One Bryant Park v Permasteelisa Cladding Tech., Ltd.
2019 NY Slip Op 30898(U)
March 29, 2019
Supreme Court, New York County
Docket Number: 450151/2018
Judge: Margaret A. Chan

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. MARGARET A. CHAN** **PART** **IAS MOTION 33EFM**

Justice

----------X

ONE BRYANT PARK, DURST DEVELOPMENT, LLC,TISHMAN CONSTRUCTION CORP.

Plaintiff,

- v -

PERMASTEELISA CLADDING TECHNOLOGIES, LTD, PERMASTEELISA NORTH AMERICA CORP.,

Defendant.

----------X

INDEX NO. 450151/2018

MOTION DATE 04/26/2018

MOTION SEQ. NO. 001

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 71, 72, 73, 74, 75, 76, 77, 78

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is determined that defendants' motion is granted.

This matter arises from an underlying Labor Law action brought by an injured construction worker, Robert McCullough, against One Bryant Park, Durst Development, LLC (Durst), Tishman Construction Corp. (collectively, Bryant Park), and a non-party here, Component Assembly Systems, Inc. (Component), under Index No. 113802/2009 (the McCullough case). The defendants in the instant matter, Permasteelisa Cladding Technologies, Ltd and Permasteelisa North America Corp. (Permasteelisa) were brought into the McCullough case as third-party defendants by Bryant Park. The third-party action was severed by order dated August 31, 2016, which also directed Bryant Park to file an RJI within 20 days of the Order (NYSCEF #143 – Order of Hon. Carol R. Edmead). Bryant Park failed to do so, and was given another opportunity to file an RJI on January 4, 2018 (NYSCEF #275 – Order of Hon. Carol R. Edmead). Permasteelisa now moves to dismiss Bryant Park's complaint on the grounds that it fails to state a cause of action pursuant to CPLR 3211(a)(7), and that it is time-barred pursuant to CPLR 3211(a)(5). Permasteelisa also sought a default judgment because Bryant Park failed to timely answer its counterclaims. However, Permasteelisa withdrew its motion for a default judgment based on the parties' March 8, 2018 stipulation to accept the late answer. The stipulation also renders moot Bryant Park's cross-motion to compel Permasteelisa to accept its Answer (NYSCEF # 70).

Background

In the underlying McCullough case, Robert McCullough was employed by Tower Installation (Tower) to install curtain wall panels that were manufactured by Permasteelisa for Bryant Park's building construction project. Bryant Park speculates in a footnote that Tower is Permasteelisa's subcontractor (NYSCEF #64, at 13, fn3). On April 14, 2009, the day McCullough sustained his injury, McCullough was on his way to speak to a co-worker about getting the wall panels that Permasteelisa stored in a mechanical room. To access the mechanical room, McCullough stepped down from an exterior roof and across a two-foot high threshold into an unfinished room and stepped into an uncovered drain-hole on the floor, causing him to fall.

McCullough brought a personal injury suit alleging violations of Labor Law § 241(6) and common law negligence against Bryant Park, and Component, which provided carpentry services that included covering drain holes such as the one involved in his accident. A jury trial was held on the McCullough case on October 2, 2017, wherein the jury found Bryant Park 90% at fault, and Component and McCullough each 5% at fault.

After the trial, Durst's motion to be dismissed from the case was granted, and the caption was amended accordingly. In the post-trial motion to set aside the verdict, Bryant Park argued that Owner should also be dismissed from the case. This court stated that "[d]espite knowing the applicable law, Owner and GC chose to be so intertwined throughout the case that it is incumbent on them to undo the intertwining between themselves for the apportionment of liability." (Index No. 113802/2009 Decision and Order dated August 10, 2018). Indeed, the Appellate Division referred to Durst, Owner and Tishman collectively as the "Bryant Park defendants" (NYSCEF #23 – *McCullough v One Bryant Park*, 132 AD3d 491 [1st Dept 2015] decision on the underlying motion for summary judgment). Meanwhile, Durst, although dismissed from the McCullough case, is back as a Bryant Park plaintiff in the instant case.

The motion to set aside the verdict was denied except for adjusting the award for loss of future earnings. Bryant Park also moved for a collateral source hearing, which is now resolved. As of this writing, there has been no notice of further proceedings, appeals, or motions in the McCullough case, as Bryant Park suggests otherwise in arguing that Permasteelisa's motion is not ripe (NYSCEF #64 at 24).

Discussion

CPLR 3211 (a)(7) -- Failure to State a Cause of Action

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*,104 AD3d 401 [1st Dept 2013]).

The first cause of action in Bryant Park's third-party complaint relates to Permasteelisa's contractual obligation to defend, indemnify and hold harmless the Bryant Park plaintiffs for claims arising out of Permasteelisa and/or its employees, agents or employee's negligent actions or omissions. Additionally, Bryant Park claims that Permasteelisa was contractually obligated to procure excess insurance coverage (NYSCEF #17, ¶¶ 24, 26-33).

Permasteelisa argues that because the jury in the McCullough case returned a verdict finding Bryant Park 90%, and Component and McCullough 5% each at fault for the underlying accident, Permasteelisa is free of any liability in the underlying accident. Permasteelisa notes that as there is no indication that Permasteelisa contributed to the underlying accident, there is no basis for contribution or contractual indemnity on Permasteelisa' part. And since the award in the McCullough case is within the limits of liability of Bryant Park' and Component's insurance policy, Permasteelisa's primary or excess policies are not triggered (NYSCEF #62 at 4-5).

In its Reply, Permasteelisa informs that its general liability carrier provided Bryant Park with a defense in the McCullough case from the commencement of the case until the exhaustion of the general liability policy on April 1, 2016. Further, Bryant Park has a separate action against AXA Insurance Company under Index No. 655640/2017 pending in supreme court, New York county, seeking a declaratory judgment entitling Bryant Park a money judgment for the defense and indemnification in the McCullough case (NYSCEF # 74, ¶¶ 48-51). The information raised in the Reply would answer at least the duty to defend prong of Bryant Park's claim. But, since the information is set forth in the Reply, and it is without support, it will not be considered, nor will it affect the decision.

Bryant Park posits that the reason the jury did not find Permasteelisa to be at fault was because the issue was not presented to the jury. The McCullough jury was neither asked to apportion fault among the three entities that collectively constitute Bryant Park nor other unnamed subcontractors. Afterall, the trial focused on the non-delegable duties of Bryant Park, as the owner and general contractor, in maintaining the construction site in a safe condition for its workers. As such, Permasteelisa was not in McCullough's case-in-chief.

The trial evidence did not indicate negligence on the subcontractors other than Component. The trial was guided by the Appellate Division's decision that denied Bryant Park's motion for summary judgment against McCullough's employer, Tower, which was not implicated as having fault for McCullough's injury. In denying Bryant Park's motion for summary judgment on Labor Law § 200 and common law negligence claims, the First Department stated:

> It is immaterial that these [Bryant Park] defendants lacked supervisory control over plaintiff's work, since his injuries arose "from the condition of the workplace ..., rather than the method used in performing the work" (internal citation omitted). Further, these [Bryant Park] defendants failed to make a prima facie showing that they lacked constructive notice of the uncovered drain hole (internal citation omitted).

(*McCullough*, 132 AD3d at 491).

Bryant Park advocates for a trial on the issue of liability as to Permasteelisa in this case. However, the issue of liability, as limited by the Appellate Division, First Department, is the condition of the workplace and lack of constructive notice of the uncovered drain hole. The jury's finding that Bryant Park, as owners and general contractor, breached their duty to McCullough and was 90% liable for McCullough's injury, shows that the negligence attributed to Bryant Park was all its own making with regard to the condition of the workplace.

Permasteelisa is contractually required to defend and indemnify Bryant Park from damages arising from Permasteelisa' work. McCullough was walking through a passageway to speak to a co-worker when he stepped into an uncovered drain-hole, which caused him to lose his balance and fall. Tower installed Permasteelisa's wall panels, but there was no indication that Permasteelisa had supervision or control of McCullough's work. Finally, the jury's verdict did not support a finding of negligence by others, except for 5% by Component and 5% by McCullough. As such, Bryant Park is not entitled to contractual indemnification from Permasteelisa (*see Licata v AB Green Gansevoort, LLC*, 158 AD3d 487, 490 [1st Dept 2018]).

As for Bryant Park's allegation regarding Permasteelisa's failure to procure excess insurance, Permasteelisa produced policies that show otherwise. In any event, Bryant Park's issue with the excess policy, because it was written in Italian, is raised beyond the statute of limitations.

Statute of Limitations

As to Permasteelisa's duty to procure primary and excess insurance coverage, Permasteelisa submitted two AXA insurance policies; the primary policy purchased on May 29, 2009 covering the period from April 1, 2009 to April 1, 2010, and the

excess policy purchased on February 17, 2009 covering the period from March 31, 2009 to March 31, 2010 (NYSCEF ## 41 and 42, respectively). McCullough's accident on April 14, 2009 was within the covered periods. The excess policy, purchased by Permasteelisa's parent company, Permasteelisa S.p.A., in Italy, is in Italian and no English translation accompanies it (NYSCEF # 42). In any event, Permasteelisa asserts that Bryant Park is time-barred from claiming that Permasteelisa breached its contract to procure excess insurance coverage.

Bryant Park responds that equitable estoppel precludes Permasteelisa from asserting a statute of limitations defense as the AXA excess policy procured by the Permasteelisa S.p.A. is in Italian. However, Bryant Park did not require a translation at the time it received the Italian AXA policy when it was purchased in February 2009 or any time thereafter. It can be said that Bryant Park waived the English translation requirement since Bryant Park never asked for one.

In any event, whether the Italian AXA excess policy or the primary policy complied with Bryant Park's requirement is academic since the time to raise any claims on the insurance policies was six years from the policy date, at the latest. Bryant Park's complaint against Permasteelisa was dated May 17, 2016, six years past any of the coverage periods. Hence, Bryant Park's claim is time-barred.

This decision does not speak to the pending matter Bryant Park has against AXA under Index No. 655640/2017. This decision speaks only to Bryant Park's breach of contract claim against Permasteelisa, which is time-barred.

Based on the foregoing, Permasteelisa's motion to dismiss the complaint is granted. Accordingly, it is

ORDERED that defendants Permasteelisa Cladding Technologies, Ltd and Permasteelisa North America Corp.'s motion to dismiss One Bryant Park, Durst Development, LLC, and Tishman Construction Corp.'s complaint against them is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants.

3/29/2019
DATE

MARGARET A. CHAN, J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE