

Schirmer v Athena-Liberty Lofts, LP

2007 NY Slip Op 32770(U)

September 4, 2007

Supreme Court, New York County

Docket Number: 0100436/2003

Judge: Shirley W. Kornreich

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

PRESENT: JUDGE SHIRLEY WERNER KORNREICH

PART 54

Index Number : 100436/2003
SCHIRMER, BRUCE

vs
ATHENA GROUP

Sequence Number : 015

The following is submitted on this motion to/for
REARGUMENT/RECONSIDERATION

X NO. _____
FILING DATE 6/28/07
FILING SEQ. NO. _____
LOCAL NO. _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
4-5
6-9

Cross-Motion: Yes No

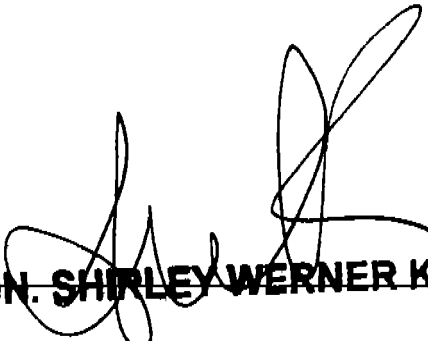
Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

FILED
SEP 07 2007
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 9/4/07


HON. SHIRLEY WERNER KORNREICH
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

-----X

BRUCE SCHIRMER and KAREN SCHIRMER,

Plaintiffs,

-against-

ATHENA-LIBERTY LOFTS, LP,

Defendant.

-----X

ATHENA-LIBERTY LOFTS, LP,

Third-Party- Plaintiff,

-against-

BURGESS STEEL, LLC, ON PAR CONTRACTING
CORP. and SEASONS CONTRACTING CORP.,

Third-Party Defendants.

-----X

ATHENA-LIBERTY LOFTS, LP,

Second Third-Party- Plaintiff,

-against-

HP ELECTRICAL DESIGNS, INC.,

Second Third-Party Defendant.

-----X

DECISION & ORDER

Index No. 100463/03

Index No. 59097/04

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NEW YORK
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-----X

ON PAR CONTRACTING CORP.,

Third Third-Party Plaintiff,

Index No. 590968/05

-against-

RC DOLNER, INC.,

Third Third-Party Defendant.

-----X

HP ELECTRICAL DESIGNS, INC.,

Fourth Third-Party Plaintiff,

Index No. 591049/05

-against-

RC DOLNER, INC.,

Fourth Third-Party Defendant.

-----X

BURGESS STEEL, LLC.,

Fifth Third-Party Plaintiff,

Index No. 590477/06

-against-

ATHENA CONSTRUCTION, LLC, ATHENA-LIBERTY LOFTS, LP, THE ATHENA GROUP, LLC, and RC DOLNER, LLC,

Fifth Third-Party Defendants.

-----X

KORNREICH, SHIRLEY WERNER, J.:

Motion sequences 005 and 015 are hereby consolidated for disposition.

I. Motion Sequence 005

In motion sequence 005, RC Dolner, LLC (“Dolner,” erroneously also sued as RC Dolner, Inc.) and Athena Construction, LLC (“Athena Construction”) (collectively “movants”)

move to reargue this court's decision and order dated March 30, 2007. Familiarity with the March 30, 2006 order is assumed and the facts will not be repeated in this opinion. The court grants reargument only insofar as reargument is sought relating to claims for common law indemnification. With respect to claims relating to contractual indemnification against Burgess Steel, LLC ("Burgess"), reargument is denied. Movants also request dismissal of some of Burgess' claims on the ground that it made duplicate claims in its fifth third-party complaint and its cross-claims in response to an amended third party complaint by Athena-Liberty Lofts ("Athena Lofts").

Upon reargument, the court grants movants' motion for summary judgment solely to the extent of dismissing all claims for common law indemnification against Dolner and Athena Construction by On Par Contracting Corp. ("On Par"), H.P. Electrical Designs, Inc. ("HP") and Seasons Contracting Corp. ("Seasons"). Common law indemnification will not be available to On Par, HP or Seasons under any circumstances. Movants are correct that if On Par, HP or Seasons is found to be negligent and movants are found to be free of negligence, then On Par, HP or Seasons will not be entitled to common law indemnification. If movants are found to be partially at fault, and On Par, HP or Seasons is also found to be partially at fault, then On Par, HP and Seasons will not be entitled to common law indemnification. If On Par, HP or Seasons is found to be free of negligence, then they will not need to be indemnified. The court notes that the moving affirmation states that the claims for common law indemnification by On Par and HP against Athena Construction were withdrawn by stipulation and, therefore, the motion is moot with respect to those common law indemnification claims.

In addition, the court *sua sponte* modifies its reasoning with respect the dismissal of

Burgess' common law indemnification claims. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 20 (1986). The prior order ruled that "Burgess is not entitled to common law indemnification because it was at least partially at fault, as it was on site and directing plaintiff's work." This was error because it cannot be held as a matter of law that Burgess was negligent merely because it was on site directing plaintiff's work. However, dismissal of Burgess' common law negligence claims is warranted for the same reason underlying the dismissal of the common law negligence claims of the other subcontractors, i.e., if Burgess is found to be negligent it is not entitled to common law indemnification and, if it is found to be free of negligence, it does not need to be indemnified.

HP seeks clarification that Athena Construction's claims for contractual indemnification could only be triggered if a subcontractor were found to be negligent. Seasons and On Par join in that request. Apparently, these subcontractors fear that the accident could be found to arise or result from their work even if they are not found to be negligent. For this reason, HP, Seasons and On Par oppose the dismissal of their common law indemnification claims against movants. In their reply papers, movants concede that the contractual indemnification clauses would not be triggered unless HP, On Par or Seasons were found to be actively negligent.

The court agrees with movants. Each of the subcontractors had identical contractual indemnification clauses, requiring them to indemnify the owner, general contractor and manager "to the fullest extent permitted by law" for losses caused by personal injury: 1) arising out of or resulting from the subcontractor's work, 2) arising out of the subcontractor's failure to comply with applicable laws, 3) caused by an act or omission of the subcontractor, or 4) caused by the subcontractor's failure to fulfill its obligations under the contract, 5) except to the extent that the

loss was caused by an indemnitee. Negligence by HP, Seasons or On Par is clearly required to trigger the clause because if these entities were not negligent in some manner, then the accident could not have arisen from their work. Unless the jury finds that HP's lighting, Seasons' debris removal, or On Par's duties regarding covering of holes contributed to the accident, it could not arise from the work of these entities within the meaning of the contract.

All parties seek clarification of the caption. The parties are directed to confer and then appear for a pre-trial conference to correct the caption. The court was advised by the Trial Support Office that it was not served with notice of entry with any orders of severance and that it has no record of the index number 700463/03 being assigned.

The motion with respect to the allegedly duplicate claims of Burgess is granted and the 1st through 3rd cross-claims and/or counterclaims against Athena Construction and Dolner contained in Burgess' answer, dated May 24, 2006, to the amended complaint of Athena Lofts, are dismissed because they duplicate claims in Burgess' fifth third-party complaint, dated May 12, 2006.

II. Motion Sequence 015

In motion sequence 015, Athena Lofts and The Athena Group, LLC ("Athena Group") move to reargue the March 30, 2007 order insofar as it: 1) denied summary judgment to Athena Lofts on its claims for common law and contractual indemnification against On Par, Seasons and HP, and contractual indemnification against Burgess; and 2) partially denied the motion of Athena Group and Athena Lofts to dismiss the fifth third-party complaint of Burgess. The motion for reargument on these grounds is denied because these are the same arguments made on the original motion and there is no demonstration that the court overlooked any controlling fact

or principal of law, other than the modification of reasoning with respect to Burgess' common law indemnification claims in this opinion. Reargument should be granted where the movant demonstrates that the court "misconstrued relevant facts or misapplied governing law."

DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d 715, 718 (1st Dept. 2005). It should not be a vehicle to rehash arguments already made. *James v. Nestor*, 120 A.D.2d 442 (1st Dept. 1986); *Foley v. Roche*, 68 A.D.2d 558 (1st Dept. 1979). In addition to precedent cited in the original ruling, p. 10, the court relies upon *Murphy v. Columbia University*, 4 A.D.3d 200 (1st Dept. 2004)(liability may arise from actual or constructive notice of defect) and *Griffin v. N.Y.C. Transit Authority*, 16 A.D.3d 202 (1st Dept. 2005)(supervision and control not required when injury arises from condition of workplace created by or known to owner). Accordingly, it is

ORDERED that motion sequence 005 by Dolner and Athena Construction to reargue this court's decision and order, dated March 30, 2007, is granted solely to the extent that the court grants reargument of movants' motion for summary judgment dismissing the common law indemnification claims of HP, Seasons, and On Par, and, upon reargument, those claims are dismissed, and in all other respects the motion is denied; and it is further

ORDERED that the court *sua sponte* modifies the reasoning for the dismissal of Burgess' common law negligence claims against Athena Lofts, Athena Construction, Athena Group and Dolner; and it is further

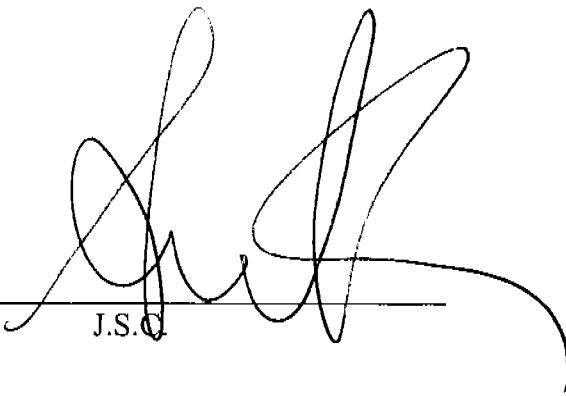
ORDERED that the 1st through 3rd cross-claims and/or counterclaims against Athena Construction and Dolner contained in Burgess' answer, dated May 24, 2006, to the amended complaint of Athena Lofts are dismissed because they duplicate claims in Burgess' fifth third-party complaint, dated May 12, 2006; and it is further

ORDERED that motion sequence 015 by Athena Lofts and Athena Group to reargue the court's decision and order, dated March 30, 2007, is denied; and it is further

ORDERED that the parties are directed to confer and then appear for a conference to resolve problems with the caption on September 13, 2007, at 10:00 a.m., in Part 54, Room 1227, 111 Centre St., New York, N.Y.

Dated: September 4, 2007

ENTER:



J.S.C

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