Calleja v Al 229 W. 43rd St. Prop. Owner, LLC
2016 NY Slip Op 32326(U)
October 21, 2016
Supreme Court, Bronx County
Docket Number: 301498/2012
Judge: Alison Y. Tuitt
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

 FILED Nov 02 2016 Bronx County Clerk

NEW YORK SUPREME COURT----------COUNTY OF BRONX

PART IA - 5

RAUL CALLEJA,

Plaintiff,

-against-

AI 229 WEST 43RD STREET PROPERTY OWNER, LLC and TSX OPERATING CO., LLC C/O RUNNING SUBWAY, LLC,

Defendants.

INDEX NUMBER: **301498/2012**

Present:
HON. **ALISON Y. TUITT**
Justice

AI 229 WEST 43RD STREET PROPERTY OWNER, LLC,

Third-Party Plaintiff,

-against-

NURMINEN CONSTRUCTION CORPORATION, SULLIVAN STEEL SERVICES, INC., NEWCOM STEEL AND IRONWORKS, INC., EASTON STEEL, INC. and DAFFY'S INC.,

Third-Party Defendants.

The following papers numbered 1-3,

Read on this Third-Party Defendant Daffy's Inc.'s Motion to Dismiss and Third-Party Plaintiff's Cross-Motion for Substituted Service

On Calendar of **3/30/15**

Notices of Motion/Cross-Motion-Exhibits and Affirmations 1, 2

Affirmation in Opposition 3

Upon the foregoing papers, third-party defendant Daffy's Inc.'s (hereinafter "Daffy's") motion to dismiss the third-party action and third-party plaintiff AI 229 West 43rd Street Property Owner, LLC's (hereinafter " AI 229") cross-motion for leave to serve the third-party complaint via substituted service are consolidated for purposes of this decision. For the reasons set forth herein, Daffy's motion and AI 229's cross-motion are denied.

This action arises out of an incident which occurred on October 15, 2011 when plaintiff Raul Calleja was allegedly injured when he fell off a ladder in the course of his employment at a construction site located at 226 West 44th Street, New York, New York. Plaintiff brought the instant action alleging Labor Law and negligence claims. In the third-party action, AI 229 seeks contribution and indemnification from Daffy's. The third-party complaint alleges that if the plaintiff was caused to sustain damages "the third-party defendant Daffy's is or will be responsible therefore by virtue of the terms, covenants, warranties and clauses contained by virtue of the contract/lease agreement between defendant/third-party plaintiff and third-party defendant." Daffy's argues that the third-party complaint must be dismissed on the grounds that any and all claims, including those for contribution and contractual indemnification by AI 229, were discharged in bankruptcy as of December 12, 2012.

Prior to the commencement of the third-party action, Daffy's filed for bankruptcy. The Bankruptcy Court, Southern District of New York's "Stipulated Order Rejecting and Terminating the Debtor's Non-Residential Real Property Lease for the Property Located at 229 West 43rd Street, New York, New York and Resolving All Claims Related Thereto" dated December 12, 2012 and So-Ordered on December 19, 2012, declared that the lease between AI 229 and Daffy's was rejected and terminated, and provided that "the Landlord forever waives and releases any and all claims and causes of action, related to, or arising under, the Lease against the Debtor, its affiliated, and their respective officers and directors...". On November 26, 2013, a final decree was entered in the Bankruptcy Court.

Daffy's moves to dismiss the third-party action arguing that the Stipulated Order waived and released its debts and all claims against Daffy's pursuant to its lease with AI 229. Daffy's further argues that the third-party action must be dismissed on the grounds that the Court does not have jurisdiction over the matter. Daffy's contends that AI 229 has not and cannot serve Daffy's as its debts were discharged in bankruptcy. Daffy's claims that the matter came to the attention of Harleysville Insurance, the carrier for the former Daffy's,

when Hanover Insurance, the carrier for AI 229, forwarded a copy of the pleadings to Harleysville.

AI 229 opposes Daffy's motion and cross-moves to serve Daffy's insurance carrier by substituted service should the Court find that service was not previously effectuated. AI 229 claims that it was not until the deposition of the plaintiff Raul Calleja, on October 15, 2013, that it learned that plaintiff could not pinpoint the exact location of the incident. When plaintiff's counsel refused to consent to a site inspection, AI 229 brought a motion which was granted directing a site inspection. The site inspection was held on April 10, 2014, over four months after the final decree was entered by the Bankruptcy Court. AI 229 argues that it was only as a result of this site visit that it learned that plaintiff's incident did not take place at the premises of defendant TSX Operating Co., but instead allegedly occurred at Daffy's premises.

AI 229 argues that Daffy's motion must be denied because the insurance proceeds from Daffy's carrier were not part of the bankruptcy estate. It is a given that a debtor's insurance policy (the policy itself) is in fact property of its bankruptcy estate. Ochs v. Lipson, 238 B.R.9, 16 (Bankr. EDNY 1999). The proceeds of liability insurance policies, however, are not property of the estate. When a bankruptcy debtor has no right to the proceeds of an insurance policy from a claim, and therefore the proceeds cannot benefit the debtor's estate or its creditor, the insurance policy proceeds are not property of the bankruptcy estate. Id.

> The overriding question when determining whether insurance proceeds are property of the estate is whether the debtor would have a right to receive and keep those proceeds when the insurer paid on a claim. When payment by the insurer cannot inure to the debtor's pecuniary benefit, then that payment should neither enhance nor decrease the bankruptcy estate. In other words, when the debtor has no legally cognizable claim to the insurance proceeds, those proceeds are not property of the estate... The proceeds... do not become... assets on a balance sheet.

Houston v. Edgeworth, 993 F.2d 51, 56 (5th Cir. 1993).

New York law holds that a bankruptcy discharge does not bar a pending lawsuit where the defendant has liability insurance coverage for the events forming the basis of the law suit. Roman v. Hudson Telegraph Associates, 11 AD3d 346 (1st Dept. 2004); Lumbermens Mutual Casualty Company v. Morse Shoe Company, 630 N.Y.S.2d 1003 (1st Dept. 1995). An insurer is obligated to provide coverage to and indemnify a defendant even when the same files for bankruptcy, provided the loss or the event sued for occurs during the life of the policy. Id. Additionally, it is well-settled that State courts usually retain the power to determine the effect of any discharges in bankruptcy. Id.

Daffy's insurance policy is a typical liability policy in which Daffy's insurance company pays the

claim directly to the injured party under a contractual obligation. The proceeds would not get paid to the debtor under any circumstance and would go directly to the plaintiff Raul Calleja. Therefore, since the claim against the insurance proceeds is not a claim against the bankruptcy estate itself, it was not waived as a result of the closure of Daffy's bankruptcy estate.

The fact that the claim herein is a "future" claim does not serve as a bar as future claims were not released in bankruptcy. By the time the bankruptcy case had been closed several months, it was then discovered that plaintiff Raul Calleja's incident allegedly occurred at Daffy's premises. AI 229 was only put on notice that it might have a claim against Daffy's after the site visit which took place approximately a year and a half after the Stipulation was entered in the Bankruptcy Court. Therefore, the claim was not waived in the Stipulation. Moreover, AI 229 only released claims "related to, or arising under, the Lease against [Daffy's]". The Stipulation did not waive claims that were unrelated to the Lease.

Daffy's also argues that the matter must be dismissed for lack of jurisdiction. It claims that AI 229 has not and cannot serve Daffy's as its debts were discharged in bankruptcy in August 2012. It further claims that this matter came to the attention of Harleysville Insurance when Hanover Insurance, the carrier for AI 229, forwarded a copy of the pleadings to Harleysville which Daffy's contends does not constitute service. However, pursuant to Daffy's filing with the New York State Department of State, Division of Corporations, Daffy's was an active foreign business corporation in the State of New York when the CT Corporation System, Daffy's its chosen authorized agent of DOS Process, was personally served with the third-party complaint on June 19, 2014, pursuant to the affidavit of service.

The process server's sworn affidavits of service constitutes prima facie evidence of proper service and creates a presumption that service was effected. See, Caba v. Rai, 882 N.Y.S.2d 56 (1st Dept. 2009); In re de Sanchez, 870 N.Y.S2d 24 (1st Dept. 2008). A blanket conclusory assertion by defendant that it was never served is insufficient to rebut this presumption. See, NYCTL 1998-1 Trust v. Rabinowitz, 777 N.Y.S.2d 483 (1st Dept. 2004). That a party is unaware of its obligation to keep the Secretary of State updated as to its correct and current information does not serve as an excuse to later claim improper service. See, Cedeno v. Wimbledon, 615 N.Y.S.2d 40 (1st Dept. 1994); CIT Group/Commercial Services, Inc. v. 160-09 Jamaica Ave. Ltd. Partnership, 808 N.Y.S.2d 187 (1st Dept. 2006); On Assignment v. Medasorb Technologies,855 N.Y.S.2d 98 (1st Dept. 2008); J & S Const. of NY, Inc. v. 321 Bowery LLC, 835 N.Y.S.2d 65 (1st Dept. 2007).

In any event, even if service had not been proper, leave for third-party plaintiff to serve Daffy's, a purported defunct corporation, by serving its insurer would be warranted. Courts in New York have granted a motion pursuant to CPLR § 311(b) to permit alternative service on the insurer of a dissolved corporation. See, Cives Steel Co. v. Unit Builders, Inc., 692 N.Y.S.2d 65 (1st Dept. 1999)(Court properly exercised its discretion in granting plaintiff leave to serve defendant, a defunct corporation, by serving its insurer given that service upon Secretary of State was not feasible in light of defendant's voluntary dissolution some three years prior to commencement of action, that plaintiff was unable to locate corporate officer who could be served, and that service upon insurer was only apparent method reasonably calculated to apprise defendant of pendency of action); In re New York City Asbestos Litigation, 984 N.Y.S.2d 335 (1st Dept. 2014)(Substituted service on the insurer is proper and does not violate due process. Appellant's contractual coverage obligations should not be nullified on the mere happenstance that the corporation was dissolved at the time these injuries manifested); Rego v. Thom Rock Realty Co., 608 N.Y.S.2d 824 (1st Dept. 1994)(Once "impracticability" is established, alternate service pursuant to CPLR 308(5) or CPLR 311(b) will be permitted by service upon the defendant's liability insurance carrier).

Accordingly, Daffy's motion to dismiss the third-party complaint is denied. AI 229's cross-motion to serve via substituted service is denied as moot as this Court finds that service of process was previously effectuated by service through the Secretary of State.

This constitutes the decision and Order of this Court.

Dated: 10/21/16

Hon. Alison Y. Tuitt