Community Assn. Underwriters of Am., Inc. v Advanced Chimney, Inc.
2021 NY Slip Op 33483(U)
February 26, 2021
Supreme Court, Suffolk County
Docket Number: Index No. 604322/2019
Judge: David T. Reilly

SHORT FORM ORDER

INDEX No. 604322/2019
CAL. No. 202000953OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

PRESENT:

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 11/24/20 (#001 & #002)
MOTION DATE 11/25/20 (#003)
ADJ. DATE 11/25/20
Mot. Seq. #001 MG
Mot. Seq. #002 MG
Mot. Seq. #003 MD

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COMMUNITY ASSOCIATION UNDERWRITERS OF AMERICA, INC. a/s/o WHITEWOOD AT NORTH HILLS CONDOMINIUM,

Plaintiff,

- against -

ADVANCED CHIMNEY, INC. and ADVANCED MAINTENANCE, INC., d/b/a ADVANCED CHIMNEY, INC.,

Defendants.

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de LUCA LEVINE LLC
Attorney for Plaintiff
100 Church Street, Suite 800
New York, New York 10007

HANNUM FERETIC PRENDERGAST & MERLINO, LLC
Attorney for Defendants/Third-Party Plaintiffs/Second Third-Party Plaintiffs Advanced Chimney, Inc. and Advanced Maintenance, Inc.
55 Broadway, Suite 202
New York, New York 10006

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ADVANCED CHIMNEY, INC. and ADVANCED MAINTENANCE, INC., d/b/a ADVANCED CHIMNEY, INC.,

Third-Party Plaintiffs,

- against -

WHITEWOOD HOMES INC., WHITEWOOD AT NORTH HILLS ASSOCIATES, CARL VERNICK, THOMAS HALSTEAD and JUDITH KATZ,

Third-Party Defendants.

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WESTERMAN BALL EDERER MILLER ZUCKER & SHARFSTEIN, LLP
Attorney for Third-Party Defendant Carl Vernick
1201 RXR Plaza
Uniondale, New York 11556

MARTYN, MARTYN, SMITH & MURRAY
Attorney for Third-Party Defendants Thomas Halstead & Judith Katz
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

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ADVANCED CHIMNEY, INC. and ADVANCED MAINTENANCE, INC., d/b/a ADVANCED CHIMNEY, INC.,

Second Third-Party Plaintiffs,

- against -

SOIL MECHANICS DRILLING CORP.,

Second Third-Party Defendant.

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by the plaintiff, dated October 30, 2020, and supporting papers (including Memorandum of Law); (2) Notice of Motion by the plaintiff, dated November 3, 2020, and supporting papers; (3) Notice of Motion by the defendants/third-party plaintiffs, dated November 3, 2020, and supporting papers; (4) Affirmation in Opposition by the defendants/third-party plaintiffs, dated November 10, 2020, and supporting papers; (5) Affirmation in Opposition by the plaintiff, dated November 18, 2020 (including Memorandum of Law); (6) Reply Affirmation by the defendants/third-party plaintiff, dated November 23, 2020; and (7) Reply Affirmation by the plaintiff, dated November 24, 2020, and supporting papers (including Memorandum of Law); it is

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that the motion by the plaintiff for an Order pursuant to CPLR 3025(b), granting leave to amend its complaint, is granted, that the amended complaint in the form annexed to the moving papers shall be deemed served upon service of a copy of this Order with notice of its entry, and that the defendants shall answer the amended complaint within 20 days after the date of such service; and it is further

ORDERED that the motion by the plaintiff for an Order admitting Benjamin D. Wharton, Esq. of the law firm de Luca Levine LLC, located at Three Valley Square, Suite 220, Blue Bell, Pennsylvania, to appear on its behalf *pro hac vice* in this matter, is granted, without opposition, on condition (i) that the plaintiff submit sufficient proof, such as a certificate of good standing, that the nominating attorney of record is a member in good standing of the New York bar (*see* Rules of Ct of Appeals [22 NYCRR] § 520.11 [c]), and (ii) that the plaintiff also submit a certificate of conformity with respect to the supporting affidavit of Benjamin D. Wharton, Esq. (*see* CPLR 2309 [c]), all within 30 days after the date of this Order; and it is further

ORDERED that the motion by the defendants/third-party plaintiffs for an Order pursuant to CPLR 3212, granting summary judgment dismissing all claims asserted against them, is denied without

prejudice to the making of a new motion for summary judgment no later than 30 days after joinder of issue on the amended complaint.

This is a subrogation action to recover the sum of $523,573.14 allegedly paid by the plaintiff to its insured, Whitewood at North Hills Condominium, for damage to property caused by a fire that took place on February 12, 2016 at a multi-unit building in a condominium community located in Roslyn, New York. It appears that the insured was the owner of the common and structural elements of the building where the fire took place. The plaintiff claims that, sometime prior to the date of the fire, Thomas Halstead, a unit owner, hired the defendants to inspect, clean, maintain, repair, and perform other work on the chimney, chimney system, fireplace, and related components at his unit; that the fire originated in the area of the fireplace and chimney system in that unit; and that the fire occurred because the defendants did not perform a complete and proper inspection in accordance with industry standards which would have revealed the defective condition that caused the fire, did not identify or cure the defective condition, did not properly hire, train, manage or supervise those charged with performing the work, and did not notify the unit owners that the fireplace and chimney system could not be used until the defective condition was repaired.

The plaintiff commenced this action on March 4, 2019; in its complaint, the plaintiff pleads one cause of action for negligence against each of the defendants. Following joinder of issue, the defendants commenced a third-party action against Whitewood Homes Inc. (general contractor), Whitewood at North Hills Associates (original condominium sponsor), and Carl Vernick (engineer) as the parties responsible for what the defendants claim was the faulty construction of the building, and against Thomas Halstead and Judith Katz (the unit owners) for their alleged dangerous and negligent use of the chimney and fireplace. Carl Vernick, Thomas Halstead, and Judith Katz have all answered the third-party complaint; Whitewood Homes Inc. and Whitewood at North Hills Associates have not appeared or answered.[1]

Now, discovery having been completed and a note of issue having been filed on October 30, 2020, the plaintiff moves separately to amend the complaint and to admit out-of-state counsel *pro hac vice*, and the defendants move, in essence, for summary judgment dismissing the complaint. The Court notes that the counterclaim pleaded by third-party defendants Thomas Halstead and Judith Katz, which is premised on a recovery by the plaintiff against them, is academic inasmuch as the plaintiff has not asserted any direct claim against them (*see* CPLR 1009).

The plaintiff seeks to amend the complaint by adding certain claims based in contract and "clarifying" its existing negligence claims. Apart from the theories of liability pleaded in the original complaint, the plaintiff alleges in its amended complaint that its insured was the intended third-party beneficiary of a contract between Halstead and one or both of the defendants to inspect, clean, maintain, repair, and perform other work on the chimney, chimney system, fireplace, and related components at

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[1] After this motion was submitted for decision, the defendants commenced a second third-party action against Soil Mechanics Drilling Corp. as the party alleged to have employed Carl Vernick. Issue has not yet been joined in the second third-party action.

the unit; the plaintiff also alleges—with a tacit nod to ***Espinal v Melville Snow Contrs.*** (98 NY2d 136, 746 NYS2d 120 [2002])—that the defendants assumed a duty of care to the plaintiff's insured arising from that contract, whether because they launched "a force or instrument of harm" by failing to conduct an adequate inspection, or because the contract relating to the fireplace and chimney system was so "comprehensive and exclusive" as to displace the duty owed by the unit owners to the insured.

Leave to amend a complaint pursuant to CPLR 3025 (b) should be freely given, provided that the proposed amendment does not prejudice or surprise the defendant and is not palpably insufficient to state a cause of action or patently devoid of merit on its face (***Rosicki, Rosicki & Assoc. v Cochems***, 59 AD3d 512, 873 NYS2d 184 [2009]; ***Lucido v Mancuso***, 49 AD3d 220, 851 NYS2d 238 [2008]). A court will not examine the legal sufficiency or merits of a proposed amendment unless the insufficiency or lack of merit is clear and free from doubt (*id.*).

While the defendants have shown delay in seeking the amendments, they have not shown prejudice.[2] "Mere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice to the other side" (***Edenwald Contr. Co. v City of New York***, 60 NY2d 957, 959, 471 NYS2d 55, 56 [1983]). "Prejudice sufficient to defeat an amendment must be traceable to the omission from the original pleading of whatever it is the amended pleading wants to add" (***Wyso v City of New York***, 91 AD2d 661, 662, 457 NYS2d 112, 113 [1982]), and it arises "when a party incurs a change in position or is hindered in the preparation of its case or has been prevented from taking some measure in support of its position" (***Anoun v City of New York***, 85 AD3d 694, 694, 926 NYS2d 98, 99 [2011]). Here, the only new fact alleged is the existence of a contract to which one or both of the defendants are allegedly parties; otherwise, the effect of the proposed amendments is simply to state new theories of liability. As it does not appear, then, how the fact of the delay or the defendants' going out of business in February 2019 might prevent them, as they claim, from investigating the "facts and circumstances surrounding plaintiff's new claims," they have failed to show how they will be hindered in the preparation of their case or prevented from taking some measure to support their position. That they prepared an "extensive summary judgment motion," ostensibly on the understanding that this matter was ready for trial, is not the kind of prejudice that the case law contemplates.

Nor have the defendants established that the proposed amendments are palpably improper or patently devoid of merit. Even assuming, as the defendants contend, that they cannot be found to owe a duty of care to the plaintiffs' insured arising from their failure to perform a complete and proper inspection in accordance with industry standards (*see* ***Altinma v East 72nd Garage Corp.***, 54 AD3d 978, 865 NYS2d 109 [2008]), the plaintiff's remaining *Espinal* theory—that the contract was a "comprehensive and exclusive" agreement obligating the defendants to maintain the fireplace and chimney system—is neither insufficient nor devoid of merit. Whether, as the defendants claim, they contracted only to perform limited work at the premises is a matter beyond the scope of legitimate inquiry on a motion for leave to amend. Likewise, that the plaintiff may have failed to submit any

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[2] Contrary to the defendants' argument, the plaintiff was not required to support its application with either an affidavit of merit or an explanation for its delay in seeking the proposed amendments.

evidence demonstrating that it was an intended third-party beneficiary of the contract does not defeat the proposed amendment, as evidentiary matters are not within the Court's consideration on such a motion.

The plaintiff's motion for leave to amend the complaint is, therefore, granted, and the plaintiff's further motion to admit out-of-state counsel *pro hac vice* is granted on the conditions set forth above. As the amended complaint is now deemed to have been filed, it supersedes the original complaint and leaves the original answer without effect, thereby rendering the defendants' motion for summary judgment academic (*see* ***Seidler v Knopf***, 186 AD3d 886, 130 NYS3d 40 [2020]).

Dated: February 26, 2021
Riverhead, NY

J.S.C.
HON. DAVID T. REILLY

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

TO: CLARK & FOX
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New York, New York 10017