

Samuels v Consolidated Edison Co. of N.Y., Inc.

2011 NY Slip Op 34298(U)

January 3, 2011

Supreme Court, New York County

Docket Number: 107142/04

Judge: Judith J. Gische

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
William C. Samuels,

Plaintiff,

-against-

Consolidated Edison Company of New York,
Inc.,

Defendant.

-----X
Consolidated Edison Company of New York,
Inc.,

Third-Party Plaintiff,

-against-

Roadway Contracting, Inc.,

Third-Party Defendant.

-----X
Consolidated Edison Company of New York,
Inc.,

Second Third-Party Plaintiff,

-against-

Alex R. Fradkoff, individually, Alex Fradoff, Inc.,
Alex R. Fradkoff, Inc., Howard R. Goldin, individually,
Howard R. Goldin Architect, P.C., Howard R.
Goldin Associates, P.C., Leithlong Construction
Corporation and Theodore Wagner Plumbing and
Heating Corp.,

Second Third-Party Defendants.

-----X

DECISION/ORDER

Index No.: 107142/04

Seq. No.: 005

Present:

Hon. Judith J. Gische

J.S.C.

Third-Party Index No.:
590831/04

Second Third-Party Index No.:
590089/08

FILED

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**NEW YORK
COUNTY CLERK'S OFFICE**

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltf's n/m (RR) w/ JHR affirm, exhs	1
Con Ed opp w/WFT affirm, exhs	2
Theodore Wagner opp w/CBK affirm	3
Roadway Const opp w/DC affirm	4
Pltf's reply w/JHR affirm	5

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action for property damage. In his complaint, plaintiff alleged that Con Edison failed to properly perform excavation work in front of his townhouse, resulting in severe water infiltration and flooding. He also claimed that Con Edison failed to supervise work being done by other contractors on its behalf and that Con Edison improperly maintained its below street vaults.

This action was dismissed by the court on June 3, 2010. The motion at bar is to reargue the court's prior dismissal order which was made on the record and contained in the minutes of that day ("dismissal order"). Plaintiff contends that a written stipulation among the parties dated October 3, 2007 ("stipulation") in another action captioned Samuels v. Fradkoff et al, Supreme Court, N.Y. Co., Index No. 112610/03 ("Fradkoff action") does not preclude this present lawsuit against Con Edison although it contains the following release:

"In an effort to help achieve a settlement of the dispute, Samuels has reduced and withdrawn his claims against the defendants arising out of water damage in the basement of the Townhouse and damage to the structural wall in the basement on the south side of the

Townhouse arising from or relating to Con Edison's work in the front of the Townhouse which is the subject of the pending action ... bearing Index No. 107142/04 (the "Con Edison Action"). Samuels expressly releases the defendants from their share of percentage of liability, if any, for any and all contribution claims which have or may be asserted by Consolidated Edison in the Con Edison Action seeking contribution for the claims asserted by Samuels . . ."

A motion to reargue is addressed to the discretion of the court and is intended to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any principle of law. CPLR § 2221 [d] [2]. Its purpose is not, however, to enable the unsuccessful party to argue once again the very questions decided against him or her (Foley v. Roche, 68 AD2d 558, 567 [1st Dept 1979]). Nor does reargument serve to provide a party an opportunity to advance arguments different from those tendered on the original application (id.). On the other hand, a motion to renew is based upon the discovery of material facts which existed at the time the prior motion was made but were not then known to the party and for that reason not disclosed to the court (Foley v. Roche, *supra*).

Stripping this motion bare of its claim that the court was "too busy" to give the oral application by Con Edison to dismiss this case any due consideration, plaintiff has failed to show what facts the court misapprehended, how it misapplied the law, or why an injustice has been served.

The decision made by the court on June 3, 2010 merely effectuated what was already decided on October 14, 2008 in connection with motions to dismiss by second third party defendants Goldin and Leitlong that the court granted. The court determined at that time that "[the] plain language of the settlement agreement makes it clear that

the damages pertaining therein are one and the same as those alleged in underlying complaint." Plaintiff could have, but failed failed to, take any position on those motions.

Although plaintiff argues that the court impermissibly considered Con Ed's late motion for summary judgment on June 3, 2010, this is incorrect. The court was ready for jury selection that day. The Judicial Hearing Officer (Gammerman) referred the case for a motion in limine. It was not an oral application for summary judgment.

Plaintiff has also failed to present any "new" facts that were unknown to it and, therefore, not disclosed to the court. The nature of this settlement agreement has been known from the outset of this case.

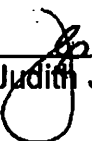
Permission to reargue and renew are denied. There is no basis for the court to reconsider its prior order dismissing this action. The dismissal marking remains.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court

Dated: New York, New York
January 3, 2011

So Ordered:



Hon. Judith J. Gische, JSC

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