

Conrad v 105 St. Assoc., LLC

2008 NY Slip Op 31151(U)

April 17, 2008

Supreme Court, New York County

Docket Number: 0105554/2004

Judge: Jane S. Solomon

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

PRESENT: HON. JANE S. SOLOMON

PART 55

Justice

Index Number : 105554/2004
CONRAD, RICHARD
VS.
105 STREET ASSOCIATES
SEQUENCE NUMBER : # 008
RE-ARGUMENT / RECONSIDERATION

INDEX NO. 105554-04
MOTION DATE 4/14/08
MOTION SEQ. NO. 7008
MOTION CAL. NO. _____

ere read on this motion to/for _____

PAPERS NUMBERED

1-3
4-5

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 is decided in accordance with the attached memorandum decision and order.

N.B. -- pre-trial conference scheduled for May 5, 2008 at 2 PM.

FILED

APR 22 2008

COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 4/17/08

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X
RICHARD CONRAD,

Plaintiff,

-against-

Index No. 105554/04

105 STREET ASSOCIATES, LLC, BFC
CONSTRUCTION CORP., BFC PARTNERS, L.P.,
LARRY E. KNIGHT, INC. and LARRY KNIGHT,

Defendants.

-----X

105 STREET ASSOCIATES, LLC., BFC
CONSTRUCTION CORP. and BFC PARTNERS, L.P.,

Third-Party Plaintiffs,

-against-

Third-Party
Index No. 50118/05

LARRY E. KNIGHT, INC., LARRY KNIGHT and
JEM ERECTORS, INC.,

Third-Party Defendants.

-----X

Jane E. Solomon, J.:

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APR 22 2008
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NEW YORK

Defendant/third-party plaintiff 105 Street Associates, LLC (105 Street) moves: (1) pursuant to CPLR 2221, for reargument of this court's October 16, 2007 Order (the Order) insofar as it denied 105 Street summary judgment on its contractual indemnification claim as against third-party defendant JEM Erectors, Inc. (JEM); and (2) pursuant to CPLR 3025 (b), for leave to serve a second amended third-party complaint to add a sixth cause of action against third-party defendants Larry E. Knight, Inc. and Larry Knight (together, LEK) for contractual

indemnification.

The facts of this matter are set forth in the Order, familiarity with which is presumed, and will not be repeated here unless necessary.

Reargument

"Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (Ito v 324 East 9th Street Corp., 2008 WL 808966, *1, 2008 NY App Div LEXIS 2763, **2 [2d Dept 2008]; see also Massei v Licciardi, 47 AD3d 774, 774 [2d Dept 2008]). The motion "is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (Gellert & Rodner v Gem Community Management, 20 AD3d 388, 388 [2d Dept 2005]), or to "argue 'a new theory of law not previously advanced' [citations omitted]" (DeSoignies v Cornasesk House Tenants' Corp., 21 AD3d 715, 718 [1st Dept 2005]).

105 Street asserts that its motion for summary judgment against JEM was denied based on the erroneous conclusion that JEM was not responsible under its contract for cleaning up other contractor's debris, citing page 3 of the the Order. This assertion is incorrect for two reasons. First, page 3 of the

Order states the parties' contentions, and not the court's legal conclusions, and accordingly, the moving papers fail to identify any matter that the court overlooked or misapprehended (CPLR 2221[e][2]). Second, even if the court adopted 105 Street's position as to whether the relevant contracts could obligate JEM to indemnify 105 Street, there is no question that JEM is contractually obligated to indemnify another party only to the extent that Conrad's injury was caused by JEM's negligent acts or omissions (Contract, Notice of Motion, Ex. C, paragraph 4.6). There is a question of fact as to whether JEM was negligent, and whether the construction manager, defendant BFC Construction Corp. (BFC), was negligent as well. 105 Street has not shown that there was evidence before the court on the prior motion to find JEM negligent as a matter of law, or even that 105 Street had sought that relief.¹ Although there is an affidavit submitted in the prior motion suggesting that JEM may have been negligent because it used plywood in its work (Carrao Aff., at paragraph 25), and Conrad tripped on a piece of plywood, that testimony was at odds to the deposition testimony of other witnesses, and the court found that this presented a question of fact (Order, 11).

¹ On this motion, 105 Street does not submit all the papers considered on the prior motion.

105 Street also contends that the court should have held that JEM was responsible under its subcontract for general clean up of the work site, including clean up of debris generated by other contractor's work. It argued that JEM was bound "to all the terms, conditions and obligations placed upon BFC in [its general construction management agreement with 105 Street], including the General Conditions, such as the obligation for safety." (Capoccia Aff, paragraph 14). There was deposition testimony that BFC was responsible for overseeing site safety, which was corroborated by BFC. On the papers presented, 105 Street fails to show that the court misapprehended or overlooked the facts or law by declining to adopt the sweeping argument that JEM contractually assumed all of BFC's obligations to oversee construction (CPLR 2221 [d][2]).

Even if the court were to consider 105 Street's arguments on the merits, the court would adhere to its prior decision. The claim upon which 105 Street relies is, in essence, one for the negligent performance of contract. However, in New York, a claim for "negligent performance of the contract ... simply does not exist" (Megaris Furs v Gimbel Bros., 172 AD2d 209, 211 [1st Dept 1991]; see also City of New York v 611 West 152nd Street, Inc., 273 AD2d 125, 126 [1st Dept 2000] ["claims based on negligent or grossly negligent performance of a contract are not cognizable"]).

Leave to Amend

"Leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party" (Trataros Construction v New York City Housing Authority, 34 AD3d 451, 452-453 [2d Dept 2006]). Such leave is "within the sound discretion of the trial court and an amendment need not be granted where the proposed amendment clearly lacks merit" (Vollbrecht v Jacobson, 40 AD3d 1243, 1247 [3d Dept 2007]).

105 Street seeks leave to further amend its third-party complaint against LEK to add a cause of action for contractual indemnification on the ground that it is an affiliate of an entity LEK contractually was obligated to indemnify, and therefore it should get the benefit of that indemnity. Pursuant to section 10 (ii) of the contract between BFC and LEK, LEK must indemnify BFC and, among others, its "affiliates." 105 Street contends, through the affidavit one of its members, that it and BFC "had some of the same owners," so that it is an "affiliate" of BFC.

LEK argues persuasively as a threshold matter that 105 Street's motion, made nearly one year after the note of issue was filed and after motions for summary judgment were decided, is based on information that 105 Street had from the inception of

this lawsuit, and granting leave to amend at this late date would be prejudicial to the other parties.

In support of its argument, 105 Street cites to two federal cases, Checkrite Petroleum v Amoco Oil Co. (678 F2d 5 [2d Cir 1982]) and Palgrove Co. v Commissioner of Internal Revenue (63 F2d 810 [2d Cir 1933]), which interpret the term "affiliate" as relevant to the construction of certain federal statutes, and they are not relevant to this lawsuit. "Affiliate" is defined in Black's Law Dictionary (7th Ed.) as "A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent or sibling corporation." 105 Street has not demonstrated that its relationship with BFC meets this, or any other, definition of affiliate. Moreover, the Court of Appeals has held that the intention to indemnify must be clearly implied from the contract language and the purposes and surrounding facts and circumstances (Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774 [1987]), and a reference to an "affiliate" as an indemnified party, where the known property owner was referred to elsewhere in the contract, does not constitute a clear implication that 105 Street was intended to be an indemnified party.

In short, 105 Street has not provided, and the court has not discovered, any legal basis for the proposition that the existence of individual shareholders of one company, who are also

partial owners of another corporate entity, in itself makes the second entity an affiliate of the first.

In light of the foregoing, that part of 105 Street's motion which seeks leave to amend its amended third-party complaint is denied. Accordingly, it hereby is

ORDERED that the motion of 105 Street Associates, LLC is denied in its entirety, and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on May 5, 2008 at 2 PM.

Dated: April 17, 2008

ENTER:



J.S.C.

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