

<b>Gilbane Bldg. Co. v Fidelity &amp; Guar. Ins. Co.</b>
2014 NY Slip Op 32400(U)
September 10, 2014
Supreme Court, New York County
Docket Number: 653199/2011
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 61

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GILBANE BUILDING CO./ TDX CONSTRUCTION  
CORP., A JOIN VENTURE; GILBANE BUILDING  
COMPANY; TDX CONSTRUCTION CORPORATION,

Plaintiff,

DECISION AND  
ORDER

-against-

Index No. 653199/2011

FIDELITY AND GUARANTY INSURANCE COMPANY  
ET AL.,

Mot. Seq. 008 & 009

Defendant.

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HON. ANIL C. SINGH, J.:

In this action for damages and declaratory relief related to insurance coverage for an underlying action, defendant United National Insurance Company (“United National” or “defendant”) moves for an order pursuant to CPLR§3211(a)(1), CPLR§3211(a)(2), CPLR§3211(a)(7) and CPLR§3211(a)(8) dismissing the second amended complaint on jurisdictional grounds. (Mot. Seq. 008). Plaintiffs’ did not oppose defendant’s motion but instead filed a third amended complaint. Defendant United National subsequently moved on the same grounds to dismiss the third amended complaint. (Mot. Seq. 009). Plaintiffs’ oppose that motion.

This is an action seeking damages and declaratory relief related to insurance coverage in an action pending in Supreme Court, New York County, *Dormitory Auth. of the State of New York v Samson Constr., et al.*, Index No. 403436/2006 (the underlying action), which was commenced on February 1, 2007. The verified complaint in the underlying action (exh. D to Westlye aff.) seeks \$40 million in damages.

The underlying action involves a construction project (“the Project”) for a forensic biology laboratory on property that is part of the Bellevue Hospital campus in Manhattan. According to the verified complaint in the underlying action, construction caused cracking and subsidence to two buildings on the Bellevue Hospital campus. Numerous third-party actions and cross claims have been filed in the underlying action.

In this case, the parties seek insurance coverage for the underlying action. Plaintiffs filed a second amended complaint joining Fidelity & Guaranty Insurance Company and defendant United National as named defendants. In defendant’s motion to dismiss the second amended complaint they argue plaintiffs’ had no standing to file a second amended complaint since they failed to comply with the jurisdictional requirements set forth in CPLR§1003 and CPLR §3025.

Defendant United National contends (i) plaintiffs’ window to amend the complaint as of right has surpassed, (ii) plaintiffs’ did not obtain approval from the

court or (iii) obtain a stipulation of all the parties who have appeared in this action to properly file the second amended complaint pursuant to CPLR §1003 thus, it is subject to dismissal. Defendant United National further argues plaintiffs' stipulation for leave to file the second amended complaint is ineffective because it was not signed by named defendants New Hampshire Insurance Company and Roadway Contracting (United National insured) or United National itself who they argue previously appeared in this matter.

Plaintiff's sought to join defendant United National into this action through stipulation. With respect to joinder, a party may be added at any stage of an action by stipulation of all of the existing parties who have appeared pursuant to CPLR §1003 (see Ferrante Immobiliare, LLC v Pace, 68 AD3d 463, 466 [1st Dept 2009]). Plaintiffs' may also amend their pleadings or supplement it pursuant to CPLR§3025(b) by setting forth additional transactions or occurrences at any time by stipulation of all the parties.

Defendant United National was not previously named as a party, however they contend they appeared in the case as "United National Casualty Insurance Company and United National Insurance Company erroneously sued herein as United National Casualty Insurance Company" with the motion to dismiss the amended complaint thus, requiring their consent in a stipulation to be joined. Defendant's position is misplaced, insofar as plaintiffs' did not require defendant

United National's consent in the stipulation to be joined since they were not named defendants in the action at the time the stipulation was filed. (See Peterkin v City of New York, 293 AD2d 244, 248 [2d Dept 2002]) (finding that stipulation for joinder requires only signatures from named parties who have appeared).

However, defendant was correct in pointing out that plaintiffs' failure to obtain consent in the stipulation of named defendants New Hampshire Insurance Company and Roadway Contracting renders the second amended complaint a legal nullity.

In lieu of opposing the motion to dismiss the second amended complaint. Plaintiffs' acknowledged that Roadway and New Hampshire remained in the action and filed stipulations agreeing to discontinue all claims against them and dismiss them from the action on February 14, 2014. Plaintiffs' then filed the third amended complaint. The third amended complaint superseded the second amended complaint becoming the only complaint in the case. (Langer v Garay, 30 AD2d 942 [1st Dept 1968])

Defendant United National moved to dismiss the new third amended complaint under the grounds that this filing does not cure the previous jurisdictional defect. Plaintiff relies on Andreyev v Zito, to stand for the proposition that jurisdictional defects cannot be cured on a retroactive basis. (15

Misc 3d 1146(A) [Sup Ct 2007]). The facts of Andreyev are distinguishable from the case at bar since plaintiffs in Andreyev “fail[ed] to memorialize said agreement by written stipulation, executed by all appearing parties or their counsel prior to the filing of said supplemental summons and amended complaint.” (Id.) Whereas in the case at bar, the stipulation was executed by all parties at the time of filing of the *new* third amended complaint opposed to curing the defect of the old second amended complaint. Thus, the jurisdictional defect was cured before plaintiffs’ filed the third amended complaint.

Moreover, as previously discussed, defendant United National’s consent in a stipulation in order to be joined was not needed for the third amended complaint. (see supra at 3). In sum, defendant United National’s jurisdictional arguments fail. Although defendant’s motion to dismiss was denominated as a CPLR 3211(a)(7) motion their motion rests on jurisdictional grounds thus the motion is denied with leave.

Accordingly it is,

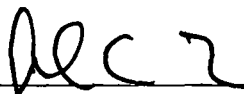
ORDERED that defendant United National Insurance Company’s motion to dismiss the second amended complaint is denied as moot (mot. seq. 008); and it is further

ORDERED that defendant United National Insurance Company's motion to dismiss the third amended complaint is denied on jurisdictional grounds; and it is further

ORDERED that defendant United National Insurance Company is directed to serve an answer or otherwise move against the third amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on December 3, 2014, at 9:30AM.

Date: September 10, 2014  
New York, New York

  
Anil C. Singh

**HON. ANIL C. SINGH**  
**SUPREME COURT JUSTICE**