

**Soto v Atlantis Rehabilitation & Residential Health
Care Facility, LLC**

2021 NY Slip Op 32248(U)

November 9, 2021

Supreme Court, Kings County

Docket Number: Index No. 503914/13

Judge: Genine D. Edwards

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, MMESP-6M of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 9th day of November 2021.

P R E S E N T:

HON. GENINE D. EDWARDS,
Justice.

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JEANETTE SOTO, as Administratrix of the Estate of
EDWIN SOTO, and JEANETTE SOTO, Individually,

Plaintiffs,

-against-

ATLANTIS REHABILITATION AND RESIDENTIAL HEALTH
CARE FACILITY, LLC, d/b/a ATLANTIS REHABILITATION
AND RESIDENTIAL HEALTH CARE FACILITY,

Defendant.

-----X
ATLANTIS REHABILITATION AND RESIDENTIAL HEALTH
CARE FACILITY, LLC, d/b/a ATLANTIS REHABILITATION
AND RESIDENTIAL HEALTH CARE FACILITY,

Third-Party Plaintiff,

-against-

THE BROOKLYN HOSPITAL CENTER,

Third-Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc No.:

Notice of Motion/Cross Motion, Affirmations,
and Exhibits Annexed _____
Reply Affirmation _____

38-46; 48-54
55

Upon the foregoing papers, third-party defendant The Brooklyn Hospital Center (“TBHC”) moves in Seq. No. 3 for an order dismissing the third-party complaint:

¹ The caption conforms to the order, dated January 16, 2020 (Edwards, J.) (NYSCEF Doc No. 78).

(1) pursuant to CPLR 3211 (a) (7), for failure to state a cause of action; (2) pursuant to CPLR 3211 (a) (6), as constituting an improper counterclaim; (3) pursuant to CPLR 3126, as violating the deadline for impleader actions as set forth in the Preliminary Conference Order, dated May 8, 2014 (the “PC order”) (NYSCEF Doc No. 42); and (4) pursuant to CPLR 603 and 1010, as a means of avoiding prejudice to substantial rights, or, alternatively, severing the third-party action from the underlying action. Defendant/third-party plaintiff Atlantis Rehabilitation and Residential Health Care Facility, doing business as Atlantis Rehabilitation and Residential Health Care Facility (“Atlantis”), objects and cross-moves in Seq. No. 4 for leave, pursuant to CPLR 3025 (b), to amend its third-party complaint.

Background

On July 12, 2013, the underlying action was commenced against Atlantis (among others). During the underlying action, the PC order was entered directing that any impleader actions be filed by no later than ninety days after the depositions were completed in the underlying action. Although the depositions were completed and a note of issue/certificate of readiness were filed in the underlying action on March 28, 2016, no impleader action was filed by that time.

Approximately eleven months later, on February 6, 2017, Atlantis impleaded TBHC for common-law indemnification and contribution. On April 13, 2017, TBHC answered the third-party complaint. While the instant motion to dismiss (as well as the instant cross-motion for leave to amend) were pending, discovery was proceeding in the third-party action, as reflected by (among other things) the orders, dated July 16, 2019 and August 20, 2021 (collectively, the “discovery orders”). The fact that discovery was proceeding in the

third-party action, notwithstanding the pendency of TBHC's motion to dismiss it, suggests that the stay of discovery under CPLR 3214 (b) had been lifted (at least implicitly, although no written directive to that effect appears on the case docket).² On August 31, 2021, this Court reserved decision on the instant motion and cross-motion.

Discussion

TBHC's Motion to Dismiss

As noted, the initial branch of TBHC's motion seeks dismissal, for failure to state a claim under CPLR 3211 (a) (7), of Atlantis's third-party complaint which is for common-law indemnification and contribution. The legal concepts of common-law indemnification and contribution were thoroughly explored by the Appellate Division in *Santoro v.*

Poughkeepsie Crossings, LLC, 180 A.D.3d 12, 115 N.Y.S.3d 368 (2d Dept. 2019). The Second Department explained the distinction between the two concepts:

“The key element of a common-law cause of action for indemnification is not a duty running from the indemnitor to the injured party, but rather is a separate duty owed the indemnitee by the indemnitor to reimburse the indemnitee for damages the indemnitee was compelled to pay for the wrongdoing of the indemnitor. The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, that is, the defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious. In the classic indemnification case, the one seeking indemnity had committed no wrong, but by virtue of some relationship with the tort-feasor or obligation imposed by law, was nevertheless held liable to the injured party. Thus, if a party is liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent. Conversely, where a party is held liable at least partially because of its own

² CPLR 3214 (b) provides, in relevant part, that “[s]ervice of a notice of motion under [CPLR] 3211 . . . stays disclosure until determination of the motion *unless the court orders otherwise*” (emphasis added).

negligence, contribution against other culpable tort-feasors is the only available remedy.”

Santoro, 180 A.D.3d 12, 115 N.Y.S.3d 368 (internal quotation marks, citations, and alterations omitted).

Here, the third-party complaint, as amplified by the underlying complaint and Atlantis’s response to TBHC’s demand for a bill of particulars (NYSCEF Doc Nos. 1 and 50, respectively), is grounded on the allegations that plaintiffs’ decedent, in the course of his residence at Atlantis, was hospitalized on multiple occasions at TBHC for bed sores (among other reasons). If (and to the extent that) Atlantis is found liable to plaintiffs in the underlying action regarding the decedent’s bed sores, it seeks proportionate recovery from TBHC by way of common-law indemnification and contribution. As the Court must afford the third-party complaint “a liberal construction, accept all facts as alleged [therein] . . . , accord the proponent the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory,” this Court finds that the third-party complaint states a viable cause of action for common-law indemnification and contribution. *See e.g., Cajigas v. Clean Rite Ctrs., LLC*, 187 A.D.3d 700, 132 N.Y.S.3d 428 (2d Dept. 2020); *Guayara v. Harry I. Katz, P.C.*, 83 A.D.3d 661, 920 N.Y.S.2d 401 (2d Dept. 2011).

The second branch of TBHC’s motion seeks dismissal of the third-party complaint pursuant to CPLR 3211 (a) (6). That provision states that a court may dismiss a counterclaim, if it “may not properly be interposed in the action.” Inasmuch as the third-party complaint is not a “counterclaim” by any stretch of imagination, TBHC’s reliance on CPLR 3211 (a) (6) as a basis for dismissal is misplaced.

The penultimate branch of TBHC's motion seeks dismissal of the third-party complaint as being untimely. According to TBHC, the third-party action should have been commenced (if it should have been commenced at all) within 90 days after the depositions were completed in the underlying action, as set forth in ¶ X of the PC Order. However, "the mere passage of time normally will not constitute substantial prejudice in the absence of some showing of actual injury to the [potentially affected party]." *Matter of Sarkisian Bros., Inc. v State Div. of Human Rights*, 48 N.Y.2d 816, 424 N.Y.S.2d 125 (1979). Here, TBHC failed to demonstrate substantial prejudice flowing from Atlantis' belated commencement of the third-party action, all the more so because multiple judges of this court took adequate steps, as evinced by the discovery orders, to ensure that discovery in the third-party action was expeditiously completed.

The final branch of TBHC's motion seeks dismissal or, alternatively, severance of the third-party action from the underlying action on the basis of perceived prejudice. This Court disagrees. TBHC cannot claim prejudice by Atlantis' delay in the commencement of the third-party action because TBHC was afforded an opportunity to conduct discovery in the third-party action while the underlying action was taken off the trial calendar. *See Solano v. Castro*, 72 A.D.3d 932, 902 N.Y.S.2d 95 (2d Dept. 2010). What's more, nothing in the record indicates that plaintiffs in the underlying action claimed any prejudice by the resulting delay.

Atlantis' Cross-Motion for Leave to Amend

Denial of TBHC's motion, as more fully set forth in the decretal paragraphs below, renders academic Atlantis' cross-motion for leave to amend its third-party complaint.

Conclusion

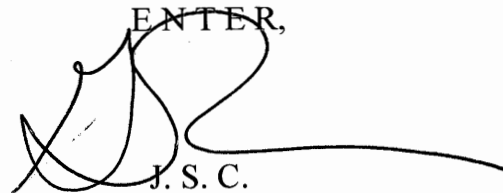
Accordingly, it is

ORDERED that TBHC's motion in Seq. No. 3 which is for dismissal of the third-party complaint and for other relief is *denied in its entirety*; and it is further

ORDERED that Atlantis' cross-motion in Seq. No. 4 which is for leave to amend its third-party complaint is *denied as academic*.

Atlantis' counsel is directed to electronically serve a copy of this Decision/Order with notice of entry on the other parties' respective counsel, and to electronically file an affidavit of service thereof with the Kings County Clerk.

This constitutes the Decision/Order of this Court.

ENTER,

J. S. C.