

**Crystal Clear Dev., LLC v Devon Architects of N.Y.,
P.C.**

2011 NY Slip Op 31907(U)

June 29, 2011

Sup Ct, Nassau County

Docket Number: 007851/09

Judge: Thomas P. Phelan

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.

SCAW

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,
Justice.

CRYSTAL CLEAR DEVELOPMENT, LLC,

Plaintiff,

-against-

DEVON ARCHITECTS OF NEW YORK, P.C.,

Defendant.

TRIAL/IAS PART 2
NASSAU COUNTY

ORIGINAL RETURN DATE: 04/08/11
SUBMISSION DATE: 04/22/11
Index No. 007851/09

MOTION SEQUENCE ## 7, 8

The following papers read on this motion:

Notice of Motion.....	1
Notice of Cross-Motion.....	2
Reply Affirmation.....	3
Memorandum of Law.....	4

Defendant moves for an order granting it leave to renew/reargue its prior cross-motion for summary judgment and upon such renewal/reargument granting defendant's cross-motion for summary judgment dismissing the amended verified complaint or, in the event the motion to renew/reargue is denied, granting defendant leave to file the motion for summary judgment more than sixty (60) days after the filing of the note of issue and upon granting such leave, granting defendant summary judgment dismissing the amended verified complaint in its entirety.

Plaintiff cross moves for an order granting leave to reargue that part of this court's decision which granted defendant leave to amend its answer and for reinstatement of the note of issue vacated by order of the court dated March 15, 2011 (Cozzens, J.), or, in the alternative, granting retroactive effect to the newly filed note of issue.

A motion to reargue is addressed to the discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the facts or misapplied the law or for some other reason improperly decided the prior motion. (CPLR 2221(d)(2); *Foley v. Roche*, 68 A.D.2d 558 [1st Dept. 1979]; *Collins v. Stone*, 8 A.D.3d 321 [2d Dept. 2004]). The motion "shall be made within thirty days after services of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221(d)(3)).

This the plaintiff has failed to do. The Notice of Entry of this court's order dated January 26, 2011 (Phelan, J.), is dated February 8, 2011. Plaintiff's cross-motion was not made until April 13, 2011, more than thirty days after the written notice of entry, and is, therefore, untimely. Unlike motions for summary judgment, CPLR 2221(d)(3) does not confer discretion upon the courts with respect to belated cross-motions for leave to reargue. Although an untimely motion for leave to reargue may be considered by the court "where a timely taken yet unsubmitted appeal is pending," this court declines to do so (*Dugas v. Bernstein*, 5 Misc.3d 818, 827 [Sup. Ct., New York Co. 2004]). Accordingly, plaintiff's cross-motion for leave to reargue is denied.

A motion to renew is to be based upon any new evidence or any evidence that could not have been discovered with due diligence before the prior motion, which would warrant renewal. (*In re Eshaghian*, 7 A.D.3d 707 [2d Dept. 2004]; *Orange and Rockland Utilities, Inc. v. Assessor of Town of Haverstraw*, 304 A.D.2d 668 [2d Dept. 2003]).

Renewal is sought by defendant on the grounds that its cross-motion for summary judgment was denied as premature in that its amended answer incorporating the defenses of waiver and release had not been served and that it has now been served. As the prior motion for summary judgment was not decided on the merits, renewal is granted.

This action was brought for breach of contract, negligence/malpractice, fraudulent representations and gross negligence and individual liability against Steven Lane. By short form order dated May 10, 2010 (Phelan, J.), the third and fourth causes were dismissed, and the caption was amended to delete the individual defendant.

Plaintiff, who was the owner of property located at 240 Frost Street, Brooklyn, New York (the "Project"), seeks recovery against defendant arising from the construction of a new four-story condominium building. According to the complaint, defendant failed to insure that construction work was performed in accordance with approved plans and construction documents approved by the Department of Buildings in breach of its contract with plaintiff. By deed dated June 19, 2008, plaintiff transferred the subject premises to 240 Frost LLC.

On the underlying motion for summary judgment, defendant submitted the affidavit of its principal, Steven Lane, who was personally involved in the Project. Mr. Lane avers that the building under construction was sold in its partially completed state. It is submitted that defendant's plans for the Project were revised and incorporated with changes by the new owner for completion of the Project. The agreement that had been entered into between the parties provided, in pertinent part, as follows:

"36. Drawings, specifications and documents prepared by Devon Architects and our consultants are Instruments of Service for use solely with this Project. Devon Architects and our consultants shall be deemed the authors and owners of the respective Instruments of Service and shall retain all common law, statutory and other reserved rights, including copyrights. . . . Owner and its successors and

assigns shall be granted a limited license to use such Instruments of Service, provided that *no modifications are made to instruments of service without prior consent of Devon* [emphasis added]. In no event shall Devon be liable for work based upon any change, modification or interpretation of the Instruments of Service without the prior consultation or consent of Devon. If Instruments for Service are used to complete construction without the involvement of Devon, Devon shall be released from liability for all work not monitored by Devon.”

Mr. Lane unequivocally stated that “Devon was never consulted nor did it ever provide its prior consent to the plaintiff, or to the new architect or new owner of the subject building, to modify Devon’s plans for use in completing construction of the subject building after Devon’s professional . . . services on the Project ended [January 2007]” (¶4). Defendant submits that it should be granted summary judgment dismissing the complaint based upon the defense of release as provided for in the contract. Counsel for defendant submits that based on the foregoing, plaintiff waived any right that it may have had to the claims interposed in this action.

In opposition to defendant’s motion for summary judgment, counsel for plaintiff contends that defendant’s motion is not supported by an affidavit of defendant. On this motion to renew its motion for summary judgment, defendant submits a copy of the initial motion for summary judgment wherein the affidavit of its principal, Steven Lane, is attached.

Plaintiff next argues that the actual construction deviations from the plans were presented to both defendant and the general contractor. It is submitted that the architectural plans used for the completion of the Project are new plans standing on their own and not modifications of defendant’s defective plans. Counsel for defendant posits that the damages sought are not for work negligently or wrongfully undertaken on the new contracts but for work performed on the defective plans of defendant. Counsel argues that the provisions of the contract between the parties does not release defendant from liability resulting from work done by the general contractor under defendant’s supervision.

Plaintiff submits the affidavit of Pawel Capala, an officer, who avers that significant changes in construction were necessary in order for the Project to be legally approved. As the property had been sold “as is” in July 2008, plaintiff had no further involvement with the construction of the Project (Capala Aff. ¶5).

Jennifer Capala, an officer of plaintiff, also submits her affidavit wherein she avers that she has seen the new plans and that “such new plans filed do not incorporate any portions of the old illegal plans filed by Devon” (¶37) (emphasis in original). Ms. Capala submits that defendant falsely certified that its plans were in conformity with the rules and regulations of the New York City Department of Buildings.

It is submitted that the defense of waiver and release is inapplicable in the instant matter as a new architect was retained by the subsequent owner of the subject property after defendant herein

defaulted. Counsel for plaintiff submits that this at a minimum raises an issue of material fact precluding summary judgment. The court agrees. Waiver is generally a question of fact (*Dice v. Inwood Hills Condominium*, 237 AD2d 403 [2d Dept. 1997]).

Defendant's argument that plaintiff's submissions contradict plaintiff's own prior submissions, the deposition testimony of plaintiff's principal, Jennifer Capala, and the public records is unavailing. Issues of credibility should not be decided on a motion for summary judgment (*Skiadas v. Terovolas*, 219 A.D.2d 635 [2d Dept. 1995]). Questions of credibility should be reserved for the trier of fact (*Republic Long Island, Inc. v. Andrew J. Vanacore, Inc.*, 29 AD3d 665 [2d Dept. 2006]). Moreover, defendant's contentions that the Amended Verified Complaint is tantamount to evidentiary proof in admissible form are mistaken as the pleading is verified by an attorney and not by a party.

Taking into consideration the arguments of both parties, upon renewal the court denies defendant's application for summary judgment.

Plaintiff's cross-motion for reinstatement of the note of issue vacated by order of the court dated March 15, 2011 (Cozzens, J.), or, in the alternative, granting retroactive effect to the newly filed note of issue is denied as the relief sought has not been addressed in papers submitted in support of the cross-motion.

This decision constitutes the order of the court.

Dated: 6-29-11

HON THOMAS P. PHELAN
Thomas P. Phelan
THOMAS P. PHELAN, J.S.C.

Attorneys of Record:

Felipe E. Orner, Esq.
Attorney for Plaintiff
72-29 137th Street
Flushing, NY 11367

Milber Makris Plousadis & Seiden, LLP
Attention: Joseph V. Cambareri, Esq.
Attorneys for Defendants
1000 Woodbury Road, Suite 402
Woodbury, NY 11797

ENTERED

JUL 01 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**