

**Marine v Haroldon Ct. Condominium, Inc.**

2009 NY Slip Op 31104(U)

May 18, 2009

Supreme Court, New York County

Docket Number: 102504/04

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Index Number : 102504/2004

MARINE, GERINELDO

vs

HAROLDON COURT CONDOMINIUM

Sequence Number : 007

REARGUMENT/RECONSIDERATION

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

Is 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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

**FILED**

MAY 19 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: May 19 2009

Walter B. Tolub  
J.S.C.

Check one:  FINAL DISPOSITION

**WALTER B. TOLUB**  
 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: IAS PART 15

-----x

GERINELDO MARINE,

Plaintiff,

Index No.  
102504/04

-against-

Motion Sequence No.  
007

HAROLDON COURT CONDOMINIUM, INC., BOARD  
MANAGERS OF HAROLDON COURT CONDOMINIUM,  
INC., JADAM EQUITIES, LLC, JADAM EQUITIES,  
LTD and TOP NOTCH CONTRACTING, INC.,

Defendants.

-----x

HAROLDON COURT CONDOMINIUM, INC., BOARD  
MANAGERS OF HAROLDON COURT CONDOMINIUM,  
INC., JADAM EQUITIES, LLC, JADAM EQUITIES,  
LTD,

Third-Party Plaintiffs,

Third-Party  
Index No.  
591162/04

-against-

ARI MICHAEL GROSS and TAMARA RIVERA GROSS,

Third-Party Defendants.

-----x

TOP NOTCH CONTRACTING, INC.,

Second Third-Party Plaintiff,

Second Third-Party  
Index No.  
559006/05

-against-

SERENA CONSTRUCTION CORP.,

Second Third-Party Defendant.

-----x

ARI MICHAEL GROSS and TAMARA RIVERA GROSS,

Third Third-Party Plaintiffs,

Third Third-Party

-against-

Index No.

570231/05

TOP NOTCH CONTRACTING, INC.,

Third Third-Party Defendants.

-----X

**WALTER B. TOLUB, J.:**

In this action to recover monetary damages as the result of an alleged April 29, 2003 workplace accident, pursuant to CPLR 2221, second third-party defendant Serena Construction Corp. (Serena) moves to reargue those portions this court's December 1, 2008 Decision and Order that: (1) granted Top Notch Contracting, Inc. (Top Notch) contractual indemnification as against Serena, conditioned upon a finding by the trier of fact that Serena was negligent in plaintiff's alleged accident; and (2) denied that portion of Serena's cross motion that sought dismissal of Top Notch's claim for monetary damages as the result of Serena's failure to procure the required insurance under the parties' contract.

For the reasons stated below, Serena's motion is granted to the extent of granting leave to reargue, and upon such reargument, this court adheres to its December 1, 2008 Decision and Order.

#### **Background**

This action arises out of an accident alleged to have

occurred on April 29, 2003, in which plaintiff, a laborer in the employ of Serena, fell off a scaffold during a remodeling of apartment 14E, 215 West 90<sup>th</sup> Street, New York, NY.

In its December 1, 2008 Decision and Order, this court determined that there was no evidence that defendant Top Notch owned the scaffold from which plaintiff allegedly fell, nor any proof that Top Notch caused or had any notice of such scaffold being in a dangerous condition. This court, therefore, held that, as a matter of law, Top Notch was not liable under common-law negligence theory or for violations of Labor Law § 200 as respects plaintiff's alleged accident.

Because it was thus determined, Top Notch was granted contractual indemnification from Serena, conditioned upon a finding by the trier of fact that Serena was negligent in plaintiff's alleged accident.

Serena now asserts that this court's determination that Top Notch was not negligent under the common-law and/or did not violate section 200 of the Labor Law was in error, because evidence was proffered that Top Notch owned the scaffold from which plaintiff allegedly fell.

Further, in the same Decision and Order, this court held that there were questions of fact as whether or not Serena procured the insurance required under that subcontractor's April 4, 2003 contract with Top Notch. Serena now contends that this

portion of the Decision and Order was in error, because it should have been determined, as a matter of law, that Serena procured the appropriate insurance for Top Notch.

Alternatively, Serena seeks a declaration that, any monetary damages for its failure to procure insurance on Top Notch's behalf, should be limited to the insurance premiums that Top Notch paid for its own liability insurance that responded to plaintiff's claim in this action.

#### **Discussion**

Section 2221 (d) (2) provides that leave to reargue must 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." Additionally, any such motion "shall be made within thirty days after service of a copy of the order determining the prior motion and notice of entry." CPLR 2221 (d) (3).

#### *Top Notch's Negligence*

In its Decision and Order, dated December 1, 2008, this court held that, as a matter of law, Top Notch was not negligent in plaintiff's alleged accident. This court based its determination upon the paucity of evidence that Top Notch owned the scaffold at issue in this action.

Plaintiff himself was unaware of the existence of Top Notch. See Plaintiff's Examination Before Trial (EBT) at 54. Although

Marek Ponchitera (Ponchitera), Serena's owner, thought that the scaffold belonged to Top Notch, and that Serena's employees moved it into the apartment where plaintiff was working, Ponchitera did not know where his workers got the scaffold from, and was not certain who owned it. See Ponchitera EBT at 26-28.

Additionally, in the same EBT, Ponchitera testified that he was unsure whether Orbit, a dryer vent installer on the construction job, owned the scaffold. See Ponchitera EBT at 107.

Ponchitera's testimony regarding Top Notch's ownership of the scaffold is speculative and insufficient to raise a triable issue in response to Top Notch's prima facie entitlement to judgment as a matter of law. See *Bruce v Fashion Square Assocs.*, 8 AD3d 1053 (4th Dept 2004); see also *Piotrowski v J&O 111 Assocs., LLC*, 17 Misc 3d 1106(A) (Sup Ct, NY County 2007). Therefore, that portion of this court's December 1, 2008 Decision and Order that dismissed plaintiff's common-law negligence and Labor Law § 200 claims as to Top Notch is adhered to, as is that portion of the same Decision and Order that granted Top Notch contractual indemnification as against Serena, conditioned upon a finding by the trier of fact that Serena was negligent in plaintiff's alleged accident.

#### *Serena's Failure to Procure Insurance*

In its December 1, 2008 Decision and Order, this court denied that portion of Serena's cross motion that sought

[\*7]

dismissal of Top Notch's claim for monetary damages as the result of Serena's failure to procure insurance as required by the parties' contract. To support its contention that this court decided this portion of the Decision and Order in error, Serena has once again proffered a copy of a certificate of insurance and a copy of the relevant insurance policy (policy # 5001HG000506-1), issued by Hudson Insurance Company (Hudson).

Although from the face of those documents, it appears that coverage was provided for Top Notch and the Haroldon Court defendants,<sup>1</sup> however, it is uncontested that Hudson declared policy # 5001HG000506-1 void for misrepresentation on the insurance application. A June 26, 2006 letter from Bridgeworks Commercial Management (the alleged claims administrator for Hudson), states that, "Hudson has revisited the voidance of the policy and denial of coverage and determined that it will reinstate the policy and defend Serene in the Marine Lawsuit, subject to denial of coverage for certain of the Causes of Action pled and subject to a reservation of rights."

Serena contends that this letter reinstates the entire policy and, when combined with the policy and certificates of insurance, serves to prove, as a matter of law, that Serena

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<sup>1</sup>The Haroldon Court defendants include Haroldon Court Condominium, Inc., Board Managers of Haroldon Court Condominium, Inc., Jadam Equities, LLC, and Jadam Equities, LTD.

fulfilled its obligation to procure insurance on behalf of Top Notch and the Haroldon Court defendants. However, such reinstatement is subject to denial of coverage for certain of the Causes of Action, as well as a reservation of rights. Because, there are issues of misstatement on the insurance application, a reservation of rights, and the failure of Hudson to respond to any of Top Notch or the Haroldon Court defendants, this court holds that material questions of fact remain to be determined as to whether Serena procured the insurance required in the parties contract.

Serena alternatively seeks to limit its damages under any such failure to procure insurance on Top Notch's behalf to the insurance premiums that Top Notch paid for its own liability insurance (that responded to plaintiff's claim in this action), and seeks a declaration from this court of such.

In *Inchaustegui v 666 5th Ave. Ltd. Partnership* (96 NY2d 111 [2001]), the Court of Appeals limited a landlord's recovery in a tenant's failure to procure such insurance to the purchase cost of its own liability insurance. The landlord was additionally entitled to recover certain out-of-pocket expenses that arose out of the action and was not covered under its own liability insurance policy. The First Department has also applied such limitations in construction cases. See *Wong v New York Times Co.*, 297 AD2d 544 (1st Dept 2002); see also *Trokie v York*

Preparatory School, Inc., 284 AD2d 129 (1st Dept 2001).

However, in its original cross motion, Serena did not seek a declaration limiting Serena's liability to the insurance premiums that Top Notch paid for its own liability insurance that responded to plaintiff's claim in this action. It will thus not be considered on a motion to reargue. See *Foley v Roche*, 68 AD2d 558 (1st Dept 1979); see also *McGill v Goldman*, 261 AD2d 593 (2d Dept 1999).

**Order**

Accordingly, it is hereby

ORDERED that second third-party defendant Serena Construction Corp.'s motion is granted to the extent of granting leave to reargue, and upon such reargument, this court adheres to its December 1, 2008 Decision and Order.

Dated: 5/18/09

ENTER:

J.S.C.

**FILED**  
MAY 19 2009  
COUNTY CLERK'S OFFICE  
NEW YORK