

**OMNI Contr. Co, Inc. v City of New York**

2010 NY Slip Op 31643(U)

June 21, 2010

Supreme Court, New York County

Docket Number: 105634/2007

Judge: Cynthia S. Kern

Republished from New York State Unified Court  
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for  
any additional information on this case.

This opinion is uncorrected and not selected for official  
publication.

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

PRESENT: CYNTHIA S. KERN  
J.S.C.  
Justice

PART 52

Index Number : 105634/2007  
OMNI CONTRACTING CO., INC.  
vs.  
CITY OF NEW YORK  
SEQUENCE NUMBER : 003  
REARGUMENT/RECONSIDERATION

INDEX NO. 105634/07  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 003  
MOTION CAL. NO. \_\_\_\_\_

this 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 the annexed decision.

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

**FILED**  
JUN 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Dated: 6/21/10

CK  
CYNTHIA S. KERN J.S.C.  
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 52

-----X  
OMNI CONTRACTING COMPANY, INC.,

Plaintiff, Index No. 105634/2007  
-against-

CITY OF NEW YORK, acting on behalf of THE NEW YORK  
CITY DEPARTMENT OF DESIGN AND CONSTRUCTION,

Defendants.  
-----X

HON. CYNTHIA KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion  
for : \_\_\_\_\_

Papers	
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits and Cross Motion.....	3
Replying Affidavits.....	3
Exhibits.....	4

**FILED**  
Numbered  
JUN 29 2010  
NEW YORK  
COUNTY CLERK'S OFFICE

Plaintiff commenced the instant action to recover damages for additional costs incurred in the course of its performance of a Department of Design and Construction (DDC) contract for work on DDC's Project No. PV525-C, "Studio Museum in Harlem-Phase IIB" ("Studio Museum Contract") that it alleges were caused by delays due to acts of the City or third parties. Defendant City of New York (the City) counterclaimed for rescission of the contract as having been procured by fraud and for setoff and recoupment. The City moved for summary judgment dismissing the complaint based on its affirmative defense of fraud in the inducement of the contract and on its counterclaims for rescission and for setoff and recoupment. The City's motion was granted because the City established that it was fraudulently induced to enter into the

contract based on plaintiff's knowing misrepresentation that it was not under any investigation for wage law violations and because plaintiff was collaterally estopped from challenging the City's defense of fraud in the inducement based on the prior determination of Justice Kerrigan in *Omni Contracting Company, Inc. v. The City of New York, New York City Department of Design and Construction*, New York Supreme Court - Queens County, Index No. 30640/08 (Sept. 25, 2009). Omni now moves for an order pursuant to CPLR 2221(d) granting it reargument of the prior grant of summary judgment on the ground that the court misapprehended the law in the prior motion and upon reargument, denying the City's motion and for an order pursuant to CPLR 2221(e) granting it renewal of the Court's prior grant of summary judgment for the defendant based upon a new fact not previously offered. For the reasons set forth below, Omni's motion for reargument is denied and its motion for renewal is denied.

As an initial matter, on a motion for leave to reargue, the movant must allege that the court overlooked or misapprehended matters of fact or law. CPLR 2221(d)(2). Omni's motion for reargument is denied as it has failed to establish that the court misapprehended the law or the facts.

On a motion for leave to renew, the movant must allege new facts not offered on the prior motion and a reasonable justification for the failure to present those facts on the prior motion. CPLR 2221(e)(2) and (3). As an initial matter, Omni's motion for renewal is denied because the new fact offered, that the City is continuing to provide it with change work orders, does not change the prior determination. This court already held in its previous decision that the City did not waive its fraudulent inducement claim based on the fact that it continued to make payments to Omni after it knew about the fraudulent misrepresentation. The "new" fact that the City is continuing to provide Omni with new change order work does not alter the court's

finding that the City would never initially have entered into the contract with Omni if it knew about the fraudulent misrepresentation.

Moreover, Omni's argument that it is entitled to leniency based on the relative lack of egregiousness of its conduct is without merit. Omni cites *Gerzof v. Sweeney*, 22 N.Y.2d 297 (1968) and *Fabrizio & Martin, Inc. V. Bd. of Ed. Central Sch. Dist. No. 2*, 523 F.2d 378 (2d Cir. 1975) to support its argument that when the fraud at issue is not directly related to the project at the center of the litigation, the Court should exercise its discretion to deal with the contractor more leniently. However, the fraud is in fact directly related to the Studio Museum Contract in that Omni caused an injury to the City by making false statements in its bid for the contract. Moreover, Omni has not pointed to any extreme unjust enrichment or misconduct on the part of the City that would justify the Court exercising its discretion in this way.

Furthermore, Omni fails to provide a reasonable justification for its failure to present the new fact it now alleges in the prior motion. The new fact presented by Omni is that the City is even now directing it to perform new change order work on the Studio Museum project. However, these change orders have been ongoing and Omni was well aware of them at the time of the prior motion. Omni's counsel argues that Omni did not provide it with this information when it filed its opposition to the original motion because it did not originally appreciate its legal significance. However, this does not constitute a reasonable justification. Courts do have the discretion to relax the requirement that a motion to renew be based on newly discovered fact that could not have been offered on the prior motion in the interests of justice. *See Mattis v. Keen*, 54 A.D.3d 610, 611 (1<sup>st</sup> Dept 2008). However, the Court will not exercise that discretion in the instant case because relaxing the requirement is not appropriate in these circumstances. Omni's owners and managers were well aware that it was engaged in litigation regarding this contract at

