Analysis
As of: Dec 05, 2012

Florence Bari, Appellant, v. Wamskau Realty Inc., Respondent, et al., Defendants

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

64 N.Y.2d 684*; *474 N.E.2d 1195*; *485 N.Y.S.2d 527*; *1984 N.Y. LEXIS 4912

November 16, 1984, Argued
December 13, 1984, Decided

PRIOR HISTORY: **[**1]** Appeal from an order of the Appellate Division of the Supreme Court in the First Judicial Department, entered February 14, 1984, which (1) reversed, on the law, an order of the Supreme Court at Special Term (Alfred M. Ascione, J.), entered in New York County, denying the motion of defendant Wamskau Realty Inc. (Wamskau) to dismiss the complaint as against it, (2) granted the motion to dismiss, and (3) severed and dismissed the complaint as against said defendant.

On April 5, 1974, plaintiff was allegedly injured on premises owned by defendants Wamskau and Eastern Savings Bank and managed by defendant Lemle & Wolfe, Inc. Service of the summons and complaint was allegedly effected on Wamskau on March 25, 1977, 11 days short of the expiration of the Statute of Limitations; Wamskau neither appeared nor answered. By motion returnable September 9, 1980, plaintiff moved for a default judgment. Wamskau opposed on two grounds: first, that plaintiff's failure to move for a default judgment within one year after the alleged default constituted an abandonment of the action under *CPLR 3215* (subd [c]), and second, that the summons and complaint had been served on an officer of Lemle & Wolfe, **[**2]** that Lemle & Wolfe and Wamskau were separate entities, and that, therefore, personal jurisdiction over Wamskau had not been obtained. Special Term dismissed the action on the first ground, noting that plaintiff had failed to explain adequately why it had not moved for a default judgment within one year after the alleged default; the Appellate Division affirmed (see *86 AD2d 817*). On May 18, 1982, plaintiff again served a copy of the summons and complaint on Wamskau, which then moved to dismiss on the ground that the limitations period had long since expired.

Special Term concluded that the commonalty of interest between Lemle & Wolfe and Wamskau was such as to bring them within the ambit of *CPLR 203* (subd [b], par 1), thereby depriving Wamskau of the defense of the Statute of Limitations. The Appellate Division concluded that nothing more was asserted than that Lemle & Wolfe was the managing agent for the premises, and that on the basis of the record, it is uncertain whether there may be defenses available to Lemle & Wolfe which are not available to Wamskau or vice versa, or whether one defendant but not another may be held liable, or whether the interest of the parties is such **[**3]** that they stand or fall together and that judgment against one will

similarly affect the other; moreover, there was no proof from which to infer from the designation of Lemle & Wolfe as "managing agent", standing alone, that Wamskau had delegated complete control of the premises to it.

Bari v Wamskau Realty, 99 AD2d 710.

DISPOSITION: Affirmed.

HEADNOTES

Limitation of Actions -- Defendants United in Interest -- Managing Agent of Building

In an action to recover for personal injuries allegedly sustained on premises owned by the defendant, which moved to dismiss the complaint as time-barred, and operated by another defendant, an order of the Appellate Division, which reversed an order denying the moving defendant's motion on the basis of a commonalty of interest between it and the other defendant (which had been timely served) (see *CPLR 203, subd [b]*, par 1), granted the motion and severed and dismissed the complaint against the moving defendant, is affirmed for reasons stated in the memorandum thereat, which concluded that nothing more was asserted by plaintiff than that the other defendant was the managing agent for the premises in question, and that on the basis of the record, it was **[**4]** uncertain whether there may be defenses available to that defendant which are not available to the moving defendant or vice versa, or whether one defendant but not another may be held liable, or whether the interest of the parties is such that they stand or fall together and that judgment against one will similarly affect the other; moreover, there was no proof from which to infer from the designation of the nonmoving defendant as "managing agent", standing alone, that the moving defendant had delegated complete control of the premises to it.

COUNSEL: *Thomas C. Lambert* and *Barry S. Huston* for appellant.

Norman E. Frowley and *Harold M. Foster* for respondent.

JUDGES: Concur: Chief Judge Cooke and Judges Jasen, Jones, Wachtler, Meyer, Simons and Kaye.

OPINION

[*686] OPINION OF THE COURT

Order affirmed, with costs, for reasons stated in the memorandum at the Appellate *Division (99 AD2d 710*; see, also, *Connell v Hayden, 83 AD2d 30*).