

Carter v OK Mgt.

2020 NY Slip Op 34903(U)

August 5, 2020

Supreme Court, Westchester County

Docket Number: 62655/2018

Judge: Lawrence H. Ecker

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This opinion is uncorrected and not selected for official publication.

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER**

-----X
BETH CARTER,

Plaintiff,

- against -

OK MANAGEMENT, DOLPHIN CONSTRUCTION CORPORATION and 290 PALISADE AVENUE CORPORATION,

Defendants.
-----X

INDEX NO. 62655/2018

DECISION/ORDER

Mot. Seq. 1

Submit Date: 7/01/2020

ECKER, J.

In accordance with CPLR 2219 (a), the decision herein is made upon considering all papers filed in NYSCEF regarding the motion of OK MANAGEMENT and 290 PALISADE AVENUE CORPORATION (290 Palisade) (Mot. Seq. 1), as against codefendant DOLPHIN CONSTRUCTION CORPORATION (Dolphin) for an order: (1) made pursuant to CPLR 3025 (b) permitting OK Management and 290 Palisade to amend their answer to add cross claims for contractual and common law indemnification; (2) made pursuant to CPLR 3212, for an order granting OK Management and 290 Palisade summary judgment declaring that Dolphin is obligated to indemnify OK Management and 290 Palisade; (3) made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and Dolphin’s cross claim as against OK Management; and (4) awarding OK Management and 290 Palisade legal fees incurred to date in this action.

Plaintiff alleges that, on the morning of March 15, 2017, she slipped and fell on an ice patch located in a lane of the parking lot located at 300 Palisade Avenue in the City of Yonkers. The parking lot is owned by 290 Palisade and managed by OK Management (hereinafter collectively referred to as movants).

As a result of her alleged physical injuries, plaintiff commenced this action in August 2018. Shortly thereafter, Dolphin answered, asserting a cross claim against movants for contribution. In December 2018, movants filed a joint answer asserting, among other things, a cross claim against Dolphin for contribution, wherein they contend that they are “entitled to indemnification from and judgment . . . against [Dolphin].”

Following discovery and filing of the note of issue, OK Management and 290 Palisade now move for leave to amend their answer to add cross claims against Dolphin for common law

and contractual indemnification, together with the original cross claim for contribution, and upon granting such amendment, awarding movants summary judgment as against Dolphin declaring that Dolphin is obligated to indemnify movants with respect to plaintiff's claims.

Dolphin opposes the amendment, contending that it is belated inasmuch as 290 Palisade has known about the contract since April 2019, yet movants are now seeking to amend their answer post-note of issue. Dolphin also argues it had no obligation under the contract to remove ice from the parking lot such that it can be held responsible for plaintiff's injury; and that the certificate of insurance is issued as a matter of information only and confers no rights upon the certificate holder.

In reply, movants argue Dolphin is responsible for the accident because plaintiff, through photographs, identified at her deposition the site of her fall as being within the main area of the parking lot. Movants assert that Edward Tatlian, Dolphin's principal, confirmed at his deposition the area which Dolphin was responsible to plow — the same area of the parking lot marked by plaintiff at her deposition; that Tatlian testified it was good practice to pre-salt the area before snow begins to fall; and that Dolphin was responsible to clear the snow in the area where plaintiff fell. Movants contend that Dolphin's duty to defend is broader than its duty to indemnify.

"A motion for leave to amend a pleading may be made 'at any time,' and 'leave shall be freely given upon such terms as may be just.' The determination to permit or deny the amendment is committed to the sound and broad discretion of the trial court, and its determination will not lightly be set aside. Delay alone is insufficient to bar an amendment to the pleading; it must be lateness coupled with significant prejudice to the other side. In the absence of prejudice or surprise . . . leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Park v Home Depot U.S.A., Inc.*, 183 AD3d 645, 646 [2d Dept 2020] [internal citations and brackets omitted], citing CPLR 3025 [b]; see *Mirro v City of New York*, 159 AD3d 964, 967 [2d Dept 2018]).

Here, insofar movants seek leave to amend their answer to add cross claims for common law and contractual indemnification as against Dolphin, the court finds that there is no impediment in doing so (see *Lui v Town of E. Hampton*, 117 AD3d 689, 690 [2d Dept 2014]). There is an issue of coverage relative to the area where plaintiff slipped and fell. 290 Palisade points to the language of the contract between it and Dolphin, which states that it must be indemnified by Dolphin for "any damage under this contract"; that "[i]nsurance will be provided upon signed contract"; that 290 Palisade is an "additional insured under this agreement,"¹ as is further evidenced by Dolphin's certificate of insurance; and that as an additional insured, 290 Palisade is entitled to the same coverage as Dolphin pursuant to the latter's liability policy.

Given the present circumstances stemming from the novel coronavirus (COVID-19) pandemic, a jury trial is improbable in the foreseeable future. The issue of the extent of the coverages provided by Dolphin's carrier has not been fully pursued nor conclusively established by virtue of the certificate of insurance. Further, Dolphin failed to demonstrate that it would be prejudiced by movants' late amendment because it had not conducted discovery relating to movants' cross claims, had relied upon the movants' original answer to its prejudice by forgoing

¹ The contract agreement refers to 290 Palisade as "290 Palisades Ave. Corp."

questioning of the witnesses during depositions, or that Dolphin has somehow been hindered in preparing its defense (see *Gurewitz v City of New York*, 175 AD3d 655, 657-658 [2d Dept 2019]; *Weber v Purow*, 89 AD3d 728, 728 [2d Dept 2011]; *St. Paul Fire & Mar. Ins. Co. v Town of Hempstead*, 291 AD2d 488, 489 [2d Dept 2002]). Therefore, the court authorizes the amendment to movants' answer to add cross claims against Dolphin, which are deemed served.

Despite this amendment, issues of fact remain as to the manner in which Dolphin carried out its contractual obligations to 290 Palisade or whether Dolphin was negligent in any duty it arguably owes to 290 Palisade (see *Engel v Eichler*, 290 AD2d 477, 479 [2d Dept 2002]). If the trier of fact determines that Dolphin was not negligent, then there is no basis to ascribe liability for common law indemnification (see *Aragundi v Tishman Realty & Constr. Co., Inc.*, 68 AD3d 1027, 1029-1030 [2d Dept 2009]; *Bryde v CVS Pharmacy*, 61 AD3d 907, 909 [2d Dept 2009]; compare *Lubell v Stonegate at Ardsley Home Owners Assn., Inc.*, 79 AD3d 1102, 1104 [2d Dept 2010]). The court is unable to determine on this record the extent to which the liability insurance contract between Dolphin and its carrier extends to 290 Palisade, such that it can be conclusively determined that 290 Palisade is entitled to contractual indemnification as a matter of law — likewise a question for the trier of fact (see *Baratta v Home Depot USA*, 303 AD2d 434, 435 [2d Dept 2003]). Hence, a determination as to whether Dolphin must indemnify 290 Palisade is premature at this juncture (see *Garcia v Utica First Ins. Co.*, 7 AD3d 665, 666 [2d Dept 2004]; cf. *Town of Oyster Bay v Employers Ins. of Wausau*, 269 AD2d 387, 388-389 [2d Dept 2000]). Accordingly, movants are not entitled to summary judgment declaring that Dolphin is obligated to indemnify them.

Notwithstanding the foregoing, the amendment of the answer may warrant further discovery to explore 290 Palisade's cross claims. Should 290 Palisade or Dolphin determine that additional disclosure is needed — whether by document demand or deposition — then the party must take the appropriate steps for the continuance of discovery for good cause shown since plaintiff filed the note of issue and certificate of readiness in January 2020 (see 22 NYCRR 202.21[e]; *Sposito v Cutting*, 165 AD3d 863, 865 [2d Dept 2018]; *Ferraro v North Babylon Union Free School Dist.*, 69 AD3d 559, 561 [2d Dept 2010]).

Turning next to that branch of the motion where OK Management separately seeks summary judgment dismissing the complaint as against it, OK Management relies on the deposition testimony of its principal, Pradeep Dhiman, who stated that OK Management was only responsible for maintaining the building on the property, but not the parking lot. Dhiman testified it was his understanding that Dolphin was obligated to plow any accumulated snow and remove ice on the parking lot. Neither plaintiff nor Dolphin opposes OK Management's relief in this regard. Therefore, OK Management is granted summary judgment dismissing the complaint and Dolphin's cross claim as against it (see *Leibovici v Imperial Parking Mgt. Corp.*, 139 AD3d 909, 910 [2d Dept 2016]).

Lastly, movants' demand for legal fees incurred in this action is denied as they failed to state a ground upon which such an award should be based. The posture of this case does not present a situation supporting the imposition of counsel fees (see *Whiteman Osterman & Hanna, LLP v Albany-Troy Neurosurgical Assoc., P.C.*, 50 AD3d 1305, 1305 [3d Dept 2008]; *Peach Parking Corp. v 346 W. 40th St., LLC*, 52 AD3d 260, 261 [1st Dept 2008]).

The court has considered the additional contentions of the parties not specifically addressed herein. To the extent any relief requested by the parties was not addressed by the court, it is hereby denied. Accordingly, it is hereby:

ORDERED that the motion of defendants OK MANAGEMENT and 290 PALISADE AVENUE CORPORATION, as against codefendant DOLPHIN CONSTRUCTION CORPORATION (Mot. Seq. 1), made pursuant to CPLR 3025 (b), for an order permitting OK MANAGEMENT and 290 PALISADE AVENUE CORPORATION to amend their answer to add cross claims for contractual and common law indemnification, is granted, and the amended answer is deemed filed and served (see NYSCEF Doc No. 37); and it is further

ORDERED that the motion of OK MANAGEMENT and 290 PALISADE AVENUE CORPORATION, made pursuant to CPLR 3212, for an order granting summary judgment declaring that DOLPHIN CONSTRUCTION CORPORATION is obligated to indemnify them, is denied, with leave to renew; and it is further

ORDERED that the motion of OK MANAGEMENT, made pursuant to CPLR 3212, for an order granting summary judgment dismissing the complaint and the cross claim of DOLPHIN CONSTRUCTION CORPORATION as against OK MANAGEMENT, is granted, and the complaint and cross claim is dismissed as against OK MANAGEMENT; and it is further

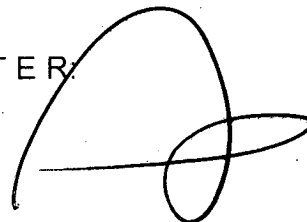
ORDERED that branch of the motion of OK MANAGEMENT and 290 PALISADE AVENUE CORPORATION to award them legal fees incurred to date in this action is denied; and it is further

ORDERED that the caption shall be amended accordingly to reflect the determinations made in this decision; and it is further

ORDERED that the remaining parties shall appear at the Settlement Conference Part of the Court, at a date, time and manner as hereafter directed by said Part.

Dated: August 5, 2020
White Plains, New York

ENTER



HON. LAWRENCE H. ECKER, J.S.C.

APPEARANCES:

Parties appearing via NYSCEF.