Courtney v 18th & 18th LLC
2015 NY Slip Op 32214(U)
November 19, 2015
Supreme Court, New York County
Docket Number: 108499/2007
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: MONICA EDMEAD Justice

PART 35

Index Number : 108499/2007
COURTNEY, TODD
vs.
18TH & 8TH LLC
SEQUENCE NUMBER : 009
DISMISS

INDEX NO. _____
MOTION DATE 10/16/15
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

In this property damage action, the motion by defendants' and cross-motion by plaintiffs are resolved as follows:

The branch of defendants' motion to dismiss the second amended complaint on the ground of untimeliness is denied. By order dated March 17, 2015, this Court directed in-coming counsel to comply with, *inter alia*, the Court's October 17, 2014 order within 45 days (of the date of the March 17, 2015 order).[1] The October 17, 2014 order adhered to the Court's April 14, 2014 decision (which granted plaintiff leave to serve an amended complaint), and expressly directed, *inter alia*, plaintiffs to "serve and file an amended complaint" in accordance with the April decision. As such, in-coming counsel for plaintiffs had until May 1, 2015 to serve and file the amended complaint. Although in-coming counsel did not serve and file the amended complaint until May 25, 2015, the Court finds no prejudice resulting from the 24-day delay. Thus, dismissal for failure to timely serve and file the amended complaint as required is denied. As such, the amended answer annexed to defendants' motion is deemed filed and served, and the

[1] The order was served with notice of entry on April 16, 2015. It is noted that 45 days from the date of service of notice of entry, if applicable, was Sunday, May 31, 2015.

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

Dated: _____ _____, J.S.C.

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

branch of defendants' motion to amend the Answer to include the affirmative defense of "release and/or set-off" if the Court dismisses the Second Amended Complaint, is moot.[2] However, dismissal of the action and of the specific claim for roof damages based on such defense and receipts of payments plaintiffs' received, is unwarranted; whether plaintiffs were fully compensated cannot be determined as a matter of law at this juncture.

The branch of defendants' motion to dismiss the fourth cause of action in the second amended complaint based on the law of the case doctrine is granted. "Where a party has been afforded 'a full and fair opportunity to fully litigate an issue, this Court's decision on that issue becomes the law of the case precluding further litigation'" of such issue (*Fitzgerald v. Fitzgerald*, 5 A.D.3d 916, 772 N.Y.S.2d 881 (Mem), 2004 N.Y. Slip Op. 01650 [3d Dept 2004]; *see also, Chanice v. Federal Exp. Corp.*, 118 A.D.3d 634, 989 N.Y.S.2d 468 [1st dept 2014]).

Here, the fourth cause of action incorporates the previous allegations in third cause of action, namely that defendants' negligence caused construction debris and mortar, which permeated the roof membrane and clogged the water drainage system and damaged the skylights; the clogged water system caused water build up and leaking throughout the premises (Third cause of action, ¶¶23-28). In the fourth cause of action, plaintiffs allege that as a result, tenants vacated the premises, causing plaintiffs to suffer loss rents (¶¶32-34). However, the Court's previous April 2014 decision denied plaintiffs' leave to add a claim for loss rent based on debris and mortar roof damage as follows:

> As to the fourth cause of action, leave to add this claim is unwarranted, in its entirety. . . . To the extent it seeks to recover lost rent from the incorporated third cause of action (debris/mortar roof damage), the lost rental damage claim is a new theory of recovery and is not "simply a particularization of the damages previously alleged as arising form the debris/mortar roof claim. Thus, such new damage claim cannot be included in the fourth cause of action. And, the remaining claim of damages, to wit: loss of use of premises, diminution in value of the Building, loss of profits, loss of business expectation and other economic damages assert new theories of recovery.

Therefore, inasmuch of the fourth cause of action seeks to claim identical relief under the same theory of law, the law of the case doctrine precludes plaintiffs from reasserting this claim (*see Lee v. Chun Ka Luk*, 127 A.D.3d 612, 8 N.Y.S.3d 288 [1st Dept 2015] (where court previously denied defendant's pre-answer motion to dismiss the complaint on statute of

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[2] As to plaintiffs' argument that the affirmative defense of "release and/or set-off" should not be permitted, it has been held that "an amended complaint is deemed to supersede an original complaint, and thus, a defendant's original answer has no effect" (*Mendrzycki v. Cricchio*, 58 A.D.3d 171, 868 N.Y.S.2d 107 [2d Dept 2008] (internal citations omitted)). "As such, an answer to an amended complaint served pursuant to CPLR 3025(d) is in fact an original answer to the amended complaint, and thus, affirmative defenses raised in that answer are not limited to those asserted in the original answer" (*id.*). That defendants could have asserted this defenses previously is not a bar to the amendment (*see Seda v. New York City Housing Auth.*, 181 A.D.2d 469, 581 N.Y.S.2d 20 [1st Dept 1992] ("Although defendant New York City Housing Authority (NYCHA) waited more than three years to raise the defense of Statute of Limitations, leave to amend pleadings is to be freely given absent prejudice or surprise resulting directly from the delay")). Further, any discovery to which plaintiff opines is necessary to explore this defense may be addressed at a further discovery conference.

limitations grounds, and held that the causes of action were timely, the law of the case precluded defendant from amending his answer to reassert the same defense); *Planck v. County of Schenectady*, 29 A.D.3d 1053814 N.Y.S.2d 374 [3d Dept 2006] ("Inasmuch as SUNY and SCCC are no longer parties to this action—plaintiff's claims against them having been unconditionally dismissed by Supreme Court and affirmed by this Court on appeal—plaintiff's continued arguments against these entities in the context of this case are barred by the doctrine of the law of the case")).[3] Thus, dismissal of the fourth cause of action is warranted.

Likewise, the branch of defendants' motion to dismiss the third cause of action pertaining to roof damage (¶¶23-28) is granted, based on the law of the case doctrine.

The branch of defendants' motion to dismiss the first and second causes of action seeking damages resulting from the severance of the sewer line is denied. The submissions indicate that issues of fact as to whether the alleged negligent construction work performed by defendant BDG Construction Corp. ("BDG") at an adjacent property, including severance of a sewer line, caused water and sewage back up and damage to the premises at 304 West 18th Street, New York, New York, owned by plaintiff Todd Courtney. That plaintiffs cannot show that they have an easement to cross defendants' property to access the City sewer system, or that the sewer was not for the benefit plaintiffs' property is not dispositive. This Court's dismissal of a similar complaint in *Kahandakar v 18th and 8th LLC* (Index No. 108498/2007) does not warrant dismissal of the first and second negligence causes of action. The Court in *Kahandakar* initially noted that plaintiffs' claims rested on their assertion that the sewer line was severed "without plaintiffs' consent or knowledge," that BDG established the absence of any sewer line that could serve as a basis for plaintiffs' claims, and that plaintiffs failed to submit any evidence that there was a sewer line common to both plaintiffs and BDG. These factors are distinct from this action, and plaintiffs' claims herein are premised on a different property allegedly damaged from the construction activities. Further, the additional basis for dismissal in *Kahandakar*, *to wit*: the absence of documentary evidence to support the loss rents and other damages, renders this action distinguishable, in that plaintiffs herein allege sufficient documentary support for the damages asserted.

Therefore, dismissal of the first and second causes of action is unwarranted. And, based on the various issues of fact concerning BDG's liability and damages, plaintiffs' application for summary judgment in their favor is denied.

The branch of defendants' motion to dismiss 18th and 8th LLC from this action pursuant to CPLR 3215(c) as abandoned is granted. CPLR 3215(c) provides:

> If the plaintiff fails to take proceedings for the entry of judgment within one year after the default, the court shall not enter judgment but shall dismiss the complaint as abandoned, without costs, upon its own initiative or on motion, unless sufficient cause is shown why the complaint should not be dismissed

(*Praino v. Times Square Trucking Corp.*, 53 A.D.2d 574 384 N.Y.S.2d 81 [1st Dept 1976]).

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[3] According to defendants, plaintiffs never filed a notice of appeal of the April 2014 decision, and the notice of appeal of the October 2014 decision was dismissed by the First Department.

Here, plaintiffs failed to establish sufficient cause as to why the complaint should not be dismissed. Plaintiff Todd Courtney's bald conclusory statement that he was not represented by counsel and did not know to make a motion for default judgment against 18th and 8th LLC is flatly contradicted by the record. Plaintiffs' summons and complaint filed on June 18, 2007 indicates that he was represented by counsel, and deposition transcripts and numerous filings throughout this litigation indicate that he was represented by various attorneys. Yet, no proceedings were taken against 18th and 8th LLC (*Baldwin v. St. Clare's Hospital*, 63 A.D.2d 761, 404 N.Y.S.2d 730 [3d Dept 1978] (dismissing complaint where "an examination before trial was held of defendant Gretz, and bills of particulars directed to his involvement in the alleged malpractice were served, no motions or proceedings were brought against defendants, Marola and Schwenk, and the bills of particulars were not directed to, or served on said defendants. There is no excuse offered for failing to take a default until by cross-motion, filed in August 2015, approximately eight years after the default.")). Although 18th and 8th LLC did not file an answer, plaintiffs are not entitled to a default judgment against said defendant (*see PHH Mortg. Corp. v. Davis*, 111 A.D.3d 1110, 975 N.Y.S.2d 480 [3d Dept 2013] ("Although Chase Bank did not submit an answer, plaintiff is not entitled to a default judgment. Instead, we dismiss the complaint against Chase Bank as abandoned because plaintiff did not seek a default judgment against that defendant within one year after the default or show sufficient cause for the delay")).

Therefore, dismissal of the complaint as against defendant 18th and 8th LLC is warranted. Consequently, plaintiffs' motion for a default judgment against 18th and 8th LLC is denied.

The branch of defendants' motion to dismiss plaintiff Todd Courtney from this action is granted. New York Limited Liability Company Law § 601 expressly provides that "A membership interest in the limited liability company is personal property. A member has no interest in specific property of the limited liability company'" (*see also*, *In re 11 East 36th, LLC*, 2015 WL 397799, *2, 85 UCC Rep.Serv.2d 668, 668, Bkrtcy [SDNY 2015] (Debtor 11 East 36th, LLC "does not have any interest in the property that belongs to its subsidiary"); *Sealy v. Clifton, LLC*, 890 N.Y.S.2d 598, 599, 68 A.D.3d 846 [2d Dept 2009] ("Since the properties in question are owned by Clifton [LLC], the plaintiff [co-owner of the LLC] cannot maintain a cause of action for partition in his individual capacity.")). Plaintiffs have failed to present any caselaw to the contrary.

Further, plaintiffs' cross-motion to add Valley National Bank as a defendant is denied. Plaintiffs' contention that the purpose of the construction project was to create a space where Valley National Bank would sit and the sewer line was severed to accommodate an underground vault for the Bank is insufficient. There are insufficient allegations of ownership, occupancy, control, or special use of the property to give rise to any duty owed to plaintiffs for alleged damages herein (*see Livichusca v. M & T Mortg. Co.*, 49 A.D.3d 822, 854 N.Y.S.2d 226 [2d Dept 2008] (where property owner brought negligence action against owners of adjoining property for property water damage, and adjoining property owner did not own its building in 2001 when the alleged damage occurred, "no cause of action for negligence could have accrued in favor of the plaintiff against the appellant in 2001 because the appellant did not owe the plaintiff any duty of care at that time"; duty to maintain the building must be predicated upon the "ownership, occupancy, control, or special use of the property . . .)).

And, plaintiffs' application for sanctions and costs and fees is denied as unwarranted, as

the record fails to establish that defendants' motion was frivolous.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the branch of defendants' motion to dismiss the second amended complaint on the ground of untimeliness is denied, the Verified Answer to the Second Amended Complaint annexed to defendants' motion is deemed filed and served, dismissal of the action and of the specific claim for roof damages is denied; and branch of defendants' motion to amend the Answer is denied as moot; and it is further

ORDERED that the branch of defendants' motion to dismiss the third and fourth causes of action is granted, and the third and fourth causes of action are severed and dismissed; and it is further

ORDERED that the branch of defendants' motion to dismiss the first and second causes of action is denied; and it is further

ORDERED that the branch of defendants' motion to dismiss defendant 18th and 8th LLC from this action pursuant to CPLR 3215(c) is granted; and the action is hereby severed and dismissed as against said defendant; and it is further

ORDERED that the branch of defendants' motion to dismiss plaintiff Todd Courtney from this action is granted; and it is further

ORDERED that the cross-motion by plaintiffs for summary judgment, default judgment, and for leave to amend and sanctions is denied; and it is further

ORDERED that defendants shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 11/19/15 **ENTER** _____, **J.S.C.**

CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**