

Benitez v Bay St. Hous. Dev. Fund Corp.

2019 NY Slip Op 34072(U)

June 28, 2019

Supreme Court, Queens County

Docket Number: 700664/17

Judge: Darrell L. Gavrin

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This opinion is uncorrected and not selected for official publication.

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN**
Justice

IA PART 27

RAMON BENITEZ,

Index No. 700664/17

Plaintiff,

Motion

Date April 16, 2019

- against-

BAY STREET HOUSING DEVELOPMENT FUND
CORP., BAY STREET HOUSING LIMITED
PARTNERSHIP, CHATEAU GC LLC and B&H
CONTRACTING CORP.,

Motion

Cal. No. 3

Motion

Seq. No. 4

Defendants.

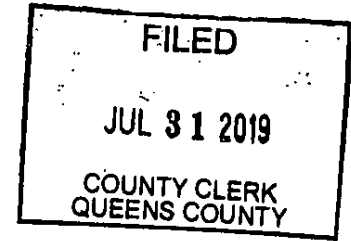
BAY STREET HOUSING DEVELOPMENT FUND
CORP., BAY STREET HOUSING LIMITED
PARTNERSHIP and CHATEAU GC LLC,

Third-Party Plaintiffs,

- against -

B&H CONTRACTING CORP., B&H CONTRACTING,
CORP., SMJ FRAMING CONSTRUCTION LLC and
SMJ CONSTRUCTION L.L.C.,

Third-Party Defendants.



The following papers numbered EF82 to EF131 read on this motion by B & H Contracting Corp. and B&H Contracting, Corp. ("together herein referred to as "B&H"), to dismiss the third-party complaint for failure to state a cause of action, pursuant to CPLR 1007, and to dismiss the summons and complaint, pursuant to CPLR 3215[c], as abandoned; and cross motion by Bay Street Housing Development Fund Corp., Bay Street Housing Limited Partnership and Chateau GC LLC (herein, "the Bay Street defendants"), for post note of issue discovery from B&H pursuant to CPLR 3214.

Papers
Numbered

Notice of Motion - Affirmation - Exhibits.....	EF82-EF91
Notice of Cross Motion - Affirmation - Exhibits.....	EF127
Reply Affirmation.....	EF131

Upon the foregoing papers, it is ordered that the motion and cross motion are determined as follows:

In this negligence action, plaintiff seeks damages for personal injuries sustained when he fell from a scaffold while performing construction work at 533 Bay Street in Staten Island, New York, during the course of his employment for SMJ Framing Construction LLC (“SMJ”). The premises were owned by Bay Street Housing Development Fund Corp., and defendant/third-party plaintiff, Chateau GC LLC (“Chateau”), was the general contractor for the construction project. Chateau contracted with B&H to perform certain tasks, including masonry work and construction of scaffolds. It is also alleged that SMJ was a subcontractor for B&H.

This action was commenced by plaintiff on February 2, 2017, against Bay Street Housing Development Fund Corp., Bay Street Housing Limited Partnership, Chateau GC LLC and B&H, to recover for personal injuries sustained in the course of his employment. Plaintiff served B&H with the summons and complaint, via the Secretary of State, on or about February 13, 2017, however no appearance was made by B&H. Chateau joined issue by service of a verified answer on or about March 21, 2017. In its’ answer, Chateau asserted cross claims against B&H for common-law and contractual indemnity and contribution. Bay Street Housing Development Fund Corp and Bay Street Housing Limited Partnership joined issue by service of a verified answer on or about August 22, 2017. In their answer, the defendants asserted cross claims against B&H for common law and contractual indemnity and contribution. They further asserted a fourth cross claim for breach of contract for failure to procure insurance.

On or about October 31, 2017, plaintiff moved for a default judgment against B&H, pursuant to CPLR 3012[a] and 3215[a]. The motion was marked off the calendar and no decision was rendered by the court. Further, no notice of entry was filed, and plaintiff did not move for default at any time prior to or subsequent to said motion. A default judgment was not entered against B&H by any party for over two years. In lieu of moving for a default judgment against B&H, co-defendants Bay Street Housing Development Fund Corp., Bay Street Housing Limited Partnership and Chateau GC LLC brought a third-party action against B&H for, among other things, common-law indemnification, contractual indemnification, contribution and breach of contract– the same causes of action as they asserted in their respective answers, as cross claims. The first three causes of action alleged in the third-party summons and complaint are identical to the cross claims asserted by co-defendants in the main action. The fourth cause of action, sounding in breach of contract, is identical to the cross claim of Bay Street Housing Development Fund Corp and Bay Street Housing Limited Partnership.

As noted above, B&H moves to dismiss the third-party complaint for failure to state a cause of action pursuant to CPLR 1007, and to dismiss the summons and complaint pursuant to CPLR 3215[c], as abandoned. The Bay Street defendants oppose the motion by B&H, and cross move for post note of issue discovery from B&H pursuant to CPLR 3214. The cross motion is opposed by B&H.

Motion by B&H

CPLR 3215[c] provides, in part, that “[i]f the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed.” “The language of CPLR 3215[c] is not, in the first instance, discretionary, but mandatory, inasmuch as courts ‘shall’ dismiss claims (CPLR 3215[c]) for which default judgments are not sought within the requisite one-year period, as those claims are then deemed abandoned” (*Najar v Najar*, 99 NYS3d 703, (Mem)-704 [2d Dept 2019], quoting *Giglio v NTIMP, Inc.*, 86 AD3d 301, 307–308 [2d Dept 2011]). “The one exception to the otherwise mandatory language of CPLR 3215[c] is that the failure to timely seek a default on an unanswered complaint or counterclaim may be excused if ‘sufficient cause is shown why the complaint should not be dismissed’ (CPLR 3215[c]). The Second Department has interpreted this language as requiring both a reasonable excuse for the delay in timely moving for a default judgment, plus a demonstration that the cause of action is potentially meritorious” (*id.* at 308).

The policy behind CPLR 3215[c] is to prevent parties who have asserted claims from unreasonably delaying the termination of actions, and to avoid inquests on stale claims (*Giglio v NTIMP, Inc.*, 86 AD3d 301, 307 [2d Dept 2011]).

Here, plaintiff took no proceedings for the entry of a default judgment within one year following the defendant’s default. Moreover, the plaintiff failed to demonstrate a reasonable excuse for his delay. Since the plaintiff failed to proffer a reasonable excuse for his delay in seeking a default judgment, this Court need not consider whether he had a potentially meritorious cause of action (*see Federal Natl. Mtge. Assn. v Heilpern*, 164 AD3d 654, 656 [2d Dept 2018]).

The branch of the motion to dismiss the Bay Street cross claims against B&H is denied. On a motion to dismiss a pleading pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the nonmoving party the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008]). “Whether the [pleading] will later survive a motion for summary judgment, or whether the [non-moving party] will ultimately be able to prove its claims, of course, plays no part in the determination of a pre-discovery CPLR 3211 motion to dismiss” (*Shaya B. Pac.*,

LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, 38 AD3d 34, 38 [2d Dept 2006]; *see EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Affording the pleading a liberal construction and giving the Bay Street defendants' the benefit of every favorable inference, the first cross claim states a cognizable cause of action against B&H for contribution and indemnification (*see Cueto v Hamilton Plaza Co., Inc.*, 67 AD3d 722, 723 [2d Dept 2009]; *see also Workers' Compensation Law* § 11; *Bovis v Crab Meadow Enters., Ltd.*, 67 AD3d 846, 847-848 [2d Dept 2009]). Further, the second cross claim states a cognizable cause of action against B&H for breach of contract to procure insurance (*see Kinney v Lisk Co.*, 76 NY2d 215, 219 [1990]; *Roldan v New York Univ.*, 81 AD3d 625, 628 [2d Dept 2011]). Accordingly, the court denies that branch of B&H's motion to dismiss the Bay Street defendants' cross claims.

Although there is no longer a direct action pending against B&H, the Bay Street defendants' cross claims may be maintained in a third-party action against B&H, under the circumstances of this case (*see Soodoo v LC, LLC*, 116 AD3d 1033, 1033-34 [2d Dept 2014]; *Baten v Northfork Bancorporation, Inc.*, 85 AD3d 697, 698-699 [2011]; *Nelson v Chelsea GCA Realty, Inc.*, 18 AD3d 838, 839 [2d Dept 2005]). Notably, the cross claims, served as an independent pleading, without leave of court, almost one year after service of the Bay Street defendants' answer to the complaint in the main action, did not contain a demand for an answer. Such lack of a demand relieved defendant on the cross claim of any obligation to serve an answer to the cross claims, because where a cross claim contains no such demand, the allegations of the cross claim are deemed to be denied or avoided (CPLR 3011; *Green Point Sav. Bank v Pagano*, 103 AD2d 735, 735-36 [2d Dept 1984]). Accordingly, the cross claims are properly converted into third-party causes of action.

Accordingly, the motion to dismiss the claims against B&H on the ground that same were abandoned, pursuant to CPLR 3215[c], is granted, and the complaint is dismissed insofar as asserted against B&H. The action against the remaining defendants is severed, the cross claims of the Bay Street defendants are converted into third-party claims against B&H, and the caption is amended accordingly (*see Arcuri v Ramos*, 7 AD3d 741 [2d Dept 2004]).

Cross Motion by defendants

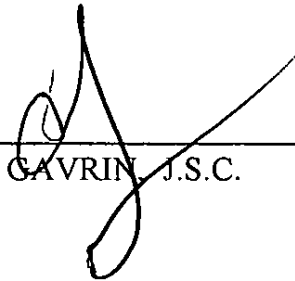
The cross motion by the Bay Street defendants for post-note of issue discovery from B&H is granted. CPLR 3124 provides that "If a person fails to respond to or comply with any request, notice, interrogatory, demand, question or order under this article, except a notice to admit under section 3123, the party seeking disclosure may move to compel compliance or a response." CPLR 3101 provides that [t]here shall be full disclosure of all matters material and necessary in the prosecution or defense of an action." Further, 22 NYCRR §202.21[d], provides that where unusual or unanticipated circumstances develop subsequent to the filing of a Notice of Issue and Certificate of Readiness, which require additional pretrial proceedings to prevent substantial prejudice, the court may grant permission to conduct such necessary proceedings.

Even though B&H was initially named as is a direct defendant at the commencement of this action by plaintiff, it only appeared in the action after commencement of the third-party action, which was filed subsequent to the note of issue. Since B&H had not appeared earlier, B&H did not participate in discovery proceedings. The Bay Street defendants submit that B&H possesses information and documents relevant to the defense and the prosecution of this matter. Notably, B&H was the subcontractor responsible for performing the masonry and scaffold construction work that plaintiff and his co-workers were performing on the site allegedly on behalf of SMJ, according to plaintiff's deposition. SMJ appears to have been a sub-contractor to B&H. Chateau, the general contractor was never made aware of SMJ's presence, even though B&H was required to obtain written permission from Chateau before retaining any subcontractors. In any event, relevant documents may include B&H's written contract with SMJ, if any; B&H's site safety manual, progress photographs; daily logs; protocols for the maintenance, construction and deconstruction of scaffolds; and reports and correspondences pertaining to the subject accident.

Based upon the foregoing, the court finds that the Bay Street defendants demonstrated unusual and unanticipated circumstances as well as "substantial prejudice," to warrant the court, in a provident exercise of discretion, to grant of the Bay Street defendants' post-note of issue discovery request (*see* 22 NYCRR 202.21[d]; CPLR 3101 [d][1][I]; *Karakostas v Avis Rent A Car Sys.*, 306 AD2d 381 [2d Dept 2003]).

Accordingly, B&H is directed to respond to the Bay Street defendants' document discovery demand within twenty (20) days from the date filing of this order with notice of entry; and to produce deposition witness(es) within sixty (60) days from the date of filing of this order with notice of entry.

Dated: June 28, 2019



 DARRELL L. GAVRINI, J.S.C.

