

Escamilla v AWR Group, Inc.

2020 NY Slip Op 34537(U)

December 23, 2020

Supreme Court, Kings County

Docket Number: 500379/2016

Judge: Devin P. Cohen

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**Supreme Court of the State of New York
County of Kings**

Index Number 500379/2016

SEQ # 012

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Part 91

GERARDO ESCAMILLA,

Plaintiff,

against

AWR GROUP, INC., STIGER CONSTRUCTION, INC., AND
THE SOUTH STAR CONDOMINIUM,

Defendants.

Papers

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Order to Show Cause and Affidavits Annexed...	<u>2</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u> </u>
Other	<u> </u>

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Upon review of the foregoing papers, defendant The South Star Condominium's ("South Star") motion to amend (Mot. Seq. 012) is decided as follows:

On January 12, 2016, plaintiff brought this action against defendants for injuries he claims to have sustained when his bicycle caught on loose mesh at defendants' construction site causing him to fall. The named defendants in the original complaint were AWR Group, Inc. and John Gold Realty LLC. Separately, on July 9, 2018, plaintiff commenced an action in Supreme Court, Queens County, against The South Star Condominiums as the only defendant.

In this action, John Gold Realty served an answer and then an amended answer, each with a cross-claim for indemnification/apportionment against AWR Group. Plaintiff then served a supplemental summons and amended complaint that added defendant Stiger Construction, Inc. John Gold Realty served an answer to the amended complaint with cross-claims for indemnification and/or apportionment against AWR Group and Stiger Construction. AWR Group served an answer to the amended complaint with cross-claims against Stiger and John Gold Realty for indemnification/apportionment, contractual indemnification, and breach of

contract. Stiger served an answer to the amended complaint with cross-claims against AWR Group and John Gold Realty for breach of contract, common-law indemnification, negligence, contractual indemnification, and insurance coverage.

By motion, dated July 3, 2018, John Gold Realty moved for summary judgment to dismiss plaintiff's claim against it. By order, dated January 9, 2019, the court (Vaughn, J.) granted the motion and dismissed the claims against John Gold Realty. By motion, filed on October 23, 2018, plaintiff requested consolidation of this action with *Escamilla v The South Star Condominiums*, Index No. 710437/2018 (Sup. Ct., Queens County). By order, dated April 3, 2019, the court (Vaughn, J.) granted consolidation of the two actions into this action.

Subsequently, defendants AWR Group and South Star moved for summary judgment to dismiss plaintiff's claims against them and for summary judgment in favor of AWR Group's cross-claims against defendant Stiger Construction. It appears that South Star intended also to seek summary judgment on a cross-claim for contractual indemnification, but it realized that it never asserted such a claim. As South Star explains, after the cases were consolidated, it never amended its answer to assert cross-claims against Stiger Construction.

South Star now moves to amend its answer to include a cross-claim against Stiger Construction for contractual indemnification. Leave to amend pleadings should be given freely when the amendment is not without merit and does not prejudice or surprise the opposing party. That said, such leave should be "discrete, circumspect, prudent, and cautious" when the case has been certified for trial (*Morand v Farmers New Century Ins. Co.*, 171 AD3d 1167, 1167 [2d Dept 2019]). While this action began in 2016, South Star was only brought into the instant action through consolidation in April 2019, more than three years later. Thereafter, the note of

issue was filed and this case was certified for trial on February 10, 2020, shortly before the COVID-19 pandemic forced a temporary moratorium on the filing of new non-emergency motions.

Stiger Construction argues that South Star has delayed too long in making its request to amend. While delay in seeking amendment may weigh against allowing the amendment, delay alone will not justify denial of the motion (*Cullen v Torsiello*, 156 AD3d 680, 681-82 [2d Dept 2017]). South Star was the only defendant in the Queens County action, and so there would have been no reason to assert cross-claims in that action. Further, it appears that South Star's failure to amend the complaint around the time of consolidation was inadvertent error.

Stiger Construction's only claim of prejudice is that amendment will prevent it from properly opposing South Star's motion for summary judgment on South Star's cross-claim. To be clear, even if I allow South Star to amend its answer to include a cross-claim for contractual indemnification, I have no intention of considering that amendment *nunc pro tunc* and revisiting my existing ruling on South Star's summary judgment motion. Consequently, there is no material prejudice to Stiger Construction caused by amendment of South Star's answer.

Lastly, Stiger Construction argues that the amendment to include a cross-claim for contractual indemnification has no merit because South Star has not shown that it is free from negligence. However, where there is no showing of prejudice, as here, South Star is not required to submit an evidentiary showing of merit in order to amend (*US Bank N.A. v Murillo*, 171 AD3d 984, 985-86 [2d Dept 2019]).

For the foregoing reasons, South Star's motion to amend is granted. South Star shall serve an amended answer within twenty days of notice of entry of this order.

This constitutes the decision and order of the court.

December 23, 2020
DATE

DEVIN P. COHEN
Justice of the Supreme Court

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