

<b>Temmel v 1515 Broadway Associates, L.P.</b>
2004 NY Slip Op 30153(U)
January 8, 2004
Supreme Court, New York County
Docket Number: 0122132/1997
Judge: Marilyn Shafer
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MARILYN CHAFER, JSC  
Justice

PART 36

George Vennel  
- v -  
1515 Broadway Associates

INDEX NO. 122132/97  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 009  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion *to require*  
*denied pursuant to attached Memorandum*

SCANNED  
JAN 14 2004

FILED  
JAN 15 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 1/8/04

[Signature]  
J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: I.A.S. PART 36

-----X  
GEORGE TEMMEL and JOANNE TEMMEL,

Plaintiff,

-against-

1515 BROADWAY ASSOCIATES, L.P. (A  
DELAWARE LIMITED PARTNERSHIP) F/N/A  
TISHMAN SPEYER-EQUITABLE ASTOR LIMITED  
PARTNERSHIP and VIACOM, INC.,

Index No.  
122132/97

Defendant.

-----X  
VIACOM, INC.,

Third-party Plaintiff,

-against-

WILLIAMS TELECOMMUNICATIONS SYSTEMS,  
INC.,

Third-party Defendant.

-----X

MARILYN SHAFER, J.:

Defendant/third-party plaintiff Viacom, Inc. (Viacom) moves: (1) pursuant to CPLR 2221, for leave to reargue this court's decision and order, dated May 13, 2003 (the "Prior Decision"), to the extent that it denied its motion for summary judgment on the indemnification claim against third-party defendant Williams Telecommunications Systems, Inc. (Wiltel); (2) vacating Wiltel's Notice of Settlement of Judgment dismissing the third-party complaint dated May 29, 2003; and (3) granting it sanctions against Wiltel.

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the **sound** discretion of the court and may be granted only upon a showing that the court overlooked **or**

misapprehended any relevant facts or misapplied any controlling principles of law (CPLR 2221[d] [2] ; Foley v Roche, 68 AD2d 558 [1st Dept 1979]).

Viacom moves for reargument, claiming that this court misapprehended the relevant facts it argued in its previous application for summary judgment on its contractual indemnification claim against Wiltel, and misapplied the controlling principle of law. A review of Viacom's papers, however, discloses that it essentially reiterates its prior arguments, which this court considered and found to be insufficient to support a finding that the indemnification provision in the purchase order between Wiltel and non-party Lehr Construction dated July 25, 1995 (the Order), should be retroactively applied to the date of the plaintiff's accident, on June 24, 1995.

It has been held that "[a] term in a contract executed after a plaintiff's accident may be applied retroactively where evidence establishes as a matter of law that the agreement pertaining to the contractor's work 'was made "as of" [a pre-accident date], and that the parties intended that it apply as of that date"' (Pena v Chateau Woodmere Corp., 304 AD2d 442, 443 [1st Dept 2003], quoting Stabile v Viener, 291 AD2d 395, 396 [2d Dept], lv dismissed 98 NY2d 727 [2002]). Retroactive application of a contractual indemnification provision was permitted where a written contract, dated December 10, 1998, specifically stated that the commencement date of the contract was November 10, 1998,

a date prior to its execution, and the contractor provided the owner with a certificate of insurance dated November 3, 1998 (Pena v Chateau Woodmere, 304 AD2d 442, supra). Documentation, other than a bid document, must be proffered to demonstrate that the parties intended the contractual indemnification provision in a written agreement to have retroactive effect (see Smith v AJ Contracting Co., Inc., 277 AD2d 305 [2d Dept 2001 [a question of fact was raised as to the retroactive application of the contract where other writings executed **by** the contractor, prior to signing the written contract, contained provisions regarding the procurement of insurance and indemnification]). Here, as held in the Prior Decision, the documents relied on by Viacom are insufficient to demonstrate, as a matter of law, that the parties intended the contractual provision in the Order to be retroactively applied to the date of the plaintiff's accident (Pena v Chateau Woodmere, 304 AD2d 442, supra; Smith v AJ Contracting, 277 AD2d 305, supra). Since the Order was not dated until approximately a month after plaintiff's accident (see Beckford v City of New York, 261 AD2d 158 [1st Dept 1999]), and there is nothing about the Order to suggest that it was intended to have retroactive effect (Burke v Fisher Sixth Ave. Co., 287 AD2d 410 [1st Dept 2001]), the Prior Decision's denial of Viacom's application for summary judgment on its contractual indemnification claim was proper.

In support of its reargument motion, Viacom also proffers, for the first time, documentation consisting of

Viacom's notice to admit and Wiltel's response to the notice, which was not submitted with its original application for summary judgment on its contractual indemnification claim against Wiltel (Correspondence from Viacom's counsel, dated June 6, 2003). The presentation of additional evidence not previously before the court is characteristic of a motion for renewal, not reargument (~~see~~ CPLR 2221 [d], [e]). Since Viacom failed to specifically identify its instant application as one also for renewal (CPLR 2221 [e] [1]), and failed to proffer any justification for the failure to present the additional facts on its prior motion (CPLR 2221 [e] [3]), its request for consideration of this additional evidence in support of its original application is denied (Pullman GrouD, LLC v Prudential Ins. Co. Of Am., 288 AD2d 2 [1st Dept 2001], lv denied 98 NY2d 602 [2002]).

Accordingly, that branch of Viacom's motion for reargument is denied.

In view of the foregoing, that branch of Viacom's motion seeking to vacate Wiltel's Notice of Settlement of Judgment Dismissing Third-party Complaint dated May 29, 2003 is denied.

That branch of Viacom's motion for sanctions against Wiltel is also denied. While 22 NYCRR § 130-1.1 permits this court, in its discretion, to impose sanctions, costs and attorney's fees on a party who engages in frivolous conduct, such as advancing arguments completely lacking in merit (Good Old Days Tavern, Inc. v Zwirn, 259 AD2d 300 [1st Dept], lv denied and

rearg denied 261 AD2d 268 [1999]), WTS's action in seeking entry of an order dismissing the contractual third-party claim based on the Prior Decision does not constitute frivolous conduct necessary to warrant the imposition of sanctions (see East New York Sav. Bank v Sun Beam Enters., Inc., 256 AD2d 76 [1st Dept 1998]) .

Accordingly, Viacom's motion is denied in its entirety.

In its opposing papers, Witel requests that this court grant it sanctions against WTS for bringing the instant application for reargument. This court initially notes that Witel fails to formally and specifically include this request in a notice of cross motion, as is required by CPLR 2215 ["At least three days prior to the time at which the motion is noticed to be heard, a party may serve upon the moving party a notice of cross-motion demanding relief, with or without supporting papers"]. Further, WTS's action in bringing the instant motion does not rise to the level of frivolous conduct necessary to warrant the imposition of sanctions (see East New York Sav. Bank v Sun Beam Enters., Inc., 256 AD2d 76, supra). Therefore, Witel's request for sanctions is denied.

Accordingly, it is

ORDERED that Viacom's motion is denied in its entirety; and it is further

ORDERED that Witel's request for sanctions is denied.

Dated:

1/8/04

**FILED**  
JAN 15 2004  
NEW YORK  
COUNTY CLERK'S OFFICE

ENTER **MARILYN SHAFER**  
J.S.C.