

**Orozco v Smith & De Groat, Inc.**

2011 NY Slip Op 32356(U)

August 25, 2011

Sup Ct, Nassau County

Docket Number: 1732/09

Judge: Denise L. Sher

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**SHORT FORM ORDER**

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER  
Acting Supreme Court Justice

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JORGE DIAZ OROZCO,

Plaintiff,

- against -

SMITH & DE GROAT, INC. and COUNTY OF NASSAU,

Defendants.

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SMITH & DE GROAT, INC.,

Third-Party Plaintiff,

- against -

WILLIAM A. TEAGUE RESTORATIONS INC.,

Third-Party Defendant.

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SMITH & DE GROAT, INC.,

Second Third-Party Plaintiff,

- against -

WILLIAM A. TEAGUE RESTORATIONS INC.,

Second Third-Party Defendant.

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**The following papers have been read on this motion:**

	Papers Numbered
Notice of Motion, Affirmation and Exhibits	1
Affirmation in Opposition by Plaintiff	2

TRIAL/IAS PART 32  
NASSAU COUNTY

Index No.: 1732/09  
Motion Seq. No.: 07  
Motion Date: 07/01/11  
**XXX**

Upon the foregoing papers, it is ordered that the motion is decided as follows:

Defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, Inc. (“Smith & DeGroat”), moves, pursuant to CPLR § 2221, for an order granting it leave to reargue its motion for summary judgment seeking dismissal of plaintiff’s common law negligence and Labor Law § 220 causes of action, and a declaration that third-party defendant/second third-party defendant William A. Teague Restorations Inc. (“Teague”) is contractually obligated to defend and indemnify defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, including reimbursement of all attorney’s fees incurred to date and through the conclusion of this case; moves, pursuant to CPLR § 3112, for an order granting it summary judgment dismissing plaintiff’s claims sounding in common law negligence and Labor Law § 220; moves, pursuant to CPLR § 3212, for an order granting it summary judgment and declaring that third-party defendant/second third-party defendant Teague is contractually obligated to defend and indemnify defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, including reimbursement of all attorney’s fees incurred to date and through the conclusion of this case; and moves for an order directing the Clerk of the Court to enter judgment against third-party defendant/second third-party defendant Teague and in favor of defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, with statutory costs and disbursements. Plaintiff opposes the motion. Third-party defendant/second third-party defendant Teague failed to submit any opposition to the instant motion.

Initially, the Court will note that the case of *Jorge Diaz Orozco v. Smith & DeGroat, Inc. and County of Nassau*, was settled. Therefore, the relief requested in the instant motion with respect to plaintiff Jorge Diaz Orozco, specifically defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat’s applications, pursuant to CPLR § 2221, for an order granting

it leave to reargue its motion for summary judgment seeking dismissal of plaintiff's common law negligence and Labor Law § 220 causes of action and, pursuant to CPLR § 3112, for an order granting it summary judgment dismissing plaintiff's claims sounding in common law negligence and Labor Law § 220 are hereby **MOOT** and therefore **DENIED**.

The matters of *Smith & De Groat, Inc., third-party plaintiff, v. William A. Teague Restoration Inc., third-party defendant, and Smith & De Groat, Inc., second third-party plaintiff, v. William A. Teague Restoration Inc., second third-party defendant*, still remain active matters. Therefore, the Court will address the applications in defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's instant motion that pertain to third-party defendant/second third-party defendant Teague. As previously mentioned, no opposition was submitted by third-party defendant/second third-party defendant Teague.

Defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat submits that it is entitled to summary judgment concerning its claims against third-party defendant/second third-party defendant Teague because the Court "erred in issuing its Short Form Order insofar as it misapplied the law concerning Teague's requirement to obtain counsel to defend itself in this action. The Court should not have considered any motion papers submitted by Teague, which would have resulted in Smith's motion for summary judgment being submitted unopposed." Defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat cites CPLR § 321(a) for the premise that a corporation shall appear by attorney. Defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat contends that it is undisputed and uncontested that third-party defendant/second third-party defendant Teague is a domestic corporate entity, incorporated under and pursuant to the laws of the State of New York, yet was not represented by counsel in the instant action. Third-party defendant/second third-party

[\* 4]

defendant Teague, by its own admission, appeared *pro se* in this action and all motion papers were submitted by third-party defendant/second third-party defendant Teague itself, not by counsel. Defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat argues that this Court erred by considering third-party defendant/second third-party defendant Teague's *pro se* motion papers and, that without such consideration, there would have been no grounds upon which to deny defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's motion for summary judgment as concerned its claims against defendant/second third-party defendant Teague.

It is well settled that "[m]otions for re-argument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon showing that the court overlooked or misapprehended the facts or law for some [other] reason mistakenly arrived at earlier." See *Carrillo v. PM Realty Group*, 16 A.D.3d 611, 793 N.Y.S.2d 69 (2d Dept. 2005). See also CPLR § 2221 (d)(2); *Barnett v. Smith*, 64 A.D.3d 669, 883 N.Y.S.2d 573 (2d Dept. 2009); *Frisenda v. X Large Enterprises Inc.*, 280 A.D.2d 514, 720 N.Y.S.2d 187 (2d Dept. 2001); *William P. Pahl Equipment Corp. v. Kassis*, 182 A.D.2d 22, 588 N.Y.S.2d 8 (1<sup>st</sup> Dept. 1992); *Foley v. Roche*, 68 A.D.2d 558, 418 N.Y.S.2d 588 (1<sup>st</sup> Dept. 1979), *appeal after remand*, 86 A.D.2d 887, *app den.* 56 N.Y.2d 507.

Notably, the remedy "is not designed to provide an unsuccessful party with successive opportunities" to make repetitious applications, "rehash questions already decided" or "present arguments different from those originally presented." See *McGill v. Goldman*, 261 A.D.2d 593, 691 N.Y.S.2d 75 (2d Dept. 1999); *Mazinov v. Rella*, 79 A.D.3d 979, 912 N.Y.S.2d 896 (2d Dept. 2010); *William P. Pahl Equipment Corp. v. Kassis*, *supra*. See also *Gellert & Rodner v. Gem Community Management Inc.*, 20 A.D.3d 388, 797 N.Y.S.2d 316 (2d Dept. 2005); *Pryor v. Commonwealth Land Title Ins. Co.*, 17 A.D.3d 434, 793 N.Y.S.2d 452 (2d Dept. 2005); *Amato*

[\* 5]  
*v. Lord & Taylor, Inc.*, 10 A.D.3d 374, 781 N.Y.S.2d 125 (2d Dept. 2004).

Although the Court initially denied defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's motion for summary judgment against third-party defendant/second third-party defendant Teague, upon re-argument the Court finds that the *pro se* opposition papers submitted by third-party defendant/second third-party defendant Teague should not have been considered by this Court as the corporate defendant was not represented by counsel. Consequently, since third-party defendant/second third-party defendant Teague failed to submit legally sufficient opposition to defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's motion for summary judgment, it therefore failed to meet its burden to come forward with competent evidence to demonstrate the existence of a material issue of fact, the existence of which necessarily precludes the granting of summary judgment and necessitates a trial.

Furthermore, upon re-argument, the Court determines that defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's motion for summary judgment as against third-party defendant/second third-party defendant Teague with respect to third-party defendant/second third-party defendant Teague's contractual obligations to defend defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat against plaintiff's claims should have been granted.

Accordingly, it is hereby

**ORDERED** that defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's motion, pursuant to CPLR § 2221, for an order granting it leave to reargue its motion for summary judgment seeking a declaration that third-party defendant/second third-party defendant Teague is contractually obligated to defend and indemnify defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, including reimbursement of all

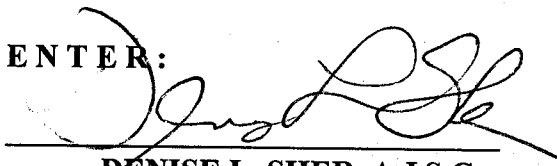
[\* 6]  
attorney's fees incurred to date and through the conclusion of this case is hereby **GRANTED**;  
and it is further

**ORDERED** that defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat's motion, pursuant to CPLR § 3212, for an order granting it summary judgment and declaring that third-party defendant/second third-party defendant Teague is contractually obligated to defend and indemnify defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, including reimbursement of all attorney's fees incurred to date and through the conclusion of this case is hereby **GRANTED**; and it is further

**ORDERED** that the Clerk of the Court enter judgment against third-party defendant/second third-party defendant Teague and in favor of defendant/third-party plaintiff/second third-party plaintiff Smith & DeGroat, with statutory costs and disbursements.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

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Dated: Mineola, New York  
August 25, 2011

**ENTERED**

AUG 29 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**