

Bedke v Chelsea Gardens Owners Corp.

2012 NY Slip Op 32392(U)

September 10, 2012

Supreme Court, New York County

Docket Number: 601112/2009

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PRESENT: _____
Justice

PART 15

Index Number : 601112/2009
BEDKE, KATHRYN
vs.
CHELSEA GARDENS OWNERS CORP
SEQUENCE NUMBER : 007
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

SEP 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9-10-12

 _____, J.S.C.

HON. EILEEN A. RAKOWER

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
KATHERINE BEDKE, JACK CHEN, RICHARD SLOTE,
AND LESLIE WEINBERG,

Plaintiffs,

Index No.601112/09
Mot. Seq. No. 07 and 08
Decision and Order

- against -

CHELSEA GARDENS OWNERS CORP., MARLITE
CONSTRUCTION CORP., RUDD REALTY MANAGEMENT
CORP., ALEXANDER COMPAGNO & ASSOCIATES,
ENGINEERING SOLUTIONS, PLLC; WILLIAM
CANDILOROS, HALIA CHUDYK, MARK GILBERT NEARY
(a/k/a GIL NEARY), HAL MOSKOWITZ, JOHN RYAN,
DAVID SHEAR, MATTHEW A. WOOLF, Individually and as
Members of the Board of CHELSEA GARDENS OWNERS
CORP., JOHN DOE, JANE DOE AND XYZ CORP.,
Defendants.

FILED

SEP 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

-----X
ALEXANDER COMPAGNO & ASSOCIATES,
Third-Party Plaintiff,

Third-Party Index No.
591035/09

-against-

STRATFORD ENGINEERING, LLC and KARL CHEN, P.E.,
Third-Party Defendants.

-----X
MARLITE CONSTRUCTION CORP.,
Second-Third-Party Plaintiff,

Second-Third-Party
Index No.

-against-

DS L VENTURE, INC. and ROSE DEMOLITION
AND CARTING, INC.,
Second-Third-Party Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

This is an action to recover monetary damages for alleged property damage to cooperative apartment units as a result of a renovation project undertaken by the

defendant cooperative, Chelsea Gardens Owners Corp. The construction commenced in 2008. Defendant/second-party plaintiff Marlite Construction Corp. ("Marlite"), the general contractor, hired Rose Demolition and Carting, Inc. ("Rose") as a subcontractor to excavate the basement space.

Presently before the Court is Rose's motion for an Order dismissing the second-third party Complaint commenced by Marlite pursuant to CPLR §3211, §3126, and 22 NYCRR §202.27 due to Marlite's failure to comply with numerous orders of this Court; failure to obtain new counsel in the time allotted by this Court; failure to appear for court-ordered conferences; failure to provide discovery responses; and failure to appear for examination before trial, as ordered before the Court. Marlite does not oppose.

Plaintiffs Bedke, Slote, and Weinberg cross move pursuant to CPLR 3024 and 1003 for leave to serve an amended complaint to add Rose, third party defendant Stratford Engineering, LLC ("Stratford Engineering"), and third party defendant Karl Chen, P.E. ("Karl Chen"), as direct defendants and to assert negligence claims against them.

Rose, Stratford Engineering, and Karl Chen oppose the cross motions. Third-party plaintiff Alexander Compagno & Associates ("Compagno") opposes Rose's motion and supports the cross motions.

A. Rose's Motion

As alleged in Terri Hall's supporting affirmation, to date, Marlite has failed to respond to Rose's demand for a Bill of Particulars and other discovery (initially served on Marlite on November 1, 2010 and renewed on February 17, 2012); failed to respond to Rose's counterclaims (served on Marlite on February 17, 2012); and failed to comply with May 11, 2010 Compliance Conference Order directing the parties to serve Bills of Particulars and other outstanding discovery requests.

On or about June 14, 2010, Marlite moved to consolidate the Bedke/Slote and Weinberg actions, which was granted by this Court on September 13, 2010. Attorneys for Marlite moved by Order to Show Cause to be relieved as counsel for Marlite, which was granted on October 25, 2011. As per the Order, all activity was stayed for 30 days to enable Marlite to appoint new counsel and a Compliance Conference was

[*4]

scheduled on December 20, 2011 and February 21, 2012 or at the subsequently party depositions. Marlite's deposition did not take place on March 29, 2012, as ordered by the December 20, 2011 Compliance Conference Order and renewed in the February 21, 2012 Order.

Pursuant to 22 NYCRR 202.27(c), if the defendant appears "[a]t any call of a calendar or at any conference, where the plaintiff fails to appear, "the judge may dismiss the action . . .". Pursuant to CPLR 3126, the Court may issue "an order striking any pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or any part thereof, or rendering a judgment by default against the disobedient party." The sanctions imposed by §3126 are warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407 [1st Dept. 2006]). The moving party must show "conclusively that failure to disclose was willful, contumacious or due to bad faith." (*Dauria v. City of New York*, 127 AD2d 416 [1st Dept. 1987]).

Here, Rose has made the requisite showing. Marlite's failure to provide requested discovery, abide by numerous court orders, appear for several Compliance Conferences or at its own scheduled deposition constitutes willful and contumacious conduct warranting the striking of its second third-party complaint. Furthermore, Marlite has not appointed new counsel and a corporation must be represented by counsel. See CPLR 321(a).

B. Bedke, Slote, and Weinberg's Cross Motion

Pursuant to CPLR 3025(b), "A party may amend his 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." (*Konrad v. 136 East 64th Street Corp.*, 246 AD2d 324, 325[1st Dept. 1998]). "Where the new defendant is united in interest with a defendant named in the original complaint, CPLR 203(c) allows amendment to assert a claim against a new defendant, even though the statute of limitations has run. To invoke this relation back doctrine, a plaintiff must show that: (1) both claims arise out of the same transaction; (2) the new party is united in interest with the original defendant such that their respective defenses are the same and they stand or fall together; and (3) the new party knew or should have known that but for the mistake of the plaintiff in failing to identify all proper parties, the action

would have been brought against him.” (*Tucker v. Lorieo*, 291 AD2d 261[1st Dept. 2002]).

Here, the Court finds that Bedke, Slote, and Weinberg are permitted to serve an amended complaint to add Rose, Stratford Engineering, Karl Chen, P.E., as direct defendants and to assert negligence claims against them. The proposed claims arise out of the same renovation project that is the basis of their initial pleadings, the parties are united in interest with existing defendants, and the parties knew or should have know that but for the mistake of the plaintiffs the action would have been brought against them. The proposed new defendants are already in the case, have been involved in the discovery process, and as such there will no prejudice as a result of granting the amendment.

Wherefore, it is hereby,

ORDERED that second third-party defendant Rose Demolition and Carting, Inc.'s motion to dismiss second-third party plaintiff Marlite Construction Corp.'s Complaint is granted and the Clerk is directed to enter judgment in favor of Rose Demolition and Carting, Inc. dismissing the action; and it is further;

ORDERED that plaintiff Kathryn Bedke, Richard Slote, and Leslie Weinberg’s cross-motions for leave to serve an amended complaint to add Rose Demolition and Carting, Inc., Stratford Engineering, LLC, and Karl Chen, P.E., as direct defendants and to assert negligence claims against them is granted; and the complaints in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated:

9/10/12

FILED

SEP 17 2012 Eileen A. Rakower, J.S.C.

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