

Levine v Rye Country Day Sch.

2014 NY Slip Op 33083(U)

September 18, 2014

Supreme Court, Putnam County

Docket Number: 2784/12

Judge: Lewis J. Lubell

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This opinion is uncorrected and not selected for official publication.

SC 10/27/14 @ 9:30 A.M.

To commence the 30 day statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties

SUPREME COURT OF THE STATE of NEW YORK COUNTY OF PUTNAM

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ADAM LEVINE,

Plaintiff,

-against -

RYE COUNTRY DAY SCHOOL and HICKORY HOMES & PROPERTIES, INC., and BBR TRUCKING, LLC. and D&N TRANSPORT, INC., DHI CONSTRUCTION SERVICES, INC., SITEWORKS UNLIMITED LTD., ROGAN BROTHERS SANITATION, INC., "JOHN DOE #1" to "JOHN DOE #10", the last ten names being fictitious and unknown to plaintiff,

Defendants.

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LUBELL, J.

DECISION & ORDER

Index No. 2784/12

Sequence No. 4 - 5

The following papers were considered in connection with Motion Sequence #4 by defendant Siteworks Unlimited Ltd. For an Order (1) pursuant to CPLR 3212, dismissing the first, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action for breach of contract; (2) pursuant to CPLR 3212, dismissing the thirteenth cause of action contained in plaintiff's verified amended complaint upon the grounds that the thirteenth cause of action fails to state a cause of action for fraud; (3) pursuant to CPLR, dismissing the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action contained in plaintiffs verified amended complaint upon the grounds that the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action for negligence against defendant are barred by the statute of limitations; (4) pursuant to 22 NYCRR Section 130-1.1 and CPLR 8303-a, awarding attorneys' fees and costs to defendant; and Motion Sequence #5 by defendants Rye Country Day School ("RCDS") and DHI Construction

Services, Inc. ("DHI") for an Order: (a) granting RCDS and DHI leave to amend their answers to include an affirmative defense alleging lack of subject matter jurisdiction and naming the defendant, Siteworks Unlimited Ltd. ("Siteworks"), in its cross-claims for common law indemnification and contribution; (b) upon amending the answers, dismissing the complaint in its entirety as to RCDS and DHI; and (c) granting RCDS and DHI such other and further relief as may be deemed just, proper and equitable under the circumstances prevailing, and granting such other and further relief as this Court deems just and proper:

PAPERS	NUMBERED
NOTICE OF MOTION/AFFIRMATION/EXHIBIT A-C	1
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Plaintiff, Adam Levine, the owner of a residential dwelling located at 99 Tammany Hall Road, Patterson, New York, (the "Premises") brings this action against various defendants for damages in connection with the alleged illegal dumping of regulated waste, including construction debris, upon the Premises allegedly on or about and between May 5 through July 1, 2010.

MOTION SEQUENCE "4" (CPLR 3212)
by Siteworks Unlimited Ltd.

Among the motions before the Court is the motion for summary judgment by Siteworks Unlimited Ltd. (hereinafter "Siteworks").

Breach of Contract

In support of its motion, Siteworks submits the affidavit of Martin Parenti, the president and sole shareholder of Siteworks. Therein, Mr. Parenti avers that "neither I nor any other employee or agent of [d]efendant [] ever had any conversation by any means with [p]laintiff. Simply stated, [d]efendant and [p]laintiff were strangers in every sense of the word. Consequently, [d]efendant

never entered into any contract with [p]laintiff" (aff of Parenti at 3). Upon review of same and the papers submitted to the Court in this regard by Siteworks, the Court finds that Siteworks has established its prima facie entitlement to judgment as a matter of law.

In opposition, plaintiff has failed to raise a triable issue of fact. Plaintiff's contention that Siteworks was in a direct relationship with plaintiff through its agent, BBR Trucking, LLC, ("BBR") which allegedly breached a contract with plaintiff to provide clean fill lacks sufficient evidentiary support in the record. So, too, does plaintiff's contention that plaintiff was a third-party beneficiary of a contract between plaintiff and BBR for the provision of clean fill.

Statute of Limitations

At the outset, the Court finds that Sitework's imposition of a statute of limitations defense in its amended verified answer with cross-claims dated February 11, 2014 which was served in response to the amended verified complaint allowed by the Court in its Decision & Order of January 27, 2014 is properly before the Court. Although Siteworks neglected to raise a statute of limitations defense in its answer with cross-claims dated December 3, 2013 to plaintiff's amended verified complaint dated November 7, 2013, the Court finds that said complaint is a nullity having not been served with prior leave of Court or otherwise as of right. Plaintiff's assertion that defendant waived its statute of limitations defense lacks merit.

With respect to plaintiff's second, third, and fourth causes of action alleging negligence, and to the extent that plaintiff's fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth causes of action allege negligence, the Court finds that defendant has established its prima facie entitlement to judgment as a matter of law by demonstrating that the action as against it was commenced well after the expiration of the applicable three-year period of limitations (see CPLR §214). At best, the action against Siteworks is deemed to have been commenced upon plaintiff's November 18, 2013 filing of a motion for leave to amend his pleadings. This action accrued at the latest on June 15, 2010.

The Court rejects plaintiff's assertion that the CPLR §214-c discovery rule tolls the period of limitations. The nature of the injuries herein alleged do not fall within the scope or intendment of section 214-c (see Germantown Cent. School Dist. v Clark, Clark, Millis & Gilson, 100 NY2d 202 [2003]; Manhattanville Coll. v James John Romeo Consulting Engr., P.C., 5 AD3d 637 [2d Dept 2004]).

Plaintiff's reliance upon the relation-back doctrine is to no avail.

In order for a claim asserted against a new defendant to relate back to the date a claim was asserted against another defendant, the plaintiff must establish that (1) both claims arose out of the same conduct, transaction, or occurrence, (2) the new party is united in interest with the original defendant, and by reason of that relationship, can be charged with notice of the institution of the action and will not be prejudiced in maintaining his or her defense on the merits by virtue of the delayed, and otherwise stale, assertion of those claims against him or her, and (3) the new party knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been timely commenced against him or her as well. The "linchpin" of the relation-back doctrine is whether the new defendant had notice within the applicable limitations period.

(Alvarado v Beth Israel Med. Ctr., 60 AD3d 981, 982 [2d Dept 2009] [internal citations omitted]; see also Xavier v RY Mgt. Co., Inc., 45 AD3d 677 [2d Dept 2007]).

Plaintiff has not provided sufficient evidentiary proof in admissible form demonstrating (a) that defendant is united in interest with Rye Country Day School, and (b) that defendant knew or should have known that, but for a mistake by plaintiff as to defendant's identity, plaintiff would have timely commenced the action against defendant.

Fraud

The Court finds that defendant has established its prima facie entitlement to judgment as a matter of law on the fraud claim.

The essential elements of a fraud claim are misrepresentation of a material fact, falsity, scienter, reliance, and injury. To maintain an action based on fraudulent representations ... in tort for damages, it is sufficient to show that the defendant knowingly uttered a

falsehood intending to deprive the plaintiff of a benefit and that the plaintiff was thereby deceived and damaged.

(RBE N. Funding, Inc. v Stone Mtn. Holdings, LLC, 78 AD3d 807, 809 [2d Dept 2010] [internal quotation marks and citations omitted]).

Defendant has come forward with evidentiary proof in admissible form demonstrating that it never made any representations to plaintiff (see Affidavit in Support of Martin Parenti), let alone any misrepresentations. In opposition, plaintiff has failed to raise a triable issue of fact.

Miscellaneous

To any further extent, defendant's motion is denied.

MOTION SEQUENCE "5" (CPLR 3211[a][7]) by RCDS & DHI

Amend Pleadings

The motion by defendants Rye Country Day School ("RCDS") and DHI Construction Services, Inc. ("DHI") for an Order granting leave to amend their answers to include an affirmative defense alleging lack of subject matter jurisdiction is denied. Plaintiff correctly notes, in response, that any statute, ordinance, rule or regulation upon which plaintiff relies is not in the nature of a private right of action but, instead, is alleged in support of plaintiff's claims of negligence against these moving defendants (see Elliott v City of New York, 95 NY2d 730, 734 [2001]).

That aspect of movants' motion to amend seeking to add a cross-claim against Siteworks for common law indemnification and contribution is denied, the action having since been dismissed as against Siteworks (see supra).

Breach of Contract

The only contract alleged in the complaint between plaintiff and any defendant is that between plaintiff and Hickory for the supply and deposit of soil or fill for purposes of installing a new backyard at the Premises. Movants correctly note that there is no allegation therein that RCDS and/or DHI had any contractual relationship with plaintiff.

Since the complaint neither alleges nor can fairly be said to allege a contractual relationship between plaintiff and movants,

the Court hereby dismisses the action as against RCDS and DHI for failure to state a cause of action as to those aspects of the first, fifth, sixth, seventh, eighth, ninth, tenth and eleventh causes of action to the extent that plaintiff seeks relief predicated upon a contractual obligation or duty.

Common Law Negligence

Upon liberally construing the pleadings, as the Court must, and affording plaintiff the benefit of every favorable inference (511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 [2002]), the Court denies defendants' motion to dismiss the common law negligence claims for want of duty owed by defendants to plaintiff and as otherwise argued by defendants.

Fraud

Defendants' motion to dismiss the fraud cause of action for failure to state a cause of action is granted for the reasons therein advanced. The Court also notes that this aspect of defendants' motion is unaddressed by plaintiff.

To any further extent, the motion is denied.

Based upon the forgoing, it is hereby

ORDERED, that the complaint be and is hereby dismissed as against Siteworks in all respects; and, it is further

ORDERED, that, the complaint is hereby dismissed as against defendants RCDS and DHI to the extent herein indicated and, as to all surviving aspects of the complaint, all remaining appearing parties are directed to appear before the Court for a Status Conference at 9:30 A.M. on October 27, 2014.

The foregoing constitutes the Opinion, Decision, and Order of the Court.

Dated: Carmel, New York
September 18 , 2014

S/

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