

Gerardi v Hudson Yards
2019 NY Slip Op 30515(U)
March 5, 2019
Supreme Court, New York County
Docket Number: 150629/2016
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

JOHN GERARDI,

Plaintiff,

- v -

INDEX NO. 150629/2016

MOTION DATE _____

MOTION SEQ. NO. 001, 002

HUDSON YARDS, THE RELATED COMPANIES,
INC., OXFORD PROPERTIES GROUP, TUDOR
PERINI BUILDING CORP., LINE DRAGON, LLC,
METROPOLITAN TRANSPORTATION
AUTHORITY,

Defendants.

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 35, 36, 37, 38, 39, 40, 41, 42, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 80, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 95, 96, 103

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81, 94, 97, 98, 99, 100, 101

were read on this motion to/for STRIKE PLEADINGS.

By notice of motion, defendants and third-party defendant New York Concrete Corp. move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the third-party complaint or, alternatively, treating the motion as one for summary judgment and dismissing the complaint. (Mot. seq. one). Third-party plaintiff Line Dragon, LLC opposes and cross moves for an order pursuant to CPLR 3215 entering a default judgment in its favor as against third-party defendant, and pursuant to CPLR 3025 granting it leave to amend the third-party complaint. Plaintiff cross-moves for an order pursuant to CPLR 603 and 1010 to dismiss the third-party complaint or to sever it from the main action. Defendants oppose the cross motions.

By notice of motion, Line Dragon moves pursuant to CPLR 3043(b), 3042(b), 3013, and 3126 for an order striking plaintiff's third further supplemental verified bill of particulars (third BP) and precluding plaintiff from offering evidence in support thereof, or, if the motion is denied, an order extending the deadline to file a note of issue for additional discovery related to the new theories raised by plaintiff therein. (Mot. seq. two). Plaintiff opposes and cross-moves for an order directing Line Dragon to accept his third BP *nunc pro tunc*. Line Dragon opposes the cross motion, and defendants partially oppose to the extent of requesting that the note of issue deadline not be extended.

The motions are consolidated for disposition.

I. DEFENDANTS' MOTION TO DISMISS

As addressed at oral argument on the motion (NYSCEF 103), defendants' motion to dismiss pursuant to CPLR 3211(a) is untimely and, thus, is denied.

II. LINE DRAGON'S CROSS MOTION FOR DEFAULT AND TO AMEND

While third-party defendant's pre-answer motion to dismiss was filed two days after the expiration of its time to appear or file an answer, plaintiff's motion for a default judgment against it is denied, given the nominal delay and the preference for resolving cases on their merits rather than on default. (*Peg Bandwidth, LLC v Optical Communications*, 150 AD3d 625 [1st Dept 2017] [while plaintiff entitled to default judgment, court properly exercised discretion in denying motion as delay in answering relatively short, no prejudice resulted, and given "strong preference that matters be decided on the merits"]; *Rivera v Banks*, 135 AD3d 621 [1st Dept 2016] [plaintiff's motion for default judgment properly denied given potentially meritorious defense and short delay; defendants directed to file answer]).

As defendants' motion to dismiss is denied, there is no need to consider Line Dragon's

alternative request to amend the third-party complaint.

III. PLAINTIFF'S CROSS MOTION TO SEVER

Plaintiff contends that the third-party complaint must be severed as Line Dragon unduly delayed in commencing the third-party action, as it is a defendant in the main action, participated in the discovery process, including numerous depositions of all of the parties, and knew of the existence of the third-party defendant from the inception of the case. According to plaintiff, he is prejudiced by the delay as there may be discovery needed by the third-party defendant that will prevent him from prosecuting his claims in a timely manner. (NYSCEF 83).

Line Dragon denies having delayed in commencing the third-party action, as the parties' preliminary conference order requires that impleader be completed 30 days after depositions have been finished, which has not yet occurred. It also observes that plaintiff has added a new claim in his third BP, and thus may not argue that he is prejudiced by the delay as his new claim will necessitate additional discovery. Line Dragon denies that there remains much discovery in the third-party action, as the third-party defendant has been deposed as a non-party, and any outstanding discovery will be completed in a few months. (NYSCEF 87).

Pursuant to CPLR 1010, a third-party action may be severed or dismissed in the exercise of the court's discretion, depending on whether the third-party action will unduly delay the determination of the main action or prejudice the substantial rights of any party.

As the parties' compliance conference order of January 16, 2019, reflects that there remain several open items of discovery among the parties, including depositions, and that a conference is scheduled for March 20, 2019, plaintiff does not establish that the third-party action has delayed or will delay the completion of discovery in the main action. And, as the preliminary conference order allows for even greater delay than that taken by Line Dragon in

filing a third-party complaint, there is no merit to plaintiff's claim that it delayed unreasonably. Even if there had been an unreasonable delay, given the ongoing discovery, plaintiff fails to show any resulting prejudice, and it is undisputed that there are questions of law and fact in common with the main action. (*See Marbilla, LLC v 143/145 Lexington LLC*, 116 AD3d 544 [1st Dept 2014] [motion to dismiss or sever third-party action properly denied as it would not unduly delay main action or prejudice any party's rights, and it presented questions of law and fact in common with main action]; *Wilson v City of New York*, 1 AD3d 157 [1st Dept 2003] [court properly exercised discretion in denying severance as actions involved common issues, there was sufficient opportunity to complete discovery, and no prejudice shown by "eleventh-hour" impleader]).

IV. LINE DRAGON'S MOTION TO STRIKE AND CROSS MOTION TO COMPEL

A. Contentions

Line Dragon contends that the third BP must be stricken as: (1) it contains new theories of strict products liability and breach of express and implied warranties not readily discerned from plaintiff's complaint or original BP; (2) it contains new theories and is thus not a supplemental BP but rather an amended one, and leave to file an amended BP was not given; and (3) discovery is almost complete, Line Dragon will be prejudiced if the third BP is not stricken. (NYSCEF 79).

Plaintiff claims that the theories of liability in the third BP against Line Dragon merely amplify the original claims of negligence and defective equipment, and that it is not prejudiced as Line Dragon possesses information about its own equipment. Moreover, no new discovery would be needed if the Third BP is permitted. (NYSCEF 97).

In reply, Line Dragon denies that the claim that the equipment is defective is sufficient to encompass a claim of a design or manufacturing defect or breach of express or implied warranties, or that improper directions or inadequate warnings accompanied the equipment. Line Dragon also argues that further discovery is needed, including its retention and designation of an expert to address plaintiff's new claims. (NYSCEF 99).

B. Analysis

Pursuant to CPLR 3043(b), a party may serve a supplemental bill of particulars without leave of the court at any time but no less than 30 days before trial, unless a new cause of action is alleged or new injury claimed.

Plaintiff's complaint contains claims for common law negligence and violations of the Labor Law, and his allegations regarding "equipment" include that defendants were negligent and careless in inspecting, maintaining, and failing to "correct" the equipment, and in failing to warn of the defective equipment. (NYSCEF 67). The bill of particulars contains similar allegations. (NYSCEF 69).

In the third BP, plaintiff adds:

- (1) Line Dragon failed to exercise reasonable care in designing and making the product for its intended, normal and foreseeable use;
- (2) It failed to exercise reasonable care in inspecting and/or testing the product in contemplation for its intended use;
- (3) The Line Dragon system was defectively designed in that it was not reasonably safe for its intended purpose and use and as the risk of injury far exceeded its utility and reasonable alternative designs exist which are feasible and reasonable; and
- (4) Line Dragon breached an express warranty as its product was not reasonably safe due to a substantial likelihood of harm and it was feasible to design the product in a safe manner, and specifically, the emergency stop buttons on the remote-control units were not synced and unable to stop both machines in case of an emergency, which constitutes a design defect.

(NYSCEF 72).

The third BP thus contains new allegations and new claims against Line Dragon, which is prohibited. (*Cf. Kelly v City of New York*, 134 AD3d 676 [2d Dept 2015] [leave to supplement pleadings may be given if there are no new allegations, no new theories of liability, and causes no prejudice]). Plaintiff's conclusory allegations in his prior pleadings about "defective equipment" in general does not put Line Dragon on notice of a products liability or breach of warranty claim. (*See Barksdale v New York City Tr. Auth.*, 294 AD2d 210 [1st Dept 2002] [as plaintiff's original claim was that lack of and/or improperly maintained safety chains between subway cars caused accident, court properly precluded plaintiff from relying on new theory in bill of particulars that attributed cause to design defects in gates or other devices between cars]; *Chipurnoi v Manhattan Bronx Surface Tr. Operating Auth.*, 216 AD2d 171 [1st Dept 1995] [precluding plaintiff from asserting design defect claim related to seat when original claims raised issues of human error and defect in steering mechanism]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants and third-party defendant's motion to dismiss (mot. seq. one) is denied; it is further

ORDERED, that third-party plaintiff Line Dragon, LLC's cross motion is denied in its entirety;

ORDERED, that third-party defendant is directed to file an answer to the third-party complaint within 20 days of the date of this order; it is further

ORDERED, that plaintiff's cross motion to sever is denied; it is further

ORDERED, that third-party plaintiff Line Dragon, LLC's motion for an order striking plaintiff's third further supplemental verified bill of particulars is granted, and it is hereby stricken (mot. seq. two); and it is further

ORDERED, that plaintiff's cross motion to compel Line Dragon to accept the third further supplemental verified bill of particulars is denied.

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BARBARA JAFFE, J.S.C.

3/5/2019
DATE

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE