

Regalado v 635 Riverside Dr. NY LLC

2018 NY Slip Op 31102(U)

June 4, 2018

Supreme Court, New York County

Docket Number: 151907/15

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

-----X
MARTIN REGALADO

Plaintiff

v

Index No. 151907/15

DECISION AND ORDER

635 RIVERSIDE DRIVE NY LLC, and DHNY
APT V LLC

MOT SEQ 005, 007

Defendant.
-----X
-----X

635 RIVERSIDE DRIVE NY, LLC

Plaintiff

v

BLUESTAR PROPERTIES INC., BLUESTAR
PROPERTIES LLC, JEFFREY PIKUS, OGANDO
CONSTRUCTION CORP., STRATHMORE
CONSTRUCTION MANAGEMENT LLC,
ARCHITECTURAL DESIGN SOLUTIONS, ASHRAF
ALI, DG UWS SUB V LLC, and HERITAGE
REAL ESTATE PARTNERS

Defendant.
-----X

NANCY M. BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from a construction accident, the third-party defendants Bluestar Properties, Inc. (Bluestar), and Jeffrey Pikus move

pursuant to CPLR 3025(b) for leave to amend their answer to assert additional affirmative defenses, and pursuant to CPLR 3211(a)(5) to dismiss the third-party complaint with prejudice, or, in the alternative, for summary judgment in favor of the third-party defendants pursuant to CPLR 3211(c) and 3212 [SEQ 005]. By a separate motion, the third-party defendant DG UWS Sub V, LLC (DG), moves for identical relief [SEQ 007]. Bluestar, Jeffrey Pikus, and DG also move for an award of attorneys' fees, costs, and expenses pursuant to 22 NYCCRR 130-1.1 [SEQ 005 and SEQ 007]. The motions are granted to the extent that leave to amend is granted, the third-party complaint is dismissed as against Bluestar and DG, and the motions are otherwise denied.

II. BACKGROUND

This action arises out of personal injuries allegedly sustained by Martin Regalado on August 20, 2012, while working at a construction project at a residential building located at either 635 Riverside Drive or 635 West 141st Street in Manhattan. He brought claims pursuant to the Labor Law and for common-law negligence against 635 Riverside Drive NY, LLC (Riverside). Thereafter, Riverside commenced a third-party action against Bluestar, Pikus, and DG, alleging causes of action for contribution, common-law indemnification, contractual indemnification, and breach of contract for failure to procure

insurance. Riverside asserted an additional cause of action to recover for breach of fiduciary duty only as against Bluestar and Pikus. Bluestar, Pikus, and DG filed their answers to the third-party complaint and have begun discovery.

Bluestar, Pikus, and DG now seek to amend their answers to assert the affirmative defense of release. See CPLR 3211(a)(5). They allege that, on or about May 29, 2012, Hon. Allan L. Gropper of the United States Bankruptcy Court for the Southern District of New York (the bankruptcy judge) issued an order for the joint administration of Chapter 11 bankruptcy cases filed by the owners of approximately 33 buildings, including Riverside (the bankruptcy proceeding). In connection with the bankruptcy proceeding, Riverside, together with the other debtors, filed a second amended reorganization plan (the plan). The plan, submitted with each of the motions here, contains a release and an injunction that Bluestar, Pikus, and DG argue is directly applicable to Riverside's claims.

The relevant language in the plan provides as follows:

... effective as of the Effective Date, the Released Parties and the Released Debtor Parties are deemed released and discharged by the Debtors and their Estates from any and all direct, indirect or derivative claims, obligations, rights, suits, judgments, Liens, damages, causes of actions, remedies, liabilities, claims or rights of contribution and indemnification, and all of the claims, causes of action, controversies of every type, kind, nature, description or character whatsoever, including any derivative claims asserted on behalf of the estates, whether

known or unknown, foreseen or unforeseen, liquidated or unliquidated, contingent or fixed, currently existing or hereinafter arising, in law, at equity, whether for tort, fraud, contract or otherwise that any Debtor would have legally been entitled to assert, including but not limited to, any claim or cause of action arising from or relating to Debtors, the Chapter 11 case; this Plan, the subject matter of the transactions or events giving rise to any claim or interest of the Released Parties and the Released Debtor parties that is treated in this Plan, the business or contractual arrangements between any Debtor on the one hand, and any Released Parties or Released Debtor Party on the other hand ...

Elsewhere in the plan, the term "Debtors" is defined to include Riverside and the term "Released Parties" is defined to include Bluestar, Pikus, and DG.

The plan further provides that

... each Debtor shall be permanently enjoined from commencing, conducting or continuing in any manner, directly or indirectly any suit, action or other proceeding of any kind, including asserting any set off, right of subrogation, contribution, indemnification or recoupment of any kind, directly or indirectly, or proceeding in any manner in any place inconsistent with the releases granted by the Debtors and their Estates to the Released Parties and the Released Debtor Parties pursuant to this Plan.

On or about August 7, 2012, the bankruptcy judge issued findings of fact, conclusions of law, and an order (the confirmation order) approving the plan. The confirmation order found that the plan was proposed in good faith and confirmed the plan under section 1129 of the Bankruptcy Code, declaring the

provisions of the plan, except as provided in the confirmation order, binding on the Debtors. The confirmation order contained a release identical in substance to the release contained in the plan, and further provided that:

... nothing in this paragraph or in the Second Amended Plan shall be deemed to release any Released Party or any Released Debtor Party from liability for acts or omissions that are the result of actual fraud, gross negligence, willful misconduct, ultra vires acts, criminal conduct, disclosure of confidential information that causes damages, or willful violation of the securities laws or the Internal Revenue Code, or, in the case of an attorney professional and as required under Rul 1.8(h)(1) of the New York State Rules of Professional Conduct, malpractice ...

The confirmation order also included an injunction identical in substance to the injunction in the plan. On September 13, 2012, a statement was filed setting forth that the effective date referenced in the plan was August 30, 2012. Proof of such statement is annexed to the motion of Bluestar and Pikus.

Bluestar, Pikus, and DG argue that the above facts provide a complete defense to the third-party action. In addition to requesting leave to amend their answers, Bluestar, Pikus, and DG move to dismiss the third-party complaint, or, in the alternative, pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint.

III. DISCUSSION

A. Third-Party Defendant Pikus

As a preliminary matter, the court notes that, by order dated June 6, 2017, the third-party action against Jeffrey Pikus was discontinued, and the third-party complaint dismissed insofar as asserted against him, without prejudice and without costs to any party. Accordingly, the instant motion is denied as academic insofar as it requests relief on behalf of Pikus.

B. Amendment of Third-Party Answers

Leave to amend a pleading is to be freely given absent prejudice or surprise resulting from the amendment, provided that the evidence submitted in support of the motion indicates that the proposed amendment may have merit. See CPLR 3025(b); McCaskey, Davies and Assocs., Inc v New York City Health & Hospitals Corp., 59 NY2d 755 (1983); 360 West 11th LLC v ACG Credit Co. II, LLC, 90 AD3d 552 (1st Dept 2011); Smith-Hoy v AMC prop. Evaluations, Inc., 52 AD3d 809 (1st Dept 2008). The motion court must examine the sufficiency of the proposed amendment since leave to amend should not be granted where the proposed amended pleading is "palpably insufficient or clearly devoid of merit." MBIA Ins. Corp. v Greystone & Co., Inc., 74 AD3d 499, 500 (1st Dept 2010); see Hill v 2016 Realty Associates, 42 AD3d 432 (2nd Dept 2007). The court also "should consider how long the

amending party was aware of the facts upon which the motion was predicated [and] whether a reasonable excuse for the delay was offered." Haller v Lopane, 305 AD2d 370, 371 (2nd Dept 2003).

The proposed amended answers of both Bluestar and DG, setting forth an additional affirmative defense based on release, as annexed to each of the motions, meet these standards. It is plain that the amendments have merit, as demonstrated by the bankruptcy court documents submitted in support of each of the motions. Moreover, Riverside had the bankruptcy court documents in its possession and knew of the release language now invoked by Bluestar and DG since the inception of the third-party action, and there is thus no prejudice resulting from the amendments. Accordingly, those branches of Bluestar and DG's motions which are to amend their answers are granted.

C. Dismissal

Bluestone and DG seek, upon the amendment of their third-party answers, to dismiss the third-party complaint as against them on the ground of release. "Generally, a valid release constitutes a complete bar to an action on a claim which is the subject of the release." Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., 17 NY3d 269, 276 (2011).

Riverside's third-party causes of action for contribution, common-law indemnification, contractual indemnification, and to

recover for breach of contract for failure to procure insurance are thus barred by virtue of the release set forth in the plan, as approved by the bankruptcy judge. See CPLR 3211(a)(5); Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V., supra; Allen v Riese Org., Inc., 106 AD3d 514 (1st Dept. 2013). This disposes of all of Riverside's causes of action against DG, as well as the contribution, indemnification, and breach of contract causes of action against Bluestar.

As for its cause of action to recover for breach of fiduciary duty as against Bluestar, designated in the third-party complaint as the fifth cause of action against Bluestar, Riverside asserts in its opposition papers that Bluestar,

"through a breach of [its] fiduciary obligations to the parties by [its] failure to adequately secure any insurance for the work being done to protect 635 Riverside along with [its] knowledge that no one was apparently paying attention to what was going on at this location can clearly be seen as deception through inaction or silence as well as fraud."

Riverside thus argues that Bluestar's conduct fell within the exemptions from release for "actual fraud, gross negligence, [and] willful misconduct," as set forth in the plan. This argument is unpersuasive, as Riverside's allegations that Bluestar did not secure insurance and did not "pay[] attention to what was going on" are clearly insufficient to support the elevation of these claims to the level of either actual fraud, gross negligence, or willful misconduct.

Based on the clear and unambiguous language of the plan's release and injunction, the third-party complaint must be dismissed as against both DG and Bluestar.

D. Attorneys' Fees

In each of their motions, Bluestar and DG seek to recover an award of attorneys' fees, costs, and expenses pursuant to 22 NYCRR 130-1.1(a). 22 NYCRR 130-1.1(a) provides that a court may award a party in any civil action costs, in the form of reimbursement for actual expenses reasonably incurred and reasonable attorneys' fees resulting from the frivolous conduct of another party.

"Conduct is frivolous if (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

22 NYCRR 130-1.1(c). In determining whether the conduct undertaken was frivolous, the court is required to consider, among other issues, "the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the

attention of counsel or the party." 22 NYCCRR 130-1.1(c).

Bluestar and DG each allege that Riverside repeatedly failed to provide them with the bankruptcy court filings, including the plan and the confirmation order, in spite of their requests, until well over one year after commencement of the third-party action. They further allege that counsel for Riverside represented throughout this litigation that he was in possession of the relevant bankruptcy court documents, that he had reviewed them, and that they were the basis for Riverside's third-party causes of action. Counsel for both Bluestar and DG allege that, upon receipt of the bankruptcy court documents, they contacted Riverside's counsel to advise him of the relevant provisions and to demand that he discontinue the third-party action as against Bluestar and DG, but that Riverside has not discontinued it.

Bluestar and DG thus argue that Riverside knew that it was explicitly barred from commencing the third-party action here, yet chose to do so anyway, and that Riverside withheld documents from Bluestar and DG in order to delay the resolution of this case. The court recognizes Riverside's failure to comply with discovery requests. However, the court also notes, as Riverside points out, that the relevant bankruptcy documents were all publicly available, and that the attorney for DG was, in fact, actively involved in the Chapter 11 proceedings, and therefore already had or should have had the bankruptcy documents in his

possession. The third-party defendant do not deny that the documents were accessible in this manner. Moreover, as Riverside made a good-faith argument that some of its third-party claims fell within an exemption from the plan's release, the court cannot conclude that Riverside proceeded with the third-party action in spite of having full knowledge that its claims were definitively barred. Accordingly, the court declines to award attorneys' fees in this case.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the motion of Bluestar Properties, Inc., and Jeffrey Pikus is granted to the extent that Bluestar Properties, Inc., is granted leave to amend its answer to add an affirmative defense of release, the amended answer, in the form annexed to the motion papers of Bluestar Properties, Inc. and Jeffrey Pikus, is deemed served upon the third-party plaintiff, and the third-party complaint is dismissed as against Bluestar Properties, Incc., and the motion is otherwise denied; and it is further,

ORDERED that the motion of DG UWS Sub V, LLC, is granted to the extent that DG UWS Sub V, LLC, is granted leave to amend its answer to add an affirmative defense of release, the amended answer, in the form annexed to the motion papers of DG UWS Sub V, LLC, is deemed served upon the third-party plaintiff, the third-


party complaint is dismissed as against DG UWS Sub V, LLC, and that the motion is otherwise denied; and it is further,

ORDERED that Bluestar Properties, Inc., and DG UWS Sub V, LLC, shall each serve a copy of this order with notice of entry upon the plaintiff and the defendant third-party plaintiff within 20 days of this order.

This constitutes the Decision and Order of the court.

Dated: June 4, 2018

ENTER: _____



J.S.C.

HON. NANCY M. BANNON