

Mastroianni v Battery Park City Auth.

2019 NY Slip Op 30031(U)

January 4, 2019

Supreme Court, New York County

Docket Number: 161489/2013

Judge: Robert D. Kalish

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

-----X	INDEX NO.	161489/2013
KEVIN MASTROIANNI and MARY MASTROIANNI,	MOTION DATE	11/7/2018
Plaintiffs,	MOTION SEQ. NO.	003, 004

- v -

BATTERY PARK CITY AUTHORITY D/B/A THE HUGH L. CAREY
BATTERY PARK CITY AUTHORITY, et al.,

Defendants.

DECISION AND ORDER

(and two third-party actions)

-----X
NYSCEF Doc Nos. 143-156, 159-198, and 200 were read on these motions to dismiss/sever and extend time.

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

The allegations underlying this construction site personal injury action were discussed in this court's order dated July 26, 2018 (Prior Order) (Dkt. 138)¹, familiarity with which is presumed.

In motion sequence number 003, second third-party defendant Donaldson Interiors, Inc. (Donaldson), joined by plaintiff Kevin Mastroianni, moves pursuant to CPLR 603 and 1010 to dismiss and/or sever the second third-party action from the underlying action and/or extend its time to answer. Defendants/third-party plaintiffs/second third-party plaintiffs Battery Party City Authority d/b/a The Hugh L Carey Battery Park City Authority (BPC), BFP Tower C Co. (BFP), Brookfield Financial Properties, L.P. (Brookfield) and Plaza Construction Corp. (Plaza) cross-move pursuant to CPLR 3215 for an order directing the entry of a default judgment in favor of second third-party plaintiffs and against Donaldson. In motion sequence number 004, defendants move pursuant to CPLR 1003 and 3025 (b) to extend their time to implead in order to commence a second third-party action against Donaldson.

BACKGROUND

As relevant here, plaintiff commenced the instant action on December 13, 2013. Plaintiff alleges that he was injured when he lost his balance and fell into an elevator shaft while performing work at a construction site located in the lobby of the World Financial Center, Winter Garden Atrium, 225 Liberty Street, New York, New York (the Premises) (Prior Order at 1). On the day of the alleged accident, BPC owned the Premises and Brookfield held the lease for it.

¹ References to "Dkt." followed by a number refer to documents filed in this action in the New York State Courts Electronic Filing (NYSCEF) system.

Plaza served as the construction manager of the renovation project (the Project) and retained plaintiff's employer, third-party defendant Atlantic Hoisting & Scaffolding, LLC, as a subcontractor in charge of providing temporary protection, scaffolding and sidewalk bridges (*id.* at 1-3). Pursuant to a subcontract dated June 26, 2012 (Aurelia Affirm. [Dkt. 160], Ex. R [Dkt. 180]) (the Subcontract), Plaza retained Donaldson to perform "Rough Carpentry / Partitions / Ceilings Work." Donaldson also agreed to indemnify defendants for claims arising out of its work and procure insurance for their benefit (Subcontract ¶ 9).

Issue was joined by service of a verified answer on February 7, 2014 (Beck Affirm. [Dkt. 144], Ex. B [Dkt. 146].) The preliminary conference order signed by the prior motion court justice on or about April 7, 2014 (uploaded April 11, 2014, but presumably mistakenly dated April 7, 2013) (Dkt. 10) directed that "impleader shall be completed on or before 60 days after [the] last EBT."

Plaintiff was deposed on June 16, 2015 (Aurelia Affirm. [Dkt. 183], Ex. R [Dkt. 194]), and indicated that he lost his balance when a plank that was part of the protective floor covering moved (Prior Order at 5). The last EBT was taken on July 6, 2017 (Beck Affirm. [Dkt. 144], Ex. G [Dkt. 151]) and the note of issue was filed on September 26, 2017 (Dkt. 60).

The parties then filed motions for summary judgment (Beck Affirm., Ex. I [Dkt 153].) While the motions were pending, on May 23, 2018, defendants filed a second third-party complaint (Dkt. 132) against Donaldson seeking common law and contractual indemnification, contribution, and damages for failure to procure insurance. Service was completed on June 5, 2018 (Dkt. 136). The pleading was filed without leave of court more than eight months after the court-ordered deadline for impleader and seven months after the filing of the note of issue.

As reflected in email correspondence dated July 16, 2018 (Aurelia Affirm [Dkt. 160], Ex. K [Dkt. 173]), Donaldson's counsel sought to confirm the parties' oral agreement to extend Donaldson's time to answer or move with respect to the complaint to July 31, 2018. Defendants' counsel replied that defendants would consent only to an extension to appear and answer and would provide Donaldson with copies of the pleadings, orders, discovery documents and motion papers upon receipt of the answer (*id.*). Nevertheless, Donaldson's counsel prepared, signed and sent a stipulation (the Stipulation), dated July 28, 2018 (Aurelia Affirm. [Dkt. 160], Ex. L [Dkt. 174]), which included language extending Donaldson's time not only to appear and answer, but also to "otherwise move", to August 17, 2018. On July 31, 2018, defendants' counsel emailed Donaldson's counsel an executed copy of the Stipulation with the words "otherwise move" crossed out (*id.*; Aurelia Affirm. [Dkt. 160], Ex. M [July 31, 2018 correspondence] [Dkt. 174]). When Donaldson's counsel emailed back asking, "I note that the terms of the agreement were changed after I signed?", defendants' counsel replied, "[s]ame exact terms as on first stip" (*id.*).² Donaldson's counsel protested that she was reviewing the case file to see if there were grounds for a motion and asked whether defendants would consent to a stipulation accommodating a potential motion. Defendants' counsel then indicated he lacked authority to so consent (*id.*).

² As the July 28, 2018 Stipulation is the only one submitted by the parties, it is not clear what counsel meant by his reference to the "first stip."

On August 15, 2018, Donaldson filed motion sequence number 003 to dismiss and/or sever the second third-party action and/or extend its time to answer. Defendants' cross-motion in motion sequence number 003 for an order directing the entry of a default judgment was filed on September 24, 2018. Defendants' motion sequence number 004 seeking leave to implead Donaldson was not filed until October 2, 2018, more than thirteen months after the court-ordered deadline for impleader and twelve months after the filing of the note of issue.

DISCUSSION

CPLR 1010 provides:

The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

Applying this rule in substantially similar circumstances, the court in *Great Northern Ins. Co. v Estelle Irr. Corp.*, 2013 WL 4763750 (Sup Ct, NY County 2013, Oing, J.), dismissed a belatedly filed third-party action. In *Great Northern*, the preliminary conference order required that all third-party practice be completed by a date certain—within 45 days of the last EBT. The defendant nevertheless sought to implead a third party more than six months after that deadline had passed and five months after the filing of the note of issue. In rejecting the third-party pleading as untimely, the court cited the defendant's failure to proffer any explanation for either its delay in filing or its failure to seek leave and noted that the defendant knew of the third-party's involvement by reason of a deposition taken over two years earlier (*id.* at *7-*8). That part of the motion court's ruling was affirmed by the Appellate Division, First Department (*see Great Northern Ins. Co. v Estelle Irr. Corp.*, 124 AD3d 431 [1st Dept 2015]).

Here, defendants' delay in commencing the third-party action was greater than that of the defendants in *Great Northern*, and defendants have offered no excuse whatsoever for failing to seek leave to commence it. Their belated application for leave rests solely on the affidavit of a safety manager for a non-party, Total Safety Consulting, LLC (Aurelia Affirm. [Dkt. 183], Ex. M [Dkt. 196]), who annexes some daily safety activity reports which he claims demonstrate that he witnessed Donaldson installing foam insulation board protection at the site of the accident on the relevant date. Although defendants characterize the affidavit as "newly obtained evidence," they are silent as to precisely when it was discovered or the circumstances under which it was obtained.

Given that defendant Plaza was in possession of its subcontract with Donaldson over five years ago—even before the underlying action was commenced—and that plaintiff's testimony alerted defendants to the alleged issue with the flooring in 2015, even if defendants could credibly argue that the "new" evidence could not have been obtained earlier—which they cannot—the court would conclude, as it does here, that defendants have not demonstrated good cause for impleader. Moreover, plaintiff would be unduly and significantly prejudiced if

discovery were to begin anew in the instant action. As such, Donaldson has demonstrated entitlement to dismissal of the second third-party complaint in its entirety.

The court rejects defendants' arguments that Donaldson is in a non-excusable default for purposes of moving in seq. 003 or for an order directing the entry of a default judgment against it. First, Donaldson's obligation to respond at all to the third-party complaint was questionable insofar as the pleading was filed: (a) five years into the action; (b) without leave of court; and (c) in violation of a court order. Donaldson's counsel's delay of a few weeks to review the files before seeking to extend its time was excusable under the circumstances.

Second, defendants' argument as to a default fails insofar as it is premised upon a violation of the Stipulation. "[A] stipulation which extends the time in which to answer a complaint also extends the time in which to move pursuant to CPLR 3211 (c), unless a contrary intent is clearly stated" (*Tatar v Port Auth. of New York & New Jersey*, 291 AD2d 554, 555 [2d Dept 2002], *citing Rich v Lefkovits*, 56 NY2d 276, 279-280 [1982].) Here, there is no dispute that defendants unilaterally altered the terms of the Stipulation after Donaldson's counsel had signed it, so the resulting agreement cannot be said to represent a meeting of the minds or "clearly state" the parties' intentions. Yet the parties did agree to an extension of the time to answer and appear to August 17, 2018. Donaldson sufficiently preserved its rights by expressly requesting an extension of its time to answer in its motion. Moreover, Donaldson filed the motion before its time to appear and answer under the Stipulation had elapsed. As such, the court extends Donaldson's time to answer, appear, or otherwise move in the action to August 17, 2018, in the interest of justice, and the instant motion sequence number 003 is therefore timely.

CONCLUSION

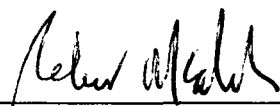
Accordingly, it is

ORDERED that motion seq. 003 is granted to the extent that the second third-party complaint is dismissed, and Donaldson shall, within 10 days of the date of the decision and order on the instant motions, serve a copy of this order with notice of entry on all parties and on the clerk, who is directed to enter judgment accordingly; and it is further

ORDERED that the cross-motion in seq. 003 is denied; and it is further

ORDERED that motion seq. 004 is denied.

The foregoing constitutes the decision and order of the court.

1/4/2019 DATE	 _____ ROBERT DAVID KALISH, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input type="checkbox"/>	<input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE