

Sengbusch v Les Bateaux De N.Y., Inc.

2014 NY Slip Op 31983(U)

July 11, 2014

Supreme Court, New York County

Docket Number: 154209/12

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 42

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SABINE VON SENGBUSCH,

Plaintiff,

INDEX NO. 154209/12

-against-

LES BATEAUX DE NEW YORK, INC. d/b/a
SAILTIME NEW YORK, DOLPHIN SERVICES, LLC
and JOHN DOE,

Defendants.
-----X

DECISION AND ORDER

NANCY M. BANNON, J.

Introduction

In this action seeking, *inter alia*, damages for negligent repairs to a sailboat, the plaintiff, Sabine Von Sengbusch, owner of the vessel, asserts causes of action for, *inter alia*, breach of contract and negligence as against defendants Les Bateaux De New York, Inc., d/b/a Sailtime New York ("Sailtime"), a boat chartering company, and Dolphin Services, LLC, ("Dolphin") a marine fiberglass specialist which performed the repairs.

The plaintiff entered into an agreement with Sailtime in 2007 wherein it was to possess and manage her 36-foot sailboat named "Never Enough" as part of its fleet. Sometime in October 2010, Sailtime rented the boat to a time-share member, who took it from Chelsea Piers to the Long Island Sound and hit a rock or otherwise grounded it at cruise speed. The member, named herein as "John Doe" but identified by Sailtime as Ford Chandler, was not served in this action. After the incident, Sailtime removed the boat to Nichols Yacht Yard ("Nichols") in Mamaroneck where repairs were performed by Dolphin. The repairs were paid for by the boat's insurer and completed. However, the plaintiff claims that the repairs were not performed properly. The boat was surveyed by a marine surveyor and deemed unseaworthy due to "incomplete and faulty repairs by Dolphin Services." Unable to use or sell the boat, the plaintiff commenced this action on June 25, 2012, seeking damages of \$198,630, the estimated value of the boat.

There are two motions now before the court. The plaintiff moves to amend the complaint to add Nichols, 41 North Marine Services, Inc. ("41 North") and Taylor Isaac as defendants, and defendant Sailtime moves for summary judgment dismissing all claims and cross-claims against it, as well as judgment on its counterclaim for attorneys fees and costs. Both motions are denied.

Motion to Amend

The plaintiff moves for leave to amend the complaint pursuant to CPLR 3025(b) to add Nichols Yacht Yard, 41 North Marine and Taylor Isaac alleging that they also performed or supervised repairs on the boat while it was at Nichols Yacht Yard. The plaintiff alleges that these entities and their alleged contribution to plaintiff's damages only recently became known after some discovery was conducted. 41 North Marine and Taylor Isaac have not submitted opposition. Nichols opposes the motion, arguing that it should not be added as a defendant because it merely contracted with the plaintiff for and performed winterization and storage of the boat, which work did not cause damage. Thus, it argues, the proposed amendment is without merit and would be subject to a motion to dismiss.

"A motion for leave to amend should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit (Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809, 811 [1st Dept. 2008])." Bishop v Maurer, 83 AD3d 483, 485 (1st Dept. 2011); see McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept. 2011). Here, the plaintiff fails to demonstrate, in the proposed Second Amended Complaint or otherwise, that the proposed new claims have any merit. She offers only conclusory assertions that, in addition to Dolphin, these other entities, Nichols, 41 North Marine and Isaac are liable in that they failed to properly supervise or inspect the repairs performed by Dolphin. It is not clear what role 41 North Marine is alleged to have played, and there is no further explanation as to who Taylor Isaac may be. If discovery revealed this information to the plaintiff, it is not conveyed in the motion papers. Nor does the plaintiff dispute Nichols' contention in opposition that did not perform any fiberglass work or hull repair but merely winterized and stored the boat pursuant to its contract with the plaintiff, and that this work had nothing to do with the work being performed by Dolphin. Further, the plaintiff, having contracted with Nichols for winterization and storage services, was aware of this entity prior to commencing the action and she does not explain on this motion, how, two years later, discovery gave rise to a theory of liability against it.

Motion for Summary Judgment

The proponent of a motion for summary judgment pursuant to CPLR 3212 must establish its entitlement to such relief as a matter of law (see Zuckerman v City of New York, 49 NY2d 557 [1980]) by submitting proof in admissible form demonstrating the absence of triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v City of New York, *supra*; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010], the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, *supra*; O'Halloran v City of New York, *supra*; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue." Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

In support of its motion, Sailtime submits an affidavit of Mathias Chouraki, its principal, and a copy of its contract with the plaintiff, and argues, primarily, that the contract unequivocally insulates it from liability under these circumstances. However, the contract terms are not as clear as Sailtime would read them and, its present arguments for dismissal of the remaining causes of action are unpersuasive. Thus, its papers fail to demonstrate the absence of triable issues of fact and entitlement to judgment as a matter of law. In any event, the plaintiff's opposition papers raise triable issues, *inter alia*, as to whether Sailtime hired or directed Dolphin to perform the repairs with or without the plaintiff's approval, and whether under the terms of its contract with the plaintiff, which imposes a duty on Sailtime to maintain the boat in "fit and seaworthy condition", Sailtime is liable to any extent for the damage and allegedly negligent repair of the boat following its grounding by one of its members. Moreover, Sailtime has not yet produced an employee for deposition.

While further discovery may ultimately establish Sailtime's lack of liability, the instant motion for summary judgment on the complaint and cross-claims must be denied. However, the denial is without prejudice to renew upon further discovery.

The branch of Sailtime's motion which seeks summary judgment on its counterclaim for attorneys fees and costs is also denied as premature, as Sailtime has not yet prevailed in the action.

Conclusion

For the foregoing reasons, and upon the papers submitted on the motions, the plaintiff's motion for leave to amend the complaint is denied and the motion of defendant Sailtime for summary judgment is denied without prejudice.

Accordingly, it is:

ORDERED that the plaintiff's motion for leave to amend the complaint pursuant to CPLR 3025(b) is denied, and it is further,

ORDERED that the motion of defendant Les Bateaux De New York, Inc., d/b/a Sailtime New York pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims against it and for summary judgment on its counterclaim is denied without prejudice.

This constitutes the Decision and Order of the court.

Dated: July 11, 2014



NANCY M. BANNON, J.S.C.