Narragansett Bay Ins. Co. v Gold Coast Design & Build, LLC.
2020 NY Slip Op 35125(U)
January 30, 2020
Supreme Court, Nassau County
Docket Number: Index No. 603640-19
Judge: Jeffrey S. Brown
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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU

P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE

NARRAGANSETT BAY INSURANCE COMPANY, as subrogee of JUSTIN and LOUISE KLEINFELD,

Plaintiff(s),

-against-

GOLD COAST DESIGN & BUILD, LLC. and JMB PLUMBING & HEATING INC.,

Defendant(s).

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TRIAL/IAS PART 9

INDEX # 603640-19

Mot. Seq. 02
Submit Date: 1.13.2020

The following papers were read on this motion:	Documents Numbered
Notice of Motion, Affirmations, Exhibits Annexed.....	29
Affirmation in Opposition.....	40
Affirmation in Opposition.....	46
Reply Affidavit(Affirmation).....	

Gold Coast Design & Building, LLC (hereafter "Defendant" or "Gold Coast") moves pursuant to CPLR 3025(b) to amend its answer to assert an additional affirmative defense. Defendant also moves pursuant to CPLR 3211(a)(5) to dismiss the complaint.

On March 30, 2017, Justin and Louise Kleinfeld (hereafter "Homeowner") hired Gold Coast to remodel their home, including the kitchen, for a total cost of $62,200. Approximately $62,000 was paid by February 27, 2018. Gold Coast subcontracted JMB to complete plumbing work in the kitchen. From October 30, 2017 to the end of February of 2018, the kitchen was unusable. Homeowner complained about various issues to Gold Coast. On March 20, 2018, the new plumbing under the kitchen sink had a leak, which caused substantial damage to other rooms and parts of the house. All work being done on the home was halted on or about March 29, 2018, with a significant

amount of work remaining to be completed. Homeowner's insurance company, Narragansett Bay Insurance Company (hereafter "Plaintiff"), covered the losses due to the water damage.

On June 6, 2018, the Nassau County Department of Consumer Affairs (hereafter "Consumer Affairs") conducted an investigation at the property to gather evidence about the work completed, the quality of the work, and all other relevant information. The investigator's report noted that "the consumer was paid by their insurance company for the losses." As a result of Consumer Affairs' findings, Gold Coast paid $10,000 to Homeowner. On January 3, 2019, Homeowner signed a notarized release (hereafter "the Release") discharging Gold Coast from all actions relating to the property at which work was done.

On March 15, 2019, Plaintiff commenced this action claiming both Defendants' negligence and breach of contract. On May 7, 2019, Gold Coast filed a verified answer with the denial of certain allegations and the assertion of affirmative defenses. In particular, the Sixth Affirmative Defense of the Answer states "[t]he answering defendant pleads a set off of all settlements, discontinuances or agreements which would reduce any recovery pursuant to General Obligations Law 15-108." Pursuant to CPLR 3025(b), Defendants seek to add another affirmative defense stating that "[t]he plaintiff's cause(s) of action are barred by execution and Delivery of a general Release, dated January 3, 2018, in the amount of Ten Thousand ($10,000) dollars."

CPLR 3205(b) provides that

> [a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading.

(CPLR 3025(b)). "[L]eave should be freely granted where, as here, a plaintiff seeks to amend a complaint merely to add a new theory of recovery, without alleging new or different transactions[.]" (*Sample v. Levada*, 8 AD3d 465, 468 [2d Dept 2004] [holding that a plaintiff's proposed amended complaint to change the theory of recovery arising from the same alleged negligence, causation and injuries as the original theory of recovery was clearly not lacking in merit]; *see also Trataros Const., Inc. v. New York City Housing Auth.*, 34 AD3d 451 [2d Dept 2006]; *Campbell v. LaForgia Oil Co., Inc.*, 81 AD2d 824 [2d Dept 1981] [holding that leave to amend the answer to include an affirmative defense of collateral estoppel should have been granted, even though the arbitration award was confirmed two and a half years before the motion for leave to amend was filed]). "Where the proposed amended pleading is palpably insufficient or patently devoid of merit, or where the delay

in seeking the amendment would cause prejudice or surprise, the motion for leave to amend should be denied." (*Lucido v. Mancuso*, 49 AD3d 220, 229 [2d Dept 2008] [holding that a proposed amended complaint alleging the defendants' negligence in a wrongful death action was neither palpably insufficient, patently devoid of merit, surprising or prejudicial]; *Norman v. Ferrara*, 107 AD2d 739, 740 [2d Dept 1985] [holding that the defendant's proposed amended answer to deny vehicle ownership, while admitting that the registration was in his name, was palpably insufficient as a matter of law and not granted leave to amend]).

Here, Defendant claims not only that it should be permitted to amend but that the Release warrants dismissal of Plaintiff's cause of action pursuant to CPLR 3211(a)(5). In response, Plaintiff argues that the Release does not have an effect on Plaintiff's right to litigate for its losses, because Defendant was aware of Plaintiff's subrogation right before the Release was executed. Plaintiff asserts that because it did not have notice or give consent to the execution of the Release and Defendant was aware of Plaintiff's subrogation, the Release can not preclude Plaintiff from litigating this matter. Plaintiff cites to *Aetna Cas. & Sur. Co. v. Bekins Van Lines Co.*, 67 NY2d 901 [1986] wherein the Court of Appeals held that a settlement between the defendant and the subrogor, after the subrogee informed the defendant of its subrogation rights, had no effect upon the subrogee's rights as against the defendant. (*See Aetna*, 67 NY2d at 903). As a result, the Court held that the subrogee was entitled to recover the full amount of its claims from the defendant which the defendant had improperly paid to the subrogors. (*Id.*) Indeed,"[a]fter payment of the insurance money, the insurer became the equitable owner of any right of action of the assured to recover the same damages against the person primarily liable." (*Hamilton Fire Ins. Co. v. Greger*, 246 NY 162, 168 [1927]). "[I]f the tortfeasor's settlement occurred after it had learned of the subrogation right, but without the insurance company's consent, the settlement would not have destroyed the insurance company's right to proceed in a subrogation action." (*Callicoon Co-op. Ins. Co. v. Osborne*, 206 AD2d 796, 797 [3d Dept 1994]).

Here, Plaintiff attaches two letters, Plaintiff's Exhibits 3 and 5, to demonstrate that Plaintiff informed Defendant about the assignment of losses prior to the January 3, 2019 Release. The first letter dated April 19, 2018 clearly states that Homeowner is Plaintiff's insured and that Plaintiff covered the losses and damages that Homeowner incurred. The second comes from counsel for Gold Coast and is dated May 22, 2018. That letter acknowledges Narragansett's claim of payment and asks for supporting documentation.

As a result of Plaintiff's payment of Homeowner's losses, Plaintiff became the equitable owner of any right of action of Homeowner to recover the same damages against Defendants. Since Gold Coast was aware of Plaintiff's interests and Plaintiff was neither notified nor consented to the Release's execution, Plaintiff is not bound to the Release and has retained its right to proceed in a subrogation action.

For these reasons, the proposed affirmative defense being proposed by Defendants' motion to amend is devoid of merit and palpably insufficient.[1] Accordingly, Defendants' motion to amend the verified answer is **denied**. For the same reasons, the motion to dismiss pursuant to CPLR 3211(a)(5) is **denied**.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
January 30, 2020

ENTER:

HON. JEFFREY S. BROWN
J.S.C.

[1] Defendants' Sixth Affirmative Defense raises a similar, if not the same, argument, asserting that the Release bars Plaintiff's cause of action pursuant to General Obligations Law 15-108. The proposed amendment is not only devoid of merit, but it would essentially be duplicative of the Sixth Affirmative Defense.