

**Creative Rest. v Dyckman Plumbing & Heating,
Inc.**

2020 NY Slip Op 34115(U)

November 16, 2020

Supreme Court, Kings County

Docket Number: 504716/2018

Judge: Devin P. Cohen

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Supreme Court of the State of New York
County of Kings

Index Number 504716/2018

SE04004 & 005

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Part 91

CREATIVE RESTAURANT AND EN LIN,

Plaintiffs,

against

DYCKMAN PLUMBING AND HEATING, INC., NATIONAL GRID SERVICES, INC., SELLING DREAMS, LLC, CHERICO KING ARCHITECT, P.C., "JOHN DOE 1-10," AND "XYZ COMPANY 1-10,"

Defendants.

Papers

Numbered

Notice of Motion and Affidavits Annexed.....	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed...	<u>2, 3</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	
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Other	

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KINGS COUNTY CLERK

Upon the foregoing papers, defendant National Grid Services Inc.'s ("National Grid Services") motion to dismiss and for summary judgment (Mot. Seq. 004) and plaintiffs' motion to amend the complaint (Mot. Seq. 005) are decided as follows:

Plaintiffs' Allegations

Plaintiffs, the owners of a Little Caesar's restaurant, commenced this action for damages to its restaurant allegedly caused by defendants. In their complaint, plaintiffs allege the following:

Plaintiffs contracted with defendant Selling Dreams, a contractor, and defendant Cherico Kings Architect, P.C. ("Cherico Kings") to design and construct its restaurant. Selling Dreams scheduled a date and time for a plumber from defendant Dyckman Plumbing and Heating, Inc. ("Dyckman Plumbing") to connect the gas line at the restaurant. On September 4, 2014, a National Grid Services employee and a plumber from Dyckman Plumbing connected the gas, but to the wrong meter. When plaintiffs began to operate the restaurant, they found the gas bill to be

too low, and they contacted National Grid Services and Selling Dreams. A National Grid Services employee and Selling Dreams both advised plaintiffs that there was no problem.

On December 8, 2016, “gasoline” [sic] fumes were reported near the restaurant, resulting in an inspection of the restaurant by National Grid Services. On December 9, 2016, National Grid Services found a problem with plaintiffs’ gas, accused plaintiff Lin of stealing gas, and terminated plaintiffs’ gas connection. Plaintiffs requested another inspection to locate the gas meter for the restaurant. The National Grid Services employee who conducted the inspection was unable to locate the proper meter.

On December 20, 2016, plaintiff Lin contacted the Dyckman Plumbing to assist in finding the correct gas meter. Dyckman Plumbing located the meter, and plaintiff contacted National Grid Services to connect the gas. However, National Grid Services declined to connect the gas to the meter because, it claimed, the restaurant was under investigation. As of the time plaintiffs commenced this action, the gas has not been connected and the restaurant has remained closed.

Analysis

Defendant National Grid Services moves to dismiss plaintiffs’ claims against them for negligence, gross negligence, negligent hiring and retention, and defamation per se, pursuant to CPLR 3211(a)(5), on the basis that these claims violate the applicable statutes of limitations.¹ The statute of limitations for plaintiffs’ negligence claims is three years (*Natl. Recruiting Group, LLC v Bern Ripka LLP*, 183 AD3d 831 [2d Dept 2020] [negligent hiring]; *Kamath v Bldg. New*

¹ Plaintiffs also assert a claim for breach of contract against National Grid, which is not the subject of this motion to dismiss.

Lifestyles, Ltd., 146 AD3d 765, 767 [2d Dept 2017] [negligence]; *Zuckerbrod v New York Tel. Co.*, 87 AD2d 574, 575 [2d Dept 1982] [gross negligence]). In the complaint, plaintiffs allege that, on September 4, 2014, a National Grid Services employee and a plumber from Dyckman Plumbing connected the gas to the wrong meter. National Grid Services argues that plaintiffs' negligence claims, as pled, arose on that date and, therefore, plaintiffs were required to bring these claims on or before September 4, 2017. Plaintiffs commenced this action on March 7, 2018, and filed an amended complaint, which contained their claim for negligent hiring, on May 9, 2018.

A claim for defamation must be made within a year of the date the defamatory statements were allegedly made (*Tyk v Brooklyn Community Bd. 12*, 166 AD3d 708, 710 [2d Dept 2018], citing CPLR 215[3]). Here the defamatory statements were allegedly made on December 9, 2016, more than a year before plaintiffs commenced this action.

National Grid Services correctly states that plaintiffs do not oppose dismissal of these claims as violative of the statute of limitations. The court notes that, while this motion was pending, the Second Department issued a decision in this matter that reversed the court's (Wooten, J.) prior dismissal of plaintiffs' negligence claim against defendant Cherico Kings. Justice Wooten held that plaintiffs' negligence claim violated the applicable statute of limitations and dismissed the claim on that basis. The appellate court found that there were issues of fact concerning whether the continuing representation doctrine tolled the statute of limitations and reversed Justice Wooten's decision. It does not appear that the continuing representation doctrine applies to National Grid Services and, in any event, plaintiffs do not posit such an argument. Accordingly, these claims are dismissed as against National Grid Services.

National Grid Services also moves for summary judgment to dismiss plaintiffs' claims on the basis that it is not a proper party to this action. On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In support of its motion, National Grid Services submits the affidavit of Reshmi Das, who states that she is the Assistant Secretary of National Grid Services. In her affidavit, she states that National Grid Services: "does not own, operate, manage or maintain any gas facilities anywhere in the United States and particularly not in Kings County, New York where the subject premises is located"; "does not engage in any gas line repairs, construction, installation or modifications to any gas lines or equipment at any time anywhere in the United States, and particularly not in the [sic] Kings County, New York, where the subject premises is located" and "did not have any connection with the alleged work performed to install the flux hose at the subject premises in and around September 4, 2014, nor did [it] have any connection with the alleged termination of gas services at the subject premises in and around December 9, 2016." (Das Affidavit at ¶¶ 5 – 7).

Notably, National Grid Services does not contest any of plaintiffs' allegations or suggest that a National Grid Services affiliate was not involved in the events underlying this action. Furthermore, plaintiff Lin submits his own affidavit in opposition to National Grid Services' motion, in which he states that he visited National Grid Services' offices at 1 MetroTech Center,

in Brooklyn, to apply for a gas connection. He also submits copies of the monthly gas bills plaintiffs received from “National Grid”, and a copy of the website of the New York Department of State, which shows that National Grid Services is located at 1 MetroTech Center. Additionally, plaintiffs argue that summary judgment is premature because National Grid Services has not responded to any plaintiffs’ discovery requests.

Relatedly, plaintiffs move to amend their complaint to add National Grid USA Service Company, Inc. and the Brooklyn Union Gas Company d/b/a National Grid NY. Leave to amend a complaint should be liberally granted absent prejudice to the opposing party, and when the proposed amendment is not palpably insufficient or devoid of merit (*Blanco Gomez v Principe*, 186 AD3d 466, 466 [2d Dept 2020]; *Dialcom, LLC v AT & T Corp.*, 50 AD3d 727 [2d Dept 2008]).

Plaintiffs argue that these entities are affiliates of National Grid Services and do business at the same address. Given the issues of fact raised by plaintiff Lin’s affidavit regarding billing statements, and considering National Grid Services’ conspicuous reticence about the identity of the proper party in this case, the better course is to deny National Grid Services’s motion for summary judgment and grant plaintiffs’ motion to amend the complaint. The only cause of action remaining in this case against these defendants is for breach of contract. It should be a simple matter to determine in discovery the identity of the parties to the service contract.

Conclusion

For the foregoing reasons, defendants’ motion is granted only to the extent that plaintiffs’ claims against National Grid Services for negligence, gross negligence, negligent hiring and retention, and defamation per se are dismissed. Plaintiffs’ cross-motion is granted to the extent

that the complaint may be amended to include a claim for breach of contract against National Grid USA Service Company, Inc. and the Brooklyn Union Gas Company d/b/a National Grid NY. Plaintiffs shall file the amended complaint within twenty days of notice of entry of this order. Then plaintiffs shall serve the amended complaint in accordance with the CPLR.

This constitutes the decision and order of the court.

November 16, 2020
DATE



DEVIN P. COHEN
Justice of the Supreme Court

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