

Konstantin v 630 Third Ave. Assoc.

2011 NY Slip Op 32739(U)

September 2, 2011

Supreme Court, New York County

Docket Number: 190134/10

Judge: Sherry Klein Heitler

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

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

KONSTANTIN, DAVID, ET AL.

INDEX NO.

190134/10

MOTION DATE

- v -

MOTION SEQ. NO.

05

630THIRD AVE. ASSOCIATES, ET AL.
(TISHMAN)

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is decided as

*per the memo discussed
of this date.*

FILED

OCT 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: Sept. 26, 2011

HON. SHERRY KLEIN HEITLER ^{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 : PART 30

----- X

DAVID KONSTANTIN and RUBY KONSTANTIN,

Plaintiffs,

-against-

630 THIRD AVENUE ASSOCIATES, et al. [Tishman],

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

Index No. 190134/10
Motion Seq 005

DECISION AND ORDER

FILED

OCT 03 2011

NEW YORK
COUNTY CLERK'S OFFICE

This motion pertains to an application by defendant TISHMAN CONSTRUCTION CORPORATION, as successor in interest to TISHMAN REALTY & CONSTRUCTION CO., INC. (hereinafter "Tishman Realty II"), for an order permitting plaintiffs to sign a No Opposition Summary Judgment Motion and Order ("NOSJM"), submitted by Tishman Realty II to all parties on October 25, 2010, which would have the effect of dismissing this action and all cross claims asserted against Tishman Realty II. Upon objection by co-defendant TISHMAN LIQUIDATING CORPORATION ("TLC"), Tishman Realty II was unable to obtain a signed NOSJM, which precipitated this motion.

The basis for Tishman Realty II's NOSJM (and this motion), is Tishman Realty II's contention that it was not the general contractor for, and did not have any presence at the construction site known as Olympic Towers, as to which plaintiff David Konstantin alleges he was exposed to asbestos, nor did Tishman Realty II even exist during the time period that plaintiff Konstantin alleges asbestos exposure at that site. The Olympic Towers project apparently was completed in or about 1976. Tishman Realty II asserts that it was initially

incorporated as "Tiona Realty & Construction Co., Inc." on December 18, 1979 ("Tiona"), four years after the Olympic Towers project was completed, and that in March 1981, six years after that fact, Tiona's name was changed to "Tishman Realty & Construction Co., Inc.", which name had then become available to it by reason of the original company's recent change of name and dissolution. Tishman Realty II explains that on January 31, 1980 Tiona purchased certain assets free of "any liability or alleged liability...relating to any matter, event or thing occurring on or prior to January 31, 1980..." from Rockefeller Center, Inc. (see Moving Papers, dated June 21, 2011, Exh. "K"). It is undisputed that Rockefeller Center, Inc. had acquired such assets in 1976 from the now defunct entity then known as Tishman Realty & Construction Co., Inc. ("Tishman Realty I") which in fact had been the general contractor for the Olympic Towers project. Such acquisition by Rockefeller Center, Inc. included the exclusive rights to the Tishman Realty & Construction Co., Inc. name and trademarks in the event Tishman Realty I was ever dissolved or changed its name. Tishman Realty I, which was incorporated in 1927, changed its name to "Tishman Liquidating Corporation" (referred to herein as "TLC") in 1978.

TLC's opposition to this motion is predicated upon its allegation that Tishman Realty II, and not TLC, is the successor in interest to the now defunct Tishman Realty I, and that it is to Tishman Realty II, therefore, that any liability for plaintiffs' claims herein should attach. There is no mention of a cross claim by TLC.

Justice Joan Madden of this court presided over the trial of this action. On July 11, 2011, in response to Tishman Realty II's CPLR 4401 motion for judgment during trial as to which all parties had the opportunity to submit their proofs, Justice Madden on the record unequivocally dismissed the cause of action against Tishman Realty II asserted by plaintiffs (see Reply

Affirmation, dated July 19, 2011, Exh. "B"). In this regard, the issues raised on this motion by Tishman Realty II for an order dismissing plaintiffs' action against it, and TLC's arguments in opposition thereto, are moot. The July 11, 2011 ruling by Justice Madden, a Justice of coordinate jurisdiction who presided over the trial of this action, is the law of this case. Accordingly, as of July 11, 2011 plaintiffs' action against Tishman Realty II was dismissed.

However, Justice Madden did not at that time also dispose of TLC's cross claim for contribution, as to which Tishman Realty II had also sought dismissal during trial. After granting full opportunity to all parties to argue the issue and present their evidence, Justice Madden severed TLC's cross claim against Tishman Realty II and deferred decision thereon to this court. According to the transcript of that hearing (Reply Affirmation, Exh. "B"), TLC's argument in support of retention of its cross claim similarly turned on the assertion that Tishman Realty II and not TLC is the successor in interest to Tishman Realty I, and that therefore Tishman Realty II is the potentially liable party for claims asserted in connection with Tishman Realty I's actions as general contractor at Olympic Towers. The proofs submitted on that motion *in limine* before Justice Madden are essentially the same proofs as are submitted on this motion at bar.

This motion was fully submitted to me for determination on July 26, 2011. During trial on that same day, Justice Madden ruled that "Tishman Liquidating is the successor to Tishman Realty^[1] and is potentially liable for claims asserted in connection with Tishman Realty's actions as a GC in the two work sites in issue." She further ruled that "Tishman [L]iquidating is judicially estopped from denying that it was formerly known as Tishman Realty, based on its

¹ In this context, Justice Madden's reference to "Tishman Realty" is intended to refer to the Tishman Realty & Construction Co., Inc. which is defined herein as "Tishman Realty I".

admissions in the Public Service Mutual Insurance complaint, and its responses to the interrogatories in the Weitz and Luxenberg [NYCAL] litigation” in which Tishman Liquidating admits it was previously known as Tishman Realty. (See Transcript of Proceedings before Justice Joan A. Madden dated July 26, 2011, pp. 1861-1864.).

In so ruling, Justice Madden relied, among other things, on a securities and exchange commission filing which indicated “that Tishman Liquidating was formerly known as Tishman Realty and that ‘the corporation will remain in existence until the reserve fund for certain fixed and contingent liabilities is exhausted or the corporate liabilities have been satisfied and the balance in the reserve fund is distributed to shareholders’” (*Id.*), and on TLC’s admission in its complaint in an unrelated action entitled *Tishman Liquidating Corporation, et ano v Public Service Mutual Insurance Company, et al.*² that Tishman Liquidating’s sole purpose was to use all available assets to run off its liabilities. Justice Madden also drew from the deposition testimony of one Charles DeBenedittis proffered on the application before her³ that “Tishman Liquidating was formed to liquidate the assets of Tishman Realty, and, that while he assumed there was a document detailing the responsibilities of Tishman Liquidating - - detailing the responsibilities Tishman Liquidating was assuming from Tishman Realty, ‘he had no direct knowledge of such a thing.’” Justice Madden further noted “[s]ignificantly Tishman Liquidating has failed to produce any such document.” (*Id.*). Accordingly, after full and fair hearing the issue of who bears successor liability in respect of Tishman Realty I was decided against Tishman

² Such complaint was also submitted in support of the motion at bar (see Reply Affirmation, Exh. “E”).

³ Such deposition testimony was also submitted by TLC to this court as Exh. “K” in opposition.

Liquidating, and it also is now the law of this case. In this regard, I find and hold that TLC's cross claim against Tishman Realty II must be dismissed. The conclusion reached by Justice Madden that Tishman Liquidating, as successor to Tishman Realty I, is the one who is potentially liable for claims asserted in connection with Tishman Realty I's actions as general contractor at Olympic Towers, absolves Tishman Realty II from any such liability. Such conclusion necessarily defeats TLC's cross claim asserted against Tishman Realty II. (*See, e.g., Stone v Williams*, 64 NY2d 638, 642 [1984]; *cf., Lifshitz v Brady*, 298 AD2d 437 [2d Dept 2002]).

CPLR 1401 provides, in relevant part:

...two or more persons *who are subject to liability for damages* for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought (emphasis added)

Pursuant to CPLR 1401, therefore, the right of contribution requires "that the party seeking contribution and the party from whom contribution is sought be liable, in whole or in part, for the same injury" (*Oursler v Brennan*, 67 AD3d 36 [4th Dept 2009]; *appeal withdrawn* 15 NY3d 848 [2010]). Where, as here, it is concluded that the party from whom contribution is sought is free from the subject liability, as a matter of law a cross motion for contribution cannot survive (*see, Tapinekis v Rivington House Health Care Facility*, 17 AD3d 572 [2d Dept 2005]).

Accordingly, it is hereby

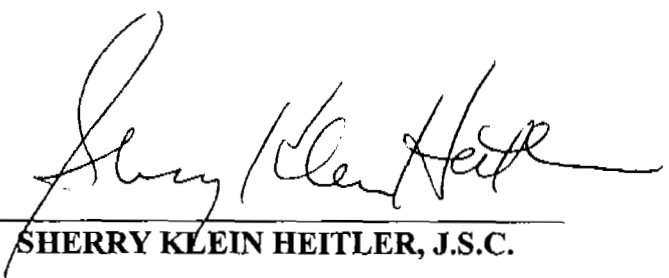
ORDERED, that the branch of Tishman Construction Corporation's (Tishman Realty II's) motion which seeks judgment dismissing plaintiffs' complaint against it is denied as moot by reason of Justice Joan A. Maddens's July 11, 2011 ruling on the same issue in its favor; and it is further

ORDERED, that the branch of Tishman Construction Corporation's (Tishman Realty II's) motion which seeks dismissal of Tishman Liquidating Corporation's cross claim against it for contribution is granted and such cross claim is hereby dismissed in its entirety; and it is further

ORDERED, that the Clerk is directed to mark his records accordingly.

This is the decision and order of the court.

Dated: 9.26.11


SHERRY KLEIN HEITLER, J.S.C.

FILED

OCT 03 2011

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