New York Univ. v Turner Constr. Co.
2020 NY Slip Op 32880(U)
September 1, 2020
Supreme Court, New York County
Docket Number: 653535/2015
Judge: Andrew Borrok
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK **PART** IAS MOTION 53EFM

Justice

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NEW YORK UNIVERSITY, NYU SCHOOL OF MEDICINE, NYU HOSPITALS CENTER,

Plaintiff,

- v -

TURNER CONSTRUCTION COMPANY,

Defendant.

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INDEX NO. 653535/2015

MOTION DATE 06/01/2020

MOTION SEQ. NO. 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 009) 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 287, 288, 289, 290, 291, 292

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, New York University, NYU School of Medicine and NYU Hospitals Center's (the plaintiffs, collectively, **NYU**) motion to amend the complaint pursuant to CPLR § 3025 is granted.

The facts of this matter are set forth in the court's prior decision (NYSCEF Doc. No. 237), and familiarity with the underlying facts is presumed. As relevant to the instant motion, the gravamen of the Complaint is that NYU asserts claims grounded in negligence and breach of contract based on Turner Construction Company's (**Turner**) failure to adequately protect NYU's Langone Medical Center (the **Langone Campus**) during Super Storm Sandy.

The Complaint alleges two causes of action for (1) breach of contract (by NYU School of Medicine against Turner) and (2) negligence (by all the plaintiffs against Turner) (NYSCEF Doc.

No. 2). NYU now moves to amend the Complaint to add an additional third cause of action on behalf of all the plaintiffs against Turner for gross negligence (the **Proposed Amended Complaint;** NYSCEF Doc. No. 224). NYU asserts that its gross negligence cause of action is based on information learned during discovery in this action, i.e., that "Turner was aware of the substantial damage that could result from failing to properly protect" what it calls the "MSB Areaway" but "recklessly ignored not only its contractual and statutory obligations, but also the directions given by NYU personnel" (NYSCEF Doc. No. 222, ¶ 7). During discovery, NYU learned that, on July 18, 2012, Turner's Project Executive and Project Superintendent, Christian Kristensen and Ralph Dillon, received an email stating, "Don't let that water get through the grating at the edge of the ramp in the west-south corner [which was the grating then covering the MSB Areaway] – it'll flood the MSB power distribution," to which Mr. Dillon responded: "On it." (*id.*,¶ 8, NYSCEF Doc. No. 227). Turner's documents also suggest that Turner discussed protecting areas such as the MSB Areaway with subcontractors and Mr. Dillon acknowledged at his deposition that NYU directed Turner to protect the MSB Areaway using plywood, plastic sheeting, and sandbags, which NYU asserts Turner failed to do (NYSCEF Doc. No. 222, ¶¶ 9-12; NYSCEF Doc. No. 229 at 119:17-25)

DISCUSSION

The standard applicable to motions for leave to amend is set forth in CPLR § 3025(b), which states that leave to amend "shall be freely given." In evaluating such requests, courts must consider two factors: "(1) whether the original complaint gave the defendant notice of the transactions or occurrences at issue and (2) whether there would be undue prejudice to the

defendant if the amendment and relation back are permitted" (*O'Hollaran v Metropolitan Transp. Auth.*, 154 AD3d 83, 87 [1st Dept 2017]). A plaintiff seeking leave to amend does not need to "establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co.*, 74 AD3d 499, 500 [1st Dept 2010]). In other words, "no evidentiary showing of merit is required" (*NYAHSA Servs., Inc. v People Care Inc.*, 156 AD3d 99, 102 [3d Dept 2017] [citing *Cruz v Brown*, 129 AD3d 455, 456 [1st Dept 2015]). Where the proposed new claim is based on the "same occurrences … and the original complaint put defendants on notice of those occurrences," the amendment should be permitted (*O'Hollaran*, 154 AD3d at 87).

Here, the original Complaint alleges, among other things, that Turner was careless and negligent in failing to protect against water intrusion into the MSB Areaway prior to Super Storm Sandy, and, specifically, that Turner attempted to protect the MSB Areaway using only a limited number of sandbags. As discussed above, NYU now claims that discovery has revealed, by way of Turner's own documents and deposition testimony, that it was well aware of the importance of protecting the MSB Areaway from water intrusion during storms like Sandy, and that Turner was specifically instructed by NYU to seal the MSB Areaway using plywood, plastic *and* sandbags, which instructions Turner ignored, and that Turner misrepresented to NYU that the MSB Areaway was properly protected when, in fact, Turner knew that it was not. Thus, NYU asserts that Turner's actions were not just negligent, but grossly negligent under New York law, and NYU seeks permission to amend their Complaint based on this discovery accordingly.

NYU's request is granted. As an initial matter, the new allegations are based on the same occurrence – i.e., Turner's alleged failure to properly protect the MSB Areaway – that has been at issue in this action from the outset. Therefore, there cannot be any surprise to Turner from the proposed amendment. In fact, the parties have previously discussed the proposed amendment with the court (*see* NYSCEF Doc. No. 222, ¶ 15).

NYU has also met its burden of showing that the proposed amendment is not palpably insufficient or devoid of merit as the proposed Amended Complaint alleges all the elements of a claim for gross negligence and punitive damages, i.e., that Turner acted with a complete disregard for the rights and safety of others (*see* NY Pattern Jury Instr., Civil § 2:278; §2:10A). Whether NYU may ultimately establish its claims is not relevant as on a motion to amend the issue is whether allegations in the proposed pleading state a claim, not whether the proponent of the amendment would ultimately prevail on the merits (*see Boliak v Reilly*, 161 AD3d 625 [1st Dept 2018]).

Next, turning to prejudice, although Turner claims the amendment will prejudice it by re-opening discovery, discovery in this action is not complete and, because the parties chose to complete their expert discovery first, as of the time of this motion Turner had only partially completed the deposition of just one of NYU's fact witnesses (*id.*, ¶ 16). Further, NYU's expert reports include a report on damages, including damages to which NYU may be entitled based on Turner's now asserted gross negligence claim, together with supporting analysis and documentation. In other words, NYU has already disclosed its damages, including those damages to which it may be entitled based on Turner's alleged gross negligence. In any event, prejudice for purposes of a

motion to amend "does not occur simply because a defendant is exposed to greater liability or because a defendant has had to expend additional time preparing its case" (*O'Halloran*, 154 AD3d at 89).

The fact that the proposed Amended Complaint seeks punitive damages is similarly not prejudicial. As the First Department explained, a defendant is "not prejudiced by the mere fact of exposure to potentially greater liability in the form of punitive damages" (*87 Chambers, LLC v 77 Reade, LLC*, 114 AD3d 525 [1st Dept 2014] [reversing trial court's denial of leave to amend]).

Finally, the proposed gross negligence claim is not barred by the statute of limitations as Turner argues because it is saved by the relation-back doctrine (CPLR § 213[f]). For a claim to relate back to the claims timely asserted in the original complaint, the facts alleged in the original complaint must give notice of the "transactions and occurrences to be proved pursuant to the amended pleading" (*id.*). This standard is clearly met here as a claim for gross negligence has all the same elements as a claim for negligence but also requires a showing of "reckless disregard for the rights of others" (*Bennett v State Farm Fire & Cas. Co.,* 161 AD3d 926, 928 [2d Dept 2018] [reversing trial court's denial of leave to amend to add gross negligence claim where original negligence claim gave notice of the transactions or occurrences to be proved as to gross negligence]). All the Proposed Amended Complaint does is add allegations regarding Turner's alleged reckless disregard, which allegations are "aimed squarely at the conduct which was the subject of [NYU's] original claim" (*Borup v National Airlines, Inc.*, 117 F Supp 475, 476 [SD NY 1954] [permitting addition of gross negligence claim which simply "define[d] with greater particularity the alleged negligence of the defendant and claim[ed] additional damages"]).

Accordingly, it is

ORDERED that the plaintiffs' motion to amend the complaint is granted; and it is further,

ORDERED that the plaintiffs shall serve the Proposed Amended Complaint (attached as Exhibit B to the Affirmation of Jeffrey A. Meltzer, NYSCEF Doc. No. 224) on the defendant within 14 days of this decision and order; and it is further

ORDERED that the defendant serve a responsive pleading within 20 days of receipt of the Proposed Amended complaint.

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9/1/2020
DATE

ANDREW BORROK, J.S.C.

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