Battery Park City Auth. v Donaldson Interiors, Inc.
2019 NY Slip Op 31975(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 152771/2019
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

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

Justice

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INDEX NO. 152771/2019

MOTION DATE 06/26/2019

MOTION SEQ. NO. 001

BATTERY PARK CITY AUTHORITY d/b/a THE HUGH L. CAREY BATTERY PARK CITY AUTHORITY, BFP TOWER C CO. LLC, BROOKFIELD FINANCIAL PROPERTIES, L.P. and PLAZA CONSTRUCTION LLC,

Plaintiffs,

- v -

DONALDSON INTERIORS, INC.,

Defendant.

DECISION + ORDER ON MOTION

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NYSCEF Doc Nos. 5–28 were read on this motion to dismiss.

Motion by Defendant pursuant to CPLR 3211 (a) (5) and on the grounds of laches to dismiss the complaint is denied.

In a related action (index no. 161489/2013), on or about January 4, 2019, this Court issued an order granting Defendant's motion pursuant to CPLR 1010 and dismissing Plaintiffs' second-third party complaint against Defendant for common law and contractual indemnification, contribution, and damages for failure to procure insurance. (Beck affirmation, exhibit A [Order].) The Order indicated that the second third-party complaint was "dismissed," having cited to CPLR 1010, which provides, in relevant part, that "[t]he court may dismiss a third-party complaint *without prejudice* . . . or make such other order as may be just." (Order at 2, 4 [emphasis added].) The Order did not indicate that the decision was with prejudice or on the merits, and the sum and substance of the Order was that the second third-party action was commenced so late in the related action as to prejudice the plaintiff in the related action. The Court did not reach the merits of the second third-party complaint, which was substantially similar to the instant complaint. No appeal was taken from the Order nor was relief sought pursuant to CPLR 2221.

Now in the instant action, commenced March 15, 2019, Plaintiffs have effectively brought their second third-party complaint as a separate action, and Defendant now moves to dismiss primarily on the ground of res judicata. "[A] dismissal 'without prejudice' lacks a necessary element of res judicata—by its terms such a judgment is not a final determination on the merits." (*Landau v LaRossa, Mitchell & Ross*, 11 NY3d 8, 13 [2008].) In contrast, "[a] dismissal 'with prejudice' generally signifies that the court intended to dismiss the action 'on the merits,' that is, to bring the action to a final conclusion against the plaintiff." (*Yonkers Contr. Co. v Port Auth. Trans-Hudson Corp.*, 93 NY2d 375, 380 [1999].) Here, the Court indicated in the Order the second third-party complaint in the action was "dismissed" on procedural grounds pursuant to CPLR 1010. Dismissal with prejudice would be inappropriate under such

circumstances, and no fair reading of the Order would lead a reader to conclude that the dismissal pursuant to CPLR 1010 was with prejudice or on the merits.

Contrary to Defendant's contentions, Plaintiffs in the instant action are exercising their rights to pursue their claims against Defendant in a new action in a manner that will not prejudice the plaintiff in the related action, whose case was trial-ready—the note of issue having been filed on or about September 26, 2017, and summary judgment motions having already been decided—by burdening his case with these additional claims. As the Court of Appeals stated in *Landau*, "[w]e remain mindful that if applied too rigidly, res judicata has the potential to work considerable injustice. In properly seeking to deny a litigant two days in court, courts must be careful not to deprive him of one." (11 NY3d at 14.) Here, Plaintiffs have yet to have their day in court to litigate the merits of their indemnification, contribution, and insurance procurement claims against Defendant. As such, res judicata is not applicable to Plaintiffs in the instant action.

Defendant's only other stated basis for the instant motion to dismiss based upon the papers submitted is the equitable doctrine of laches. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party. The mere lapse of time, without a showing of prejudice, will not sustain a defense of laches." (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 816 [2003] [internal citations and quotation marks omitted].) "[L]aches is not applicable to an action at law." (*Fade v Pugliani/Fade*, 8 AD3d 612, 615 [2d Dept 2004].) Here, Plaintiffs' claims regarding indemnification and failure to procure insurance are based in contract, and laches is unavailable.

As to Plaintiffs' cause of action for contribution, and insofar as Plaintiffs are asserting any cause of action for common-law indemnification, "[t]he statute of limitations on a claim for indemnity or contribution accrues only when the person seeking indemnity or contribution has paid the underlying claim. . . . Thus, [Plaintiffs'] time to sue has not even begun to run. (*Residential Bd. of Mgrs. of Platinum v 46th St. Dev., LLC*, 154 AD3d 422–423 [internal citations and quotation marks omitted].) Nevertheless, "[l]aches and limitations are not the same. Limitations involve the fixed statutory periods within which actions must be brought, while laches signifies a delay independent of statute." (*Saratoga*, 100 NY2d at 816.) "The four basic elements of laches are (1) conduct by an offending party giving rise to the situation complained of, (2) delay by the complainant asserting his or her claim for relief despite the opportunity to do so, (3) lack of knowledge or notice on the part of the offending party that the complainant would assert his or her claim for relief, and (4) injury or prejudice to the offending party in the event that relief is accorded the complainant." (*Dwyer by Dwyer v Mazzola*, 171 AD2d 726, 727 [2d Dept 1991].) Here, Defendant argues that the Order was "dispositive on the merits as to the untimeliness and prejudice sustained by the defendant" and that such is the "law of the case." (Affirmation of Beck ¶ 9.) Defendant further argues that

> "[t]he fact that the plaintiffs filed a new action does not extinguish the prejudice and delays the defendant faced in the First Action. In fact, your affirmant has been advised that any potential witnesses with knowledge of this project are no longer working for Donaldson. One key former employee lives out of state (Florida) and is not reachable. To permit this claim to advance against the defendant would only cause the defendant irreparable harm and prejudice. The defendant will have to

> partake in five years of discovery after the date of the accident, and after the Court has already determined substantive issues on summary judgment motions- which defendant did not have an opportunity to partake in. Some of the Court's prior decisions as to liability are significant and if this action is permitted without consolidation and joinder, the parties could be faced with inconsistent findings."

(Affirmation of Beck ¶ 10.)

As previously indicated, Plaintiffs' time to assert equitable causes of action for common-law indemnification and contribution has not yet begun to run, as no payments have yet been made to the plaintiff in the related case. Further, the affidavit submitted by Plaza states that it commenced the second third-party action against Defendant in the related case as soon as it learned that Defendant installed certain flooring protection at issue in the related case. (Affidavit of Hulbert ¶ 5.) These two factors, taken together, sufficiently refute the second element of laches—delay by the complainant asserting its claim for relief despite the opportunity to do so—for the purposes of this pre-answer motion to dismiss.

Moreover, the Court finds that the bare affirmation of counsel for Defendant as to prejudice to Defendant based upon the unavailability of witnesses is without evidentiary value and thus unavailing. (*Zuckerman v City of New York*, 49 NY2d 557, 563 [1980].) Defendant submitted no affidavit from Donaldson or other proof in admissible form with its motion. The affidavit from Omar Otero, Vice President of Field Operations for Defendant, submitted for the first time in the reply papers is not properly before the Court, and in any event, contains nothing regarding any injury or prejudice to Defendant based on laches, but rather impermissibly seeks to assert new grounds for the motion to dismiss. (*See Keneally v 400 Fifth Realty LLC*, 110 AD3d 624, 624 [1st Dept 2013].) As such, Defendant has failed to show in the instant pre-answer motion to dismiss by proof in admissible form that it had a lack of knowledge or notice that Plaintiffs would assert their claims for relief, as required by the third element of laches, or that Plaintiffs' "delay [if any] in bringing the claims hampered [Defendant's] ability to defend against them," as required by the fourth element. (*Knobel v Shaw*, 90 AD3d 493, 496 [1st Dept 2011].)

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CONCLUSION

Accordingly, it is

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that Plaintiffs shall, within 10 days of the NYSCEF filing date of the decision and order on this motion, serve a copy of this order with notice of entry on Defendant, who shall answer pursuant to CPLR 3211 (f); and it is further

ORDERED that the parties shall appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, October 22, 2019, at 9:30 a.m., for a preliminary conference.

The foregoing constitutes the decision and order of the Court.

7/8/2019
DATE

HON. ROBERT D. KALISH J.S.C.

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