

Berger v Prospect Park Residence LLC

2016 NY Slip Op 32977(U)

March 25, 2016

Supreme Court, Kings County

Docket Number: 6639/14

Judge: Wayne P. Saitta

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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 25th day of March, 2016.

P R E S E N T:

HON. WAYNE P. SAITTA,
Justice.

-----X
EMILY BERGER, et al.,

Plaintiffs,

- against -

PROSPECT PARK RESIDENCE LLC, et al.,

Defendants.
-----X

DECISION AND ORDER

Index No. 6639/14

Mot. Seq. No. 15

The following papers numbered 1 to 5 read herein:

Papers Numbered

Notice of Motion, Affirmation, and Memorandum of Law Annexed _____	<u>1-3</u> _____
Opposing Affirmation _____	<u>4</u> _____
Reply Affirmation _____	<u>5</u> _____

Defendants New York State Department of Health, Nirav R. Shah, M.D., M.P.H., as its former commissioner, and Howard Zucker, M.D., as its current commissioner (collectively, DOH), move for an order, pursuant to CPLR 3211 (a) (2) and (7), dismissing the cross claim of co-defendants 1 Prospect Park Residence, LLC, 1 Prospect Park ALF, LLC, Haysha Deitsch, David Pomerantz, and Sam Zalmanov (collectively, PPR).

Background

This is a hybrid civil action/article 78 proceeding brought by the current and former residents of an assisted-living facility against DOH which approved the proposed closure of the facility and PPR which owns and operates the facility. As to PPR, the plaintiffs asserted three causes of action sounding in tort: (1) that PPR breached its

fiduciary duty to the plaintiffs (the fifteenth cause of action); (2) that PPR negligently and/or recklessly inflicted emotional distress upon the plaintiffs by announcing and implementing the facility-closure plan in a manner calculated to cause severe emotional distress to the plaintiffs (the sixteenth cause of action); and (3) that PPR engaged in deceptive business practices, in violation of General Business Law § 349, by deliberately giving the plaintiffs the false impression that they would be able to "age in place" at the facility (the seventeenth cause of action). PPR moved, pre-answer, to dismiss the complaint insofar as asserted against it. By decision and order, dated July 1, 2015 (the Decision), this Court granted PPR's motion to the extent it dismissed that portion of the plaintiffs' sixteenth cause of action which alleged negligent infliction of emotional distress, and otherwise denied its motion. The Decision (at page 25) extended PPR's time to serve its answer until ten days after service thereof with notice of entry.

PPR served its answer dated August 28 2015 which included a cross claim against DOH which demanded judgment against DOH for its alleged culpability for whatever damages the Plaintiffs may have suffered pursuant to Articles 14 and 16 of the CPLR. DOH made the instant motion to dismiss that cross claim.

After this motion was made PPR served an amended answer, dated October 27, 2015. Considering that the Decision denying PPR's motion to dismiss the complaint has not been served with notice of entry to date, the amended answer is deemed timely pursuant to CPLR 3025 (a).

PPR's amended answer (in ¶ 164) asserts a single cross claim against DOH. The cross claim alleges that:

"The damages alleged to have been sustained by plaintiffs were caused entirely or in part through the wrongful conduct of . . . DOH . . . , and it is demanded [that] there be a dismissal or reduction in any recovery that may be had by the plaintiffs in proportion to which the culpable conduct attributable to . . . DOH . . . bears to the culpable conduct which caused the alleged damages."

Discussion

Although PPR still denominates ¶ 164 as a cross claim against DOH, in fact they have eliminated any claim for damages against DOH. The amended answer only seeks to have any recovery by the Plaintiffs reduced in proportion to DOH's culpability. It is undisputed that this Court does not have subject matter jurisdiction to hear a claim for contribution against a State department such as DOH.

The question remaining is whether it is proper for DOH to seek to reduce any award to Plaintiffs based on any culpability on the part of DOH, where there is no subject jurisdiction to hear a claim against DOH and any determination of culpable conduct by DOH would not be binding on DOH.

CPLR article 16, enacted in 1986, modifies New York's joint and several liability rule as it applies to the apportionment of non-economic loss, such as pain and suffering, and mental anguish. CPLR 1601 (1) provides that in any action involving two or more tortfeasors or in any claim against the State, any defendant found to be less than 50% liable need only pay his or her equitable share of damages for non-economic loss. A defendant will not, however, be able to reduce his or her share by any amount for which a third party is responsible if "jurisdiction" cannot be obtained over such party (*see* CPLR 1601 [1]). The word "jurisdiction," as used in CPLR 1601 (1), has been construed to refer

to personal, rather than subject-matter, jurisdiction (*see Artibee v Home Place Corp.*, 132 AD3d 96, 99 [3d Dept 2015]; *Duffy v Chautauqua*, 225 AD2d 261, 267 [4th Dept 1996]).

The Appellate Division, Third Department, has endorsed the view that when a private party and the State are both allegedly negligent in causing a personal injury resulting in non-economic loss, the private party, sued alone in Supreme Court, is entitled to the reduced-judgment benefits of CPLR 1601 (1), *i.e.*, that the jury should be instructed to apportion the percentage of fault, if any, between the private party and the State (*see Artibee*, 132 AD3d at 99).¹

CPLR 1602 lists several exceptions to this modification of joint and several liability, including instances in which the defendant's acts, on which liability is based, were performed with "intent" (CPLR 1602 [5]) or instances in which the defendant acted in "reckless disregard for the safety of others" (CPLR 1602 [7]). These exceptions are based on a policy determination that intentional or reckless conduct should subject the defendant to full joint and several liability to the injured plaintiff.

Here, one of the components of the plaintiffs' claim for damages against the PPR is for "the serious emotional distress [d]efendants' unconscionable conduct has visited on [p]laintiffs" (Complaint, ¶ 4), which is a type of non-economic loss. Thus, it appears, as

¹ For its holding, *Artibee* relied on, among other decisions, *Rezucha v Garlock Mech. Packing Co., Inc.*, 159 Misc 2d 855, 862 (Sup Ct, Broome County 1993). *Rezucha* ruled that "[t]o permit as comprehensive a determination of relative fault as possible, proof of the State's culpable conduct will be permitted and its proportional share will be included in the consideration of whether CPLR 1601 reduces any defendant's liability for non-economic loss to that defendant's actual share." *See also Thomas v Burack*, 2009 NY Slip Op 32647(U), *9 (Sup Ct, Kings County 2009) (Dabiri, J.) (following *Rezucha*).

a general matter, that PPR is entitled to the reduced-judgment benefits of CPLR 1601 (1) (see *Cabrera v A-To-Z Signs*, ___ Misc 3d ___, 2016 WL 1061338, 2016 NY Slip Op 26079, *2 [Sup Ct, Westchester County 2016] ["In the absence of a decision from the Second Department, . . . this Court will follow the reasoning of the Third Department (in *Artibee*) and allow the defendant to introduce evidence to the jury of the State's liability, if any, and in addition will charge the jury with regard to apportionment of liability(,) and the State will appear on the verdict sheet."]).

Since, the Court has no subject matter jurisdiction to hear a claim against DOH, any apportionment of liability would not be binding against DOH.

After examining the specific tort claims against PPR, the Court holds that the plaintiffs' fifteenth cause of action for breach of fiduciary duty falls within the scope of CPLR 1601 (1) and is not subject to either of the two above cited exceptions of CPLR 1602 (5) or (7). The same determination applies to the plaintiffs' seventeen cause of action for deceptive business practices under General Business Law § 349. Regarding the claim for deceptive business practices, the Decision (at page 23) noted that such claim requires proof of "three elements: first, that the challenged act or practice was consumer-oriented; second, that it was misleading in a material way; and third, that the plaintiff suffered injury as a result of the deceptive act" (*Beneficial Homeowner Serv. Corp. v Williams*, 113 AD3d 713, 714 [2d Dept 2014] [internal quotation marks omitted]). Significantly, the statute does not require that the plaintiff prove that the defendant's practices and acts were intentional (see *Small v Lorillard Tobacco Co., Inc.*, 94 NY2d 43,

55 [1999]) or even reckless (see *Griffin-Amiel v Frank Terris Orchestras*, 178 Misc 2d 71, 78 [Yonkers City Ct 1998]).

On the other hand, the Court holds that the surviving portion of the plaintiffs' sixteenth cause of action against PPR which is for recklessly inflicted emotional distress fits within the "reckless disregard" exception of CPLR 1602 (7) so PPR is not entitled to apportionment as to that cause of action.

WHEREFORE, DOH's motion to dismiss PPR's cross claim against it is denied. Pursuant to CPLR 1601 (1), the jury may consider DOH's proportional share of fault, if any, in assessing PPR's liability to the plaintiffs for non-economic loss under the fifteenth and seventeenth causes of action for breach of fiduciary duty and deceptive business practices, respectively, and it is hereby,

ORDERED PPR is directed to serve a copy of this decision and order with notice of entry on the other parties and to file an affidavit of said service on the Kings County Clerk. As a housekeeping matter, PPR is further directed to file with the Kings County Clerk a copy of its amended answer which is annexed as Exhibit B to its opposition papers.

This constitutes the decision and order of the Court.

E N T E R,



J. S. C.

**HON. WAYNE P. SAITTA
J.S.C.**

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