

Coffin v Dr. Pepper Snapple Group
2019 NY Slip Op 32447(U)
August 15, 2019
Supreme Court, Seneca County
Docket Number: 50541
Judge: Daniel J. Doyle
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STATE OF NEW YORK
SUPREME COURT SENECA COUNTY

JEFFREY R. COFFIN and
SUE COFFIN,

Plaintiffs

-vs-

DR. PEPPER SNAPPLE GROUP /s/h/i/a
DR PEPPER GROUP, INC, and
HUTTEMAN LAW AND LANDSCAPE, INC.,

Defendants.

Decision and Order

Index No. 50541

On January 15, 2015, Plaintiff fell on snow and ice while at the facility of Defendant Dr. Pepper Group, Inc (“Dr. Pepper”). Plaintiff commenced this negligence action on September 30, 2016 against Dr. Pepper. On November 22, 2016, Dr. Pepper removed this action to United States District Court for the Western District of New York based upon diversity jurisdiction. After the parties engaged in discovery, Plaintiff learned that Dr. Pepper had a snow plowing contract with Hutteman Lawn and Landscape (“Hutteman”). On January 3, 2018, Plaintiff filed a motion in federal court to amend its complaint adding Hutteman as a Defendant and remanding the case back to Supreme Court because, upon amendment, complete diversity of the parties would no longer exist.

Also on January 3, 2018, Plaintiff commenced a separate negligence action in Supreme Court Seneca County under Index Number 51798 solely against

Defendant Hutteman (“The Hutteman action”). Plaintiff never served Defendant with the complaint in Index No 51798.

Federal Court granted the motion to remand and by extension, the motion to amend. An amended complaint was not filed in Federal Court though. Instead, the action was remanded to Seneca County and an Order confirming remand and permitting the filing and service of the supplemental summons and amended complaint was signed September 24, 2018 and filed September 26, 2018. The supplemental summons and amended complaint were filed October 16, 2018 and Hutteman was served on October 25, 2018.

Hutteman interposed an answer asserting a statute of limitations defense. Thereafter, Hutteman has moved for dismissal on statute of limitations grounds (CPLR 3211[a][5]), or, in the alternative, for summary judgment on both the Plaintiffs’ complaint and Dr. Pepper’s cross-claims (CPLR 3212). Plaintiffs oppose the motion and have cross-moved to consolidate the Hutteman action with this action pursuant to CPLR 602 and for leave for late service of the Hutteman action pursuant to CPLRF 306-b. Hutteman opposes the Plaintiffs’ motion for an extension of time to serve and that opposition is the basis for Hutteman’s opposition to consolidate the two actions.

A. *The CPLR 3211[a][5] dismissal motion*

A party seeking dismissal based upon the expiration of the applicable statute of limitations period has “the initial burden of establishing prima facie that the time in which to sue has expired” (*Lyndaker v Bd. of Educ. of West Canada Valley Cent. School Dist.*, 129 AD3d 1561, 1563 [4th Dept 2015]). In a negligence action, the applicable statute of limitations is 3 years (CPLR 214[5]). Should the moving party sustain its burden, the burden shifts to the non-moving party “to establish that an exception to the limitations period applies” (*Carrington v New York State Off. for People With Dev. Disabilities*, 170 AD3d 1495, 1496 [4th Dept 2019]).

Here, as the injury occurred on January 15, 2015, the statute of limitations would have expired on January 15, 2018. The Plaintiffs’ motion to amend the complaint was filed on January 3, 2018 and the Court of Appeals has held that the filing of a motion to amend a complaint serves to toll the statute of limitations (*Perez v Paramount Communications, Inc.*, 92 NY2d 749, 755 [1999]). When Plaintiffs filed their motion, 12 days remained before the expiration of the limitations period.

However, under New York Law, tolling would have ended on September 26, 2018 with the filing of the Order permitting the filing of supplemental

summons and amended complaint, and, once entered, Plaintiff had until October 8, 2018 to serve the supplemental summons and amended complaint upon Hutteman (see, e.g. *Abreu v Casey*, 157 AD3d 442, 442 [1st Dept 2018]). The Plaintiffs filed the supplemental summons on October 16, 2018 and Plaintiffs served Hutteman on October 25, 2018, and both those acts occurred after the limitations period expired.

Plaintiffs, relying upon Federal caselaw (*Mayes v AT & T Information Sys.*, 867 F.2d 1172 [8th Cir.1989]; *Longo v Pennsylvania Elec. Co.*, 618 F.Supp. 87 [W.D.Pa.1985], *affd.* 856 F.2d 183 [3d Cir.1988]; and *Rademaker v E D Flynn Export Co.*, 17 F.2d 15 [5th Cir.1927]), argue that the act of attaching the amended complaint in federal court and the order of federal court permitting the amendment served to not only toll the statute of limitations period, but also, to end it. Contrary to the Plaintiff's argument, the Order entered in Federal Court did not end the statute of limitations period. Under the *Erie* doctrine (*Erie Railroad Company v Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 [1938]), in a diversity action, Federal court is obligated to apply substantive New York law and when an action is deemed commenced and the expiration of a statute of limitations are substantive in nature (see *Gasperini v Ctr. for Humanities, Inc.*, 518 US 415, 427 [1996]). Thus, even if some of the cases relied upon by the Plaintiffs can be read

to say that Federal Court's order ended the statute of limitations (not simply tolled it), that case law was not applying New York law. Indeed, the Court of Appeals in making the rule articulated in *Perez* explicitly considered the cases relied upon by Plaintiffs before ultimately rejecting their central holding that a motion to amend a complaint ends the statute of limitations rather than simply tolls it (*Perez v Paramount Communications, Inc.*, 92 NY2d at 755). Consequently, Hutteman would be entitled to dismissal of this action pursuant to CPLR 3211[a][5].

B. The summary judgment motion

Though, as discussed above, Hutteman was entitled to dismissal on statute of limitations grounds, the Court will also consider the alternative grounds for summary judgment because of its relevance to Dr. Pepper's cross-claims against Hutteman and its relevance to Plaintiffs' cross-motion to extend time to serve.

A party seeking summary judgment pursuant to CPLR 3212 must make a prima facie showing of entitlement to judgment as a matter of law and submit sufficient evidence to demonstrate the absence of any material issue of fact (*Iselin & Co. Inc. v Mann Judd Landau*, 71 NY2d 420 [1988]). The prima facie showing which a defendant must make on a motion for summary judgment is governed

by the allegations of liability made by the plaintiff in the pleadings (see generally *Alvarez v Prospect Hosp.*, 68 NY2d 320, 325 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The Court must view the evidence presented in the light most favorable to the nonmoving party (*Russo v YMCA of Greater Buffalo*, 12 AD3d 1089 [4th Dept 2004]). If the proponent demonstrates entitlement to summary judgment, the opposing party must then demonstrate, generally by admissible evidence, the existence of an issue of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 851 [1985]).

In this case, Defendant landowner Dr. Pepper had a contract with Hutteman to remove snow from its parking lot, and under *Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002], there are three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care – and thus be potentially liable in tort – to third persons:

(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely (*Ketch v Ridge Overhead Door, Inc.*, 173 AD3d 1627, 1628 [4th Dept 2019]).

Contrary to the Plaintiffs' argument, Hutteman met its prima facie burden. The Plaintiffs' bill of particulars alleges that Hutteman failed to properly remove

the snow and ice. As the bill of particulars does not assert one of the three *Espinal* exceptions, Hutteman may satisfy its prima facie burden case “merely by coming forward with proof that... [Plaintiffs were not parties]... to... [the]... snow removal contract and... therefore owed no duty of care to the plaintiff” *Foster v Herbert Slepoy Corp.*, 76 AD3d 210, 214 [2d Dept 2010]). Once Hutteman met its burden, Plaintiffs were obligated to come forward with evidence sufficient to raise a triable issue of fact regarding the applicability of one or more of the *Espinal* exceptions. The Plaintiffs have failed to do so and Hutteman is entitled to summary judgment.¹

C. *The motion to consolidate and for extension of time to serve*

Under CPLR 602, the court may, “upon motion, may order... the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.” As the Plaintiffs sought in their cross-motion to consolidate this action with the Hutteman action and the Court finds that to do so would “tend to avoid unnecessary costs or delay,” the motion

¹It must also be said that Defendant Dr. Pepper has also failed to do so. Having failed to do so, its cross-claims are also dismissed and Dr. Pepper will be precluded from asserting that Hutteman bears any liability to the Plaintiffs regarding the incident on January 15, 2015 (see CPLR 1605; *Johnson v Peloro*, 62 AD3d 955, 956 [2d Dept 2009]).

to consolidate this action with the Hutteman action is granted.

Plaintiff moved under CPLR 306-b for an extension of time to serve. Under CPLR 306-b, "if service is not made upon a defendant within the time provided in this section, the court, upon motion, shall... upon good cause shown or in the interest of justice, extend the time for service." It is well settled that the determination to grant an "extension of time for service is a matter within the court's discretion" (*Leader v Maroney, Ponzini & Spencer*, 97 NY2d 95, 101 [2001])

Here, the Plaintiffs failed to establish due diligence in serving Hutteman with the summons and complaint (*Busler v Corbett*, 259 AD2d 13, 14 [4th Dept 1999]). Should the Court find that Plaintiffs failed to establish due diligence, the Court must then look to whether the interests of justice weigh in favor of extending time to serve (*Vanyo v Buffalo Police Benevolent Assn., Inc.*, 159 AD3d 1448, 1450 [4th Dept 2018]). In determining whether the interests of justice weigh in favor of extending the time to serve the Court should consider the following factors: "the expiration of the statute of limitations, the meritorious nature of the cause of action, the length of delay in service, the promptness of . . . plaintiff's request for the extension of time, and prejudice to defendant" (*Moss v Bathurst*, 87 AD3d 1373, 1374 [4th Dept 2011]). Here, the factors weigh against granting an extension of time to serve: the statute of limitations expired, Hutteman was

entitled to summary judgment on the complaint as discussed above, and the Plaintiffs' delayed for over a year in moving for an extension of time to serve.

D. Conclusion

Based upon the foregoing, it is hereby

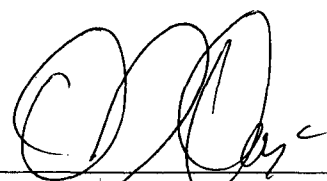
ORDERED that Defendant Hutteman's motion for dismissal pursuant to CPLR 3211[a][5] and/or for summary judgment pursuant to CPLR 3212 is hereby GRANTED and the Plaintiffs' complaint and Defendant Dr. Pepper's cross-claim against Hutteman are hereby dismissed; and it is further

ORDERED that Plaintiffs' cross-motion to consolidate is GRANTED; and it is further

ORDERED that the Seneca County Clerk shall consolidate the action *Coffin v Hutteman Lawn Service and Landscape, Inc* (Seneca County Index Number 51798) under this index number (Seneca County Index Number 50541); and it is further

ORDERED that the Plaintiffs' cross-motion for an extension of time to serve pursuant to CPLR 306-b is hereby DENIED and the Plaintiffs' complaint against Hutteman is hereby dismissed.

Dated: August 15, 2014


The Honorable Daniel J. Doyle
Supreme Court Justice