

Mitchell v 608 Co. LLC

2020 NY Slip Op 33232(U)

September 29, 2020

Supreme Court, New York County

Docket Number: 159494/14

Judge: Lynn R. Kotler

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This opinion is uncorrected and not selected for official publication.

[*1]

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

FERNANDO MITCHELL

INDEX NO. 159494/14

- v -

MOT. DATE

608 COMPANY LLC et al.

MOT. SEQ. NO. 009 and 010

The following papers were read on this motion to/for reargue

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

This is a Labor Law action arising from a construction site injury. Previously, in a decision/order dated May 7, 2020, the court:

- [1] severed and dismissed plaintiff’s Labor Law § 240[1] claim against Top Rock Interiors (“Top Rock”);
- [2] severed and dismissed plaintiff’s Labor Law § 240[6] claim entirely;
- [3] severed and dismissed plaintiff’s Labor Law § 200 and common law negligence claims against 608 Company, LLC (“608”) and TMO 1 LLC (“TMO”) and JRM Construction Management, LLC (“JRM”);
- [4] severed and dismissed Top Rock’s crossclaims against JRM without opposition;
- [5] severed and dismissed all claims for common law indemnification and contribution against Cool Wind Ventilation Corp. (“Cool Wind”);
- [6] found that BP Mechanical Corp. (“BP”) and JRM were entitled to contractual indemnification against Cool Wind as well as for attorneys fees and costs; and
- [7] found that JRM was entitled to conditional summary judgment on its claim for common law contribution against Top Rock.

Further, the court referred the issue of what amount Cool Wind should reimburse BP and JRM for defense costs incurred to a special referee to hear and determine.

Now, there are two motions to reargue pending. This first, motion sequence 009, is by Cool Wind seeking to reargue the 5/7/20 order which found that Top Rock owed contractual indemnification and defense costs (including attorney fees and interest) to JRM but erred by not so-ordering Top Rock to also appear with Cool Wind. at a hearing before a Special Referee to determine the amounts owed to JRM. There is no opposition to motion sequence 009.

Dated: 9/29/20



HON. LYNN R. KOTLER, J.S.C.

1. Check one:

CASE DISPOSED NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

Seq 009 Seq 010
 GRANTED DENIED GRANTED IN PART OTHER

3. Check if appropriate:

SETTLE ORDER SUBMIT ORDER DO NOT POST

FIDUCIARY APPOINTMENT REFERENCE

[*2]

The second motion is by JRM and is motion sequence 010. In this motion, JRM seeks to reargue the 5/7/20 decision on that portion of its prior motion for summary judgment (motion sequence 006) against BP and Cool Wind seeking dismissal of all crossclaims/counterclaims for common law indemnity and contribution as against JRM; and upon reargument, granting JRM's motion for summary judgment dismissing BP's and Cool Wind's cross-claims/counterclaims for common law indemnity and contribution as against JRM. JRM further moves to clarify/modify the 5/7/20 order "to add in the decretal paragraph of the Order a provision that JRM's motion for summary judgment dismissing BP's and Cool Wind's crossclaims/counterclaims for contractual indemnity, breach of contract (failure to procure insurance) and attorneys' fees is granted and that these claims are dismissed. Finally, JRM moves to clarify/modify the 5/7/20 order to add" that the granting "in its entirety" of JRM's motion for summary judgment on its contractual indemnification claim against defendant/third-party plaintiff/third third-party defendant [Top Rock] includes reimbursement of JRM's defense costs, expenses and attorneys' fees; and (ii) to further add in the decretal paragraph a directive that the issue of the amount of JRM's defense costs, expenses and attorneys' fees, due and owing from Top Rock be referred to a Special Referee; or in the alternative, granting leave to reargue the award of defense costs, expenses and attorneys' fees and upon reargument granting this relief.

Finally, JRM seeks to reargue the court's grant of conditional summary judgment to it against Top Rock on JRM's contractual indemnification claim or alternatively modifying the 5/7/20 order to change the grant of summary judgment on its claim for common-law "contribution" to conditional summary judgment on its claim for common-law indemnification.

Top Rock opposes motion sequence 010 to the extent that JRM's seeks to reargue its prior motion for summary judgment seeking unconditional common law indemnification against Top Rock.

Both motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (see CPLR § 2221[d][2]). In order to succeed motion for reargument, the movant must demonstrate that the Court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to re-litigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; see also *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 [1st Dept 2005]).

At the outset, Cool Wind's motion must be granted. Cool Wind has established, without opposition, that the court erred in finding that both Top Rock and Cool Wind were both contractually liable to JRM for defense costs and indemnification but only ordered Cool Wind to appear before a special referee to hear and determine the amounts owed to BP for the defense costs incurred to date, with statutory interest. The court's error was inadvertent. Accordingly, motion sequence 009 is granted and the upon reargument, the court modifies the 5/7/20 order to amend the reference set forth therein as follows: the issues of what amount Cool Wind and Top Rock should reimburse BP and JRM for the defense costs incurred to date, with statutory interest are referred to the Special Referee Clerk for assignment to a Special Referee to hear and determine.

Next, there is no opposition to JRM's motion to reargue, to the extent that it seeks: [1] summary judgment dismissing BP's and Cool Wind's cross-claims/counterclaims for common-law indemnity and contribution as against JRM; [2] to add in the decretal paragraph of the Order a provision that JRM's motion for summary judgment dismissing BP's and Cool Wind's crossclaims/counterclaims for contractual indemnity, breach of contract (failure to procure insurance) and attorneys' fees is granted and that these claims are dismissed; [3] (i) to add in the decretal paragraph of the Order a provision that the granting "in its entirety" of JRM's motion for summary judgment on its contractual indemnification claim

[*3] against Top Rock includes reimbursement of JRM's defense costs, expenses and attorneys' fees; and (ii) to further add in the decretal paragraph a directive that the issue of the amount of JRM's defense costs, expenses and attorneys' fees, due and owing from Top Rock be referred to a Special Referee.

Therefore, that branch of the motion is granted without opposition and upon reargument, the court modifies the 5/7/20 order to:

[1] grant JRM summary judgment dismissing BP's and Cool Wind's cross-claims/counterclaims for common-law indemnity and contribution as against JRM;

[2] grant JRM's motion for summary judgment dismissing BP's and Cool Wind's cross-claims/counterclaims for contractual indemnity, breach of contract (failure to procure insurance) and attorneys' fees and these claims are severed and dismissed; and

[3] JRM's motion for summary judgment on its contractual indemnification claim against Top Rock includes reimbursement of JRM's defense costs, expenses and attorneys' fees.

JRM's motion seeking reargument on the issue of whether JRM is entitled to unconditional common law indemnification is denied as the court does not believe it overlooked any facts or misapprehended the law when it granted JRM conditional summary judgment against Top Rock. The court, however, will grant the motion to reargue to the extent that it will modify item number 8 under the first ordered paragraph on the decision on page 11 to find that "JRM is entitled to conditional summary judgment on its claim for common law indemnification against Top Rock."

CONCLUSION

In accordance herewith, it is hereby

ORDERED that motion sequence number 009 is granted without opposition; and it is further

ORDERED that motion sequence 010 is granted in part; and it is further

ORDERED that the first ordered paragraph of the 5/7/20 order is modified as follows (bold items are modified or added):

ORDERED that motion sequence number 004-008 are decided as follows:

[1] plaintiff's Labor Law § 240[1] claim against Top Rock is severed and dismissed;

[2] plaintiff's Labor Law § 241[6] claim is severed and dismissed;

[3] Labor Law § 200 and common law negligence claims against 608, TMO and JRM are severed and dismissed;

[4] Top Rock's crossclaims against JRM are severed and dismissed without opposition;

[5] all claims for common law indemnification and contribution against Cool Wind are severed and dismissed;

[*4]

[6] BP and JRM are entitled to contractual indemnification against Cool Wind as well as for attorneys fees and costs; and

[7] JRM is entitled to contractual indemnification against Top Rock as well as for attorneys fees and costs; and

[8] JRM is entitled to conditional summary judgment on its claim for common law indemnification against Top Rock.

[9] JRM's motion for summary judgment dismissing BP's and Cool Wind's crossclaims/counterclaims for common-law indemnity and contribution as against JRM is granted and these claims are severed and dismissed.

[10] JRM's motion for summary judgment dismissing BP's and Cool Wind's crossclaims/counterclaims for contractual indemnity, breach of contract (failure to procure insurance) and attorneys fees is granted and these claims are severed and dismissed.

And it is further

ORDERED that the reference set forth in the second ordered paragraph of the 5/7/20 order is amended as follows:

ORDERED that the issues of what amount Cool Wind and Top Rock should reimburse BP and JRM for the defense costs, expenses and attorneys fees incurred to date, with statutory interest, are referred to the Special Referee Clerk for assignment to a Special Referee to hear and determine.

And it is further

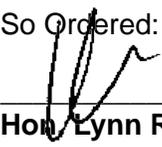
ORDERED that BP and JRM's time to serve the 5/7/20 order and the instant order upon the Special Referee Clerk in the Motion Support Office (Room 119M) is extended to 90 days from service of this order with notice of entry and the Special Referee Clerk is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date; and it is further

ORDERED that motion sequence 010 is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 9/29/20
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.