

Quincy Mut. Fire Ins. Co. v PVE LLC

2023 NY Slip Op 31638(U)

May 9, 2023

Supreme Court, New York County

Docket Number: Index No. 151296/2022

Judge: Leslie A. Stroth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LESLIE A. STROTH PART 12

Justice

-----X
QUINCY MUTUAL FIRE INSURANCE COMPANY A/S/O
RTH REALTY CORP.,

Plaintiff,

INDEX NO. 151296/2022
MOTION DATE 5/9/2023
MOTION SEQ. NO. 001 002

- v -

PVE LLC, K RESTORATION AND ROOFING CORP., K
WATERPROOFING, NEW GENERATION
CONSTRUCTION SERVICES LLC, 284-5 APT INC., NEW
GENERATIONS CONSTRUCTION LLC

Defendant.

**DECISION + ORDER ON
MOTION**

-----X
The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13,
14, 15, 16, 17, 18, 30, 31, 32, 33, 34, 39, 40

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 002) 35, 36, 37, 38, 41,
42, 43

were read on this motion to/for DISMISS

On February 11, 2022, subrogee Quincy Mutual Fire Insurance (plaintiff) filed a summons and complaint on behalf of its subrogor RTH Realty Corp. (subrogor) alleging property damage suffered by subrogor resulting from construction being performed at the adjoining property, 284 5th Avenue, New York, New York. Plaintiff filed an amended verified complaint on February 24, 2022. The amended verified complaint seeks damages from defendants "as owner and contractors working on an adjoining piece of property." See NYSCEF doc. no. 4 at ¶ 4.

Under motion sequence 001, Defendant PVE LLC (PVE) moves for an order dismissing the amended complaint for failure to state a cause of action pursuant to CPLR 3211(a) (7). Plaintiff opposes and cross-moves to amend its complaint. PVE opposes plaintiff's cross-motion.

Defendants K Restoration and Roofing Corp and K Waterproofing (together, K Restoration) cross-move to dismiss.

Under motion sequence number 002, defendant New Generations Construction Services, LLC s/h/a New Generations Construction LLC (New Generations) moves for an order dismissing the amended complaint for failure to state a cause of action pursuant to CPLR 3211(a) (7). Plaintiff opposes.¹

The motions are consolidated herein for disposition. Oral argument was held on May 9, 2023, at which all moving parties were present.²

I. Plaintiff's Cross-Motion to Amend

Plaintiff seeks to amend the complaint to provide further detail as to: the connection between the parties, the work being conducted at 284 Fifth Avenue, and the alleged property damage incurred.

CPLR 3025 (b) provides,

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

Leave to amend a caption should be freely granted in the absence of prejudice or surprise unless the proposed amendment is palpably insufficient or patently devoid of merit. *See MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). The First Department, Appellate Division has held that, “[the] plaintiff need not establish the merit of its proposed new allegations...but simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit.”

¹ Although New Generations objects to plaintiff's opposition as untimely, the Court will consider the opposition, as it re-iterates the arguments in the timely filed opposition and cross-motion to motion sequence 001.

² Defendant 284-5 Apt Inc., the owner of the adjoining building, did not appear.

Id. at 500 (citations omitted). “The burden of establishing prejudice is on the party opposing the amendment.” *Kimso Apartments, LLC v Gandhi*, 24 NY3d 403, 411 (2014) (citations omitted). Courts are given “...considerable latitude in exercising their discretion, which may be upset by us only for abuse as a matter of law.” *Matter of Von Bulow*, 63 NY2d 221 (1984).

The proposed second amended complaint pleads that subrogor suffered property damage as a result of a fire which occurred inside of 3 W. 30th Street, New York, New York. Plaintiff amends its claims to assert that as construction was being performed at the adjoining property, 284 5th Avenue, New York, New York, damage was done to subrogor’s chimney and/or heating system. Plaintiff also claims that the damage caused to the chimney and efforts to repair the chimney caused the fire. Plaintiff further alleges that New Generations, PVE, and the K Defendants were involved in the construction activities taking place at 284 5th Avenue.

The causes of action plead in plaintiff’s proposed second amended complaint, which sound in negligence with respect to the fire and the construction work, are not so palpably insufficient or devoid of merit so as to warrant denial of the motion. As no prejudice has been articulated in any way by the moving parties, and as leave to amend pleadings shall be freely given, the Court grant’s plaintiff’s motion to amend its complaint.

II. Motions to Dismiss

Defendants PVE, K Restoration, and New Generations (the moving defendants) move to dismiss the complaint for failure to state a claim. In sum and substance, the moving defendants’ motions to dismiss are nearly identical. The moving defendants argue that the amended complaint fails to plead facts to establish negligence, in that the complaint does not adequately allege that these defendants owed a duty to plaintiff and breached such duty, causing plaintiff to suffer damage.

A. CPLR 3211 (a) (7)

CPLR 3211 (a) (7) provides that a party may move to dismiss where the pleading fails to state a cause of action. CPLR 3211(a)(7). On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. *See Leon v Martinez*, 84 NY2d 83, 87 (1994). When considering a motion to dismiss, the Court must review, whether the facts as alleged fit within any cognizable legal theory. *Id.*

The motions to dismiss will be considered as against plaintiff's second amended complaint. Defendants maintain that plaintiff's second amended complaint does not cure the deficiencies in the amended complaint. As discussed *supra*, affording the proposed second amended complaint a liberal construction, plaintiff pleads facts that fit within a cognizable legal theory of negligence against the moving defendants. Plaintiff identifies each defendant as an entity involved in the construction at issue which had a duty to ensure that work being conducted at 284 Fifth Avenue did not impact adjoining structures. Plaintiff also pleads that defendants violated said duty, leading to the fire and resulting damage at 3 W. 30th Street.

B. CPLR 3211 (h)

In reply to plaintiff's opposition and cross-motion to amend, PVE raises the additional argument that plaintiff must satisfy a heightened pleading standard on its claims against PVE as a licensed engineer, pursuant to CPLR 214-d.

CPLR 3211 (h) sets forth the standard of review on a motion to dismiss where claims are subject to CPLR 214-d. Pursuant to CPLR 3211 (h), in a motion to dismiss involving a licensed engineer, such motion should be granted where the movant demonstrates that the action is one in which a notice of claim should have been served upon movant. The burden then shifts to the opposing party to demonstrate that a substantial basis in law exists to believe that the performance,

conduct or omission complained of with respect to the engineer was negligent and the proximate cause of personal injury complained of by the claimant.

In its attorney's affirmation in opposition, counsel affirms that it is an "engineering design professional," thereby triggering the burden-shifting provisions of CPLR 3211 (h). However, PVE does not include an affidavit or other record that demonstrates that it is a "licensed engineer" pursuant to CPLR 214-d. Accordingly, PVE does not adequately demonstrate that the heightened standard of CPLR 3211 (h) applies.

Therefore, the moving defendants' motions to dismiss for failure to state a claim are denied in their entirety.

III. Conclusion

Accordingly, is hereby

ORDERED that defendant PVE's motion to dismiss is denied, with leave to renew such motion within 60 days (motion sequence 001); and it is further

ORDERED that the cross-motion of defendants K Restoration and Roofing Corp. and K Waterproofing's is denied (motion sequence 001); and it is further

ORDERED that the motion of defendant New Generations Construction Services, LLC s/h/a New Generations Construction LLC is denied (motion sequence 002); and it is further

ORDERED that the plaintiff's cross-motion for leave to amend the complaint herein (motion sequence 001) is granted, and the second amended complaint in the proposed form annexed to the moving papers shall be deemed served upon service of a copy of this order with notice of entry thereof; and it is further

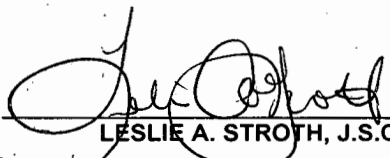
ORDERED that the defendants shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that counsel are directed to e-file a proposed preliminary conference order on or before June 13, 2023. A courtesy copy of such proposed order shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov; and it is further

ORDERED that if counsel are unable to consent to a preliminary conference order, counsel shall file a joint letter with the Court via NYSCEF on or before June 13, 2023 requesting a preliminary conference and outlining the reasons that an agreement could not be reached. A courtesy copy of such letter shall also be e-mailed directly to sfc-part12-clerk@nycourts.gov.

The foregoing constitutes the decision and order of the Court.

5/9/2023
DATE


LESLIE A. STROTH, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input checked="" type="checkbox"/>	DENIED	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN				