

Quezada v Rodrigues-Plank

2014 NY Slip Op 31706(U)

July 2, 2014

Supreme Court, New York County

Docket Number: 109419-2009

Judge: George J. Silver

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. GEORGE J. SILVER
Justice

PART 10

Index Number : 109419/2009
QUEZADA, YOMARIS
vs.
RODRIGUES-PLANK, CRISTINA
SEQUENCE NUMBER : 008
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

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

FILED
JUL 03 2014
NEW YORK
COUNTY CLERK'S OFFICE

Dated: JUL 02 2014

George J. Silver, J.S.C.

HON. GEORGE J. SILVER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
YOMARIS QUEZADA,

Plaintiff,

Index No. 109419-2009

-against-

DECISION/ORDER

CRISTINA RODRIGUES-PLANK and OPEN DOOR
FAMILY MEDICAL CENTER, INC.,

Defendants.

-----X
CRISTINA RODRIGUES-PLANK,

Third-Party Plaintiff,

Index No. 590279-2012

-agaisnt-

THE HARTFORD, HARTFORD ACCIDENT AND
INDEMNITY COMPANY and HARTFORD CASUALTY
INSURANCE COMPANY,

Third-Party Defendants.

-----X
CRISTINA RODRIGUES-PLANK,

Second Third-Party Plaintiff,

Index No. 590530-2013

-agaisnt-

ALLSTATE ENVIRONMENTAL CORP. and HUDSON
INSURANCE GROUP,

Second Third-Party Defendants.

FILED

JUL 03 2014

**NEW YORK
COUNTY CLERK'S OFFICE**

-----X

HON. GEORGE J. SILVER, J.S.C.

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion/Order to Show Cause, Affidavits, Exhibits Annexed & Memorandum of Law.....	1, 2
Affirmation in Opposition, Affidavit(s) & Exhibits.....	3
Reply Memorandum of Law in Further Support of Motion.....	4
Notice of Cross-Motion, Affirmation & Exhibits.....	5
Affirmation in Opposition to Cross-Motion & Exhibits Annexed.....	6
Reply Affirmation.....	7

Plaintiff Yomaris Quezada (plaintiff) commenced this action against defendant/third-party plaintiff/second third-party plaintiff Cristina Rodrigues-Plank (Rodrigues-Plank) and defendant Open Door Family Medical Center, Inc. (Open Door) alleging causes of action for negligence and violations of Labor Law §§ 200, 240 [1] and 241 [6] as a result of an accident that allegedly occurred on December 6, 2008 at the premises located at 80 Beekman Avenue, Sleepy Hollow, New York (the premises). The complaint alleges that Rodrigues-Plank is the owner of the premises and that Open Door is a lessee. Rordrigues-Plank commenced a third-party action against The Hartford, Hartford Accident and Indemnity Company and Hartford Casualty Insurance Company in which she seeks a declaration that third-party defendants have a duty to indemnify and defend Rodrigues-Plank on a primary basis and to reimburse for any defense costs incurred by her in the action commenced by plaintiff. Rodrigues-Plank commenced a second third-party action against second third-party defendants Allstate Environmental Corp. (Allstate) and Hudson Insurance Group (Hudson) in which she seeks a declaration that Hudson has a duty to defendant and indemnify her on a primary basis as an additional insured under the Commercial General Liability (CGL) policy issued by Hudson to Allstate and to reimburse her for defense costs by her in defending plaintiff's action. By order dated July 2, 2014 the second third-party complaint was dismissed as against Hudson. Allstate now moves by Notice of Motion dated September 12, 2013 for a order dismissing the second third-party complaint pursuant to CPLR § 3211 [a] [7]. Rodrigues-Plank cross-moves for leave to amend the second third-party complaint pursuant to CPLR § 3025.

In support of the motion, Allstate argues that the second third-party complaint does not state a cause of action because it does not seek any relief from Allstate. As Allstate correctly points out, the second third-party complaint seeks only a declaration that Hudson has a duty to defend and indemnify Rodrigues-Plank as an additional insured but is silent with respect to Allstate.

In opposition, Rodrigues-Plank avers that in November 2008 she responded to requests by Open Door, who was a triple net lessee of the premises, to assist it in expanding the premises by entering into a written agreement with Open Door wherein she agreed to pay for a portion of the work Open Door wanted performed at the premises. Rodrigues-Plank contends that she and her attorney discussed payment schedules and insurance information, with Allstate's owner, Jose Montas (Montas) during which Rodrigues-Plank indicated that Allstate must provide Rodrigues-

Plank with a certificate of insurance naming her as an additional insured under his policy with Hudson before Allstate was to begin work on the premises. Rodrigues-Plank also claims that there was an agreement between her and Allstate that payment would be made unless a certificate of insurance was provided. On November 18, 2008 Montas provided Rodrigues-Plank with a certificate of insurance naming her as an additional insured. Thereafter a payment agreement was drawn up and signed by Montas. Rodrigues-Plank issued a check for a down payment in the amount of \$12,000 on the same date and work began shortly after the check was deposited. Although the alleged November 18, 2008 written agreement signed by Montas is silent with respect to the issue of insurance, Rodrigues-Plank claims that Allstate's agreement to defend, indemnify and provide additional insurance to Rodrigues-Plank was part and parcel to the written agreement.

Rodrigues-Plank contends that Allstate should be a party to the second third-party action because it is a party with an interest or right affected by the declaratory judgment. Rodrigues-Plank also contends that the motion should be denied because she has not had the opportunity to obtain discovery relevant to the issues raised in the second third-party complaint.

Rodrigues-Plank cross-moves to amend the second third-party complaint to allege that Allstate agreed to name Rodrigues-Plank as an additional insured and to defend and indemnify her; that she was named as an additional insured in a certificate of insurance; that Allstate contracted with Hudson to provide coverage to Rodrigues-Plank; that Rodrigues-Plank duly tendered the defense of the underlying action to Hudson; that Hudson failed to respond to her tender and/or to defend and indemnify her in the underlying action; and that Allstate breached its agreement with Rodrigues-Plank.

Addressing Rodrigues-Plank's cross-motion first, leave to amend a pleading is freely granted in the absence of prejudice or surprise to the opposing party. Mere lateness is not a barrier to amendment. To establish prejudice, which must be significant (*see Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 459 NE2d 164, 471 NYS2d 55 [1983]), there must be some indication that the opposing party will have been hindered in the preparation of its case or prevented from taking some measure to support its position (*see Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 429 NE2d 90, 444 NYS2d 571 [1981]). Moreover, on a motion for leave to amend, plaintiff need not establish the merit of its proposed new allegations but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*MBIA Ins. Corp v Greystone & Co., Inc.*, 74 AD3d 499 [1st Dept 2010]). The essential elements of a cause of action for breach of contract are the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages (*Morpheus Capital Advisors LLC v. UBS AG*, 105 AD3d 145 [1st Dept 2013]). Since Rodrigues-Plank's proposed amendment sufficiently alleges the existence of a valid and binding oral agreement by Allstate to procure insurance on Rodrigues-Plank's behalf and since Allstate has not established that it will be prejudiced by the proposed amendment, the cross-motion for leave to amend is granted. Questions regarding whether the conduct of the parties evinces mutual assent are best resolved either on a motion for summary judgment after the completion of discovery or at trial.

Because Rodrigues-Plank's cross-motion to amend the second third-party complaint is granted, Allstate's motion to dismiss the second third-party complaint for failing to state a cause of action is denied as moot.

Accordingly, it is hereby

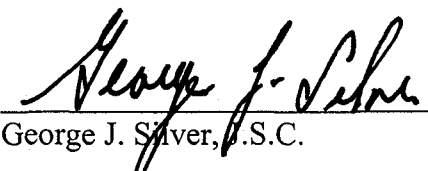
ORDERED that second third-party defendant Allstate Environmental Corp.'s motion to dismiss is denied as moot; and it is further

ORDERED that second third-party plaintiff Cristina Rodrigues-Plank's cross-motion to amend the second third-party complaint is granted as follows: leave is granted to amend the second third-party complaint to assert a breach of contract cause of action against second third-party defendant Allstate Environmental Corp. and to this extent the amended second third-party complaint in the form annexed to the cross-moving papers shall be deemed served upon second third-party defendant Allstate Environmental Corp. upon service of a copy of this order with notice of entry¹; and it is further

ORDERED that all remaining parties to the action are to appear for a status conference on September 16, 2014 at 9:30 a.m. in Part 10, room 422 of the courthouse located at 60 Centre Street, New York, New York 10007; and it is further

ORDERED that movant Allstate Environmental Corp. shall serve a copy of this order, with notice of entry, upon all parties to this action within 20 days of entry.

Dated: **JUL 02 2014**
New York County


George J. Silver, J.S.C.

HON. GEORGE J. SILVER

FILED
JUL 03 2014
NEW YORK
COUNTY CLERKS OFFICE

¹ The second third-party complaint was dismissed against Hudson and Rodrigues-Plank's cross-motion to amend the second third-party complaint to allege an equitable estoppel cause of action against Hudson was denied by this court in a separate order dated July 2, 2014. Therefore, the fourth cause of action in the amended second third-party complaint is stricken.