

400 East 51st Street, LLC v Fifty First Beekman Corp.

2005 NY Slip Op 30287(U)

March 17, 2005

Supreme Court, New York County

Docket Number: 0115311/2001

Judge: Shirley Werner Kornreich

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

PRESENT: Kornreich, Shirley Werner, J.
Justice

PART 54

400 East 51st Street, LLC,

Plaintiff

-against-

Fifty First Beekman Corp., et al.,

Defendants.

INDEX NO. 115311/01

MOTION DATE 10/28/04

MOTION SEQ. NO. 3

MOTION CAL. NO. _____

The following papers, numbered 1 to 12 were read on this motion for

Default Judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits...

PAPERS NUMBERED

1,2,3,4

Answering Affidavits — Exhibits

5,6,7,8,9,

Replying Affidavits

10,11,12

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision and order.

FILED

MAR 23 2005

NEW YORK
COUNTY CLERK'S OFFICE

SHIRLEY WERNER KORNREICH
J.S.C.

Dated: March 17, 2005

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
400 EAST 51ST STREET LLC,

Plaintiff,

Index No.: 115311/01

**DECISION AND
ORDER**

-against-

FIFTY FIRST BEEKMAN CORP., ROSE
ASSOCIATES, INC., PAUL J. HERMAN, MIDTOWN
PRESERVATION, INC., KATHLEEN NEEDHAM
INOCCO, and JOHN DOES #1-10,

Defendants.

-----X
FIFTY FIRST BEEKMAN CORP. and
MIDTOWN PRESERVATION, INC.,

Index No.: 591082/01

Third-Party Plaintiffs,

-against-

ALEXICO MANAGEMENT GROUP, INC., NISO
BAHAR, IZAK SENBAHAR, RESAT ARBAS,
GAMA HOLDINGS, INC., SIMON ELIAS, HRH
CONSTRUCTION CORPORATION, PETER PALAZZO,
ROBERT CONROY, FRANK ROSS, JR., HARRY
WEIDMYER, BREEZE CONTRACTING CORP., and
JOHN DOES #1-10,

Third-Party Defendants.

-----X
BREEZE CONTRACTING CORP., ALEXICO
MANAGEMENT GROUP, INC., NISO
BAHAR, IZAK SENBAHAR, RESAT ARBAS,
and SIMON ELIAS,

Index No.: 590808/02

Second Third-Party Plaintiffs,

-against-

FLEET TRUCKING INC.,

Second Third-Party Defendant.

-----X

BREEZE CONTRACTING CORP., ALEXICO
MANAGEMENT GROUP, INC., NISO
BAHAR, IZAK SENBAHAR, RESAT ARBAS,
and SIMON ELIAS,

Index No.: 591109/02

Third Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV.,

Third Third-Party Defendant.

-----X

HRH CONSTRUCTION CORPORATION,
PETER PALAZZO, ROBERT CONROY, FRANK
ROSS, JR., and HARRY WEIDMYER,

Index No.: 591149/02

Fourth Third-Party Plaintiffs,

-against-

CIVETTA COUSINS, JV.,

Fourth Third-Party Defendant.

-----X

KORNREICH, SHIRLEY WERNER, J.:

This is an action to recover for alleged “unlawful interference with the use and enjoyment” of property at 400 East 51st Street, in New York City, the site at which plaintiff plans to construct a “new residential high rise” building (the “Project”). In its Verified Complaint, dated August 10, 2001, plaintiff alleged that its construction project was delayed due to a Department of Buildings stop-work order caused by defendants’ failure to remedy a dangerous condition that existed in the facade of a building adjacent to plaintiff’s property (the

“Adjacent Building”). Plaintiff’s complaint asserted causes of action for private nuisance, violation of building codes and negligence against defendants—the owner, managing agent and engineering consultant of the neighboring property, and two of their employee/agents.

Defendants counterclaimed that plaintiff’s negligent demolition caused the dangerous condition.

On October 5, 2001, defendants Fifty First Beekman Corp. (“Beekman”), the owner of the neighboring building at 420 East 51st Street, and its engineering consultant Midtown Preservation, Inc. (“Midtown”), commenced a third-party action against several of plaintiff’s principals, Alexico Management Group, Inc. (“Alexico”), Niso Bahar, Izak Senbahar, Resat Arbas, Gama Holdings, Inc., and Simon Elias; plaintiff’s construction manager HRH Construction Corporation (“HRH”), and certain of its principals, Peter Palazzo, Robert Conroy, Frank Ross, Jr. and Harry Weidmyer; and Breeze Contracting Corp. (“Breeze”), a demolition contractor hired for plaintiff’s project. The theory of the third-party plaintiffs was that the third-party defendants had caused the wall of the Adjacent Building to become unstable through improper demolition techniques, as well as through their failure to brace, stabilize and weatherproof the wall.

In July 2002, Breeze and assorted other third-party defendants commenced a second third-party action against Fleet Trucking Inc. (“Fleet”), its demolition subcontractor, for contractual indemnification, and/or for Fleet’s alleged breach of the defense-and-indemnification provisions of its purchase order agreement with Breeze. On January 29, 2004, plaintiff moved to amend its complaint to assert claims directly against Breeze and Fleet for breach of contract and contractual indemnification. The motion was opposed by Fleet, but not by Breeze. By order dated July 21, 2004, the Court granted the motion, holding that Fleet had failed to make a

showing of prejudice, and rejecting Fleet's arguments that (1) plaintiff's cause of action against Fleet was really a negligence claim in disguise, and, therefore, was time-barred; and (2) that plaintiff's causes of action against Fleet and Breeze contradicted its earlier theory of the case. Although Fleet had argued that the motion should be denied because of a conflict of interest caused by Breeze's counsel's simultaneous representation of plaintiff's employee/agents Alexico, Bahar, Senbahar, Arbas and Elias, the Court did not address that argument in its decision.

On August 25, 2004, defendants moved to strike plaintiff's note of issue on the ground that important discovery remained outstanding. By order dated January 18, 2005, the Court granted defendants' motion to the extent of vacating the note of issue, and directing that the parties complete discovery. By the same order, the Court directed that Fleet's motion to dismiss plaintiff's claims against it, which was then pending, would be decided in accordance with Fleet's other pending motion, for reargument of the Court's decision on plaintiff's motion to amend, wherein identical issues were raised. Accordingly, the Court now consolidates the foregoing motions for unitary disposition.

I. Fleet's Pending Motions

Fleet now moves for reargument of the Court's decision granting plaintiff's motion to amend its complaint on the grounds that: (1) the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP ("Wilson Elser"), which simultaneously represents Breeze and plaintiff's principals, should have been and should be disqualified; (2) plaintiff's causes of action against Fleet are "unmeritorious" because plaintiff is not a third-party beneficiary to the Fleet-Breeze purchase order agreement; (3) the amendments were prejudicial, surprising and inexcusably untimely. In support of its motion, Fleet submits the affirmation of its attorney, together with

documentary evidence. In opposition, plaintiff submits its attorney's affirmation and certain documentary evidence.

II. Conclusions of Law

"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 the facts or the law or for some reason mistakenly arrived at its earlier decision.'" *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992) quoting *Schneider v. Solowey*, 141 AD2d 813 (2nd Dept. 1988). For the reasons that follow, the Court concludes that Fleet has failed to meet its burden, and, therefore, the motion is denied.

A. Disqualification

Fleet contends that Wilson Elser's representation of Breeze and plaintiff's principals creates an actual conflict of interest necessitating reargument of the motion to amend. The Court agrees that Wilson Elser cannot now represent Breeze as a direct defendant, but does not agree that the conflict necessitates reargument.

Disciplinary Rule 5-105 of the Code of Professional Responsibility prohibits a lawyer from representing multiple clients unless "a disinterested lawyer would believe that the lawyer can competently represent the interest of each and if each consents to the representation after full disclosure of the implementations of the simultaneous representation and the advantages and risks involved." 22 NYCRR § 1200.24. "Because dual representation is fraught with the potential for irreconcilable conflict, it will rarely be sanctioned even after full disclosure has been had and the consent of the parties obtained." *Greene v. Greene*, 47 N.Y.2d 447, 451-52 (1979). "With rare and conditional exceptions, the lawyer may not place himself in a position where a

conflicting interest may, even inadvertently, affect, or give the appearance of affecting, the obligations of the professional relationship.” *Matter of Kelly*, 23 N.Y.2d 368, 376 (1968).

Moreover, “[d]oubts as to the existence of a conflict of interest must be resolved in favor of disqualification.” *Heelan v. Lockwood*, 143 A.D.2d 881, 883 (2nd Dept. 1988).

Here, Fleet contends that Wilson Elser improperly represented, and still represents, Breeze and plaintiff’s principals. Neither Breeze nor Wilson Elser deny these allegations. Nor do they deny Fleet’s allegation that on March 11, 2004, Wilson Elser represented to the Court that its dual representation was improper, and that it would be “substituted out” of the litigation. Affirmation of G. Fellner, Exhibit 3 at ¶ 5. It is clear that the interests of Breeze as a direct defendant diverge significantly from those of plaintiff’s principals. There is no evidence that this conflict was consented to by the represented parties. Under the circumstances, Wilson Elser must withdraw as counsel for Breeze as a direct defendant. On the other hand, Wilson Elser’s representation of Breeze did not significantly affect the disposition of plaintiff’s motion to amend, and, therefore, is not grounds for reargument. *See New York C. R. Co. v. Banton Corp.*, 110 N.Y.S.2d 64, 66 (Sup. Ct., App. Term, New York Co. 1952) (motion to reargue is “intended to point out to the court an error in point of law or fact of such a nature as to be decisive of the matter”).

B. Reargument

Fleet’s remaining arguments were considered and rejected in the Court’s January 18, 2005 decision. Plaintiff may bring a cause of action against Fleet as a third-party beneficiary to the Fleet-Breeze purchase order agreement, which required Fleet to “perform work in a safe and proper manner and save [Breeze] ... *as well as the owner ... of the Project* [plaintiff] harmless”

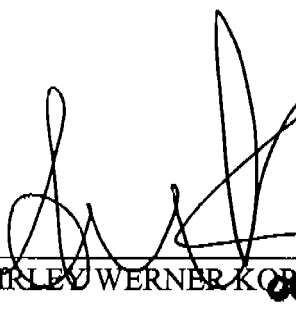
against claims of liability for personal and property damage in connection with the work. Affirmation of P. Friman, Exhibit G (emphasis added). *See Port Chester Electrical Constr. Corp. v. Atlas*, 40 N.Y.2d 652 (third party may sue on contract where intent to benefit it is demonstrated in instrument). Fleet failed to meet its burden to show prejudice warranting a denial of a motion to amend. *See Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981) *rearg. den.* 55 N.Y.2d 801 (1981). Therefore, its reargument motion must be denied. For the same reasons, its motion to dismiss, which raises the same arguments as the reargument motion, also is denied. Accordingly, it is

ORDERED that the law firm of Wilson, Elser, Moskowitz, Edelman & Dicker, LLP is hereby disqualified from representing Breeze Contracting Corp. as a direct defendant in this action, and said firm is directed to withdraw as counsel for said defendant; and it is further

ORDERED that the motion of third-party defendant Fleet to reargue the Court's decision and order dated January 18, 2005, granting plaintiff's motion to amend its complaint, is denied; and it is further

ORDERED that the motion of third-party defendant Fleet Trucking Inc., to dismiss plaintiff's complaint as against it, is denied.

Date: March 16, 2005
New York, New York


SHIRLEY WERNER KORB
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