

Tishman Constr. Corp. v Great Am. Ins. Co.
2011 NY Slip Op 31607(U)
June 15, 2011
Sup Ct, NY County
Docket Number: 112959/05
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SCOTTON

PART 55

Index Number : 112959/2005

TISHMAN CONSTRUCTION

vs
GREAT AMERICAN INSURANCE

Sequence Number : 008

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 2/14/11

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-8

9-12

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. — Compliance conf. scheduled for 7/19/11 at 12 noon.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 6/15/11

JANE S. SCOTTON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 55

-----X

TISHMAN CONSTRUCTION CORP. OF
NEW YORK, CARNEGIE HALL CORPORATION
and NATIONAL UNION FIRE INSURANCE
COMPANY OF PITTSBURGH, PA,

Index No. 112959/05

Plaintiffs,

DECISION AND ORDER

-against-

UNFILED JUDGMENT

GREAT AMERICAN INSURANCE COMPANY and
SCHIAVONE CONSTRUCTION COMPANY,

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and notice of entry cannot be served hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).**

Defendants.

-----X

SOLOMON, J.:

This is an action for breach of contract,
indemnification, subrogation and declaratory judgment arising
from a construction accident in a renovation project below
Carnegie Hall. A decision and order dated October 13, 2010
(Prior Order) denied plaintiffs' motion for summary judgment, and
granted in part a cross-motion and separate motion by defendant
Schiavone Construction Company (Schiavone) for summary judgment.
Schiavone now moves to reargue these motions (CPLR 2221), and
plaintiffs cross-move to reargue as well. The facts are set
forth in the Prior Order, and will not be repeated here.

Schiavone Motion

Schiavone had sought summary judgment dismissing the
first cause of action by plaintiffs Tishman Construction Corp. Of
New York (Tishman) and Carnegie Hall Corporation (CHC) seeking
contractual indemnification, on the grounds that these plaintiffs

had waived the claim when they agreed to a waiver of subrogation with Schiavone in the underlying construction contract. In the Prior Order, the court held that Schiavone was not entitled to summary judgment on this issue. The court looked to the contract between CHC and Tishman, which required Tishman to obtain a broad waiver of subrogation from its contractors in favor of CHC and Tishman. The court found that there was no waiver of subrogation in Schiavone's contract with Tishman, and that Schiavone had not obtained a waiver of subrogation from its insurer, National Union. Citing the Court of Appeals decision in *Kaf-Kaf, Inc. v Rodless Decorations, Inc.* (90 NY2d 654 [1997]), the court found that Schiavone could not rely upon a waiver of subrogation defense because it had not obtained such a waiver from its insurer.

Schiavone now contends that the court misapprehended important facts in that the contract between Tishman and Schiavone did include a waiver of subrogation provision, and Schiavone's insurance policy with its primary carrier, plaintiff National Union Fire Insurance Company of Pittsburgh, PA (National Union), included a waiver of subrogation. Plaintiffs do not contest either of these facts. Schiavone submits the waiver of subrogation provision from its National Union policy, stating that it did not submit it on the prior motion because there was no dispute on this fact. These documents show that indeed the

court misapprehended a significant fact, and so reargument and renewal is warranted.

Plaintiffs argue that even when these documents are taken into account, Schiavone has failed to show that it performed its obligation under the Tishman-Schiavone contract because the excess coverage provided to Schiavone by defendant Great American Insurance Company (GAIC) does not have a waiver of subrogation provision. If plaintiffs were to recover from GAIC, it would be on the basis that Tishman and CHC are additional insureds under the policy, or that National Union has a subrogated claim against Schiavone. GAIC submits a memorandum of law and exhibits in support of Schiavone's motion, and in opposition to plaintiffs' cross-motion. It points to the "Cross Suits Exclusion" in its policy, which excludes "any liability of any 'insured' covered by this policy to any other 'insured' covered under this policy" (GAIC Mem. of Law, Ex. 3, Bates Stamp No. 2609). By its terms, it excludes claims by or on Schiavone's behalf against Tishman and CHC arising from this contract.

While admitting that Schiavone's National Union policy has an express waiver of subrogation, Tishman and CHC argue that the GAIC policy also is required to have an express waiver of subrogation provision, and that it was not enough to exclude coverage for suits between its insureds. Plaintiffs' argument is unpersuasive. The GAIC exclusion is broader than a waiver of

subrogation, but in this instance, it offers Tishman and CHC the same protection from liability.

In the Prior Order, the court focused on an apparent lack of mutuality on Schiavone's part by failing to obtain insurance with a subrogation waiver. Schiavone obtained a broad waiver of subrogation from its insurer that satisfies its contractual obligation to Tishman, and the Cross Suits Exclusion in the GAIC policy satisfies the mutuality requirement as well. Notably, Tishman's and CHC's defense costs and liability to the injured plaintiffs in the underlying lawsuits were satisfied from insurance, so the only damages attributable to their contractual indemnification claim would be to satisfy their insurers by way of subrogation (one of whom is National Union).

The significance of the waiver of subrogation clause is that, if enforceable, plaintiffs have no subrogation claim, and National Union has no basis for recovery. Moreover, Tishman and CHC have no suit for damages in their own names because the underlying actions were defended and paid from insurance (see, *Osowski v AMEC Constr. Mgt., Inc.*, 69 AD3d 99, 106 - 107 [1st Dept 2009]).

Tishman/CHC Cross-Motion

Tishman and CHC seek leave to reargue the Prior Order's denial of their motion for summary judgment on the contractual indemnification cause of action. This cross-motion fails in

light of the determination that contractual indemnification is barred by the waiver of subrogation. The cross-motion would be denied in any event.

First, Tishman and CHC argue that they should have been granted summary judgment because the indemnification clause is invoked where a claim arises from Schiavone's work and the alleged injury is due to the negligence of Schiavone, its contractor, vendor or materialman (Prior Order, 9). Plaintiffs argue that the injuries in the underlying actions must be the result of someone's negligence, so Schiavone is liable. However, even though one of the underlying actions was tried to verdict, there has not been a finding of negligence by any party; Tishman and CHC were held liable under Labor Law § 240(1), which does not require a showing of negligence. As explained in the Prior Order, there are issues of fact with respect to Schiavone's negligence, and the negligence of a supplier of an allegedly defective piston to Schiavone's vendor is not attributable to Schiavone under the contractual indemnification provision, because the equipment supplier was not Schiavone's subcontractor, vendor or materialman.

In their reply on the cross-motion, plaintiffs submit a copy of a contract between Schiavone and its vendor, Stokes Industries, Inc. (Aff. Of Richard Imbrogno, Esq., Ex. A) (see Prior Order regarding Stokes's role in the accident). This is

meant to show that the damages arose from the negligence of Schiavone's vendor, so contractual indemnification is warranted. As a threshold matter, there is no indication that this document was part of the prior motion, so it does not provide a basis for reargument. Substantively, as explained in the Prior Order, a jury determined that Stokes was not negligent, so evidence that Stokes was Schiavone's vendor does not support plaintiffs' position. Accordingly, plaintiffs' cross-motion to reargue is denied. It hereby is

ORDERED that Schiavone's motion to renew and reargue is granted, and upon reargument, that part of the Prior Order which denied Schiavone's motion and cross-motion for summary judgment dismissing the first cause of action hereby is vacated; and it further is

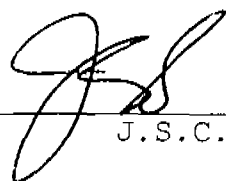
ORDERED that plaintiffs' cross-motion for leave to reargue is denied; and it further is



ORDERED, ADJUDGED and DECLARED that Schiavone is not obligated to indemnify Tishman and CHC under the relevant contract; and it further is

ORDERED that counsel shall appear for a compliance conference in Part 55 on July 19, 2011 at 12 noon to discuss whether there are any remaining issues in this lawsuit, and if so, how it shall proceed.

Dated: June 15, 2011

Enter:



J.S.C.



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