

Orchard Mgt., Inc. v Insurance Co. of Greater N.Y.

2010 NY Slip Op 33266(U)

November 15, 2010

Supreme Court, New York County

Docket Number: 602476/05

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

Index Number : 602476/2005
ORCHARD MANAGEMENT
VS.
INSURANCE CO. GREATER NY
SEQUENCE NUMBER : 009
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
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 for*

affaded

FILED
NOV 23 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/15/10

[Signature]

J.S.C.
EMILY JANE GOODMAN

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
ORCHARD MANAGEMENT, INC. and
234-240 EAST 25th STREET ASSOCIATES, L.P.,

Plaintiffs,

-against-

Index No. 602476/05

INSURANCE COMPANY OF GREATER NEW YORK,
242 EAST 25th STREET ASSOCIATES, L.L.C.,
C. GERSHON COMPANY, INC.,
J.E. LEVINE BUILDERS, INC.,
STEPHEN B. JACOBS GROUP, P.C.,
ROBERT DERECTOR ASSOCIATES, INC.,
THE CANTOR SEINUK GROUP, INC.,
SOIL MECHANICAL DRILLING AND TESTING CORP.,
and 242 EAST 25th STREET CORPORATION,

Defendants.

-----x
J.E. LEVINE BUILDERS, INC.,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 591266/05

GOLDEN VALE CONSTRUCTION CORP.,

Third-Party Defendant.

-----x
INSURANCE COMPANY OF GREATER NEW YORK,

Second Third-Party Plaintiff,

-against-

Second Third-Party
Index No. 590318/06

242 EAST 25th STREET CORPORATION and
242 EAST 25th STREET ASSOCIATES, L.L.C.,

Second Third-Party Defendants.

-----x
INSURANCE COMPANY OF GREATER NEW YORK,

Third Third-Party Plaintiff,

Third Third-Party
Index No. 590388/07

-against-

FILED
NOV 23 2010
NEW YORK
COUNTY CLERKS OFFICE

C. GERSHON COMPANY, INC.,
J.E. LEVINE BUILDER, INC,
STEPHEN B. JACOBS GROUP, P.C.,
ROBERT DERECTOR ASSOCIATES, INC.,
THE CANTOR SEINUK GROUP, INC., and
SOIL MECHANICAL DRILLING AND TESTING CORP.,

Third Third-Party Defendants.

-----x

Motion Seq 009

EMILY JANE GOODMAN, J.S.C.:

The Cantor Seinuk Group, Inc. (Cantor), the structural engineer for the project who signed the initial TR-1, filed with DOB, indicating that it was responsible for structural underpinning and shoring work, among other tasks, moves to reargue the Decision and Order of the Court, dated April 5, 2010 (Decision), to the extent that it granted The Insurance Company of Greater New York (GNY), as insurer/subrogee, summary judgment on its cross claims against Cantor.

Plaintiffs cross move to sever the trial of their claims against GNY for damages, as the Decision awarded Plaintiffs summary judgment on liability against the insurer. Plaintiffs contend that if the trial is not severed, the bulk the trial would involve issues of indemnification and apportionment, for which Plaintiffs have no interest (i.e., who is responsible for the damages) and the jury would perform two valuations on damages, which might be confusing. It is not disputed that damages under the policy are based on actual cash value, while any damages due to GNY, as subrogee, would be based on fair

market value.

The motion to reargue is opposed by GNY and the owner/developer of the adjoining property, 242 East 25th Street Associates, LLC, 242 East 25th Street Corporation and C. Gershon Company, Inc. (collectively, 242/Gershon) on the basis that the reargument is duplicative of Cantor's cross motion for summary judgment, which was denied as untimely in the Decision, and on the basis that Cantor cannot avoid liability because it filed the TR-1, regardless of its lack of intent to fulfill the responsibilities therein (because it merely intended to be a placeholder), despite its contrary representations in the TR-1 to the Department of Buildings, and on the basis that even if Metric Consulting & Inspection Corporation (who was never implead) performed the controlled inspections, a superceding TR-1 was not filed until after August 8, 2005, a year after the work was done and damages allegedly sustained.

The cross motion to sever is opposed by GNY, Cantor and 242/Gershon, on the basis that severance would be a waste of judicial resources, because defendants in the third party actions would lose the opportunity to cross examine Plaintiffs, because of the risk of inconsistent judgments on damages, because the Court originally granted consolidation for trial, and because Plaintiffs still have a claim against 242/Gershon, in addition to its claim against GNY. GNY also argues, without citing any

relevant policy provision, that Plaintiffs' assertion that the jury will perform two damages valuations is not the case, because Plaintiffs did not repair or rebuild the property, even though GNY acknowledges that valuation of damages under the policy is actual cash value, while valuation of damages due to GNY as subrogee would be based on fair market value.

Discussion

The motion to reargue is granted and upon reargument, the Court reverses its determination that GNY is entitled to summary judgment on its cross claim as to liability against Cantor, as that is an issue of fact for trial. Cantor correctly points out that the court mistakenly conflated Cantor with the other defendants when, on page 28 of the Decision, it granted GNY's cross motion for summary judgment "[b]ecause GNY has made a prima facie showing, and because the co-defendants have not produced evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial." A denial of summary judgment is consistent with the court's finding, on page 34 of the Decision, that "there is an issue of fact with respect to the exact scope of responsibilities assumed by Cantor under its private contract with 242/Gershon and the public TR-1 that bore its signature." However, the court will not address Cantor's arguments that it cannot be held liable, as a matter of law, as those arguments

were made in its untimely cross motion for summary judgment and in any event, were unpersuasive, for the reasons stated in the Decision.

The cross motion for severance is held in abeyance pending oral argument. The Court is concerned with jury confusion if the trial is not severed.¹ If the trial is severed, although the total amount of damages awarded by the two different juries may differ and although defendants in the third party actions would not be entitled to cross Plaintiffs, this is inherent in any situation where an insurer settles and pays a claim, as Plaintiffs contend should have been done here, and later seeks to collect that amount from any wrongdoers.² Accordingly, why such concerns should take precedence over the court's management of its docket, especially where the issue of potential jury confusion is raised, has not been established. Nevertheless, the court will schedule oral argument on this issue before it makes a final determination.

¹GNY provides no support for its contention that although Plaintiffs correctly maintain that the damages due under the policy are based on actual cash value, while damages due to GNY from any tortfeasor are based on fair market value, somehow the valuation is really the same because Plaintiffs did not repair or rebuild the property.

²The fact that Plaintiffs have a claim against 242/Gershon and Levine (which Plaintiffs claim they will withdraw once payment is received by GNY) does not sway the court, as the concern is potential jury confusion.

Accordingly, it is


ORDERED that the court grants reargument; and it is further ORDERED that upon reargument, the court reverses its award of summary judgment in favor of GNY on liability on its cross claim against co-defendant The Cantor Seinuk Group, Inc.; and it is further

ORDERED that the cross motion for severance is held in abeyance pending oral argument, which shall be held on January 6, 2011 at 12 noon.

This constitutes the Decision and Order of the court.

Dated: November 15, 2010

ENTER:



J.S.C.
EMILY JANE GOODMAN

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NOV 23 2010
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