Spa Castle, Inc. v Choice Agency Corp.

2020 NY Slip Op 31076(U)

March 11, 2020

Supreme Court, Queens County

Docket Number: 705293/19

Judge: Timothy J. Dufficy

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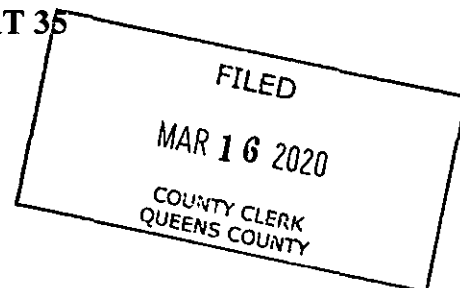
Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice



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SPA CASTLE, INC. and CHON PROPERTY CORP.,

Plaintiffs,

-against-

Index No.: 705293/19
Motion Date:9/24/19

CHOICE AGENCY CORP. and SOLOMON AGENCY CORP.,

Defendants.

Mot. Seq. No.: 1

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The following papers were read on this motion by defendant Choice Agency Corp. (Choice) to dismiss the complaint on the grounds that another action is pending, pursuant to CPLR 3211(a)(4), the action is barred by the statute of limitations, pursuant to CPLR 3211(a)(5), and for failure to state a cause of action, pursuant to CPLR 3211(a)(7), or alternatively, to dismiss the complaint, pursuant to CPLR 205(a), on the grounds that plaintiffs' prior action was dismissed due to the failure to prosecute; and on the cross-motion by defendant Solomon Agency Corp. (Solomon) to dismiss the complaint against it, pursuant to CPLR 3211(a)(1), (a)(4), (a)(5), and (a)(7).

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits	EF 6 - 45
Notice of Cross Motion - Affidavits - Exhibits	EF 46 - 60
Reply Affidavits	EF 66 - 68

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

This is an action to recover damages for breach of contract, breach of fiduciary duty, professional negligence, and indemnification. On October 31, 2018, the plaintiffs commenced a prior action against the defendants in this court by filing a Summons with Notice (Index No. 716686/18). On November 29, 2018, Solomon filed a Notice of Appearance and demand for a complaint, and, on December 11, 2018, Choice also filed a

Notice of Appearance and demand for a complaint. On January 18, 2019, Choice made a motion to dismiss the 2018 action because the plaintiffs failed to timely serve a complaint, pursuant to CPLR 3012(b). In their opposition to these motions, the plaintiffs attached a verified complaint. Meanwhile, on March 26, 2019, the plaintiffs commenced the instant action against the same defendants by filing a Summons and Complaint, which alleged the same causes of action as the prior action. On January 22, 2019, Solomon cross-moved seeking the same relief. By an Order, dated May 15, 2019, Justice Allan B. Weiss granted Choice's motion and Solomon's cross-motion to dismiss the prior action.

Initially, the Court notes that Solomon's denomination of its motion as a "cross motion" was incorrect because a cross-motion can only be made for relief against a moving party (CPLR 2215). As such, the cross-motion should have been filed as a separate notice of motion since it was not made against the moving party, that is, Choice (*see Gaines v Shell-Mar Foods, Inc.*, 21 AD3d 986, 987-988 [2d Dept 2005]). Despite this procedural irregularity, and given the absence of prejudice, in light of the fact that all parties responded to the cross-motion, the Court will entertain the cross-motion.

Those branches of Choice's motion and Solomon's cross-motion to dismiss this action, pursuant to CPLR 3211(a)(4), are denied. CPLR 3211(a)(4) provides that a party may move for dismissal of one or more causes of action on the ground that "there is another action pending between the same parties for the same cause of action in a court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." To determine whether or not an action should be dismissed pursuant to CPLR 3211(a)(4), the court must look not to when the alleged prior action was filed, nor to when a summons with notice was served in that action, but rather to if and when a complaint was served in the alleged prior action (*see Wharton v Wharton*, 244 AD2d 404 [2d Dept 1997]). CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action (*see Whitney v Whitney*, 57 NY2d 731 [1982]). Here, the prior action was dismissed, pursuant to an Order by Justice Allan B. Weiss, dated May 15, 2019, on the grounds that the plaintiffs failed to timely serve a complaint, pursuant to CPLR 3012(b). Where, as here, a summons is served with notice, but without a complaint in the prior action, such did not constitute "another

action" within the meaning of CPLR 3211(a)(4) (*see John J. Campagna, Jr., Inc. v Dune Alpin Farm Assocs.*, 81 AD2d 633 [2d Dept 1981]).

Next, the Court will address those branches of Choice's motion and Solomon's cross-motion to dismiss the complaint, pursuant to CPLR 3211(a)(5), on the grounds that the action is barred by the statute of limitations. On a motion to dismiss a cause of action pursuant to CPLR 3211(a)(5) as barred by the applicable statute of limitations, a defendant must establish, prima facie, that the time within which to sue has expired. Once that showing has been made, the burden then shifts to the plaintiff to raise a question of fact as to whether the statute of limitations has been tolled, that an exception to the limitations period is applicable, or that the plaintiff actually commenced the action within the applicable limitations period (*see Quinn v McCabe, Collins, McGeough & Fowler, LLP*, 138 AD3d 1085 [2d Dept 2016]; *Tsafatinos v Law Off. of Sanford F. Young, P.C.*, 121 AD3d 969 [2d Dept 2014]; *Bullfrog, LLC v Nolan*, 102 AD3d 719 [2d Dept 2013]).

A cause of action for breach of fiduciary duty is governed by a six-year statute of limitations where the relief sought is equitable in nature (CPLR 213[1]), or by a three-year statute of limitations where, as here, the only relief sought is money damages (CPLR 214 [4]; *Klein v Gutman*, 12 AD3d 417 [2d Dept 2004]; *Dignelli v Berman*, 293 AD2d 565 [2d Dept 2002]). A cause of action for breach of fiduciary duty accrues and the statute of limitations begins to run when the fiduciary has openly repudiated the obligation (*see Evangelista v Mattone*, 44 AD3d 704 [2d Dept 2007]). Here, it is alleged in the complaint that Choice and Solomon breached their fiduciary duties to the plaintiffs by failing to procure proper and uninterrupted insurance coverage for plaintiffs. The alleged breach occurred when Choice procured and issued the insurance policy at issue, in May, 2012, and Solomon procured and issued the subject insurance policy, in May 2013. Plaintiffs, however, commenced the instant action, on March 26, 2019, more than four and three years, respectively, after the expiration of the limitations period. Therefore, the plaintiffs' cause of action for breach of fiduciary duty is dismissed as time-barred.

Turning to the plaintiffs' professional negligence cause of action, a claim that an insurance broker was negligent in failing to obtain appropriate insurance is governed by the three year statute of limitations contained in CPLR 214(4) (*see Chase Scientific*

Research, Inc. v NIA Group, Inc., 96 NY2d 20, 30 [2001]). In support of their respective motion and cross-motion, Choice and Solomon contend that the negligence cause of action accrued at the time that the allegedly defective coverage was first procured. However, the statute of limitations "does not [begin to] run until there is a legal right to relief" (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]). In other words, "accrual occurs when the claim becomes enforceable, i.e., when all elements of the tort can be truthfully alleged in a complaint" (*id.* at 94). Since damages are a necessary element of a negligence cause of action (*see Lewiarz v Travco Ins. Co.*, 82 AD3d 1464, 1466 [3d Dept 2011]; *Hesse v Speece*, 204 AD2d 514 [2d Dept 1994]), such a cause of action is not cognizable until damages are sustained. "[W]here, as here, a claim against an insurance agent or broker relating to the failure of insurance coverage sounds in tort, the injury occurred and the plaintiffs were damaged when coverage was denied" (*Lewiarz*, 82 AD3d at 1466; *see Bonded Waterproofing Servs., Inc. v Anderson-Bernard Agency, Inc.*, 86 AD3d 527 [2d Dept 2011]). Applying this principle of law here, the plaintiffs' professional negligence cause of action is time-barred since the only evidence offered by the plaintiffs was the receipt of a disclaimer of coverage letter, dated September 15, 2014, in connection with a personal injury claim filed against plaintiff Spa Castle, Inc., which is more than eighteen months after the expiration of the applicable statute of limitations period. As such, the plaintiffs' cause of action for professional negligence must also be dismissed.

The cause of action for indemnification is likewise dismissed. In determining the applicable statutory period, the reality and essence of a cause of action, rather than what its proponent has named it, governs (*see Bunker v Maccaro*, 80 AD2d 817 [1st Dept 1981], *citing Brick v Cohn-Hall-Marx Co.*, 276 NY 259, 264 [1937]). Here, the complaint alleges that "[p]laintiffs are without fault and defendants must indemnify Plaintiffs for all loses [sic] sustained by Plaintiffs due to defendants fault, including but not limited to defense costs, settlement payments and expenses." Plaintiffs' cause of action for indemnification is based on the same allegations as their negligence cause of action because they are seeking indemnification for damages resulting from Choice and Solomon's alleged negligence in failing to procure the proper insurance coverage. In essence, the gravamen of the plaintiffs' indemnification claim is that the defendants

breached duties that were owed, not to third parties, but to the plaintiffs and, thus, the plaintiffs have a direct claim against te defendants, not one sounding in indemnification (*see Morgan v Worldview Entertainment Holdings, Inc.*, 170 AD3d 500 [1st Dept 2019]). As discussed above, this action was commenced after the expiration of the three-year statute of limitations applicable to professional negligence causes of action and, therefore, the indemnification claim is untimely.

Plaintiffs' cause of action to recover damages for breach of contract accrued, and the relevant six-year statute of limitations began to run, upon the breach, not when plaintiffs allegedly sustained damages arising therefrom (CPLR 213[2]; *see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d 399 [1993]). On a claim that an insurance broker failed to get the coverage requested by the insured, the statue begins to run when the deficient policy at issue is procured and issued (*see St. George Hotel Assocs. v Shurkin*, 12 AD3d 359 [2d Dept 2004]). Here, as to Choice, the alleged breach occurred, in May, 2012, when the policy at issue was procured and issued by Choice. This action was commenced, on March 26, 2019, almost one year after the expiration of the applicable statute of limitations period. Thus, the plaintiffs' cause of action to recover damages for breach of contract against Choice is time-barred.

The breach of contract cause of action insofar as asserted against Solomon, however, was timely commenced because the alleged breach occurred, in May, 2013, when it procured and issued the subject insurance policy, which is within the statutory period.

With respect to this remaining claim, Solomon also cross-moves to dismiss the breach of contract cause of action against it, pursuant to CPLR 3211(a)(1) and (a)(7). On a motion to dismiss, pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 406, 414 [2001]). It is well-established that on a motion to dismiss, pursuant to CPLR 3211(a)(7), the inquiry is limited to whether, looking at the four corners of the complaint, it states a cause of action cognizable at law (*see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In addition, where documentary evidence definitively contradicts the plaintiff's factual allegations and conclusively disposes of the plaintiff's claim, dismissal

pursuant to CPLR 3211(a)(1) is warranted (*see DiGiacomo v Levine*, 76 AD3d 946, 949 [2d Dept 2010]; *Berardino v Ochlan*, 2 AD3d 556, 557 [2d Dept 2003]).

Applying these principles to the case at bar, this Court finds that the complaint sufficiently stated a cause of action for breach of contract against Solomon. Plaintiffs alleged in the complaint that Solomon agreed to procure an insurance policy for the plaintiffs and that Solomon breached that agreement by procuring improper and uninterrupted insurance coverage, which resulted in the receipt of a disclaimer and a lapse of coverage, thereby requiring plaintiffs to defend the underlying personal injury actions by retaining private counsel. Moreover, the documentary evidence submitted by Solomon on its cross-motion, including the plaintiffs' commercial insurance application, did not resolve all factual issues as a matter of law and conclusively dispose of the plaintiffs' breach of contract claim against Solomon.

The Court has reviewed defendants' remaining contentions and finds them without merit.

Accordingly, it is

ORDERED that the motion by defendant Choice to dismiss the complaint against it is granted; and it is further

ORDERED that the cross-motion by defendant Solomon to dismiss the complaint is granted in part and denied in part. Except for the cause of action for breach of contract asserted against Solomon, all other causes of action are dismissed as against it.

Dated: March 11, 2020

TIMOTHY J, DUFFICY, J.S.C.