

Fischer v Pollack

2014 NY Slip Op 33688(U)

January 10, 2014

Supreme Court, Westchester County

Docket Number: 52037/2013

Judge: William J. Giacomo

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time 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 WESTCHESTER
PRESENT: HON. WILLIAM J. GIACOMO, J.S.C.

-----x
ELISE FISCHER, DDS.,

Plaintiff,

-against-

Index No. 52037/2013
DECISION & ORDER

GLORIA E. POLLACK, SOUTHEAST CONSTRUCTION GROUP, INC., NEW YORK LADDER & SCAFFOLD CORPORATION, GRIGG & DAVIS ENGINEERS, PC, STEVEN SECON ARCHITECT, PC and THE TRAVELERS INDEMNITY COMPANY OF CONNECTICUT,

Defendants.

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The following papers numbered 1-14 were read on defendant Gloria Pollack's motion to amend her answer, plaintiff's motion to amend her complaint and consolidate, New York Ladder & Scaffold Corporation's ("NY Ladder") motion to dismiss and The Travelers Indemnity Company of Connecticut's ("Travelers") motion to sever.

PAPERS NUMBERED

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Factual and Procedural Background

Defendant Gloria Pollack ("Pollack") owned a commercial office building located at 266 Purchase Street, Rye, New York. Plaintiff, Elise Fischer, DDS, was a tenant of the building pursuant to the terms of a 10-year lease dated February 2003 and occupied Suite 201 in the subject building. Deborah Troy, DDS, PC, ("Troy") occupied the first floor of the subject premises.

In 2012, Troy, with the permission of Pollack, began interior, non-structural, renovation work on the first floor of the building. At some point during the renovation project interior partition walls and column enclosures which provided structural support for the building were removed causing a deflection in a support column. Ultimately on June 4, 2012, the building partially collapsed and was immediately condemned by the City of Rye Building Department. Consequently, all the tenants in the building were forced to evacuate for more than 6 months.

By letter dated July 25, 2012, defendant Travelers denied plaintiff's claim for coverage. According to Travelers, the damage was the result of a pre-existing condition at the base of the column supporting a steel girder caused by repeated seepage of ground water under the concrete slab of the building.

On February 15, 2013, plaintiff commenced this action (Action #1) against Pollack, Southeast Construction Group, Inc. ("Southeast") who allegedly performed the renovation work, NY Ladder who she alleges was involved in the renovation work, Grigg & Davis Engineers, PC who allegedly examined the column that ultimately collapsed, Steven Secon, Architect, PC the architect on the project and The Travelers Indemnity Company of Connecticut which issued plaintiff's general liability coverage policy.

On February 28, 2013, Pollack commenced another action (Action #2) against Andrew Sackett, Andrew Sackett Contracting, Gary Ederer, Southeast, Bond E. Davis III, Grigg & Davis Engineers, PC, Deborah Troy, DDS PC, and Travelers Casualty Insurance Company of America, her insurer, seeking damages suffered due to the building collapse.

The Motions

Pollack now moves for leave to amend her answer to include affirmative defenses and cross claims. There is no opposition to this motion.

Plaintiff moves to amend her complaint to add the following defendants Southeast Construction Corp., Southeast Construction Consulting, Inc., Southeast Construction Development Corp., Southeast Construction Management, Inc., and Thornwood Carpentry, Inc. d/b/a Southeast Carpentry and to join Action #1 and Action #2 for discovery and trial.

Southeast opposes plaintiff's application to amend her complaint arguing that Troy's contract for renovation work was with Southeast Construction Group and no other parties. Southeast does not oppose consolidation of Action #1 and Action #2 for pre-trial purposes.

Pollack and Travelers do not oppose Fischer's application for joint discovery, however, Travelers opposes a joint trial if it includes insurance coverage issues.

NY Ladder moves to dismiss the action and all cross claims asserted against it on the ground that it was not hired to perform any work on the premises until after the June 4, 2012 building collapse. Plaintiff and Southeast oppose the motion on the ground that it is premature.

Travelers moves to sever all insurance coverage claims from this action. Pollack opposes the severance of the claims against Travelers, assuming Action #1 and Action #2 are joined for discovery and trial.

Discussion

Pollack's Motion to Amend her Answer

Defendant Pollack's unopposed motion to amend her answer is GRANTED.

Plaintiff's Motion to Amend Her Complaint and Consolidate Action # 1 and Action #2

Under CPLR 3025(b), leave to amend a pleading shall be freely granted absent prejudice to the adverse party. Nonetheless " ' it is equally true that the court should examine the sufficiency of the merits of the proposed amendment,' and, where the proposed amendment is 'palpably insufficient as a matter of law or is totally devoid of merit, leave to amend should be denied'. " (*Hill v. 2016 Realty Associates*, 42 A.D.3d 432, 433, 839 N.Y.S.2d 801, 802 [2nd Dept 2007], quoting *Morton v. Brookhaven Mem. Hosp.*, 32 A.D.3d 381, 820 N.Y.S.2d 294 [2nd Dept 2006] and citing *Lee v. Health Force*, 268 A.D.2d 564, 702 N.Y.S.2d 108 [2nd Dept 2000]).

Here, there is no evidence linking any of the proposed defendants to the renovation work of the building in question. Notably, the renovation contract was between Troy and Southeast Construction Group and no other parties.

Accordingly, plaintiff's motion to amend is DENIED.

With respect to plaintiff's motion to join Action #1 and Action #2 for discovery and trial, in view of the existence of common issues of law and fact in the two actions the motion to join Action #1 and Action #2 for discovery on all issues is GRANTED, however,

plaintiff's motion for a joint trial is GRANTED only on the non-insurance coverages issues. (See CPLR 602[a]).¹

NY Ladder's Motion to Dismiss

NY Ladder moves to dismiss the complaint on the ground that plaintiff's complaint seeks damages suffered as a result of the June 4, 2012, partial collapse of the building. NY Ladder notes that it was not hired by Southeast to shore up the collapsed column until June 6, 2012. Therefore, it cannot be liable for any alleged negligence which caused the partial collapse of the building.

In opposition, Southeast argues that NY Ladder's motion is premature. Further, Southeast contends that there maybe evidence that NY Ladder negligently shored up the column after the June 4, 2012 collapse.

Plaintiff also opposes NY Ladder's motion on the grounds that it is premature.

Under CPLR 3211(a)(1), a complaint may be dismissed where a "defense is founded upon documentary evidence". However, to prevail under this provision, "the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Teitler v. Max J. Pollack & Sons*, 288 A.D.2d 302 [2d Dept. 2001]).

By contrast, on a motion for dismissal pursuant to CPLR 3211(a)(7) for failure to state a cause of action, "[the Court's] well-settled task is to determine whether, 'accepting as true the factual averments of the complaint, plaintiff can succeed upon any reasonable

¹The Court notes that the determination of who opens and closes first shall be determined by the trial court (see *Gordon v. Ermann*, 87 A.D.2d 760, 449 N.Y.S.2d 40 [1st Dept 1982]).

view of the facts stated" (*Campaign for Fiscal Equity, Inc. v. State*, 86 N.Y.2d 307, 318 [1995] [internal citations and quotation marks omitted]). In performing that task, the Court "[is] required to accord plaintiff[] the benefit of all favorable inferences which may be drawn from [its] pleading, without expressing [any] opinion as to whether [it] can ultimately establish the truth of [its] allegations before the trier of fact" (*ibid.*).

Here, NY Ladder has produced its contract with Southeast which indicates it was not hired until two days after the building collapse. Further, as NY Ladder notes, in her complaint plaintiff only seeks damages as a result of the negligence which caused the June 4, 2012 building collapse. Plaintiff does not allege in her complaint any negligence occurred after the June 4, 2012 collapse.

Accordingly, NY Ladder's motion to dismiss the complaint and all cross claims is GRANTED.

Travelers's Motion to Sever

Travelers's motion to sever is GRANTED only to the extent of directing that the coverage issues be severed for trial purposes (see *Kelly v. Yannotti*, 4 N.Y.2d 603, 176 N.Y.S.2d 637, 15 N.E.2d 69 [1958]; *Christensen v. Weeks*, 15 A.D.3d 330, 790 N.Y.S.2d 153 [2nd Dept 2005]; *Golfo v. Loevner*, 7 A.D.3d 568, 777 N.Y.S.2d 159 [2nd Dept 2004]). Severance of the trials is proper to avoid the obvious resultant prejudice during the jury trial of the plaintiff's personal injury action. **No** claims are severed for the pre-trial/discovery purposes.

Accordingly, Travelers's motion to sever all coverage claims asserted in Action # 1 and Action #2 is GRANTED only for trial purposes. Action #1 and Action #2 shall be joined for pre-trial purposes.

Summary

Defendant Pollack's motion to amend her answer is GRANTED and deemed amended.


Plaintiff's motion to amend her complaint is DENIED and her motion to join Action #1 and Action #2 is GRANTED for pre-trial purposes for all claims and GRANTED for trial purposes for all non-insurance coverage claims asserted in both actions.

NY Ladder's motion to dismiss the complaint is GRANTED.

Travelers's motion to sever all insurance coverage claims asserted in Action # 1 and Action #2 is GRANTED only for trial purposes.

The parties are directed to appear in the Preliminary Conference Part on February 3, 2014 at 9:30 a.m. room 800 for further proceedings.

Dated: White Plains, New York
January 10, 2014



HON. WILLIAM J. GIACOMO
SUPREME COURT JUSTICE