

Calleja v AI 229 W. 43rd St. Prop. Owner, LLC

2019 NY Slip Op 31185(U)

March 7, 2019

Supreme Court, Bronx County

Docket Number: 301498/2012

Judge: Alison Y. Tuitt

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

PART IA - 5

RAUL CALLEJA,

INDEX NUMBER: 301498/2012

Plaintiff,

-against-

Present:
HON. ALISON Y. TUITT
Justice

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

Defendants.

AI 229 WEST 43RD STREET PROPERTY OWNER,
LLC,

INDEX NUMBER: 83868/2014

Third-Party Plaintiff,

-against-

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

Third-Party Defendants.

AI 229 WEST 43RD STREET PROPERTY OWNER,
LLC,

INDEX NUMBER: 84051/2015

Third Third-Party Plaintiff,

-against-

NURMINEN CONSTRUCTION OF N.Y. INC.,

Third Third-Party Defendant.

DAFFY'S INC.,

INDEX NUMBER: 301498/2018

Fifth Third-Party Plaintiff,

-against-

**NURMINEN CONSTRUCTION OF N.Y. INC., and
SULLIVAN STEEL SERVICES, INC.,**

Fifth Third-Party Defendants.

The following papers numbered 1 to 3,

Read on this Nurminen Construction of N.Y. Inc.'s Motion to Dismiss

On Calendar of 8/20/18

Notice of Motion - Exhibits and Affirmation _____ 1

Affirmation in Support _____ 2

Reply Affirmation _____ 3

Upon the foregoing papers, third third-party defendant/ fifth third-party defendant Nurminen Construction of N.Y., Inc.'s ("Nurminen NY") motion to dismiss Daffy's Inc.'s (hereinafter "Daffy's") verified fifth third-party complaint is granted for the reasons set forth herein,

The within action involves personal injuries allegedly sustained by plaintiff on October 15, 2011 during the course of his employment when he fell off a ladder at a construction site at 226 West 44th Street, New York, New York. Plaintiff commenced an action against several defendants, including the owner of the premises AI 229 West 43rd Street Property Owner ("AI 229"). The owner in turned brought a third-party action against the tenant Daffy's. Daffy's had previously moved this Court to dismiss the action against it arguing that it was barred by a stipulated order in tenant's bankruptcy proceeding. The First Department affirmed in Calleja v. AI 229 West 42nd Street Property Owner, LLC, 69 N.Y.S.3d 626 (1st Dept. 2018), holding:

The court correctly determined that this third-party action against Daffy's Inc. is not barred by the "Stipulated Order" in Daffy's bankruptcy proceeding, in which third-party plaintiff AI 229 West 43rd Street Property Owner, LLC, waived and released any claims or causes of action relating to or arising under its lease with Daffy's, and the lease was "rejected and terminated." The motion papers make it clear that AI 229 West seeks to establish Daffy's liability in the underlying personal injury action for the sole purpose of recovering under Daffy's insurance policy in effect at the time of the accident. Because the policy would not inure to Daffy's pecuniary benefit, it was not part of the bankruptcy estate, and thus it is not covered by the Stipulated Order (see *In the Matter of Edgeworth*, 993 F.2d 51, 55–56 [5th Cir. 1993]). Moreover, this Court has recognized that "a claim asserted for the sole purpose of establishing the liability of a party's insurer is not barred by that party's discharge in bankruptcy" (*Roman v. Hudson Tel. Assoc.*, 11 A.D.3d 346, 347, 784 N.Y.S.2d 31 [1st Dept. 2004], citing *Lumbermens Mut. Cas. Co. v. Morse Shoe Co.*, 218 A.D.2d 624, 630 N.Y.S.2d 1003 [1st Dept. 1995]). 9 N.Y.S.3d 626.

...

To the extent Daffy's argues that there is no evidence in the record that it had insurance coverage at the time of the underlying accident and that the third-party complaint is not limited either to the insurance coverage or by any stated amount, these arguments do not compel the dismissal of the third-party complaint as against Daffy's at this stage. AI 299 West, which admits unequivocally that Daffy's is not liable for any claim in its bankruptcy case or against its estate, will have to establish the facts to support its claim for insurance proceeds. The bankruptcy court's retention of exclusive jurisdiction over issues arising from the bankruptcy does not affect AI 229 West's claim since, as indicated, the insurance proceeds are not included in the bankruptcy estate.

Daffy's Verified Fifth Third-Party Complaint asserts two causes of action against Nurminen NY.

The first cause of action is for indemnification and contribution and the second cause of action alleges a cause of action for breach of contract. Nurminen NY moves to dismiss the action pursuant to CPLR 3211(a)(1), (2), (3), (5) and CPLR 3211 (a)(5) dismissing the Second Cause of Action as barred by the statute of limitations.

CPLR §213(2) requires actions based on breach of contract to be commenced within six years. See, *Town of Oyster Bay v. Lizza Industries, Inc.*, 22 N.Y.3d 1024 (2013). Causes of action for breach of contract not instituted within the six years statute of limitations are barred. See, *Eskenazi v. 163 Schapiro*, 27 A.D.3d 312, 315 (1st Dept.2006); *Schreier v. Law School Admission Council*, 737 N.Y.S.2d 35 (1st Dept. 2002); *East Midtown Plaza Housing Co., Inc. v. City of New York*, 631 N.Y.S.2d 38 (1st Dept. 1995). On a motion to dismiss a cause of action on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired by establishing, inter alia, when the plaintiff's cause of action accrued. McKinney's CPLR 3211(a)(5); *Lebedev v. Blavatnik*, 38 N.Y.S.3d 159 (1st Dept. 2016).

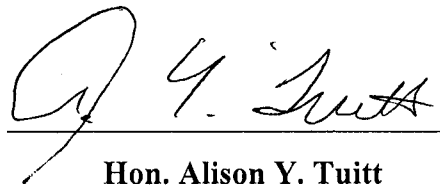
When a defendant moves to dismiss the complaint based on legal insufficiency, plaintiff has no obligation to show evidentiary facts to support the allegations of the complaint. Generally, on a motion to dismiss made pursuant to CPLR §3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory". Leon v. Martinez, 84 N.Y.2d 83 (1994). See also, Rovello v. Orofino Realty Co., 40 N.Y.2d 633 (1976). In the context of a CPLR 3211 motion to dismiss, the pleadings are necessarily afforded a liberal construction. Leon, 84 N.Y.2d 83. Turning to Daffy's CPLR 3211(a)(1) motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law. See, Goshen v. Mutual Life Insurance Co. of New York, 98 N.Y.2d 314 (2002).

In the instant matter, Nurminen NY's Paragraph 20 of the Fifth Third-Party Complaint asserts that prior to October 15, 2011, Daffy's and Nurminen NY entered into an agreement and attached the agreement dated July 11, 2011. Paragraphs 22 and 23 alleges that Nurminen NY breached said contract by not procuring insurance for the benefit of Daffy's concerning this loss on October 15, 2011. Based on the alleged breach as of October 15, 2017, the six year statute of limitations expired on October 15, 2017. The Fifth Third-Party action was filed on April 10, 2018. Here, the Second Cause of Action must be dismissed as it is barred by the six year statute of limitations.

Daffy's First Cause of Action for indemnification and contribution must also be dismissed as there can be no damages sustained by Daffy's, pursuant to the holding in the Bankruptcy proceedings. As held by the First Department "AI 229 West seeks to establish Daffy's liability in the underlying personal injury action for the sole purpose of recovering under Daffy's insurance policy in effect at the time of the accident. Because the policy would not inure to Daffy's pecuniary benefit, it was not part of the bankruptcy estate". As such, Daffy's will not sustain any losses as a result of this litigation. Moreover, Daffy's failed to comply with conditions precedent prior to litigation. The contract between Daffy's and Nurminen included AIA Document A201-2007, Section 15.3.1 requires that any claims, disputes or other matters in controversy arising out of or related to the contract shall be subject to mediation as a condition precedent to binding dispute resolution. Section 9.2 of the AIA Document A134-2009 provides that any claim not resolved by mediation will be resolved by litigation. Daffy's failed to allege compliance with the conditions precedent in its Complaint. See, Allied Bldg. Inspectors Intl. Union of Operating Engrs., Local Union No. 211, AFL-CIO v Office of Labor Relations of City of N.Y., 45 N.Y.2d 735 (1978).

Accordingly, Nurminen NY's motion to dismiss the fifth-third party action against it is granted.
This constitutes the decision and Order of this Court.

Dated: 3/7/19



Hon. Alison Y. Tuitt