Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY
Present: HONORABLE PATRICIA P. SATTERFIELD IAS TERM, PART 19
Justice

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ZAHID ZAIDI,

Plaintiff,

-against-

NEW YORK BUILDING CONTRACTORS, LTD., and SALVATORE VALENZA CONTRACTORS, INC., and VALENZA CONTRACTORS, INC.,

Defendants.

Index No.: 8641/05
Motion Date: 9/8/10
Motion Cal. No.: 34
Motion Seq. No.: 9

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NEW YORK BUILDING CONTRACTORS, LTD., and VALENZA CONTRACTORS, INC.,

Third-Party Plaintiffs,

- against -

LTC ELECTRIC, INC.,

Third-Party Defendant.

TP Index No.: 350705/05

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The following papers numbered 1 to 9 read on this motion by third party defendant LTC Electric, Inc., for an order: (1) pursuant to CPLR 2221(a) and (d), seeking leave to reargue that portion of the moving third-party defendant's previous motion for summary judgment, seeking dismissal of the fourth cause of action pleaded in the third-party complaint; and (2) upon reargument, granting such portion of the third-party motion which sought dismissal of the fourth cause of action in the third-party complaint, based on matters of fact and law which were overlooked or misapprehended by the court in determining that portion of such prior motion.

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	1 - 4
Affirmation in Opposition.....	5 - 6
Reply Affirmation-Exhibits.....	7 - 9

Upon the foregoing papers, it is hereby ordered that the motion is disposed of as follows:

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Zahid Zaidi, on November 21, 2002, when he fell from a ladder during the course of his employment with third-party defendant LTC Electric, Inc. ("LTC Electric"). The accident occurred at a construction site located at 45-80 162nd Street in Queens, New York, which at the time of the accident was owned by defendant/third-party plaintiffs New York Building Contractors, Ltd. Defendant Salvatore Valenza Contractors, Inc. and defendant/third-party plaintiff Valenza Contractors, Inc., were allegedly the general contractors for construction at the subject premises. Defendants/third-party plaintiffs New York Building Contractors, Ltd. and Valenza Contractors, Inc., filed a third party complaint asserting four causes of action against LTC Electric, as plaintiff's employer. The first cause of action asserted a claim for common-law indemnification; the second cause of action sounds in common law or contractual indemnification; the third cause of action seeks contractual indemnification; and the fourth cause of action alleges breach of contract for failing to procure insurance on behalf of the third-party defendants. By order dated April 16, 2007, this Court granted LTC Electric's motion for summary judgment to the extent that all causes of actions asserted against it, except the fourth cause of action, were dismissed. By further decision of this Court, dated January 23, 2008, the motion by LTC Electric for reargument of that prior motion to dismiss insofar as it denied dismissal of the fourth case of action was granted, and upon reargument, the motion to dismiss was granted, without opposition, and the fourth cause of action set forth in the third-party complaint hereby was dismissed.

Thereafter, by Order dated April 10, 2008 (Schulman, J.), third party plaintiffs' motion to vacate its default in appearing at the trial of the action and inquest, to restore the action to the trial calendar and to vacate the January 23 2008 order of this Court, was denied. By Decision and Order dated April 14, 2009, the Appellate Division, Second Department, reversed the April 10, 2008 order, and held, inter alia, that the "Supreme Court erred in denying that branch of the defendants' motion which was to vacate the prior order dated January 23, 2008, granting, upon reargument, the third-party defendant's unopposed motion for summary judgment dismissing the fourth cause of action in the third-party complaint." Finding that there was "conflicting evidence with respect to the issue of whether the third-party defendant's motion for leave to reargue was properly served," the Appellate Division ordered a hearing and a new determination. On their July 14, 2010 appearance before Justice Schulman, the parties stipulated to waive "the hearing in lieu of the third party defendant refiling their motion to reargue" before this Court. Upon refiling, LTC Electric now moves for leave to reargue the denial of that prong of its prior summary judgment motion, and upon reargument, granting dismissal of the fourth cause of action in the third party complaint, based on

matters of fact and law which were overlooked or misapprehended by the court in determining that portion of such prior motion.

In its prior decision this Court, in denying that prong of the summary judgment motion seeking dismissal of the fourth cause of action, stated:

> In opposition to summary judgment, defendants/third-party plaintiffs New York Building Contractors and Valenza Contractors submit an affirmation by their attorney, Lawrence A. Kushnick. Mr. Kushnick states that the aforementioned retained LTC Electric to perform electrical work at the subject premises. According to Mr. Kushnick, LTC Electric verbally promised defendants/third-party plaintiffs that it would procure insurance to provide them with coverage, as additional insureds, in the event of a loss for personal injuries occasioned by a work site accident. Mr. Kushnick indicates that LTC Electric had instead merely procured a policy with a blanket endorsement indicating that only those who had agreed in a written contract to be named as an additional insureds would be treated as additional insureds. Since the purported agreement that additional insured coverage would be provided for the benefit of the defendants/third-party plaintiffs was verbally made, the insurance obtained by LTC Electric does not provide coverage for plaintiff's accident. As a result, the defendants/third-party plaintiffs contend that LTC Electric did not comply with the verbal contract to provide full coverage for them.
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> That branch of the motion which seeks summary judgment dismissing the defendants/third-party plaintiffs' fourth cause of action for breach of contract arising from LTC Electric's failure to procure personal injury insurance coverage with respect to the subject project is denied. In light of the sharply disputed and contradictory documentary evidence submitted by the parties, a triable issue of fact exists with respect to whether LTC Electric agreed to provide the type of coverage that is at issue herein. (See generally, Daliendo v Johnson, 147 AD2d 312 [1989].)

A motion to reargue allows a party to establish that the court "overlooked or misapprehended the relevant facts" or "misapplied any controlling principle of law," in determining the prior motion. Cruz v. Masada Auto Sales, Ltd., 41 A.D.3d 417 (2d Dept. 2007); Collins v. Stone, 8 A.D.3d 321 (2d Dept. 2004; Delgrosso v. 1325 Ltd. Partnership, 306 A.D.2d 241 (2d Dept. 2003). "The motion does not offer an unsuccessful party [] successive opportunities to present arguments not previously advanced (citations omitted)." Pryor v. Commonwealth Land Title Ins. Co., 17 A.D.3d 434 (2d Dept. 2005); Amato v. Lord & Taylor, Inc., 10 A.D.3d 374 (2d Dept. 2004). CPLR 2221, and caselaw interpreting that statutory provision, condition a grant of such a motion "upon matters

of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." In support of its motion to reargue the denial of that branch of the motion to dismiss the fourth cause of action, LTC Electric contends that the Court overlooked the parol evidence rule, the application of which would compel the dismissal of that cause of action. LTC Electric reiterates that the "attempt to inject such oral agreement, even if it existed, to modify the terms of the already-signed proposal/contract, violates the Parol Evidence Rule," and correctly points out that the "Court did not analyze and made no mention of the Parol Evidence rule or its application to the claims contained in the fourth cause of action of the third-party complaint."

In opposition, the third party plaintiffs argue that this Court did not err in refusing to give weight to the parol evidence rule because no written agreement is being sought to be modified. The allegations contained in the fourth cause of action set forth that the parties entered into a contract, pursuant to which "LTC Electric, Inc. was obligated to obtain liability insurance coverage for the benefit of the third-party plaintiffs such as would insure the third-party plaintiffs from the suit of the plaintiff herein." They argue that whether an oral agreement existed between the parties raises a question of fact, stating:

> There is plenty of evidence that such an agreement did exist. LTC did, in fact, perform work on the site and procured insurance certificates naming Third-Party Plaintiffs as certificate holders despite the absence of any language in the proposal regarding insurance or any details regarding the location of the site where the work was to be performed. See Exhibit F of LTC's instant motion. It is clear that, since LTC did in fact commence working, the parties must have entered into a subsequent oral agreement in which they discussed the specifics of the work to be performed. If such an agreement did exist– and that is a question of fact which precludes summary judgment–parol evidence would be admissible to determine its terms.

This Court agrees.

The conflicting statements made by third party plaintiffs' principal and by third party defendant's principal raise an issue of fact whether LTC Electric orally agreed to name third party plaintiff as an additional insured under its general liability policy. Although it is well settled that "absent fraud or mutual mistake, where the parties have reduced their agreement to an integrated writing, the parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing" (Marine Midland Bank-Southern v. Thurlow, 53 N.Y.2d 381, 387 (1981)), and while "evidence of the alleged oral agreement, which would contradict and vary the terms of [an agreement] is precluded by the parol evidence rule" (Sabo v. Delman, 3 N.Y.2d 155, 161 (1957); Harris v. Hallberg, 36 A.D.3d 857 (2nd Dept. 2007)), neither preclusion applies here. The only written memorandum of understanding between the parties is the work proposal that is silent as to any issue other than the work to be done and the schedule of payments to be made. Testimony on any other issue in no way

would create any ambiguity with respect to the work proposal. See, also, W.W.W. Assocs., Inc. v. Grancontiere, 77 N.Y.2d 157, 163 (1990) ["It is well settled that extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous upon its face"]. This Court thus concludes on the record now before it that there is an issue of fact with respect to the existence of an oral agreement, rendering summary judgment on the breach of contract cause of action inappropriate. See, Pyramid Brokerage Co., Inc. v. Zurich American Ins. Co., 71 A.D.3d 1386 (4th Dept. 2010).

Accordingly, based upon the foregoing, third party defendant's motion for reargument is granted, and upon reargument, this Court adheres to its original decision which granted summary judgment to the extent that all causes of actions asserted against it, except the fourth cause of action, were dismissed.

Dated: October 25, 2010

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J.S.C.