

Cubs 42nd LLC v Century-Maxim Constr. Corp.

2010 NY Slip Op 32555(U)

September 15, 2010

Supreme Court, New York County

Docket Number: 117987/06

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN, Justice

PART 21

CUBS 42ND LLC, JD CARLISLE DEVELOPMENT CORP. and M.D. CARLISLE CONSTRUCTION CORP.,

INDEX NO. 117987/06

Plaintiffs,

- v -

MOTION DATE 8/23/10

MOTION SEQ. NO. 005

MOTION CAL. 27

CENTURY-MAXIM CONSTRUCTION CORP. and VIRGINIA SURETY COMPANY, INC.,

Defendants.

FILED
SEP 17 2010
NEW YORK COUNTY CLERK'S OFFICE


The following papers, numbered 1 to 4 were read on this motion for renewal

	<u>Papers Numbered</u>
Notice of Motion— Affirmation — Exhibits A-E	<u>1-2</u>
Answering Affirmation — Exhibits A-C	<u>3</u>
Replying Affirmation	<u>4</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that plaintiffs' motion for renewal of their motion for summary judgment is decided in accordance with the annexed memorandum decision and order.

Dated: 9/15/10
New York, New York


_____, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE SETTLE/SUBMIT ORDER/JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 21

-----x
CUBS 42nd LLC, JD CARLISLE DEVELOPMENT
CORP. and M.D. CARLISLE CONSTRUCTION
CORP.,

Plaintiffs,

Index No.: 117987/06

-against-

DECISION AND ORDER

CENTURY-MAXIM CONSTRUCTION CORP. and
VIRGINIA SURETY COMPANY, INC.,

Defendants.

FILED
SEP 17 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----x

HON. MICHAEL D. STALLMAN:

Plaintiffs move, pursuant to CPLR 2221 (e), for leave to renew their motion, dated January 9, 2009, which sought summary judgment declaring that defendant Virginia Surety Company, Inc. (Virginia) was obligated to defend and indemnify them in the underlying personal injury action entitled *Joseph Aceto v Cubs 42nd LLC, JD Carlisle Development Corp., M.D. Carlisle Construction Corp. and Century Maxim Construction Corp.*, bearing Index Number 13442/06, filed in Supreme Court, Bronx County. By order of this Court, dated May 5, 2009, that portion of plaintiff's motion seeking to declare that Virginia was obligated to defend them in the underlying personal injury action was granted, but that portion of the motion seeking a declaration that Virginia was obligated to indemnify plaintiffs was denied as

premature. In addition, the court severed that portion of plaintiffs' earlier motion seeking reimbursement for defense costs already expended, and referred the matter to a Special Referee to hear and report with recommendations regarding such reimbursement.

In the instant motion, plaintiffs seek to renew their argument with respect to that portion of this Court's earlier decision that decided that it was premature to determine issues of indemnification because liability for the underlying personal injury action had yet to be determined.

Plaintiffs now provide an affidavit from an eyewitness to the underlying accident, which, they assert, was not available to them at the time that their earlier motion was filed. Plaintiffs also indicate that the underlying plaintiff recently filed a summary judgment motion in the personal injury action, which has yet to be decided.

CPLR 2221 (e) states:

"A motion for leave to renew:

1. shall be identified specifically as such;
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."

Defendants do not argue that the affidavit now presented by plaintiffs was not previously available to them, but oppose the instant motion on the ground that triable issues of fact continue

[* 4]

to exist with respect to plaintiffs' liability in the underlying personal injury action.

This Court's earlier determination was predicated on the fact that the trial court hearing the underlying personal injury action had not yet reached a conclusion as to the liability of the parties. Even if the affidavit of an eyewitness were to address some of the liability questions raised by the facts of the underlying personal injury action, it would be inappropriate for this Court to make a determination of liability in the underlying personal injury action while that issue is still before the IAS court hearing the matter. "In the absence of a jury finding in the underlying action, any claim of an entitlement to indemnification would be premature." *Bovis Lend Lease LMB Inc. v Garito Contracting, Inc.*, 65 AD3d 872, 875 (1st Dept 2009); *Crespo v City of New York*, 303 AD2d 166 (1st Dept 2003); *79th Realty Co. v X.L.O. Concrete Corp.*, 247 AD2d 256, 257 (1st Dept 1998) ("a declaration that the insurer has a duty to indemnify the general contractor requires a determination that the underlying accident arose out of the subcontractor's performance of work under its contract with the general contractor, which must await a determination of liability in the underlying personal injury action").

Therefore, even though plaintiffs have provided evidence not previously available to them, such evidence does not address the

reasoning of this Court, as expressed in its earlier decision, in denying plaintiffs' earlier requested relief.

Based on the foregoing, it is hereby

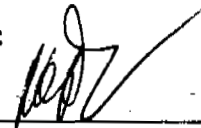
ORDERED that the motion of plaintiffs for leave to renew their motion for summary judgment on the issue of indemnification is granted; and it is further

ORDERED that, upon renewal, the Court adheres to its Decision and order, dated May 5, 2009, denying as premature plaintiff's request for a declaration that Virginia Surety Company, Inc. has a duty to indemnify them in the underlying personal injury action.

Dated: September 15, 2010

New York, NY

ENTER:



Michael D. Stallman, J.S.C.

FILED
SEP 17 2010
NEW YORK
COUNTY CLERK'S OFFICE