

New York City Hous. Auth. v Scottsdale Ins. Co.

2018 NY Slip Op 33244(U)

December 13, 2018

Supreme Court, New York County

Docket Number: 155714/2016

Judge: Kathryn E. Freed

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED PART IAS MOTION 2

Justice

INDEX NO. 155714/2016

MOTION SEQ. NO. 002

NEW YORK CITY HOUSING AUTHORITY, TRINITY WEST
HARLEM PHASE ONE LIMITED PARTNERSHIP, TRINITY WEST
HARLEM PHASE ONE HOUSING DEVELOPMENT FUND
CORPORATION, MEGA CONTRACTING GROUP LLC, and
ARCH SPECIALTY INSURANCE COMPANY,

Plaintiffs,

- v -

DECISION AND ORDER

SCOTTSDALE INSURANCE COMPANY and SHAWN
CONSTRUCTION, INC.,

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 36, 37, 38, 39, 40,
41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for AMEND PLEADINGS

Upon the foregoing documents, it is ordered that the motion is granted.

In this declaratory judgment action, plaintiffs New York City Housing Authority
("NYCHA"), Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase
One Housing Development Fund Corporation (collectively "Trinity"), Mega Contracting Group
LLC ("Mega"), and Arch Specialty Insurance Company ("Arch") move, pursuant to CPLR
3025(b), for leave to file an amended verified complaint asserting a second cause of action
against defendant Scottsdale Insurance Company ("Scottsdale Insurance") seeking a declaration
that Scottsdale Insurance is obligated, pursuant to CPLR 3001, to defend and indemnify Shawn
Construction, Inc. ("Shawn Construction") in a Labor Law action styled Sacko v New York City
Hous. Auth., Supreme Court, New York County Index Number 157722/2015 ("the underlying

action”). After oral argument, and after a review of the parties’ papers and the relevant statutes and case law, it is ordered that the motion is **granted**.

FACTUAL AND PROCEDURAL BACKGROUND:

Madimoro Sacko (“Sacko”) was injured while performing construction work on March 9, 2015 as an employee of Shawn Construction at a housing development located on West 114th Street in Manhattan (“the premises”). (Doc. 56 at 6.) The premises were owned by NYCHA (*id.*), but were leased to Trinity (Doc. 37 at 2). For the construction project, Trinity retained Mega as the general contractor. (*Id.*) Mega in turn retained Sacko’s employer, Shawn Construction, to perform carpentry work at the premises. (*Id.* at 2–3.)

On July 28, 2015, Sacko commenced the underlying action against NYCHA, Trinity, and Mega (Doc. 51), in which he alleged that he was injured due to their alleged Labor Law violations.

On November 20, 2015, NYCHA, Trinity, and Mega commenced a third-party action against Shawn Construction styled *New York City Hous. Auth. v Shawn Constr., Inc.*, Supreme Court, New York County Index Number 595840/2015. (Doc. 52.) The third-party complaint alleges, *inter alia*, a cause of action for contractual indemnification against Shawn Construction for any damages awarded against them in the underlying action. (*Id.* at 7–9.)

Mega is insured by Arch under policy number GAP000993209, which was in effect when Sacko’s accident occurred. (Doc. 37 at 3.) Arch is also providing coverage to NYCHA and Trinity in the underlying action as additional insureds under the policy. (*Id.*) Shawn Construction is insured by Scottsdale Insurance under policy number CPS1996231, which was also effective during Sacko’s incident. (*Id.* at 3–4.) Pursuant to a contract between Mega and Shawn

Construction, Shawn Construction is obligated to defend and indemnify NYCHA, Trinity, and Mega for any claims arising out of Shawn Construction's work under the contract. (Doc. 37 at 4.)

Arch placed Scottsdale Insurance on notice of Sacko's claim on March 17, 2015. (Doc. 42.) Arch's letter to Scottsdale Insurance specifically stated that Sacko was purportedly injured while working as "an employee of Shawn Construction" (*id.* at 2-3) which, as mentioned above, is insured by Scottsdale Insurance (Doc. 37 at 3-4). In a letter to Shawn Construction dated May 22, 2015, Scottsdale Insurance disclaimed coverage of the incident. (Doc. 45.) Scottsdale Insurance based its denial on the fact that Sacko was an employee of Shawn Construction and that its insurance policy does not cover employees who are injured during the course of employment. (*Id.* at 9.) Consequently, Scottsdale Insurance is not defending or covering Shawn Construction for any of the claims in the underlying action. (Doc. 37 at 7.)

On July 11, 2016, NYCHA, Trinity, Mega, and Arch commenced the instant declaratory judgment action seeking an order that NYCHA, Trinity, and Mega are entitled to additional insured coverage in the underlying action under Scottsdale Insurance's policy and that Scottsdale Insurance's disclaimer of coverage was untimely. (Doc. 41 at 1-13.) Scottsdale Insurance filed an answer on September 9, 2016. (*Id.* at 14-25.) On September 12, 2016, Scottsdale Insurance filed an amended answer asserting, *inter alia*, that NYCHA, Trinity, and Mega are not additional insureds under the policy and that it is not obligated to provide coverage for any claims arising out of Sacko's accident. (Doc. 55 at 13-24.)

Plaintiffs NYCHA, Trinity, Mega, and Arch now move, pursuant to CPLR 3025(b), for leave to file an amended verified complaint asserting a second cause of action against defendant Scottsdale Insurance seeking a declaration that Scottsdale Insurance is obligated, pursuant to

CPLR 3001, to defend and indemnify Shawn Construction in the underlying action. (Doc. 37 at 1-2.)

POSITIONS OF THE PARTIES:

Plaintiffs first argue that they should be permitted to amend their complaint because Scottsdale Insurance's disclaimer letter was untimely and invalid. (*Id.* at 8.) In support of this argument, plaintiffs cite *W. 16th St. Tenants Corp. v Pub. Serv. Mut. Ins. Co.*, 290 AD2d 278 (1st Dept 2002) which, they allege, established that a 30-day delay in disclaiming coverage is untimely as a matter of law. (*Id.* at 11.) Second, plaintiffs maintain that they have standing to seek coverage for Shawn Construction because they would "stand to benefit" if Shawn Construction were granted coverage under its policy with Scottsdale Insurance (*id.* at 8), insofar as they would benefit from such coverage through their claim against Shawn Construction for contractual indemnification (*id.* at 11). Plaintiffs have submitted a proposed amended complaint. (Doc. 46.)

In opposition to the motion, defendant Scottsdale Insurance claims that the motion to amend the complaint should be denied as procedurally defective because plaintiffs have not included an affidavit by a party who has knowledge of the new allegations. (Doc. 56 at 8.) Scottsdale Insurance further alleges that the motion should be denied because plaintiffs have not complied with Insurance Law § 3420(a)(2). (*Id.* at 9.) That provision requires the third party, such as plaintiffs herein, to first secure a judgment against the alleged tortfeasor, serve the tortfeasor's insurer with a copy of the judgment, and wait for satisfaction of the judgment for 30 days. (*Id.*) According to Scottsdale Insurance, the third party may commence a suit directly against the insurer only if the judgment remains unsatisfied after that time period. (*Id.*) Scottsdale

Insurance argues that because plaintiffs have not secured a judgment against Shawn Construction in the underlying action, they do not have standing to litigate the proposed additional claim. (*Id.* at 13.) Moreover, Scottsdale Insurance claims that its disclaimer of coverage to Shawn Construction was timely. (*Id.*)

In reply, plaintiffs argue that Insurance Law § 3420(a)(2) is inapposite because that provision is designed to preclude a direct action against an alleged tortfeasor's insurer by a "stranger" to the insurance contract unless certain prerequisites—set forth above—are met. (Doc. 57 at 1–2.) Plaintiffs maintain that they are not strangers to Shawn Construction's insurance policy with Scottsdale Insurance since they are claiming to be additional insureds. (*Id.*) Last, as to Scottsdale Insurance's allegation that plaintiffs' motion to amend the complaint is procedurally defective, plaintiffs request that this Court grant them a period of 30 days following a decision on the motion to obtain and exchange client verifications. (*Id.* at 9.)

LEGAL CONCLUSIONS:

CPLR 3025(b) provides that leave to amend the pleadings "shall be freely given" A party who moves to amend or supplement the pleadings must submit "the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading" with the movant's papers. (CPLR 3025[b].) "The decision to allow or disallow the amendment is committed to the court's discretion." (*Edenwald Contr. Co., Inc. v City of New York*, 60 NY2d 957, 959 [1983].)

"The party opposing the motion to amend must overcome a heavy presumption of validity in favor of the moving party." (*Otis El. Co. v 1166 Ave. of Americas Condominium*, 166 AD2d 307, 307 [1st Dept 1990].) In opposing the motion, a party must establish that amendment

of the pleadings would result in prejudice. (*See Seda v New York City Hous. Auth.*, 181 AD2d 469, 469–70 [1st Dept 1992].) In determining whether prejudice exists, courts have elucidated that “[m]ere lateness is not a barrier to amendment; however, lateness, coupled with significant prejudice to the party opposing the amendment, is necessary.” (*Sass v Mack Trucks, Inc.*, 158 AD2d 332, 333 [1st Dept 1990].) “There must be some special right lost in the interim, some change of position or some significant trouble or expense that could have been avoided had the original pleading contained what the amended one wants to add.” (*A. J. Pegno Constr. Corp. v City of New York*, 95 AD2d 655, 656 [1st Dept 1983] (internal citation omitted).)

This Court, in its discretion, grants plaintiffs leave to file an amended complaint asserting a second cause of action against Scottsdale Insurance for a declaration that Scottsdale Insurance is obligated, pursuant to CPLR 3001, to defend and indemnify Shawn Construction in the underlying action. In opposing the motion, it was Scottsdale Insurance’s burden to establish that amendment of the complaint would result in significant prejudice. (*See, e.g., Seda*, 181 AD2d at 469–70; *Sass*, 158 AD2d at 333.) Scottsdale Insurance failed to meet that burden.

Furthermore, although courts have at times declined leave to amend when the proposed pleading clearly lacks merit, (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009]), Scottsdale Insurance has not shown how the proposed second cause of action is meritless. The crux of Scottsdale Insurance’s argument in opposition to the motion is that plaintiffs lack standing to bring the claim. (Doc. 56 at 8–13.) Standing, however, is a distinct issue separate from the merits of the case. (*See, e.g., Socy. of Plastics Indus., Inc. v County of Suffolk*, 77 NY2d 761, 769 [1991] (“Standing is a threshold determination . . . that a person should be allowed access to the courts to adjudicate the merits of a particular dispute”)) Leave to amend should therefore be granted in this instance.

In accordance with the foregoing, it is hereby:

ORDERED that plaintiffs New York City Housing Authority, Trinity West Harlem Phase One Limited Partnership, Trinity West Harlem Phase One Housing Development Fund Corporation, Mega Contracting Group LLC, and Arch Specialty Insurance Company's motion is granted; and it is further


ORDERED that, within 14 days of the uploading of this order to NYSCEF, plaintiffs' counsel is directed to serve a copy of this order, with notice of entry, on defendants Scottsdale Insurance Company and Shawn Construction, Inc.'s counsel and on the Clerk of the Court; and it is further

ORDERED that plaintiffs are granted a period of 30 days following the uploading of this decision on the motion to NYSCEF to obtain and exchange client verifications; and it is further

ORDERED that this constitutes the decision and order of this Court.

12/13/2018

DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE