Steward v Brooklyn Pier 1 Residential Owner, LP
2023 NY Slip Op 35033(U)
August 1, 2023
Supreme Court, Kings County
Docket Number: Index No. 501930/19
Judge: Carl J. Landicino
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At an IAS Part Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 1st day of August 2023.

PRESENT:

HON. CARL J. LANDICINO,
Justice.

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LEVERN T. STEWARD,

Plaintiff,

-against-

Index No.: 501930/19

BROOKLYN PIER 1 RESIDENTIAL OWNER, LP, BROOKLYN PIER 1 HOTEL OWNER, LP, HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, CONSTRUCTION REALTY SAFETY GROUP, CONSTRUCTION AND REALTY SERVICES GROUP, TOLL BROTHERS, INC. AND STARWOOD CAPITAL, LLC,

DECISION AND ORDER

MOTION SEQUENCE #5

Defendants.

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BROOKLYN PIER 1 RESIDENTIAL OWNER, LP, BROOKLYN PIER 1 HOTEL OWNER, LP, HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, TOLL BROTHERS, INC. AND STARWOOD CAPITAL, LLC,

Third-Party Plaintiffs,

-against-

GYPSUM NEW YORK SALES CORP. D/B/A POURED FLOORS OF NY & NJ,

Third-Party Defendants.

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BROOKLYN PIER 1 RESIDENTIAL OWNER, LP, BROOKLYN PIER 1 HOTEL OWNER, LP, HUDSON MERIDIAN CONSTRUCTION GROUP, LLC, TOLL BROTHERS, INC. AND STARWOOD CAPITAL, LLC,

Second Third-Party Plaintiffs,

-against-

ARTHUR BYRD,

Second Third-Party Defendant.

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The following e-filed papers read herein:	NYSEF Doc Nos.:
Notice of Motion/Order to Show Cause/Petition/ Cross Motion and Affidavits (Affirmations)	152-166
Opposing Affidavits (Affirmations)	167-171
Reply Affidavits (Affirmations)	173-178

Upon the foregoing papers, proposed intervenor Utica Mutual Assurance Company (Utica) moves (motion sequence five) for an order, pursuant to CPLR 1012 and/or 1013, permitting it to intervene in this personal injury action to protect its subrogation rights.

Factual Background

In December 2015, Utica issued a $1,000,000.00 supplementary uninsured/underinsured motorist (SUM) insurance policy to third-party defendant Gypsum New York Sales Corp. d/b/a Poured Floors of NY & NJ (Gypsum) for the period of February 13, 2016 to February 13, 2017 (SUM policy). Subsequently, on August 24, 2016, plaintiff Levern T. Steward (plaintiff) alleged injuries after being struck by the vehicle operated by second third-party defendant Arthur Byrd (Byrd) at or near the corner of Furman and Fulton Streets in Brooklyn, New York. At the time of the accident, Byrd was proceeding around a construction flag man, who was guiding a vehicle exiting an adjacent construction site; and plaintiff, who was employed by Gypsum as a truck driver and laborer, was retrieving items from the back of a tractor-trailer owned by Gypsum at the construction site. In April 2017, plaintiff settled its claims against Byrd for the sum of $25,000.00 and provided Byrd with a general release, which reserved the rights of any insurer to their subrogation claims. Plaintiff then filed a claim with Utica for underinsured motorist benefits.

After Utica denied his claim, plaintiff served an arbitration demand on April 11, 2017. In response, Utica petitioned the Supreme Court, Suffolk County for a permanent stay of arbitration, which was granted by decision and order dated October 2, 2018. Plaintiff subsequently appealed the decision; and, on January 15, 2020, the Appellate Division, Second Department reversed the Supreme Court's decision and ordered the arbitration to proceed (*see Utica Mutual Assurance Company v Levern Steward*, 179 AD3d 815 [2d Dept 2020]). After a hearing, by decision dated December 7, 2020, the arbitrator valued plaintiff's injuries at $800,000.00 but set-off $25,000.00 [Byrd's settlement amount], which resulted in an award of $775,000.00 in favor of plaintiff (arbitration award). On January 26, 2021, Utica satisfied the arbitration award.

Procedural History

Plaintiff commenced this action on January 28, 2019, by the service of a summons and complaint against defendants Construction Realty Safety Group (CR Safety) and Construction and Realty Services Group (CR Services) and defendants/third-party plaintiffs/second third-party plaintiffs Brooklyn Pier 1 Residential Owner, LP (BP1 Residential), Brooklyn Pier 1 Hotel Owner, LP (BP1 Hotel), Hudson Meridian Construction Group, LLC (Hudson), Toll Brothers, Inc. (Toll Brothers) and Starwood Capital, LLC (Starwood) (collectively, defendants). In his complaint, plaintiff asserts common law negligence and Labor Law §§ 200, 240 (1) and 241 (6) claims.

Issue was joined by the filing of the answer of CR Safety and CR Services (collectively, CRSG) on May 16, 2019. BP1 Residential, BP1 Hotel, Hudson, Toll

Brothers, and Starwood (collectively, defendants/third-party plaintiffs) subsequently filed their answer on May 30, 2019. Thereafter, defendants/third-party plaintiffs impleaded Gypsum and Byrd for contribution and indemnification on October 16, 2019 and November 26, 2019, respectively. Gypsum filed its answer on January 3, 2020. In lieu of an answer, on February 7, 2020, Byrd filed a motion to dismiss the second third-party complaint, pursuant to CPLR 3211 (a) (5) and (7), based upon the payment and release doctrine and for failure to state a cause of action for indemnification. By decision and order dated August 19, 2020, Byrd's motion was granted, and the second third-party complaint was dismissed.

Utica's Instant Motion

On April 20, 2022, Utica filed the instant motion seeking an order, pursuant to CPLR 1012 and/or 1013, permitting it to intervene in this action to protect its right to recover the sum it paid to plaintiff pursuant to the arbitration award. Asserting that its right to subrogation accrued upon payment of the arbitration award, Utica claims entitlement to intervene as of right, pursuant to CPLR 1012, and by permission, pursuant to CPLR 1013, to ensure that recovery of the monies it paid to plaintiff from any party found liable in this action, to the extent of that party's liability. Utica argues that if it is not permitted to intervene, plaintiff could obtain a double recovery since the arbitrator already determined the value of his injuries and plaintiff could retain the sum awarded in this action without observing subrogation rights.

Defendants' Opposition

In opposition, defendants argue that Utica's motion should be denied, since Utica failed to submit its proposed pleading as required by CPLR 1014. Notwithstanding, defendants contend that Utica has not demonstrated entitlement to intervene as of right or by permission under CPLR 1012 or 1013, in that it fails to identify a statute granting it an absolute right to intervene; it would not be bound by any judgment in this action; and the action does not involve property in which Utica has an interest.

Furthermore, defendants argue that Utica's attempt to assert its subrogation rights as an intervenor is improper, in that the SUM policy requires Utica to commence a separate subrogation action. Nevertheless, they contend that Utica's motion should be denied, since its subrogation claim is barred by CPLR 214 (5). Defendants aver that, as a subrogation claim is subject to the same three-year statute of limitations as the underlying tort and plaintiff's accident occurred on August 24, 2016, Utica's subrogation claim, first asserted in its application to intervene filed on March 10, 2021,[1] is time-barred.

Gypsum's Opposition

In opposition, Gypsum adds that Utica's motion should be denied, since insurance disputes should not be decided by the same jury deciding liability issues, as it

[1] Utica filed a prior motion to intervene (mot. seq. 4) on March 10, 2021, which was marked off by the court on March 2, 2022. Utica later renewed its application by the instant motion on April 20, 2022.

fundamentally prejudices the insured defendant. Moreover, Gypsum argues Utica cannot recover any monies from it, as a covered person under the SUM policy, pursuant to Article 51 of the New York Insurance Law (No-Fault Law), which prohibits an insurer to subrogate a claim against covered persons (*see* New York Insurance Law (Insurance Law § 5104 [a]). Moreover, Gypsum contends that, as BP1 Residential, BP1 Hotel and Hudson are additional insureds under the SUM policy, Utica also cannot recover monies from them.

Plaintiff's Partial Opposition

Although plaintiff does not dispute Utica's right to recover the monies it paid to him from anyone legally responsible for his bodily injuries, he argues that Utica's right to recover is limited to payments solely for his bodily injuries as specified in the SUM policy since the arbitration award did not include a determination as to his claims relating to future lost wages, diminished earning capacity claim or his future medical expenses. Additionally, plaintiff argues that Utica is also limited in the manner in which it can pursue its right to recover by the SUM policy, which specifies that Utica must pursue its right by subrogation action. Notwithstanding, plaintiff maintains that, if the court finds that Utica has a right to intervene, the court should, nevertheless, deny Utica's motion with leave to renew upon submission of its proposed pleading, as required by CPLR 1014.

Utica's Reply

In reply, Utica submits its proposed pleading. However, relying on *Overseas Chines Mission v Well-Come Holdings* (145 AD3d 634 [1st Dept 2016]), Utica argues that the submission was not required. Utica next avers that, contrary to the parties' contentions, it has demonstrated entitlement to intervene pursuant to CPLR 1012 and 1013. Utica posits that defendants' argument that it has not identified a statute that confers it an absolute right to intervene ignores the remainder of CPLR 1012 and 1013, which allows intervention as of right when the intervening party's interests may not be properly protected or when the action involves a claim for bodily injury and the intervening party may be adversely affected by the judgment, both of which Utica contends is present in this case. Utica argues that its interests are not properly protected based upon plaintiff's contention that future lost wages, diminished earning capacity and future medical expenses are not included in Utica's subrogation claim. Utica further argues that it will be adversely affected by the judgment in this action, if defendants pay plaintiff and plaintiff does not repay Utica.

Next, Utica contends that, although the parties argue that it must file a separate subrogation action, the law permits intervention. Utica further argues that the statute of limitations on its subrogation claim has not expired since its claim relates back to the date of the filing of plaintiff's complaint, and as CPLR 204 stayed the applicable three-year statute of limitations, its obligation to pay SUM benefits was not triggered until January 15, 2020, when the appellate court ruled that it had an obligation to pay the benefits.

Moreover, Utica argues that, as it is not seeking a declaration regarding insurance coverage but the derivative right to recover what it paid, its request to intervene does not improperly join insurance and liability issues. Utica further avers that Gypsum's arguments regarding the No Fault Law are irrelevant and does not prohibit it from seeking recovery from any of the defendants, including Gypsum.

Discussion

Proposed Pleading

Contrary to Utica's contentions, CPLR 1014 requires that a motion seeking leave to intervene, pursuant to CPLR 1012 or 1013, "be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought" (CPLR 1014). As stated by the court, in *New Hope Missionary Baptist Church, Inc. v 466 Lafayette Ltd*, "[t]he court has no power to grant leave to intervene [under CPLR 1012 or 1013] where, as here, the prospective intervenor did not include in [his] motion papers 'a proposed pleading setting forth the claim or defense for which intervention is sought'" (*New Hope Missionary Baptist Church, Inc. v 466 Lafayette Ltd*, 169 AD3d 811, 812 [2d Dept 2019] quoting *Matter of Carriage Hill v Lane*, 20 AD2d 914 [2d Dept 1964]).

The case of *Oversea Chinese Mission v Well-Come Holdings* (145 AD3d 634 [1st Dept 2016]), relied on by Utica, does not dictate a contrary conclusion, not only because the Appellate Division, Second Department is the controlling authority for this court, but also since the First Department, in the later case of *US Bank Trust NA v 21647 LLC* (188 N.Y.S.3d 491 [1st Dept 2023]), declined to adopt its holding in *Oversea Chinese Mission,*

noting that the proposed intervenor's "reliance on *Oversea Chinese Mission v Well-Come Holdings, Inc.* (145 AD3d 634 [1st Dept 2016]) for the proposition that no proposed pleading is required is misplaced. That case made no reference to CPLR 1014, which specifically provides that '[a] motion to intervene *shall* be accompanied by a proposed pleading setting forth the claim or defense for which intervention is sought' " (*US Bank Trust NA v 21647 LLC*, 188 N.Y.S.3d at 492 [emphasis in original]).

Although Utica belatedly submitted its proposed pleading with its reply papers, such submission was improper and does not serve to bring it into compliance with CPLR 1014 (*see* CPLR 1014; *see also US Bank, NA v Nathan,* 173 AD3d 1112 [2d Dept 2019]; *Vardaros v Zapas,* 105 AD3d 1037 [2d Dept 2013]; *Henriquez v Clarence P. Grant Hous. Dev. Fund Co., Inc.*, 186 AD3d 577 [2d Dept 2020]). As a result, Utica's motion must be denied for failure to comply with CPLR 1014 (*see MTGLQ Invs., LP v Noftell*, 204 AD3d 786 [2d Dept 2022]; *New Hope Missionary Baptist Church, Inc. v 466 Lafayette Ltd*, 169 AD3d at 812). While such denial would generally be with leave to renew upon proper papers, [2] this allowance is not available to Utica, since its subrogation claim is time-barred, as further discussed herein.

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[2] The Appellate Division, Second Department has ruled against an insurer's right to intervene in pending tort litigation between its insured and the alleged wrongdoer, finding that doing so would create an adversarial relationship between the insurer and its insured and detrimentally complicate the litigation (*see Humbach v Goldstein*, 229 AD2d 64 [2d Dept 1997]). Although the holding in *Humbach* has come into question, in light of the Court of Appeals' decision in *Fasso v Doerr* (12 NY3d 80, 89-90 [2009]), and the NYS Legislature's subsequent enactment of General Obligation Law (GOL) § 5-335, which only addresses situations where the insured and tortfeasor have settled (*see Rizzo v Moseley*, 30 Misc3d 773 [Sup Ct, Westchester County 2020] and *Robles v Bruhns*, 31 Misc3d 1219[A] [Sup Ct, Suffolk County 2011]), to date, *Humbach* has not been reversed and

Utica's Right of Subrogation

Utica's right of subrogation arises both from contract, namely the SUM policy, and from the principals of equity by virtue of its satisfaction of the arbitration award. Paragraph 13 of the "Conditions" section of the SUM policy, which is entitled "Subrogation," states, in pertinent part, that

> "[i]f we make a payment under this SUM coverage, we have the right to recover the amount of this payment from any person legally responsible for the bodily injury or loss of the person to whom, or for whose benefit, such payment was made to the extent of the payment . . ." (*see* NYSCEF Doc No. 163 at 107).

Although the parties argue that this policy language requires Utica to commence a subrogation action to assert its right to recover, the unambiguous policy language reveals no such requirement. Instead, it merely preserves Utica's right to subrogation.

Statute of Limitations

A subrogation claim, whether based in contract or in equity, is subject to the same three-year statute of limitations as the underlying tort. Therefore, as plaintiff is alleging personal injuries, CPLR 214 (5), which requires personal injury claims to be commenced within three years from the date of the injury, applies to Utica's subrogation claim. Furthermore, "since the nature of subrogation is derivative of the underlying tort, it accrues from the date of the underlying accident and not from the date of payment" (*Liberty Mut.*

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neither the NYS Legislature nor the Court of Appeals have addressed whether an insurer can intervene in pending tort litigation, as sought by Utica herein.

Ins. Co. v Clark, 296 AD2d 442 [2d Dept 2002], citing *Matter of Nationwide Mut. Ins. Co. v Motor Veh. Acc. Indem. Corp.*, 190 AD2d 798 [1993]; *see also Allstate Ins. Co. v Stein*, 1 NY3d 416 [2004]).

Therefore, since Utica initially moved to intervene on March 10, 2021, nearly five years after plaintiff's accident on August 24, 2016, its subrogation claim is barred by CPLR 214 (5); and, despite Utica's contentions, its subrogation claim is not made timely by CPLR 204 (b) or the relation back doctrine.

CPLR 204 (b)

CPLR 204 (b) states, in pertinent part,

> "(b) Arbitration. Where it shall have been determined that a party is not obligated to submit a claim to arbitration, the time which elapsed between the demand for arbitration and the final determination that there is no obligation to arbitrate is not a part of the time within which an action upon such claim must be commenced. The time within which the action must be commenced shall not be extended by this provision beyond one year after such final determination."

Thus, Utica's argument that CPLR 204 (b) tolled the applicable three-year statute of limitation under CPLR 214 (5) from April 11, 2017, when the arbitration demand was served, until January 15, 2020, when the appellate court ruled that it had an obligation to pay the benefits, is an incorrect application of the statute.

Notwithstanding, CPLR 204 (b) is, nevertheless, inapplicable to Utica's claim, since plaintiff's tort action against the defendants does not involve the same controversy in the

SUM arbitration between plaintiff and Utica (*see Provenzano v Joffe*, 12 AD3d 353 [2d Dept 2004], *lv denied* 5 NY3d 701 [2005]). As the court held, in *Provenzano v Joffe*,

> "the purpose of CPLR 204 (b) is to preserve a remedy to a litigant who has mistaken his forum . . . [T]he function of CPLR 204 (b) is similar to that of CPLR 205. The two provisions serve to extend the time for 'commencing *a second action* after *a timely action* has been terminated in a manner other than by voluntary discontinuance, a dismissal for neglect to prosecute, or a final judgment on the merits' (*Bright v Pagan*, 236 AD2d 350, 351 [2d Dept 1997]). Here, as in *Bright*, there was no second action 'because the demand to arbitrate did not concern the claim asserted in the common-law negligence action. The demand to arbitrate concerned the plaintiff's contractual rights to uninsured motorist benefits" under his policy with Federal (*id.*). Thus, the common-law negligence cause of action was not "an action upon such claim' as was arbitrated, within the meaning of CPLR 204 (b), and the plaintiff was not entitled to the statutory toll under the circumstances of this case (*id.*)" (*Provenzano v Joffe*, 12 AD3d at 355).

Relation Back Doctrine

Next, Utica's argument that the statute of limitations on its subrogation claim relates back to the filing date of plaintiff's complaint, pursuant to the relation back doctrine, is similarly unavailing (*see Insurance Co. of N. Am. v Hellmer*, 212 AD2d 665 [2d Dept 1995] [where the court held that the plaintiff could not avail himself of the relation back doctrine to amend his original complaint for personal injury to include an otherwise time-barred claim as a subrogor for property damage on behalf of his insurer]). In *Insurance Co. of N. Am. v Hellmer*, the Second Department reasoned that

> "[it] does not believe that CPLR 203 (subd [e]) was intended to permit an amendment of this sort, the effect of which would

> be to revive an otherwise time-barred claim by a third party, a stranger to the initial action. Applying CPLR (subd [e]) in such a situation would be to distort its meaning and purpose. The relation back provision was not meant to extend this far and the court declines to apply it here" (*Insurance Co. of N. Am. v Hellmer*, 212 AD2d at 665, citing *Krellenstein v Fieldcrest Mills*, 123 Misc2d 783, 784-785 [Sup Ct, New York County 1984]; *see also Key Intl. Mfg v Morse/Diesel, Inc.*, 142 AD2d 448, 458-459 [2d Dept 1988]).

Based upon the foregoing, Utica's motion must be denied. In light of this decision, the court need not address the parties' or Utica's remaining contentions.

Conclusion

Accordingly, it is hereby

ORDERED that Utica's motion (mot. seq. five) seeking an order, pursuant to CPLR 1012 and/or 1013, permitting it to intervene in this action is denied.

This constitutes the decision and order of the court.

E N T E R,

Carl J. Landicino, J.S.C.