Ryklina v 1116 Kings Highway Realty LLC
2023 NY Slip Op 33662(U)
October 12, 2023
Supreme Court, Kings County
Docket Number: Index No. 521852/19
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 12th day of October, 2023.

P R E S E N T:

HON. WAYNE P. SAITTA,

Justice.

- -X

ALLA RYKLINA,

Plaintiff,

- against -

Index No. 521852/19

1116 KINGS HIGHWAY REALTY LLC, 1118 KINGS HIGHWAY REALTY LLC, ALBERT M. BEYDA, SAMUEL BEYDA, ALDO GROUP INC. D/B/A ALDO AND WILLIAM BARTHMAN JEWELER, LTD. D/B/A WILLIAM BARTHMAN,

Defendants.

- -X

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	55-66 75-76, 78
Opposing Affidavits (Affirmations)	78 83-87
Reply Affidavits (Affirmations)	83-87

Upon the foregoing papers in this personal injury action regarding plaintiff Alla Ryklina (Plaintiff or Ryklina), a pedestrian, who allegedly tripped and fell on the public sidewalk adjacent to 1116 Kings Highway and 1118 Kings Highway in Brooklyn (Properties), defendant Aldo Group, Inc., d/b/a Aldo (Aldo) moves (in motion sequence [mot. seq.] four) for an order, pursuant to CPLR 3211 (a) (5), dismissing the complaint (NYSCEF Doc No. 55).

Plaintiff cross-moves (in mot. seq. six) for an order seeking relief "consistent with" New York Insurance Law § 3420 (NYSCEF Doc No. 75).

Background

On October 7, 2019, Plaintiff commenced this action by filing a summons and a complaint labeled "verified complaint" without a verification (*see* NYSCEF Doc No. 1). The complaint alleges that on September 9, 2019, Plaintiff, a pedestrian on the public sidewalk in front of the Properties owned and maintained by defendants "was caused to slip and/or trip and fall and sustain severe and permanent injuries" (NYSCEF Doc No. 1 at ¶ 81). Plaintiff's accident was allegedly "caused by the negligence of the Defendants and/or said Defendants' servants, agents, employees and/or licensees in the ownership, construction, operation, inspection, repair, management, maintenance and control of the aforesaid premises and the public sidewalks thereat" (*id.* at 82). Plaintiff seeks $5 million (*id.* at ¶ 84).

On December 3, 2019, Defendant Aldo e-filed its answer to the complaint, denied the material allegations (except admitted that it is a foreign company authorized to do business in New York), asserted affirmative defenses, including res judicata, collateral estoppel and discharge in bankruptcy, and asserted cross claims (NYSCEF Doc No. 15).

Aldo's Dismissal Motion

On September 15, 2022, Aldo filed a motion to dismiss the complaint, pursuant to CPLR 3211 (a) (5) (NYSCEF Doc No. 55). Aldo submits an attorney affirmation arguing

that "the cause of action may not be maintained for reason of bankruptcy discharge" (NYSCEF Doc No. 56 at ¶ 2). Defense counsel affirms that:

> "[o]n or about May 7, 2020, defendant ALDO filed a Companies Creditors Arrangement Act claim ('CCAA') for bankruptcy protection in Quebec, and subsequently filed a Chapter 15 bankruptcy petition for each of its affiliates in United States Bankruptcy Court for the District of Delaware. As this Court is aware, a CCAA proceeding is akin to a Chapter 11 Bankruptcy/Restructuring under the Bankruptcy Code, and the Chapter 15 proceeding is for domestic recognition of a foreign proceeding. The Court was notified of the pendency of this proceeding by correspondence dated May 11, 2020 and provided with a copy of the Stay Notice by correspondence dated June 3, 2020 . . .
>
> "On or about December 13, 2020, despite the expiration of the initial proof of claim deadline, plaintiff was provided with correspondence from Ernst & Young, the CCAA proceeding monitor/trustee. This correspondence, annexed hereto as Exhibit 'D', provided explicit instructions as to the procedure for filing a proof of claim in the CCAA/Bankruptcy proceedings in both English and French language. The correspondence went on to communicate the extended Claims Bar Date until September 30, 2020, pursuant to the Claims Process Order of Hon. Michel A. Pinsonnault. A copy of this Claims Process Order is annexed hereto as Exhibit 'E'. *No such proof of claim was received from plaintiff* prior to or since the Claims Bar Date.
>
> "On or about May 4, 2022, the Superior Court, Commercial Division, in and for the Judicial District of Montreal, Canada, issued an Order sanctioning and approving the Re-Amended Plan of Arrangement dated April 21, 2022 . . ." (*id.* at ¶¶ 5-7 [emphasis added]).

Defense counsel explains that Paragraph 5.9 of Aldo's Sanction Order/Plan, entitled "**RELEASE OF THE DEBTORS**," explicitly provides that:

> "On the Plan Implementation Date, each of the Debtors shall be released and discharged *from any and all* demands, *claims, actions, causes of action*, counterclaims, suits, debts, sums of money, accounts, covenants, damages, judgments expenses, executions, liens and other recoveries on account of any liability, obligation, demand or cause of action of whatever nature which any Person may be entitled to assert, whether known or unknown, matured or unmatured, foreseen or unforeseen, existing or hereafter arising, based in whole or in part on any act or omission, transaction, duty, responsibility, indebtedness, liability, dealing or other occurrence existing or taking place on or prior to the later of the Plan Implementation Date and the date on which actions are taken to implement the Plan, that constitute or are in any way relating to, arising out of or in connection with any Affected Claims, the business and affairs of the Debtors, the Plan, the CCAA Proceedings and the U.S. Case, or any Affected Claim that has been barred or extinguished by the Claims Process Order, *and all claims arising under such actions or omissions shall be forever waived and released* (other than the right to enforce the Debtors' obligations under the Plan and the Sanction Order), all to the fullest extent permitted by Applicable Law, providing that nothing herein shall release or discharge the Debtors from and in respect of (i) any Unaffected Claim, (ii) any Claim which may not be released pursuant to the provisions of the CCAAA and (iii) any Claim listed in subsection 19 (2) of the CCAA to the extent that such Claim is held by a Creditor who has not voted, and who is not deemed to have voted, in favour of the Plan" (*id.* at ¶ 8; *see also* NYSCEF Doc No. 64 at ¶ 5.9 [emphasis added]).

Defense counsel asserts that "it is undisputed that plaintiff was placed on notice of the pendency of the CCAA and Chapter 15 bankruptcy proceedings . . . and was placed on notice of the Claims Bar Date . . . and failed to interpose a Proof of Claim in the proceeding" (NYSCEF Doc No. 56 at ¶ 10). Counsel argues that "based upon CPLR 3211 (a) (5), the causes of action by plaintiff and all co-defendants as against defendant ALDO must be

dismissed in their entirety, with prejudice, as the adoption of the Plan Implementation by the Bankruptcy Court . . . has fully and completely released the instant claims per the annexed and foregoing [Bankruptcy] Orders . . . as no party filed the requisite Proof of Claim" (*id.* at ¶ 11).

Plaintiff's Opposition and Cross Motion

Plaintiff, in opposition, submits an attorney affirmation arguing that "the alleged bankruptcy discharge is ineffectual with respect to . . . Ryklina since the plaintiff was not properly listed on the bankruptcy petition with a correct address, and was thus not formally notified, or notified at all, of the proceeding, the subject debt was not discharged in the defendant's bankruptcy proceeding" (NYSCEF Doc No. 78 at ¶ 4). Plaintiff's counsel further argues that Aldo failed to demonstrate that it met all of the requirements for a bankruptcy discharge against a creditor, including that Ryklina had notice or actual knowledge of Aldo's bankruptcy and that she was named in Aldo's bankruptcy petition (*id.* at ¶ 5).

Plaintiff also cross-moves "for relief against the insurer of . . . Aldo . . . (believed to be Chubb Insurance), under Insurance Law § 3420, despite Aldo's claims of discharge in bankruptcy . . ." (*id.* at ¶ 7). Plaintiff's counsel asserts that "New York State law holds that a bankruptcy discharge does not bar a pending lawsuit where the defendant has liability insurance coverage for the events forming the basis of the lawsuit" (*id.* at ¶ 13). Plaintiff seeks "relief" under Insurance Law § 3420, which "precludes the defendant's insurance

carrier from being released by the virtue of Aldo's purported bankruptcy discharge" (*id.* at ¶¶ 14-15).

Aldo's Opposition and Reply

Aldo, in opposition to the cross motion and in further support of its dismissal motion, submits an attorney affirmation arguing that Insurance Law § 3420 is irrelevant because it only relates to judgment creditors (NYSCEF Doc No. 83 at ¶ 4).

Discussion

"A party may move for judgment dismissing one or more causes of action on the ground that the cause of action may not be maintained because of discharge in bankruptcy" (*Bd. of Directors of Colonial Square Homeowners' Ass'n, Ltd. v Signorile*, ___ AD3d ___, 2023 WL 6134162, *1 (2d Dept 2023). However, the Court of Appeals has held that a bankruptcy discharge "does not bar a plaintiff in a personal injury action from obtaining a judgment against a bankruptcy defendant for the limited purpose of pursuing payment from defendant's insurance carrier" (*see Lang v Hanover Ins. Co.*, 3 NY3d 350, 355 [2004]). The Court of Appeals further held that:

> "[e]ven if we were to assume that the potential personal liability judgment was listed in [defendant's] bankruptcy petition, the discharge would not prevent plaintiff from obtaining a judgment against [defendant], thereby satisfying the section 3420 condition precedent to suit against [defendant's insurer]" (*id.* at 355-356).

Here, Plaintiff is correct in arguing that she may maintain a personal injury action against Aldo, despite its discharge in bankruptcy, for the limited purpose of pursuing

payment from Chubb, Aldo's liability insurer, in a subsequent lawsuit under Insurance Law § 3420. Consequently, Aldo's dismissal motion is denied.

However, Plaintiff's cross motion for "relief" pursuant to Insurance Law § 3420 is denied as premature. While that statute provides that an injured plaintiff may have the right to sue a bankrupt insured's insurance carrier because "the insolvency or bankruptcy of the person insured . . . shall not release the insurer from the payment of damages for injury sustained or loss occasioned during the life of and within the coverage of such policy[,]" obtaining a judgment against Aldo is a condition precedent to any lawsuit to recover against Chubb, Aldo's insurer. As the Court of Appeals explained in *Lang v Hanover*, the bankruptcy discharge would not prevent Ryklina from obtaining a judgment against Aldo, which is *a condition precedent to a lawsuit against Chubb*, pursuant to Insurance Law § 3420. Accordingly, for the reasons discussed herein, it is hereby

ORDERED that Defendant Aldo's dismissal motion (mot. seq. four) is denied; and it is further

ORDERED that Plaintiff's cross motion (mot. seq. six) is denied as premature.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.