

Broecker v Conklin Prop., LLC
2018 NY Slip Op 32010(U)
August 17, 2018
Supreme Court, Suffolk County
Docket Number: 20807-2015
Judge: David T. Reilly
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**SUPREME COURT OF THE STATE OF NEW YORK
I.A.S. PART 30 SUFFOLK COUNTY**

**PRESENT:
HON. DAVID T. REILLY, J.S.C.**

INDEX NO.: 20807-2015

**ARIANN BROECKER as Administrator of the Estate of
ERIC R. BROECKER, Deceased,**

**Pazer, Epstein & Jaffe, P.C.
Attorneys for Plaintiff
20 Vesey Street, 7th Floor
New York, NY 10007**

Plaintiff,

-against-

**CONKLIN PROPERTY, LLC, DAWN ELECTRICAL
CONTRACTING CORP., DAWN ELECTRIC
CONTRACTING CORPORATION, DAWN
ELECTRICAL CORP. and GURWIN HOME CARE
AGENCY, INC.,**

**Law Offices of Daniel R. Oliveri, P.C.
Attorneys for Conklin Property, LLC
100 Jericho Quadrangle, Suite 233
Jericho, NY 11753**

**Gallo Vitucci Klar LLP
Attorneys for Dawn Electrical Contracting Corp.
90 Broad Street, 12th Floor
New York, NY 10004**

Defendants.

DAWN ELECTRICAL CONTRACTING CORP.,

**Third-Party Action
INDEX NO. 791075-2017**

Third-Party Plaintiff,

-against-

JJC CONTRACTING, INC.,

**Ahmuty Demers & McManus, Esqs.
Attorneys for Gurwin Home Care Agency, Inc.
200 I.U. Willets Road
Albertson, NY 11507**

Third-Party Defendant.

**Baxter Smith & Shapiro, P.C.
Attorneys for JJC Contracting Inc.
99 North Broadway
Hicksville, NY 11801**

CONKLIN PROPERTY, LLC,

**Fourth-Party Action
INDEX NO. 791179-2017**

Fourth-Party Plaintiff,

-against-

**JJC CONTRACTING, INC. TOTAL MANAGEMENT
CORP. And DAVID LANDE,**

**Kaufman Dolowich & Voluck, LLP
Attorneys for Total Management Corp. &
David Lande
135 Crossways Park Drive, Suite 201
Woodbury, NY 11797**

Fourth-Party Defendants.

MOTION DATE:	<u>11/13/17</u>
SUBMITTED:	<u>04/04/18</u>
MOTION SEQ. NO.:	<u>1.2</u>
MOTION:	<u>001 MotD</u>
	<u>002 MG</u>

Upon the reading and filing of the following papers in this matter: (1) Fourth-Party Defendants Total Management Corp. and David Lande's Notice of Motion dated October 20, 2017 and supporting papers with Memorandum of Law; (2) Fourth-Party Plaintiff Conklin Property, LLC's Notice of Cross-Motion dated February 13, 2018 and supporting papers; (3) Fourth-Party Plaintiff's Opposition to Cross-Motion and in Further Support of Motion to Dismiss dated March 13, 2018; and (4) Fourth-Party Plaintiff's Reply Affirmation in Further Support of Cross-Motion dated April 2, 2018 and supporting papers (~~and after hearing counsel in support and in opposition to the motion~~) it is,

ORDERED that fourth-party defendants Total Management Corp. and David Lande's (TMC) application for an Order dismissing the fourth-party complaint pursuant to CPLR 3211(a)(1)(5) and (7), or in the alternative, severing and staying the claims asserted in the fourth-party complaint is determined as set forth below; and it is

ORDERED that fourth-party plaintiff Conklin Property, LLC's (Conklin) application for an Order granting leave to amend the fourth-party complaint to add an additional cause of action is granted upon the circumstances presented; and it is

ORDERED that movant shall serve a copy of this decision and Order with notice of entry upon all parties to these actions and the Calendar Clerk of the Court by regular mail.

This action stems from a personal injury action commenced by the Estate of Eric R. Broecker (Broecker), who was injured in an accident on Conklin's property located at 330 Conklin Street, Farmingdale, New York 11735 (the subject premises). In or about May 2014, Conklin entered into an agreement with fourth-party defendant JJC Contracting Inc. (JJC) to perform certain construction/renovation work at the subject premises. As part of that agreement JJC was required to, in sum and substance, indemnify, defend and hold Conklin harmless against any and all actions arising out of work performed by JJC or any subcontractors. The subject premises was subsequently leased to defendant Gurwin Home Care Agency, Inc. (Gurwin) pursuant to a ten-year lease agreement. JJC retained defendants Dawn Electrical Contracting Corp. and Dawn Electrical Contracting Corporation (Dawn Electrical) to perform electrical work at the subject premises. It appears that Broecker was electrocuted while employed at the subject premises and later passed away.

According to the fourth-party complaint, in and around the time that Conklin executed the lease with Gurwin, Conklin contacted TMC to retain their services in connection with obtaining insurance for its benefit during the construction/renovation work at the subject premises. It is alleged that TMC reviewed the contracts between Conklin and both Gurwin and JJC to make a determination as to the extent of the insurance coverage required. After some further discussion TMC procured a commercial general liability policy covering Conklin for the period from June 30, 2014 to September 30, 2014. That policy contained specific exclusions with respect to bodily injury to contractors and subcontractors on the subject premises. An endorsement was issued on August 6, 2014 which

removed the "Independent Contractors/Subcontracts Exclusion," purportedly after further discussions between Conklin and TMC. However, an additional exclusion remained in the policy entitled, "All Employees, Volunteer Workers, Temporary Workers, Casual Laborers, Contractors, and Subcontractors Bodily Injury Exclusion" (Endorsement L500). Broecker was injured on the subject premises on August 29, 2014.

On December 6, 2015, Broecker's Estate commenced a lawsuit against Conklin, JJC, Dawn Electrical and Gurwin. U.S. Underwriters, who issued the policy to Conklin through TMC, denied coverage to Conklin solely based on Exclusion L500. On February 23, 2016 and July 13, 2017, Atlantic Casualty Insurance Company (Atlantic) denied Conklin defense and indemnity coverage under the policy issued to JJC which purportedly covered Conklin as an "additional insured." On August 9, 2017, Conklin commenced this fourth-party action against JJC and TMC alleging negligence, negligent misrepresentation and breach of contract.

As relevant here, the causes of action asserted against TMC seek damages for common law indemnification, contribution and breach of contract. The fourth-party complaint alleges that Conklin and TMC entered into a "special relationship" whereby, for consideration paid and or agreed to be paid, TMC advised Conklin as to all matters related to insurance needed for the subject premises. Conklin alleges that TMC reviewed the contract between Conklin and JJC and the lease between Conklin and Gurwin and advised it as to the insurance necessary to protect Conklin's sole asset, the subject premises. The complaint alleges that TMC became the *de facto* insurance department for Conklin. Conklin maintains that TMC violated that special relationship between the two when it failed to secure necessary insurance for Conklin and issued a false and misleading endorsement stating that the Conklin policy removed the Employer Exclusion when it, in fact, did not, thereby subjecting Conklin to liability for damages suffered by the Estate of Eric R. Broecker.

TMC now moves to dismiss the fourth-party complaint as asserted against it pursuant to CPLR 3211(a) (1), (5) and (7). TMC maintains that the action is time barred, inasmuch as the policy it procured through U.S. Underwriters was issued on June 30, 2014 and the fourth-party action was commenced on August 9, 2017, beyond the three-year statute of limitations applicable to such actions (*see* CPLR 214[4]). TMC further contends that a cause of action for negligence does not lie on these facts as Conklin cannot sufficiently demonstrate that TMC owed a duty to Conklin with respect to the Atlantic policy, nor that Conklin enjoyed a "special relationship" with TMC which would imply an ongoing duty to advise Conklin beyond the procurement of the policy with U.S. Underwriters. In addition, TMC asserts that Conklin failed to specifically request coverage with respect to claims arising out of subcontractors in connection with the construction/renovation work. Finally, TMC argues that Conklin has failed to properly assert a cause of action for negligent misrepresentation because it has not pled the necessary elements inherent with that cause of action, to wit: the existence of a "special relationship," that the information supplied was incorrect and justifiable reliance.

Conklin has submitted opposition to TMC's application arguing that it did, indeed, enjoy a "special relationship" with TMC, that TMC was the *de facto* insurance department for Conklin and that Conklin was a novice when it came to insurance requirements for construction and renovation projects. Conklin further contends that, for purposes of statute of limitations, the proper measurement

begins from the date of the underlying injury, not the date of issuance of the policy and, therefore, the action is not time-barred. Conklin has also submitted a cross-application for an Order granting leave to amend the fourth-party complaint to add a cause of action for breach of fiduciary duty. TMC has filed opposition to the cross-motion, the motions are consolidated for purposes of this determination and are decided as follows.

Initially, with respect to TMC's argument that the fourth-party complaint should be dismissed as time barred, the Court disagrees. Conklin appropriately cites the case *Chase Scientific Research Inc. v. NIA Group Inc.* (96 NY2d 20 [2001]) which held that causes of action against insurance agents and brokers for negligence are governed by the three-year statute of limitations (CPLR 214[4]) which begins to accrue on the date of the accident, or in this case, August 29, 2014, when Mr. Broecker was injured. Inasmuch as the filing of the summons and complaint in this case was completed on August 9, 2017, the action is timely.

With respect to that branch of TMC's motion for dismissal for failure to state a claim, on a motion to dismiss pursuant to CPLR 3211(a)(7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated (*Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization*, 80 AD3d 643, 649, 915 NYS2d 117 [2d Dept 2011]; *Schneider v Hand*, 296 AD2d 454, 744 NYS2d 899 [2002]). Although the facts pleaded are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible (*Nasca v Sgro*, 101 AD3d 963, 964, 957 NYS2d 246 [2d Dept 2012]).

Turning to Conklin's cause of action alleging negligence on the part of TMC the Court finds the appropriate query is whether a "special relationship" existed between Conklin and TMC. Conklin alleges that it was a novice when it came to securing insurance for construction and renovation projects for premises like 330 Conklin Street, Farmingdale NY. Hal Fuchs, one of the managing partners along with his wife of Conklin Property LLC, has submitted an affidavit wherein he states that he ran a flooring business open to the general public for many years and that he and his wife were new to the commercial real estate leasing business when he began to make improvements to the subject premises in order to lease space. Fuchs states that he retained TMC upon a referral because of their apparent expertise and advice providing insurance for rental commercial properties. He further states that he contacted TMC with many questions regarding the policy forwarded to him with particular emphasis on the exclusions for contractors and subcontractors. In addition, Mr. Fuchs sought the advice of TMC with respect to the contract entered into with JJC and the lease agreement with Gurwin, and the insurance requirements for each. Finally, when the construction and renovation phase of the project ended, TMC offered Conklin further services in terms of insurance coverage.

Considered cumulatively, the Court finds that Conklin has sufficiently pled the essential elements for the causes of action set forth in the fourth-party complaint, including the claims for negligent misrepresentation and breach of contract. It shall be for the trier of fact to determine whether Conklin has established whether there existed a "special relationship" between itself and TMC.

Accordingly, TMC's application for an Order dismissing the fourth-party complaint pursuant to CPLR 3211 (a)(7) is denied.

Turning then to Conklin's cross-motion, on a motion for leave to amend, plaintiffs need not establish the merit of their proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (*MBIA Insurance Corp. V Greystone & Co., Inc.*, 74 AD3d 499, 901 NYS2d 522 [1st Dept 2010]). Although leave to amend should be freely given in the absence of prejudice or surprise to the opposing party (*see* CPLR 3025[b]), the motion should be denied where the proposed amendment is palpably insufficient or patently devoid of merit (*Ferrandino & Son, Inc. v Wheaton Bldrs., Inc., LLC*, 82 AD3d 1035, 920 NYS2d 123 [2d Dept 2011], citing *Scofield v DeGroot*, 54 AD3d 1017, 1018, 864 NYS2d 174; *Lucido v Mancuso*, 49 AD3d 220, 227, 851 NYS2d 238).

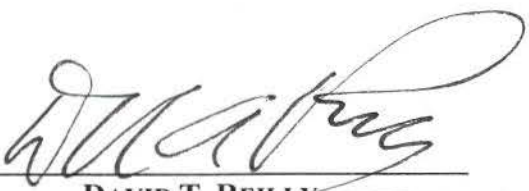
Here, Conklin seeks to amend the fourth-party complaint to add a cause of action for breach of fiduciary duty. The Court has examined the proposed amendment and finds that it is not palpably insufficient or patently devoid of merit (*see Ferrandino & Son, Inc. v. Wheaton Bldrs, Inc., LLC*, supra). Accordingly, the cross-motion is granted and the amended fourth-party verified complaint is deemed served as of the date of this decision and Order.

Finally, the Court has considered TMC's alternative form of relief and finds merit to the application. Accordingly, it is hereby

ORDERED that the fourth-party causes of action asserted against TMC are hereby severed with respect to the remaining claims therein and the prosecution of those actions are stayed pending the outcome of Conklin's claims against JJC with respect to common law indemnification, contribution and breach of contract.

This constitutes the decision and Order of the Court.

Dated: August 17, 2018
Riverhead, New York



DAVID T. REILLY
JUSTICE OF THE SUPREME COURT

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION