept 2009]; ***International Oil Field Supply Services Corp. v Fadeyi***, 35 AD3d 372, 825 NYS2d 730 [2d Dept 2006]). Upon a motion to dismiss, a pleading will be liberally construed and such motion will not be granted unless the moving papers conclusively establish that no cause of action exists (***Chan Ming v Chui Pak Hoi***, 163 AD2d 268, 558 NYS2d 546 [1st Dept 1990]).

It is well settled that a fire district is not chargeable with negligence in discharging the governmental function of fighting fires (***Harland Enters. v Commander Oil Corp.***, 64 NY2d 708, 485 NYS2d 733 [1984]; *see also* ***State Farm Fire & Cas. Co. v Village of Bronxville***, 24 AD3d 453, 805 NYS2d 651 [2d Dept 2005]; ***Rood Utils. v City of Auburn***, 233 AD2d 873, 649 NYS2d 291 [4th Dept 1996]; ***Kroger v City of Mount Vernon***, 104 AD2d 855, 480 NYS2d 370 [2d Dept 1984]; ***Hughes v State***, 252 AD 263, 299 NYS 387 [3d Dept 1937]). However, a fire district can be found liable for actions which affirmatively prevent the prompt extinguishment of a fire (***Matlock v New Hyde Park Fire Dist.***, 16 AD2d 831, 228 NYS2d 894 [2d Dept 1962]). In addition, there is an exception to the general rule that a fire district or other public entity is immune from negligence claims arising out of the performance of its governmental functions where the injured person establishes a special relationship with the public entity which would create a special duty of protection with respect to that individual (***United Servs. Auto. Assn. v Wiley***, 73 AD3d 1160, 904 NYS2d 436 [2d Dept 2010]; ***Clarke v City of New York***, 18 AD3d 796, 796 NYS2d 689 [2d Dept 2005]; ***Sandstrom v Rodriguez***, 221 AD2d 513, 633 NYS2d 403 [2d Dept 1995]).

General allegations of negligence against a fire district, which do not allege that the district assumed any special duty toward the plaintiff, fail to state a cause of action (***Schekter v Long Is. Light. Co.***, 137 AD2d 591, 524 NYS2d 484 [2d Dept 1988]; *see also* ***Messineo v City of Amsterdam***, 17 NY2d 523, 267 NYS2d 905 [1966]; ***LaDuca v Town of Amherst***, 53 AD2d 1011, 386 NYS2d 269 [4th Dept 1976]). The four elements that are required to establish a special relationship are (1) an assumption by the municipality, through promises or actions, of an affirmative duty to act on behalf of a party who was injured; (2) knowledge on the part of the municipality's agents that inaction could lead to harm; (3) some form of direct contact between the municipality's agents and the injured party; and (4) that party's justifiable reliance on the municipality's affirmative undertaking (*see* ***Kovit v Estate of Hallums***, 4 NY3d 499, 797 NYS2d 20 [2005]; ***Pelaez v Seide***, 2 NY3d 186, 778 NYS2d 111 [2004]).

In their complaint, the plaintiffs plead facts asserting causes of action in negligence against the District. They do not plead any contact or communication with the District directly or indirectly, nor do they plead justifiable reliance on the District's affirmative undertaking to provide fire protection to their

building. In opposition to the motion, the plaintiffs submit the affirmation of their attorney, who contends that direct contact with the District was established through the plaintiffs' "presence at the scene and their contact with individuals on Plaintiffs' behalf," and that the plaintiffs "justifiably relied on [the District's] ability to extinguish the fire in an appropriate manner."

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint (*see* ***Leon v Martinez***, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994]; ***Rovello v Orofino Realty Co.***, 40 NY2d 633, 389 NYS2d 314 [1976]; ***DaCosta v Trade-Winds Envtl. Restoration, Inc.***, 61 AD3d 627, 877 NYS2d 373 [2d Dept 2009]). When evidentiary material is adduced in support of the motion, the court must determine whether the proponent of the pleading has a cause of action, not whether the proponent has stated one (*see* ***Guggenheimer v Ginzburg***, 43 NY2d 268, 401 NYS2d 182 [1977]; ***Thomas v Lasalle Bank N. A.***, 79 AD3d 1015, 913 NYS2d 742 [2d Dept 2010]; ***Scoyni v Chabowski***, 72 AD3d 792, 793, 898 NYS2d 482 [2d Dept 2010]; ***Peter F. Gaito Architecture, LLC v Simone Dev. Corp.***, 46 AD3d 530, 846 NYS2d 368 [2d Dept 2007]). Dismissal under CPLR 3211 is not warranted unless it is established "conclusively that the plaintiff has no cause of action" (***Sokol v Leader***, 74 AD3d 1180, 904 NYS2d 153 [2d Dept 2010] quoting ***Lawrence v Graubard Miller***, 11 NY3d 588, 873 NYS2d 517 [2008]; ***Rovello v Orofino Realty Co.***, *supra*).

Here, the affirmation submitted by the attorney for the plaintiffs does not set forth facts sufficient to indicate that the plaintiffs have a cause of action against the District. Setting aside the issue whether the affirmation should be considered by the Court, as it is not made by a person with personal knowledge and is conclusory rather than factual, the contentions in the attorney's affirmation refer to alleged contact and reliance by the plaintiffs after the District had already undertaken to extinguish the subject fire. In addition, the affirmation does not indicate that the District affirmatively prevented the prompt extinguishment of the fire. Accordingly, the District's motion to dismiss the complaint pursuant to CPLR 3211 (a) is granted.

Devendra and Buckley now move for summary judgment dismissing the complaint against them. As discussed above, Devendra is the owner of 386 Main, who leased the premises to Buckley as tenant. In their complaint, the plaintiffs make identical factual claims against Devendra and Buckley (collectively the defendants) including, but not limited to, allegations that they failed to install or properly install an adequate sprinkler system at 386 Main, that they failed to guard, store and maintain propane gas tanks at the premises, and that they failed to take proper precautions to prevent a fire from spreading to the plaintiffs' adjacent property. In opposition, the plaintiffs contend, among other things, that the attorney for the defendants should be disqualified as there is an inherent conflict of interest between said parties, and that the defendants' submission in support of their motion highlights that conflict. The plaintiffs point out that the initial argument in the defendants' motion is that Devendra is not liable to the plaintiffs as it is an out-of-possession landlord, which deflects any culpability onto Buckley.

The disqualification of an attorney is a matter that rests solely in the discretion of the trial court (*see* ***Falk v Gallo***, 73 AD3d 685, 901 NYS2d 99 [2d Dept 2010]; ***Nationscredit Fin. Servs. Corp. v Turcios***, 41 AD3d 802, 839 NYS2d 523 [2d Dept 2007]; ***Boyd v Trent***, 287 AD2d 475, 731 NYS2d 209

[2d Dept 2001]), and a client's right to the counsel of its own choosing is an invaluable right that should not be tampered with unless a clear showing of disqualification has been made (***S & S Hotel Ventures Ltd. v 777 S.H. Corp.***, 69 NY2d 437, 515 NYS2d 735 [1987]; ***Zutler v Drivershield Corp.***, 15 AD3d 397, 790 NYS2d 485 [2d Dept 2005]). It is axiomatic that an attorney must avoid even the appearance of a conflict of interest (*see* ***Rose Ocko Foundation, Inc. v Liebovitz***, 155 AD2d 426, 547 NYS2d 89 [2d Dept 1989]; ***Bridges v Alcan Constr. Corp.***, 134 AD2d 316, 520 NYS2d 793 [2d Dept 1987]; ***Seeley v Seeley***, 129 AD2d 625, 514 NYS2d 110 [2d Dept 1987]). The lawyer may not place himself in a position where a conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship (*see* ***Rose Ocko Foundation, Inc. v Liebovitz***, 155 AD2d at 427; *see also* ***Kelly v Greason***, 23 NY2d 368, 376, 296 NYS2d 937 [1968]; ***Roddy v Nederlander Producing Co. of Am., Inc.***, 96 AD3d 509, 949 NYS2d 10 [1st Dept 2012]; ***Flores v Willar J. Price Assoc., LLC***, 20 AD3d 343, 799 NYS2d 43 [1st Dept 2005]; ***Seeley v Seeley***, 129 AD2d at 626-627).

Because "dual representation is fraught with the potential for irreconcilable conflict it will rarely be sanctioned even after full disclosure has been made and the consent of the clients obtained...or where the conflict extends to the very subject matter of the litigation" (***Greene v Greene***, 47 NY2d 447, 418 NYS2d 379 [1979]). As the Court of Appeals set forth, "...the lawyer owes a duty to each client to advocate the client's interest zealously. Yet, to properly represent either one of the parties, he must forsake his obligation to the other" (***Greene v Greene***, *id.).* "A client who is made fully cognizant of a potential (or, occasionally, actual) conflict, is entitled to take his chances. But in some instances, because the relationships or interest create a substantial likelihood of profound conflict, or for other policy reasons, representation is not permitted under any circumstances. Thus, where a lawyer represents parties whose interests conflict as to the particular subject matter, the likelihood of prejudice to one party may be so great that misconduct will be found despite disclosure and consent" (***Kelly v Greason***, *supra*).

This prohibition was designed to safeguard against not only violation of the duty of loyalty owed the client, but also against abuse of the adversary system and resulting harm to the public at large" (***Greene v Greene***, *supra*). An attorney may not, generally speaking, represent in litigation clients with mutually antagonistic interests (*see* Rules of Professional Conduct [22 NYCRR] Rule 1.7).

Here, the record reveals that Devendra initially appeared in this action by service of an answer which contained a cross claim against Buckley. When new counsel for Devendra was substituted in, that firm served an amended answer and a second amended answer which omitted any cross claim against Buckley. The Court finds that said amended answers do not obviate the inherent conflict between the parties. By way of example only, there is a issue of fact as to who, if anyone, is responsible for the installation and placement of two propane tanks on 386 Main which may have accelerated and/or exacerbated the spread of the fire from 386 Main to the plaintiffs' building. In addition, counsel for the defendants has failed to provide any indication that the defendants have been advised of the inherent conflict between them, or that the defendants have consented to dual representation herein. It is well settled that doubts as to the existence of a conflict of interest must be resolved in favor of disqualification (*see* ***Campbell v McKeon***, 75 AD3d 479, 905 NYS2d 589 [1st Dept 2010]; ***Lammers v Lammers***, 205 AD2d 432, 613 NYS2d 906 [1st Dept 1994]; ***Rose Ocko Found. v Liebovitz***, *supra*; ***Flushing Sav. Bank v FSB Props.***, 105 AD2d 829, 482 NYS2d 29 [2d Dept 1984]).

After careful review, the Court concludes that Purcell & Ingrao, P.C. cannot continue to represent both Devendra and Buckley. The Court is concerned, in part, that the parties' competing interests, and the divided loyalties they create, will compromise the attorney's effectiveness as an advocate for each of its clients pursuant to the New York Rules of Professional Conduct 1.7 (a) (1). Accordingly, this action is stayed for sixty days to permit said defendants to obtain new counsel. The defendants are granted leave to serve their respective motions for summary judgment within ninety days of the date of this order, if so advised.

Dated: Sept. 24, 2013

W. Gerard Asher
J.S.C.

_____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION