

**Spruill v City of New York**

2008 NY Slip Op 30449(U)

February 14, 2008

Supreme Court, New York County

Docket Number: 0105880/2004

Judge: Eileen A. Rakower

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PRESENT: **EILEEN A. RAKOWER**  
**J.S.C.**

PART 5

Index Number : 105880/2004  
**SPRUILL, CALVETTE**  
VS.  
**CITY OF NEW YORK**  
SEQUENCE NUMBER : # 008  
RESTORE TO ACTIVE STATUS

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INDEX NO. 105880-04  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. #008  
MOTION CAL. NO. \_\_\_\_\_

d on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...  
Answering Affidavits -- Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
1  
2,3,4,5  
6

Cross-Motion  Yes  No

Upon the foregoing papers, it is ordered that this motion

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

**FILED**  
FEB 19 2008  
NEW YORK  
COUNTY CLERK'S OFFICE

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

Dated: 2/14/08

  
**EILEEN A. RAKOWER** 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 5

-----X

CALVETTE SPRUILL,

Plaintiff,

Index No.  
105880/04  
**ORDER AND  
DECISION**  
Mot. Seq.: 008

- against -

THE CITY OF NEW YORK, FRED-DOUG 117 LLC,  
FRED-DOUG MANAGER LLC, STRATEGIC  
CONSTRUCTION CORP. a/k/a STRATEGIC  
CONSTRUCTION LIMITED and d/b/a STRATCON,  
and SPRING SCAFFOLDING, INC.,

Defendants.

-----X

STRATEGIC CONSTRUCTION CORP.,

Index No.  
590536/04

Third-Party Plaintiff,

-against-

ASTIR CONSTRUCTION, INC.,

Third-Party Defendant.

-----X

EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when she tripped and fell on the sidewalk in front of 279 West 117<sup>th</sup> Street New York, New York on August 12, 2003. Defendants Fred-Doug 117 LLC, Fred-Doug Manager LLC and Strategic Construction Corp., d/b/a Stratcon ("Strategic") move to restore the case to active status for the purposes of hearing and deciding the motion; for an order dismissing plaintiff's complaint pursuant to CPLR §3126; and for summary judgment as against third-party defendant Astir Construction, Inc. ("Astir") for defense costs. Astir opposes and cross-moves for summary judgment, dismissing the third-party complaint against it. Defendant Spring Scaffolding, Inc. ("Spring") opposes

Strategic's motion, Astir's cross-motion and also cross-moves to restore the action in order to decide this motion; for an order dismissing plaintiff's complaint and for summary judgment. Strategic partially opposes both Astir and Spring's cross-motions. Plaintiff does not oppose any of the motions or cross-motions and defendant the City of New York does not submit papers.

Strategic was the general contractor of a construction project which was ongoing at the subject location. The Fred-Doug defendants were the owners of the premises abutting the sidewalk where plaintiff fell. Spring is a scaffolding company hired to erect a sidewalk bridge in front of the premises. Strategic brought a third-party action for indemnification against Astir, its subcontractor.

Strategic, in support of its motion, submits: the pleadings; an order issued by the Honorable Justice R. Bruce Cozzens, Jr. entered August 22, 2006; an order issued by the Honorable Eileen A. Rakower dated entered June 22, 2007; and four so-ordered stipulations dated June 5, 2007, July 31, 2007, September 4, 2007, and October 23, 2007; an affidavit by John J. Freeza, President of Strategic; and a contract between Strategic and Astir.

Strategic and Spring argue that plaintiff has failed to comply with numerous court orders to appear for a deposition. Plaintiff was represented by Stephen M. Cohen of the Law Office of Cohen & Jaffe, LLP until the Honorable Justice Eileen A. Rakower issued an order dated June 15, 2007, relieving him as counsel. The order states, in relevant part:

Stephen M. Cohen, Esq. represents that plaintiff has refused to attend any of the court ordered depositions, and is not cooperating with counsel's office . . . the deposition of plaintiff was scheduled no less than 7 times.

The order directed plaintiff to retain new counsel within thirty days from the date of service of the order with notice of entry, and that no proceedings were to take place within that time. Prior to the issuance of the order, and dating back to September 27, 2005, five so-ordered stipulations signed by plaintiff's counsel, directed plaintiff to appear for a deposition.

On June 29, 2007 a motion to dismiss for plaintiff's failure to comply was denied by this court as premature, without prejudice to renew when the above

mentioned stay of the proceedings expired. On July 31, 2007 plaintiff appeared, *pro se*, for a compliance conference, and was given an adjournment to either obtain counsel or continue to appear *pro se*. Plaintiff did not appear on September 4, 2007 or thereafter. The case was marked off the calendar on October 23, 2007.

CPLR §3126 states, in relevant part:

If any party . . . refuses to obey an order for disclosure or willfully fails to disclose information which the court finds ought to have been disclosed . . . the court may make such orders with regard to the failure or refusal as are just, among them:

- (3) an order striking out pleadings or parts thereof . . . or dismissing the action

The sanction of striking a party's complaint is warranted when a party repeatedly and persistently fails to comply with several disclosure orders issued by the court. (*Yoon v. Costello*, 29 A.D.3d 407[1<sup>st</sup> Dept. 2006]). When a party fails to comply with a court order and frustrates the disclosure scheme set forth in the CPLR, it is well within the Trial Judge's discretion to dismiss the complaint. (*Kihl v. Pfeffer*, 94 N.Y.2d [1999]).

Plaintiff has failed to comply with numerous requests to appear for a deposition. Indeed, plaintiff did not cooperate with her own attorney. Most significantly, she has not appeared for a deposition after five so-ordered stipulations directed her to do so. Plaintiff does not oppose the motion. Plaintiff's failure to comply, or offer a valid excuse for her non-appearance, creates an inference that her non-compliance was willful.

Strategic also moves for summary judgment against third-party defendant Astir for defense costs based on Astir's duty to indemnify. Section 4.6 of the contract between Strategic and Astir states, in relevant part:

. . . Subcontractor shall indemnify . . . contractor . . . from and against all claims . . . including but not limited to attorneys' fees arising out of or in any way such claim, damages, loss or expense is . . . attributable to bodily injury . . . caused in whole or in part by any actual or alleged . . . act or omission of the Subcontractor . . .

Since the complaint in the main action is dismissed as to Strategic, the issue of indemnification for plaintiff's injuries is moot. (*Ayala v. Lockheed Martin Corp*, 22 A.D.3d 394 [1<sup>st</sup> Dept. 2005]). The remaining question is whether Astir is liable to Strategic for attorneys' fees. A promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees. Thus, the intention to do so must be unmistakably clear from the language of the promise. (*Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487[1989]).

The indemnification clause referred to here states that Astir shall indemnify for injuries "caused in whole or in part by any actual or *alleged* . . . act or omission of the Subcontractor." It is not "unmistakably clear" from the contract language that Strategic is entitled to the collection of attorneys' fees for actions which do not involve allegations of negligence by third parties. Plaintiff does not allege that her injuries arose out of any act or omission of Astir. As the complaint is dismissed as to Strategic, the third-party complaint for indemnification is also dismissed.

City has not moved for affirmative relief in this action. Therefore the case as against the City will resume it's status as being marked off the calender.

Wherefore it is hereby

ORDERED that defendants Fred-Doug 117 LLC, Fred-Doug Manager LLC, and Strategic Construction Corp., d/b/a STRATCON's motion to restore this matter to the calendar is granted; and it is further

ORDERED that the motion is granted and the complaint is hereby severed and dismissed as against defendants Fred-Doug 117 LLC, Fred-Doug Manager LLC, and Strategic Construction Corp., d/b/a STRATCON; and it is further


ORDERED that defendants Fred-Doug 117 LLC, Fred-Doug Manager LLC, and Strategic Construction Corp., d/b/a STRATCON motion for an order granting costs in the form of reimbursement for attorneys' fees is denied

ORDERED that defendant Spring Scaffolding's cross-motion is granted and the complaint is hereby severed and dismissed as against defendant Spring Scaffolding; and it is further

ORDERED that defendant Astir Construction, Inc.'s cross-motion for summary judgment is granted and the third-party complaint is hereby dismissed; and it is further

ORDERED that the remainder of the action shall continue.

DATED: February 14, 2008



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EILEEN A. RAKOWER, J.S.C.

**FILED**  
FEB 19 2008  
NEW YORK  
COUNTY CLERK'S OFFICE