

Cusumano v Extell Rock, LLC
2009 NY Slip Op 30202(U)
January 15, 2009
Supreme Court, New York County
Docket Number: 115389/05
Judge: Carol Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD
Justice

PART 35

Index Number : 115389/2005

CUSUMANO, FRANK

INDEX NO. _____

vs

EXTELL ROCK, LLC

MOTION DATE 8/20/08

Sequence Number : 006

MOTION SEQ. NO. 006

DISMISS

MOTION CAL. NO. _____

his 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

Motion sequence 006 and 007 are decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that second third-party defendant/third third-party defendant Remco Maintenance, LLC (Remco) motion (motion sequence number 006), pursuant to CPLR 3211, to dismiss the complaint of defendant/third third-party plaintiff Regions Facility Services, Inc. (Regions) is granted, and the third third-party complaint is severed and dismissed as to this defendant, and the Clerk of Court is directed to enter judgment in favor of this defendant; and it is further

ORDERED that second third-party defendant/third third-party defendant Remco's motion (motion sequence number 007) is denied; and it is further

ORDERED that the remainder of the action shall continue.

ORDERED that counsel for second third-party defendant/third third party defendant Remco shall serve a copy of this order with notice of entry within twenty days of entry on all counsel.

Dated: 1/15/09

[Signature]
HON. CAROL EDMEAD

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

2/1/09

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
FRANK CUSUMANO and LINA CUSUMANO,

Plaintiffs,

-against-

EXTELL ROCK, LLC, ABCO MANAGMENT CORP. and
REGIONS FACILITY SERVICES, INC.,

Defendants.

-----X
EXTELL ROCK, LLC,

Third-Party Plaintiff,

-against-

HARD ROCK CAFÉ INTERNATIONAL, INC.,

Third-Party Defendant.

-----X
HARD ROCK CAFÉ INTERNATIONAL, INC.,

Second Third-Party Plaintiff,

-against-

REMCO MAINTENANCE, LLC,

Second Third-Party Defendant.

-----X
REGIONS FACILITY SERVICES, INC.,

Third Third-Party Plaintiff,

-against-

REMCO MAINTENANCE, LLC and "JOHN and JANE DOE
NO. 1 through 10" (said names being false and fictitious, as the
names of these other Defendants are unknown at this time),

Third Third-Party Defendants.

-----X
Edmead, J.:

Index No.: 115389/05

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK
Index No.: 90032/07

Index No.: 590905/07

Index No.: 590371/08

MEMORANDUM DECISION

Motion sequence numbers 006 and 007 are hereby consolidated for disposition.

This is an action to recover monetary damages for personal injuries sustained by plaintiff Frank Cusumano when he fell from a scaffold after being struck on the head by a light placed inside the scaffold at a work site located at 221 West 57th Street, New York, New York on August 18, 2005.

In motion sequence number 006, second third-party defendant/third third-party defendant Remco Maintenance, LLC (Remco) moves, pursuant to CPLR 3211, to dismiss the complaint of defendant/third third-party plaintiff Regions Facility Services, Inc. (Regions).

In motion sequence number 007, Remco moves, (a) pursuant to CPLR 2221 (e), for leave to reargue that portion of its motion, pursuant to CPLR 3211, seeking to dismiss second third-party plaintiff Hard Rock Café International, Inc.'s (Hard Rock) claims for contractual indemnification and breach of contract for failure to procure insurance, on the basis that matters of fact and/or law were allegedly overlooked or misapprehended by the court in its prior determination, and (b) pursuant to CPLR 2221 (d), for leave to renew that portion of said motion, pursuant to CPLR 3211, seeking to dismiss Hard Rock's claims for contractual indemnification and breach of contract for failure to procure insurance, on the basis of new information.

BACKGROUND

Extell Rock, LLC (Extell) is the owner and lessor of the premises where plaintiff's accident took place. Extell leased the premises to third-party defendant and second third-party plaintiff Hard Rock. Hard Rock entered into an agreement with defendant and third third-party plaintiff Regions, whereby Regions was to perform construction work at the premises. Regions

hired second third-party defendant and third third-party defendant Remco to perform marble work at the premises. Plaintiff was employed by Remco as a marble polisher.

On the day of plaintiff's accident, plaintiff sustained injuries when he was caused to fall from a scaffold after being struck on the head by a light which was hanging inside said scaffold. Plaintiff's injuries included contusions and lacerations to his head and knee, which required multiple stitches, back sprain and pain, disc bulges and herniations and internal derangement of his left knee.

Plaintiff and his wife, Lina Cusumano, commenced an action alleging claims pursuant to common-law negligence and Labor Law §§ 200, 240 (1) and 241 (6) against Extell, ABCO Management Corporation and Regions. In turn, Extell commenced a third-party action against its lessee, Hard Rock, which in turn commenced a second third-party action against plaintiff's employer, Remco. Remco moved, pursuant to CPLR 3211, for summary judgment dismissing Hard-Rock's second third-party claims against it for common-law and contractual indemnification, contribution and breach of contract.

In its order, dated June 9, 2008, this court granted that part of Remco's motion seeking to dismiss Hard-Rock's second third-party claims for common-law indemnification and contribution as against it. In addition, this court denied that part of Remco's motion seeking to dismiss Hard-Rock's second third-party claims for contractual indemnification and breach of contract.

DISCUSSION

REMCO'S MOTION TO DISMISS REGIONS' THIRD THIRD-PARTY COMPLAINT AGAINST IT (motion sequence number 006)

On a motion to dismiss made pursuant to CPLR 3211, the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “allegations consisting of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not entitled to such consideration” (*Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]; see also *Biondi v Beekman Hill House Apartment Corporation*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). “[T]he criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see *Leon v Martinez*, 84 NY2d at 88).

“The party opposing [a dispositive] motion ... must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests” (*Gilbert Frank Corporation v Federal Insurance Company*, 70 NY2d 966, 967 [1988]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” for this purpose (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “[A] shadowy semblance of an issue or bald conclusory allegations, even if believable, are insufficient to defeat [a dispositive motion]” (*Polanco v City of New York*, 244 AD2d 322, 322 [2d Dept 1997]).

REGIONS' COMMON-LAW INDEMNIFICATION AND CONTRIBUTION CLAIMS AGAINST REMCO

In Regions' third third-party complaint against Remco, Regions first asserts two claims sounding in common-law indemnification and contribution based upon Remco's alleged negligence. Similarly, Regions' fourth claim asserts that it is entitled to indemnification and contribution from Remco based on Remco's alleged violation of Labor Law § 240 (1), citing Remco's failure to provide adequate scaffolding.

In opposition to these claims, Remco maintains that, as plaintiff did not sustain a "grave injury," these claims against it should be dismissed pursuant to section 11 of the Workers' Compensation Law. Section 11 of the Workers' Compensation Law prescribes, in pertinent part, as follows:

For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: [listing conditions not relevant here].

"An employer's liability for an on-the-job injury is generally limited to workers' compensation benefits, but when an employee suffers a 'grave injury' the employer also may be liable to third parties for indemnification or contribution" (*Rubeis v Aqua Club, Inc.*, 3 NY3d 408, 412-413 [2004]). "[T]he moving party bears the burden of establishing an absence of grave injury; it is not the burden of the party moved against to show the presence of a grave injury"

(*Way v Grantling*, 289 AD2d 790, 793-794 [3d Dept 2001]).

In this case, as it has not been demonstrated that plaintiff suffered a "grave injury," Remco is entitled to dismissal of Regions' first, second and fourth causes of action, pursuant to section 11 of the Workers' Compensation Law. A reading of plaintiff's bill of particulars, wherein plaintiff stated that his injuries included contusions and lacerations to his head, lacerations to his knee, back sprain and pain, disc bulges and herniations, and internal derangement of the left knee, reveals that none of the injuries suffered by the plaintiff fall within the list of injuries listed in Workers' Compensation Law § 11. Since "[i]njuries qualifying as grave are narrowly defined in Workers' Compensation Law § 11 [, ...] the only determination to be made is whether the injury falls within the statute's objective requirements" (*Castro v United Container Machinery Group, Inc.*, 96 NY2d 398, 401 [2001]).

Moreover, in its prior decision, this court already judicially determined that plaintiff did not suffer a "grave injury" (*see Martin v City of Cohoes*, 37 NY2d 162, 165 [1975] ["when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned"]; *see also Mohamed v Defrin*, 45 AD3d 252, 253 [1st Dept 2007]).

Remco is also entitled to dismissal of Regions' third claim against it sounding in breach of contract. The documentary evidence in this case indicates that Remco's marble restoration work at the premises was done solely pursuant to the terms of a proposal submitted by Remco to Regions regarding the subject work (the proposal).

In support of its breach of contract claim, Regions asserts that, pursuant to the proposal, Remco was required to perform labor, provide equipment and supervise in a safe manner. As

such, Regions argues that Remco breached the agreement when it failed to provide and maintain adequate scaffolding, and when it failed to provide adequate supervision of plaintiff.

However, a review of the proposal reveals that, aside from stating the price for Remco's work, the proposal only stated that Remco "furnish all labor, materials and equipment ... and supervision to repair holes due to signage removal at [the premises]" (Remco's Notice of Motion to Dismiss, Exhibit H, Remco Proposal). As such, the proposal did not, in fact, require that Remco perform in a safe manner. Thus, as Remco did not breach any stated contractual duty, Remco is entitled to dismissal of Regions' breach of contract claim against it.

In any event, as Regions' breach of contract claim seeks to recover for plaintiff's bodily injury due to Remco's alleged negligence, Regions' breach of contract claim is actually a disguised tort claim, which is not permitted under the facts of this case, pursuant to section 11 of the Workers' Compensation Law.

In opposition to Remco's motion to dismiss Regions' third third-party complaint, Regions argues that more discovery is still needed in order for it to obtain further facts regarding whether any additional written contracts exist. However, as Regions' third third-party claims do not include allegations of any contractual indemnification or breach of contract claims arising from any such additional alleged written contracts, it is not necessary to deny Remco's motion on this ground.

REMCO'S MOTION TO REARGUE AND RENEW (motion sequence number 007)

CPLR 2221 (d) states, in pertinent part:

“(d) A motion for leave to reargue:

* * *

2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.”

Motions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended facts or law or mistakenly arrived at its earlier decision (*Marini v Lombardo*, 17 AD3d 545, 546 [2d Dept 2005]; *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (*Pryor v Commonwealth Land Title Insurance Company*, 17 AD3d 434, 436 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]). New questions which were not previously advanced may not be raised on a motion to reargue (*Levi v Utica First Insurance Company*, 12 AD3d 256, 258 [1st Dept 2004]).

Second third-party defendant/third third-party defendant Remco asserts that it is entitled to leave to reargue, because the court overlooked or misapprehended facts or law or mistakenly arrived at its earlier decision to deny that part of its motion to dismiss Hard Rock's second third-party claims for contractual indemnification and breach of contract against it.

In its earlier decision, the court found that the affidavit of Hard Rock's risk manager, John Pinkerton (Pinkerton), raised the possibility that a written document may exist that could

hold Remco contractually obligated to indemnify Hard Rock and provide it with additional insured coverage. Accordingly, the court denied that part of Remco's motion to dismiss Hard Rock's second third-party claims for contractual indemnification and breach of contract, on the ground that more discovery was yet needed. In support of its motion to reargue, Remco now argues that the court should have ignored Pinkerton's affidavit, because it was based upon Pinkerton's groundless speculations.

Here, the court did not overlook or misapprehend relevant facts, or misapply controlling principles of law in making its determination. Thus, Remco is not entitled to leave to reargue that portion of its motion seeking to dismiss Hardrock's claims for contractual indemnification and breach of contract for failure to procure insurance.

CPLR 2221 (e) states, in pertinent part:

"(e) A motion for leave to renew:

* * *

2. shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and
3. shall contain reasonable justification for the failure to present such facts on the prior motion."

"A motion to renew should not be granted based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence on the original motion" (*Leonard Fuchs, Inc. v Laser Processing Corporation*, 222 AD2d 280, 280 [1st Dept 1995]). "[R]enewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation'"

(*Rubinstein v Goldman*, 225 AD2d 328, 328-329 [1st Dept 1996], quoting *Matter of Bieny*, 132 AD2d 190, 210 [1st Dept 1987]; *Chelsea Piers Management v Forest Electric Corporation*, 281 AD2d 252, 252 [1st Dept 2001]).

Remco asserts that new facts now exist which were not known to it at the time it moved to dismiss Hard Rock's second third-party claims for contractual indemnification and breach of contract for failure to procure insurance, and that these new facts would change the court's prior determination which denied those claims, on the ground that discovery was still needed to determine whether any additional contracts existed which would contractually obligate Remco to indemnify Hard Rock and provide it additional insured coverage.

To this effect, Remco asserts as a new fact Regions' omission of contractual indemnification and breach of contract for failure to procure insurance claims in its third third-party action against Remco. However, Regions' omission of these claims is not so much a new fact, but rather a litigation strategy. In addition, Remco does not assert any new law in support of his motion to renew. Thus, Remco is not entitled to leave to renew his motion to dismiss the portion of its prior summary judgment motion seeking to dismiss Hardrock's claims for contractual indemnification and breach of contract for failure to procure insurance.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that second third-party defendant/third third-party defendant Remco Maintenance, LLC (Remco) motion (motion sequence number 006), pursuant to CPLR 3211, to dismiss the complaint of defendant/third third-party plaintiff Regions Facility Services, Inc. (Regions) is granted, and the third third-party complaint is severed and dismissed as to this

defendant, and the Clerk of Court is directed to enter judgment in favor of this defendant; and it is further

ORDERED that second third-party defendant/third third-party defendant Remco's motion (motion sequence number 007) is denied; and it is further

ORDERED that the remainder of the action shall continue.

DATED: January 15, 2009

ENTER:



Carol Robinson Edmead, J.S.C.

HON. CAROL EDM EAD

FILED
JAN 20 2009
COUNTY CLERK'S OFFICE
NEW YORK