Neighborhood Partnership Hous. Dev. Fund Co., Inc. v West 132nd St., LLC
2016 NY Slip Op 31270(U)
June 27, 2016
Supreme Court, New York County
Docket Number: 653867/2015
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

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NEIGHBORHOOD PARTNERSHIP HOUSING DEVELOPMENT FUND COMPANY, INC., *by and through its subrogee* RLI INSURANCE COMPANY,

Plaintiff,

- against -

WEST 132ND STREET, LLC, NY RESIDENTIAL PROPERTY WORKS LLC and WEST 132ND STREET CLUSTER L.P.,

Defendants.

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Index Number: 653867/2015

Decision and Order

Motion Seq. No.: 001

Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 5, were used on defendants' motion, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint, and plaintiff's cross-motion, pursuant to CPLR 305© and 3025, to amend the complaint:

Papers Numbered:

Notice of Motion - Affirmation - Exhibits 1
Affirmation in Opposition - Exhibits 2
Notice of Cross-Motion - Affirmation - Exhibit 3
Reply Affirmation & Opposition to Cross-Motion 4
Reply Affirmation in Further Support of Cross-Motion - Exhibit 5

Upon the foregoing papers, defendants' motion to dismiss is denied in part and granted in part; and plaintiff's cross-motion to amend is granted.

Background

In this action, plaintiff RLI Insurance Company ("RLI"), as subrogee of Neighborhood Partnership Housing Development Fund Company, Inc. ("NPHDFC"), seeks contractual indemnification from defendants for the $250,000 RLI paid to settle an underlying Labor Law personal injury lawsuit, and damages for defendants' alleged breach of contract for failure to procure insurance on behalf of NPHDFC.

Briefly, NPHDFC, as Sponsor, and defendant West 132nd Street LLC ("West 132nd"), as Manager/Developer, entered into a Site Development and Management Agreement (the "Agreement"), for the redevelopment and rehabilitation of real property at West 131st and 132nd

Streets in Manhattan. Under the Agreement, West 132nd agreed to, inter alia, "direct the operation and redevelopment of" the property. The Agreement identifies non-party A. Aleem Construction, Inc. ("Aleem") as the contractor performing the redevelopment/rehabilitation work. The Agreement also contains an indemnification and insurance procurement provision, requiring West 132nd: (1) to indemnify NPHDFC "from and against any and all liabilities, obligations, claims, causes of action, judgments, damages, ... arising from or relating to ... any accident, injury to ... persons occurring in, on or about the Property ... including without limitation, in connection with the Work" (Agreement, Article VIII, Section 8.6); and (2) to procure various types of insurance coverage naming NPHDFC as additional insured on West 132nd's insurance policies, and to cause Aleem to procure the same insurance for the benefit of NPHDFC (Agreement, Article VIII, Section 8.2-8.4). As is here pertinent, Aleem procured the required insurance from Mt. Hawley Insurance Company ("Mt. Hawley"); Mt. Hawley's policy issued to Aleem named NPHDFC and West 132nd as additional insureds for the redevelopment project.

On December 21, 2007, Mahamadou Gory, an employee of Aleem, commenced an action against NPHDFC and Aleem to recover for personal injuries sustained while working at the redevelopment project; the complaint was later amended to add West 132nd and NY Residential as defendants (the "Gory Action"). NPHDFC cross-claimed against West 132nd for contractual indemnification for any damages NPHDFC would be liable to pay plaintiff Gory.

Mt. Hawley provided NPHDFC, its additional insured, with a defense and indemnification in the Gory Action. However, Mt. Hawley disclaimed coverage for West 132nd in the Gory Action upon the ground of late notice. Thus, West 132nd commenced, in the Gory Action, a third-party action against Mt. Hawley and others seeking a declaration that Mt. Hawley's disclaimer was invalid and that Mt. Hawley owes West 132nd a defense and indemnity for plaintiff Gory's claims. By Decision and Order dated July 9, 2010, the court (Lucindo Suarez, J.), dismissed West 132nd's third-party complaint as against Mt. Hawley, finding Mt. Hawley's disclaimer of coverage to West 132nd "timely" (the "July 2010 Order").

The merit to NPHDFC's contractual indemnification cross-claim against has also been determined. By Decision and Order dated January 28, 2014, the Appellate Division, First Department, found that NPHDFC "is entitled to summary judgment on its contractual indemnification claim" against West 132nd (the "App. Div. Order"). On July 8, 2015, the Gory Action settled for the sum of $250,000, with the settlement payment "funded by [NPHDFC's] insurance carrier, RLI/Mt. Hawley Insurance Company." The terms of the settlement were read into the record in open-court; plaintiff Gory agreed to the terms; and NPHDFC reserved its right to "proceed to seek indemnification of all the funds that RLI will extend to settle this action against West 132nd Street, LLC."

The Complaint

The instant complaint names RLI as subrogee/plaintiff, and West 132nd, NY Residential Property Works LLC ("NY Residential"), and West 132nd Street Cluster LP ("Cluster") as defendants. The complaint alleges, inter alia, that: NY Residential and Cluster are each "affiliated with," a "subsidiary of," a "related company of," and the "alter-ego of" West 132nd; that based upon the Agreement and the App. Div. Order, NPHDFC is entitled to contractual indemnification from defendants in the sum of $250,000; and that defendants breached their agreement "to obtain

insurance coverage" on behalf of NPHDFC. Defendants now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the complaint. Plaintiff cross-moves to amend the complaint to add Mt. Hawley as plaintiff in place and instead of RLI.

Discussion

Amendment of Complaint

Plaintiff's motion to amend the complaint to name as plaintiff Mt. Hawley in place and instead of RLI is granted, notwithstanding plaintiff's failure to submit a marked amended pleading in support of the motion in accordance with CPLR 3025(b). The proposed amendment simply identifies the correct subrogee/plaintiff, does not cause defendants prejudice, and is otherwise not palpably insufficient or clearly devoid of merit. Indeed, it is clear from the third-party pleadings in the Gory Action, and transcript of the open-court settlement therein, that West 132nd is – and has always been – aware that Mt. Hawley insured NPHDFC in the Gory Action, that RLI and Mt. Hawley are related, and that Mt. Hawley paid the $250,000 settlement on behalf of NPHDFC. See MBIA Ins. Corp. v Greystone & Co., 74 AD3d 499, 500 (1st Dep't 2010) (movant must "simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit").

Dismissal of the Complaint

The law on the dismissal of a complaint pursuant to CPLR 3211 is clear and well-settled. Dismissal pursuant to CPLR 3211(a)(1) is warranted where the documentary evidence submitted conclusively establishes as a matter of law a defense to the asserted claims. Leon v Martinez, 84 NY2d 83, 88 (1994); accord; Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 82-83 (1st Dept 2013) ("[d]ismissal under CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"). Dismissal pursuant to CPLR 3211(a)(7) is warranted where, after accepting the facts alleged as true and according plaintiff the benefit of every possible favorable inference, the court determines that the allegations do not fit within any cognizable legal theory. Leon v Martinez, supra, 84 NY2d at 87-88; see also EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11, 19 (2005) ("[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus" in determining a motion to dismiss for failure to state a cause of action). A complaint survives a motion to dismiss for failure to state a cause of action if it gives the court and the parties "notice" of what is intended to be proved and the material elements of a cause of action. CPLR 3013.

In view of the foregoing, the complaint adequately states causes of action against West 132nd for contractual indemnification and breach of contract for failure to procure insurance. Far from conclusively establishing a defense to the complaint, the documentary evidence – the Agreement, the Gory Action third-party pleadings, the July 8 Order, the App. Div. Order, and the transcript of the July 8, 2015 settlement – establish the merit to plaintiff's claims. The Agreement and App. Div. Order establish NPHDFC's right to contractual indemnification from West 132nd for any amounts paid to settle the Gory Action; the Agreement establishes West 132nd's obligation to procure insurance on NPHDFC's behalf (and the complaint sufficiently alleges breach thereof); and, as noted above, the Gory Action third-party pleadings and transcript of settlement establish that Mt. Hawley is the proper insurer/subrogee. Contrary to defendants' argument, the anti-subrogation rule does not bar Mt. Hawley's subrogation claims because West 132nd is not an

insured under Mt. Hawley's policy for the Gory Action; the July 8 Order makes that clear. See Fitch v Turner Const. Co., 241 AD2d 166, 171 (1st Dep't 1998) (insurer of "third-party plaintiff who does not insure a third-party defendant should be permitted to assert its right of subrogation against that third-party defendant"); see also Dillion v Parade Mgmt. Corp., 268 AD2d 554, 556 (4th Dep't 2000). Thus, dismissal of the complaint as against West 132nd is not warranted.

However, the complaint fails to state causes of action against NY Residential and Cluster based upon an alter-ego, or corporate veil-piercing, theory. The mere allegations that said defendants are corporate "affiliates," "subsidiaries," "related to," and the "alter-ego" of West 132nd, do not sufficiently state a claim for alter-ego/veil-piercing liability. See generally Baby Phat Holding Co., LLC v Kellwood Co., 123 AD3d 405, 407 (1st Dep't 2014) ("In order to state a claim for alter-ego liability plaintiff is generally required to allege 'complete domination of the corporation [here PFLLC] in respect to the transaction attacked' and 'that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury'"); see also UBS Sec. LLC v Highland Capital Mgmt., L.P., 93 AD3d 489, 490 (1st Dep't 2012) (veil-piercing claim "sufficiently stated based on the alter ego allegations which allege, inter alia, that SOHC's sole board member is on Highland Financial's board, Highland Financial did not distinguish between its debts and obligations and those of SOHC, and that it operated SOHC and Highland Financial as a single economic entity"). Thus, dismissal of the complaint as to NY Residential and Cluster is proper. The Court notes that, in opposition to defendants' motion to dismiss as to NY Residential and Cluster, plaintiff failed to set forth and support a request to replead under CPLR 3211(e). See Bardere v Zafir, 63 NY2d 850, 852 (1984) ("In order to reverse the implicit refusal by the Appellate Division of leave to replead to plaintiff we would have to say that plaintiff's papers, as a matter of law, necessarily satisfied that court that there was good ground to support a theory of successor liability and, further, that the appellate court was required (again as a matter of law) to excuse compliance with the statutory mandate of inclusion of a request to replead in the opposing papers. We can do neither.").

Conclusion

Defendants' motion to dismiss is denied in part and granted in part; and plaintiff's cross-motion to amend is granted. Plaintiff may file and serve an amended complaint, naming, as plaintiff, Mt. Hawley Insurance Company in place and instead of RLI Insurance Company, within thirty days of the date of this Order.

Dated: June 27, 2016

Arthur F. Engoron, J.S.C.