

Wessler v Scattone
2018 NY Slip Op 31477(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 160605/2016
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

RICHARD WESSLER and SHEENA HANKIN
WESSLER,

Index No.: 160605/2016
DECISION/ORDER
Motion Seq. No. 001

Plaintiffs,

-against-

FRANCESCO SCATTONE, SILVER LININGS,
CONSTRUCTION CORP. and SILVER LININGS
INTERIORS, INC.,

Defendants.

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendant Francesco Scattone's motion to dismiss and plaintiffs' cross-motion for either (1) an order granting plaintiffs leave to file and serve the amended summons with notice *nunc pro tunc* under CPLR 305 (c); or (2) an order granting plaintiffs leave to amend the summons with notice initially filed in this action to change the notice of damages date for just cause under CPLR 305 (c), and, extend the time to serve defendants under CPLR 306-b

Papers	NYSCEF Document Numbers
Defendant Francesco Scattone's Notice of Motion.....	18-29
Plaintiffs' Notice of Cross-Motion	31-46
Defendant Francesco Scattone's Opposition to Cross-Motion	48-51
Plaintiffs' Reply	52-53

Greenblatt & Agulnick, P.C., New York (Scott E. Agulnick of counsel), for plaintiffs.
Wade Clark Mulcahy LLP, New York (Dana Purcaro of counsel), for defendant Francesco Scattone.
Harris, King, Fodiera & Correia (Thomas J. King of counsel) for defendant Silver Linings Interiors, Inc.

Gerald Lebovits, J.

Defendant Francesco Scattone moves under CPLR 3012 (b), CPLR 306-b, and CPLR 214 to dismiss the complaint and all cross-claims. Scattone moves to dismiss the complaint for lack of personal jurisdiction and expiration of the statute of limitations. Scattone admits in his motion to dismiss that he inadvertently omitted from his answer a personal-jurisdiction defense.

Plaintiffs cross-move for either (1) an order granting plaintiffs leave to file and serve the amended summons with notice *nunc pro tunc* under CPLR 305 (c); or, in the alternative, (2) an order granting plaintiffs leave to amend the summons with notice initially filed in this action to

change the notice of damages date for just cause under CPLR 305 (c), and, extend the time to serve defendants under CPLR 306-b. Scattone opposes plaintiffs' cross-motion.

I. Background

This is an alleged property-damage case brought by plaintiffs Richard Wessler and Sheena Hankin Wessler against defendants Scattone, Silver Linings Construction Corp., and Silver Linings Interior, Inc. Plaintiffs filed a summons with notice in this court on December 16, 2016, for injury to their property located at 18 East 93 Street, New York, New York by defendants' construction to the adjacent property located at 20 East 93 Street, New York, New York ("20 East 93"). Plaintiffs allege in their summons with notice that defendants' negligent construction, nuisance, and trespass at 20 East 93rd damaged their property on or around December 15, 2013, and continue to date.

On December 19, 2016, plaintiffs filed a new summons with notice alleging they noticed damages on December 16, 2013, not December 15, 2013. After plaintiffs received Scattone's demand for a complaint, plaintiffs filed and served the complaint on all defendants. Scattone filed an answer to the complaint on March 28, 2017, raising defenses and cross-claims for contribution and indemnifications from plaintiffs.

Scattone's motion to dismiss the complaint and all cross-claims is denied. Plaintiffs' cross-motion is granted and plaintiffs' amended summons with notice is deemed filed and served *nunc pro tunc* under CPLR 305 (c).

II. Scattone's Failure to Raise Personal-Jurisdiction Defense in his Answer

Scattone's motion to dismiss for lack of personal jurisdiction is denied. Scattone failed to raise a personal-jurisdiction defense in his answer; therefore, he waived the defense: "A jurisdictional defense not asserted in the first responsive pleading, whether answer or pre-answer dismissal motion pursuant to CPLR 3211, is waived." (CPLR 3211 [e]; *Adresso v Shemtob*, 70 NY2d 689, 690 [1987].) Scattone may not, 77 days after answering the complaint, raise this defense in a motion to dismiss with a verified answer. Scattone's argument that a clerical error caused this mishap does not cure the waiver of this defense.

III. Scattone's Statute of Limitations Arguments

Scattone argues that plaintiffs failed to commence this property-damage action within the three-year limitation period under CPLR 214 (4). CPLR 214 (4) provides that "an action to recover damages for injury to property must be commenced within three years of the date of the injury. Scattone argues that plaintiffs first noticed damage to their property on February 8, 2013, based on an engineering report plaintiffs produced. Scattone contends that this action is therefore 10 months beyond the three-year limitations period.

Plaintiffs refute this argument, arguing that the engineering report found no evidence of structural damage on February 8, 2013. The engineer's inspection noted waterproofing problems that "may" have been attributable to the demolition and construction on the neighbor's property. Plaintiffs argue that its causes of action for negligence, nuisance, and trespass accrued from December 16, 2013, and continue to date.

At this time, Scattone has not met his burden to dismiss this case. The movant has the burden to demonstrate that the statute of limitations has expired: "To dismiss a cause of action pursuant to 3211 (a) (5), on the ground that it is barred by the Statute of Limitations, a defendant bears the initial burden of establishing prima facie evidence that the time in which to sue has expired" (*Hebrew Institute for Deaf and Exceptional Children v Kahana*, 57 AD3d 734 [2d Dept 2008].) The court cannot determine whether plaintiffs' time to sue has expired. The facts about plaintiffs' damage and the continuing nature of the damages are in dispute.

Plaintiffs' cross-motion is granted. Plaintiffs' amended summons with notice (NYSCEF document number 2) is deemed filed and served *nunc pro tunc* under CPLR 305 (c). Under CPLR 305 (c):

"a court, at any time, in its discretion and upon such terms as it deems just, may allow any summons to be amended, if a substantial right of a party against whom the summons issued is not prejudiced (CPLR 305 (c).)"

Here, Scattone fails to establish that a substantial right would be prejudiced by allowing plaintiffs leave to file and serve the amended summons with notice. Plaintiffs filed and served their corrected summons with notice three days after filing their original summons. The corrected summons contained no changes aside from the typographical error contained in the body of the notice itself. Scattone was served with the corrected summons with notice within the 120-day period and participated in the action accordingly. A substantial right is not prejudiced by allowing plaintiffs' leave to file and serve the amended notice which contains the corrected date already served on Scattone.

Accordingly, it is hereby

ORDERED that defendants Francesco Scattone's motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiffs' cross-motion is granted and plaintiffs' amended summons with notice (NYSCEF document number 2) is deemed filed and served *nunc pro tunc* under CPLR 305 (c); and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on all parties; and it is further

NYSCEF DOC. NO. 54

RECEIVED NYSCEF: 02/07/2018

ORDERED that the parties appear for a conference on March 28, 2018, at 10:00 a.m., in Part 7, room 345, at 60 Centre Street.

Dated: January 11, 2018


J.S.C.
HON. GERALD LEBOVITS
J.S.C.