

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D32969
W/prt

_____AD3d_____

Submitted - October 25, 2011

REINALDO E. RIVERA, J.P.
DANIEL D. ANGIOLILLO
ARIEL E. BELEN
SHERI S. ROMAN, JJ.

2010-10491
2011-00938

DECISION & ORDER

Robinson Duran Urena, plaintiff, v Ciampa Estates, LLC, defendant third-party plaintiff-respondent, et al., defendants; Sanita Construction Co., Inc., third-party defendant-appellant.

(Index No. 12901/07)

Weiner, Millo, Morgan & Bonanno, LLC, New York, N.Y. (John Bonanno of counsel), for third-party defendant-appellant.

Rubin, Fiorella & Friedman LLP, New York, N.Y. (Stewart B. Greenspan of counsel), for defendant third-party plaintiff-respondent.

In an action to recover damages for personal injuries, the third-party defendant appeals from (1) an order of the Supreme Court, Queens County (Schulman, J.), entered September 13, 2010, as amended by an order entered January 11, 2011, which granted the motion of the defendant third-party plaintiff to schedule a hearing to determine the issue of the reasonableness of the amount of a proposed settlement with the plaintiff, and for leave to enter judgment against the third-party defendant in the finally determined settlement amount, and (2) the order entered January 11, 2011, which granted its motion pursuant to CPLR 2221 to resettle the order entered September 13, 2010, to correct typographical errors contained therein.

ORDERED that the appeal from the order entered January 11, 2011, is dismissed, as the third-party defendant is not aggrieved thereby (*see* CPLR 5511); and it is further,

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ORDERED that the order entered September 13, 2010, as amended by the order entered January 11, 2011, is affirmed; and it is further,

ORDERED that the one bill of costs is awarded to the defendant third-party plaintiff.

We decline to address the contention of the third-party defendant, Sanita Construction Co., Inc. (hereinafter Sanita), that the defendant third-party plaintiff, Ciampa Estates, LLC, is not entitled to contractual indemnification because no finding of negligence on Sanita's part was made. Sanita failed to perfect an appeal from an order dated November 6, 2009, which addressed this issue. As a general rule, we do not consider any issue raised on a subsequent appeal that could have been raised in an earlier appeal which was dismissed for lack of prosecution (*see Bray v Cox*, 38 NY2d 350), although we have the inherent jurisdiction to do so (*see Deutsche Bank Natl. Trust Co. v Matheson*, 77 AD3d 883, 884). Sanita has not demonstrated any basis for the exercise of such discretion.

Sanita's remaining contentions are not properly before this Court.

RIVERA, J.P., ANGIOLILLO, BELEN and ROMAN, JJ., concur.

ENTER:


Matthew G. Kiernan
Clerk of the Court