

Greater N.Y. Mut. Co. v CONA Elec. Inc.
2021 NY Slip Op 32738(U)
December 21, 2021
Supreme Court, New York County
Docket Number: Index No. 162674/2015
Judge: Phillip Hom
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PHILLIP HOM PART 2
Justice

GREATER NEW YORK MUTUAL COMPANY AS
SUBROGEE OF 2665 HOMECREST AVENUE OWNERS
CORP.,

Plaintiff,

- v -

CONA ELECTRIC INC., CONSOLIDATED EDISON
COMPANY OF NEW YORK, INC

Defendant.

INDEX NO. 162674/2015
MOTION DATE 05/24/2021
MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Upon the foregoing documents, it is ORDERED that the motion is granted and Defendant Consolidated Edison Company of New York, Inc.'s ("Con Ed") Second Amended Verified Answer with Cross-Complaint ("SAVA") (NYSCEF Doc. No. 74) is deemed filed, nunc pro tunc and it is further ORDERED that the Complaint and any Cross Claims are dismissed as against Con Ed only as time barred.

Background

Plaintiff Greater New York Mutual Insurance Company ("Greater NY") commenced this action as subrogee of 2665 Homecrest Avenue Owners Corp. ("2665 Homecrest") by filing a Summons and Complaint on December 11, 2015. 2665 Homecrest owned the building at 2665 Homecrest Avenue, Brooklyn, NY (the "Building"). Greater NY paid a claim for property damage due to a fire that occurred on December 22, 2012 in the utility room of the Building.

Greater NY alleges that on December 22, 2012, a fire originated in the gas meter room of the Building causing property damage after Defendants Cona Electric Inc. (“Cona”) and Con Ed had advised that the Building’s electrical system could be re-energized after a previous flood (NYSCEF Doc. No. 1 ¶10).

Con Ed moves to amend its Answer and to dismiss the Complaint on statute of limitations ground. Greater NY opposes the motion.

Amend Answer

Con Ed moves under CPLR §3025 for leave to serve a SAVA asserting as its sixth affirmative defense the statute of limitations and dismissing this action as time barred. Con Ed served an earlier amended answer on June 6, 2016, asserting various defenses, but did not raise the affirmative defense of the statute of limitations (NYSCEF Doc. No. 25).

It is well-established that leave to amend pleadings to add the statute of limitations defense should be freely allowed, except where the proposed defense clearly lacks merit or there is prejudice or surprise resulting directly from the delay (CPLR §3025(b); *Solomon Holding Corp., v Golia*, 55 AD3d 507 [1st Dept 2008]). “This favorable treatment applies even if the amendment substantially alters the theory of recovery” (*Kimso Apts., LLC v Gandhi*, 24 NY3d 403, 411 [2014]).

The late assertion of a statute of limitations defense is no barrier to the amendment, unless there would be significant prejudice to plaintiff (*Cseh v New York City Tr. Auth.*, 240 AD2d 270, 271 [1st Dept 1997], *citing* CPLR §3025[b]). Prejudice is described by the Court of Appeals as more than “the mere exposure of the [party] to greater liability . . . there must be some indication that the [party] has been hindered in the preparation of [the party's] case or has

been prevented from taking some measure in support of [its] position” (*Id.*). “The kind of prejudice required to defeat an amendment . . . must . . . be a showing of prejudice traceable not simply to the new matter sought to be added, but also to the fact that it is only now being added. 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” (*Jacobson v Croman*, 107 AD3d 644, 645 [1st Dept 2013]). The burden of establishing prejudice is on the party opposing the amendment (*Id.*).

In support of its motion to amend, Con Ed alleges that Greater NY filed its Summons and Complaint on December 11, 2015 (NYSCEF Doc. No. 1). Con Ed further argues that Greater NY cannot claim prejudice or surprise since its Supplemental Bill of Particulars (“Supp BP”) alleges its claims against Con Ed arise from events that occurred on November 1, 2012 and consequently the Complaint against them should be dismissed as time barred (NYSCEF Doc. No. 73, ¶5). In its Suppl BP, Greater NY alleges that following Hurricane Sandy, Con Ed restored the power to the building without properly testing and repairing the equipment and did not take proper and timely steps to avoid the fire that occurred on December 22, 2012 in the Building’s electrical system (*Id.* ¶5).

In opposition, Greater NY argues that this case arises from a fire which occurred in the utility room of the Building on December 22, 2012, following Hurricane Sandy. In reply, Con Ed further alleges that Greater NY’s opposition papers were untimely submitted to the Court and its motion should be deemed unopposed. The Court notes that Greater NY failed to submit its opposition papers in accordance with the CPLR. However, in the interest of justice, and consistent with the policy of resolving issues on their merits, the Court will consider Greater NY’s untimely opposition papers.

The Court finds that Con Ed's SAVA has merit and there is no prejudice to Greater NY, which stated in its Supp BP that Con Ed was "careless and negligent" when it restored electricity to the Building on November 1, 2012, after Hurricane Sandy, without inspecting the equipment in the Building for saltwater damage. The Court grants Con Ed's motion to serve its SAVA in the form annexed as NYSCEF Doc. 74 *nunc pro tunc*, asserting its sixth affirmative defense, the statute of limitations.

Motion to Dismiss Under CPLR §3211(a)(5)

Under CPLR § 3211(e), any objection or defense based upon the statute of limitations is deemed waived unless it is raised either in the responsive pleading or by motion to dismiss (*Horst v Brown*, 72 AD3d 434 [1st Dept 2010], citing *Buckeye Retirement Co., L.L.C., Ltd. v Lee*, 41 AD3d 183 [1st Dept 2007]). However, unlike a personal jurisdiction defense, the defense of statute of limitations in an amended answer can be granted, in the court's discretion, absent prejudice or surprise to the plaintiff (*Seda v New York City Hous. Auth.*, 181 AD2d 469 [1992], citing *Fahey v County of Ontario*, 44 NY2d 934 [1978]).

To dismiss a cause of action under CPLR § 3211(a)(5) because it is barred by the statute of limitations, a defendant bears the initial burden of establishing through *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]). CPLR § 214(4)'s three-year statute of limitations for claims arising from injury to property accrues "upon the date of injury, and not upon discovery of the damage" (*Verizon-New York, Inc., v Reckson Assoc. Realty Corp.*, 19 AD3d 291, 291 [1st Dept 2005]). An insurer's subrogation action is governed by the same statute of limitations

applicable to the underlying personal injury or [property damage] action (*Allstate Ins. Co. v Stein*, 1 NY3d 416 [2004]).

According to Greater NY's own Supp BP, Con Ed was careless and negligent when it restored power to the Building on November 1, 2012 without inspecting the electrical equipment in the main electrical room to determine if there was any damage from saltwater flooding caused by Hurricane Sandy. Greater NY did not discover the damage until December 22, 2012, when it alleges a fire started due to Con Ed's negligence. Under these facts, the Court finds that the injury to the property occurred on November 1, 2012, which was discovered on December 22, 2012 and this action was commenced on December 11, 2015 (CPLR § 214(4)), after the November 1, 2015 expiration of the statute of limitations.

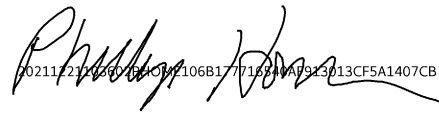
Accordingly, Con Ed has met its burden of showing that Greater NY filed its Summons and Complaint after the statute of limitations had expired and the Court dismisses Greater NY's Complaint and all cross claims as untimely.

Conclusion

Accordingly, it is

ORDERED that Con Ed's motion for leave to serve its SAVA asserting a sixth statute of limitations affirmative defense is granted, *nunc pro tunc*. It is further ORDERED that the Complaint and all cross claims as against Defendant Con Ed only are dismissed, with prejudice.

This constitutes the Decision and Order of the Court.


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December 21, 2021

DATE

PHILLIP HOM, 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