Meehan v County of Suffolk
2014 NY Slip Op 33856(U)
June 30, 2014
Supreme Court, Suffolk County
Docket Number: 9281/10
Judge: Jr., Paul J. Baisley
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Short Form Order

SUPREME COURT - STATE OF NEW YORK
CALENDAR CONTROL PART - SUFFOLK COUNTY

PUBLISH

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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MICHELLE MEEHAN,

Plaintiff,

-against-

COUNTY OF SUFFOLK, SUFFOLK COUNTY PROTECTION SERVICES (CPS), HARVEY BIRNBAUM and ROSLYN BIRNBAUM,

Defendants.

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HARVEY BIRNBAUM and ROSLYN BIRNBAUM,

Third-Party Plaintiffs,

-against-

COUNTY OF SUFFOLK and SUFFOLK COUNTY DEPARTMENT OF SOCIAL SERVICES CHILD PROTECTION SERVICES BUREAU,

Third-Party Defendants.

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INDEX NO.: 9281/10
CALENDAR NO.: 201102136MV
MOTION DATE: 5/23/14
MOTION SEQ. NO.: 007 MOT D

PLAINTIFF'S ATTORNEY:
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Upon the following papers numbered 1 to 21 read on this motion to dismiss or sever : Notice of Motion/ Order to Show Cause and supporting papers 1- 13 ; Notice of Cross Motion and supporting papers___ ; Answering Affidavits and supporting papers 14-17 ; Replying Affidavits and supporting papers 18-19; 20-21 ; Other___ ; (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that this motion by the third-party defendants County of Suffolk and County of Suffolk i/s/h/a Suffolk County Child Protective Services (County) seeking an order pursuant to CPLR 3211(a)(7) & (10) dismissing the third party complaint asserted by third-party plaintiffs Harvey Birnbaum and Roslyn Birnbaum (Birnbaum) or, in the alternative, for an order pursuant to CPLR 603, 1001 & 1010 severing the third party complaint from the main action is granted to the extent that the third-party claims asserted by third-party plaintiff Harvey Birnbaum are hereby dismissed; and it is further

ORDERED that defendants' application for an order severing the remaining claims asserted on behalf of third-party plaintiff Roslyn Birnbaum from the main action is granted; and it is further

ORDERED that defendants' application for an order pursuant to CPLR 1001 compelling the third-party plaintiff to add the State Farm Insurance Company as a necessary party to the severed

declaratory judgment action is granted. The third-party plaintiff is hereby directed to personally serve a copy of the amended third-party complaint upon the third-party defendants County of Suffolk, County of Suffolk i/s/h/a Suffolk County Child Protective Services and State Farm Insurance Company within twenty days of the date of this order with notice of entry. Responsive pleadings shall be served in accordance with CPLR 3025(d); and it is further

ORDERED that the Clerk of the Court is directed to mark the underlying action as active (since it appears that it was incorrectly marked as "disposed" as a result of the prior short form Order dated January 31, 2014 which only dismissed the complaint as to the County defendants) and to schedule the main action involving the remaining defendants Harvey Birnbaum and Roslyn Birnbaum on the Ready Day calendar of the Calendar Control Part (CCP) and the parties are directed to appear at CCP on August 4, 2014 at 9:30 a.m. for the calendar call of the trial calendar.

On February 18, 2010 plaintiff Michelle Meehan (Meehan) was operating a motor vehicle which was involved in a collision with a vehicle driven by defendant Roslyn Birnbaum (Birnbaum) and owned by defendant Harvey Birnbaum. Meehan commenced a personal injury action against the Birnbaums claiming that defendant Roslyn Birnbaum's negligent failure to properly operate the vehicle caused the two car collision. During the course of discovery plaintiff learned that Birnbaum had been employed by Suffolk County Child Protective Services (CPS) and was in the process of conducting a CPS field visit when the collision occurred. As a result, Meehan commenced a second action against the County of Suffolk claiming that the County was vicariously liable for Birnbaum's alleged negligence. By short form order (Farneti, J.) dated March 16, 2012 the actions were consolidated under the original 2010 index number.

Roslyn Birnbaum had been employed by Suffolk County Child Protection Services as a senior caseworker until her retirement effective March 31, 2009. Birnbaum entered into two "Consultant/Personal Services Contracts" with Suffolk County executed by her in April, 2009 and March, 2010. The term of the first contract extended from May 1, 2009 until December 31, 2009; the term of the second contract extended from January 1, 2010 until December 31, 2010. The contracts designated Birnbaum as a consultant who was to be paid an hourly fee for services rendered to the County.

By short form Order dated January 31, 2014 the County defendants' motion seeking an order granting summary judgment dismissing plaintiffs' complaint was granted and the Birnbaum defendants' motion seeking leave to amend their answer to include a cross claim against the County for contractual indemnification was denied without prejudice. The County defendants claimed that the County was not liable for plaintiff Meehan's injuries since defendant Roslyn Birnbaum was an independent contractor at the time the collision occurred. In opposition plaintiff Meehan contended that Birnbaum was a County employee and therefore the County was responsible for plaintiff's injuries as a result of Birnbaum's negligence. In support of their motion, the defendants/third party plaintiffs Birnbaums argued that the under terms of the Birnbaum/County agreement the County was obligated to provide liability coverage. This Court in granting the County summary judgment determined that Birnbaum was an independent contractor and the County was not therefore responsible for plaintiff's injuries. The Birnbaums' motion was denied without prejudice since, as a result of the dismissal of plaintiff's complaint, the County was no longer a party to the action.

In March, 2014 the defendants/third party plaintiffs commenced a third party complaint against the County seeking a judgment declaring that under the terms of the County/Birnbaum consultant agreement, the County is obligated to provide liability coverage for the defendants/third party plaintiffs and to contribute and indemnify them for any injuries which occurred as a result of the February 18, 2010 collision.

Defendant County of Suffolk's motion seeks an order dismissing the third party complaint claiming that no valid claim exists against the County which would obligate the County to provide insurance coverage for the Birnbaums. The County claims that the relevant consultant agreement contains merger and indemnification clauses which require that the contractor (Birnbaum) is obligated to "protect, indemnify and hold harmless" the County from negligent acts committed by the contractor in connection with the agreement. While the County concedes that an amendment to the second consultant contract states that the County shall "maintain coverage for the consultant while in the performance of (her) duties", that amendment cannot be applied retroactively since the County did not execute the provision until more than two months after the collision occurred. The County also argues regardless of the amendment, there are insufficient contractual terms to support a finding that the County is obligated to indemnify Birnbaum for the damages resulting from the collision. The third party defendant also contends that coverage is barred by anti-subrogation principles and asserts that even if a valid claim was asserted against the County the third party complaint must be dismissed since Birnbaum's insurer, State Farm Insurance Company, has not been joined as a necessary party to the third party action.

In opposition the defendants/third party plaintiffs claim that the written agreement between the County and Birnbaum covering the period between January 1, 2010 through December 31, 2010 required that the County maintain insurance coverage for Birnbaum while she performed her consultant duties under the contract. The Birnbaums contend that the undisputed proof shows that under the terms of the parties agreement the County breached the contractual requirement to provide liability coverage for Birnbaum with respect to the February 10, 2010 accident. Defendants argue that the fact that the amendment providing such coverage was executed by the parties after the accident had occurred is irrelevant to the issue of coverage since the County representative testified during her deposition that the County had agreed to provide such coverage for the entire year.

The issue before the Court on a motion to dismiss for failure to state a cause of action is not whether the cause of action can be proved, but whether one has been stated (*Stakuls v. State of New York*, 42 NY2d 272, 397 NYS2d 740 (1977)). The Court must accept the facts alleged as true and determine whether they fit any cognizable legal theory (CPLR 3211(a)(7); *Marone v. Marone*, 50 NY2d 481, 429 NYS2d 592 (1980); *Klondike Gold Inc. v. Richmond Associates*, 103 AD2d 821, 478 NYS2d 55 (2nd Dept., 1984)). A motion to dismiss a declaratory judgment action before serving an answer presents for determination only the question whether a case for a declaratory judgment is made out, not the question of whether the third party plaintiffs are entitled to an adjudication in their favor (*Law Research Service, Inc. v. Honeywell,* 31 AD2d 900, 298 NYS2d 1 (1st Dept., 1969)). However in cases where there are no factual issues presented by the pleadings or where the facts are undisputed, a court may award judgment to the appropriate party (*Cohen v. Employers Reinsurance Corp.*, 117 AD2d 435, 503 NYS2d 33 (1st Dept., 1986)).

The record shows that sufficient evidence has been submitted by the defendant/third party plaintiff Roslyn Birnbaum to support a viable declaratory judgment action against the County based upon the insurance coverage amendment, conceded to have been made by the County, to the 2010 County/Birnbaum consultant agreement. The third-party defendant County's motion to dismiss the third-party complaint asserted by Roslyn Birnbaum must therefore be denied. The County's application to dismiss the third–party complaint with respect to the claims asserted by Harvey Birnbaum must be granted since Harvey Birnbaum was never a party to the underlying agreement or its amendment.

CPLR 1010 provides:

> **Dismissal or separate trial of third-party complaint.**
> The court may dismiss a third-party complaint without prejudice, order a separate trial of the third-party claim or of any separate issue thereof, or make such other order as may be just. In exercising its discretion, the court shall consider whether the controversy between the third-party plaintiff and the third-party defendant will unduly delay the determination of the main action or prejudice the substantial rights of any party.

CPLR 603 provides:

> **Severance and separate trials.**
> In furtherance of convenience or to avoid prejudice the court may order a severance of claims, or may order a separate trial of any claims, or of any separate issue. The court may order the trial of any claim or issue prior to the trial of others.

The decision to order severance is discretionary and should not be exercised unless the failure to sever will place some substantial right in jeopardy (*Pellegrino v. Walker Theatre, Inc.*, 127 AD2d 574, 511 NYS2d 372 (2nd Dept., 1987); *Karama Supermarket, Inc. v. Frawley Plaza Associates*, 200 AD2d 355, 606 NYS2d 177 (1st Dept., 1994)). The severance of an insurance coverage dispute from an underlying personal injury action is required to avoid the prejudice inherent to the insurer (*Kelly v. Yannotti*, 4 NY2d 603, 176 NYS2d 637 (1958); *Redanz v. Kuntz*, 99 AD2d 654, 472 NYS2d 56 (4th Dept., 1984); *Burlington Insurance Company v. Guma Construction Company*, 66 AD3d 622, 887 NYS2d 177 (2nd Dept., 2009)).

Clearly the third-party claims asserted by Roslyn Birnbaum, which concern the issue of insurance coverage, must be severed from the underlying personal injury action (*Kelly v. Yannotti, supra.*). However it is equally clear that third-party plaintiff Birnbaum's insurer, State Farm Insurance Company, is a necessary party to this action since the insurance provider will be affected by the judgment in this action (CPLR 1001). Accordingly the Court directs that the third-party plaintiff include State Farm Insurance Company as a named third-party defendant in the third-party complaint and shall personally serve a copy of the amended third-party complaint upon the third-party defendants, including the insurer, within twenty days of the date of this order with notice of entry.

Dated: June 30, 2014

J.S.C.

HON. PAUL J. BAISLEY JR.