

Dreher v City of New York

2013 NY Slip Op 30807(U)

April 17, 2013

Sup Ct, New York County

Docket Number: 112104/08

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 112104/2008
DREHER, JOHN
vs.
CITY OF NEW YORK
SEQUENCE NUMBER : 015
REARGUMENT/RECONSIDERATION

INDEX NO. 112104/08
MOTION DATE 4/7/13
MOTION SEQ. NO. 015

The following papers, numbered 1 to 28, were read on this motion to renew/reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). <u>1-5</u>
Answering Affidavits — Exhibits <u>X motions + opp</u>	No(s). <u>6-21</u>
Replying Affidavits <u>+ opp h X motions</u> <u>Reply to X motions</u>	No(s). <u>22-23</u> <u>24-28</u>

Upon the foregoing papers, it is ordered that this motion is

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

APR 22 2013

NEW YORK COUNTY CLERK'S OFFICE

Dated: April 17, 2013


JOAN M. KENNEY, J.S.C.
J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X
JOHN E. DREHER,

Plaintiff,

-against-

CITY OF NEW YORK, BROOKLYN NAVY YARD
DEVELOPMENT CORPORATION and TDX
CONSTRUCTION CORPORATION,

Defendants.
-----X

Index No. 112104/08

FILED

APR 22 2013

**NEW YORK
COUNTY CLERK'S OFFICE**

TDX CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

-against-

Third-Party Index
No. 590342/09

CALCEDO CONSTRUCTION CORPORATION and
GLASSOLUTIONS UNLIMITED CORP.,

Third-Party Defendants.
-----X

TDX CONSTRUCTION CORPORATION,

Fourth-Party Plaintiff,

-against-

Fourth-Party Index
No. 590057/11

KURITZY GLASS CO., INC.,

Fourth-Party Defendant.
-----X

Joan M. Kenney, J.:

Motions with sequence numbers 015 and 016, and three cross motions are hereby consolidated for disposition.

The facts of this matter are set forth in this court's September 28, 2012 Decision (the Prior Decision), familiarity with which is presumed.

In motion sequence number 015, defendant/third-party defendant Calcedo Construction Corporation (CCC) moves, pursuant to CPLR 2221 (a) and (d), for leave to reargue the Prior Decision with respect to the denial of summary judgment in CCC's favor against third-party defendant Glassolutions Unlimited Corp. (Glassolutions), and, upon reargument, for summary judgment in CCC's favor against Glassolutions on CCC's contractual indemnification claim.

In motion sequence 016, defendants City of New York and Brooklyn Navy Yard Development Corporation (together, defendants) move (1) for leave to reargue defendants' prior motion for summary judgment against CCC, and upon reargument, to grant summary judgment against CCC for contractual indemnification, including reimbursement of defendants' costs and attorneys' fees incurred in this action; (2) to seek clarification, amendment and/or resettlement of the Prior Decision, and/or reargument, pursuant to CPLR 2221 (d), concerning whether defendants are entitled to defense and indemnity, including reimbursement of costs and attorneys' fees, as part of the Prior Decision's grant to defendants of contractual indemnity against Glassolutions; and (3) for leave to reargue, pursuant to CPLR 2221, defendants' prior motion for summary judgment against fourth-party defendant Kuritzky Glass Co., Inc. (Kuritzky), and upon reargument, granting defendants summary judgment on their common-law indemnification claim, including reimbursement of defendants' costs and attorneys'

fees incurred in this action.

In its cross motion, defendant/third- and fourth-party plaintiff TDX Construction Corporation (TDX) moves for leave to reargue its prior motion for summary judgment on its claim for common-law indemnity against Kuritzky, and, upon reargument, to grant TDX summary judgment on that claim, along with reimbursement of its litigation expenses, including attorneys' fees.

CCC cross-moves, pursuant to CPLR 3025, for leave (1) to assert a cross claim for contractual indemnification against Glassolutions, for fees related to this action, including costs and attorneys' fees, and (2) to assert a cross claim against Glassolutions for breach of contract for failure to procure insurance with CCC as an additional insured.

Plaintiff cross-moves, pursuant to CPLR 2221, for leave to reargue the prior motions and cross motions, and upon reargument, to modify the Prior Decision to the extent of reinstating plaintiff's Labor Law § 240 (1) claim, and granting plaintiff summary judgment on the issue of liability.

CCC's Motion (motion sequence number 015) for Leave to Reargue

According to CPLR 2221 (d) (2), a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion[.]"

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided"

(*Mangine v Keller*, 182 AD2d 476, 477 [1st Dept 1992]).

CCC's motion to reargue is denied. The court did not overlook CCC's Second "Cross Complaint"¹ against Glassolutions (which was found as part of Exhibit A to the November 21, 2011 Affirmation of CCC's counsel, McLoughlin). Nor did the court misapprehend CCC's conclusion that Glassolutions and Treverton were at fault, and thus, that CCC should obtain contractual indemnification from Glassolutions (see McLoughlin 11/21/11 Affirm., ¶¶ 98-103). Rather, having considered this evidence, without specifically identifying CCC's Second "Cross Complaint" in the footnote, the court determined that "CCC has not brought a claim for contractual indemnification against Glassolutions" (Prior Decision, at 2, n 2).

In its prior motion papers, CCC clearly identified Article 9.1.1, as amended by Exhibit 6, as the indemnification provision of the CCC/Glassolutions subcontract (McLoughlin 11/21/11 Affirm., ¶¶ 9-10). However, now, for the first time, CCC is claiming that Glassolutions breached a particular provision of the

¹The court assumes that, in using the term "cross complaint," CCC actually means "cross claim."

* 6]
CCC/Glassolutions subcontract, i.e., section 3.14.1, and that breach of this section is the basis for its contractual indemnification claim.

As indicated above, the CCC/Glassolutions subcontract was part of the papers considered in determining the Prior Decision, and CCC had a full and fair opportunity to bring its factual argument concerning section 3.14.1 at that time. By raising it now, for the first time, in its motion papers, CCC is attempting to "include ... matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). As such, the motion must be denied.

CCC's Cross Motion for Leave to Amend

CPLR 3025 (b), which governs "Amendments and supplemental pleadings by leave," provides:

"A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

As set forth in *McGhee v Odell* (96 AD3d 449, 450 [1st Dept 2012]),

"Leave to amend pleadings under CPLR 3025 (b) should be freely given, and denied only if there is prejudice or surprise resulting directly from the delay, or if the proposed amendment is palpably improper or insufficient

as a matter of law. A party opposing leave to amend must overcome a heavy presumption of validity in favor of permitting amendment. Prejudice to warrant denial of leave to amend requires some indication that the defendants have been hindered in the preparation of their case or has [sic] been prevented from taking some measure in support of their position [internal quotation marks, brackets and citations omitted]"

(see also *360 W. 11th LLC v ACG Credit Co. II, LLC*, 90 AD3d 552, 553 [1st Dept 2011] ["Nevertheless, a court must examine the merit of the proposed amendment in order to conserve judicial resources"]; *Castor Petroleum, Ltd. v Petroterminal de Panama, S.A.*, 90 AD3d 424, 425 [1st Dept 2011] [amendment granted when "amendment was premised upon the same facts, transactions or occurrences alleged in the complaint"]; *Perrotti v Becker, Glynn, Melamed & Muffly LLP*, 82 AD3d 495, 498 [1st Dept 2011] ["It is true that on a motion for leave to amend a pleading, the movant need not establish the merit of its proposed new allegations, but must simply show that the proffered amendment is not palpably insufficient or clearly devoid of merit (internal quotation marks, brackets and citations omitted)"]).

In its opposition to CCC's cross motion, Glassolutions contends that CCC's cross motion is procedurally defective because it is not in response to a motion brought by Glassolutions. Pursuant to CPLR 2001, since Glassolutions will not be prejudiced by consideration of the cross motion, the court will disregard this defect and consider CCC's cross motion to amend.

CCC's proposed Second "Cross-Complaint" against Glassolutions now includes the words "contractual indemnification." However, it still does not indicate any basis for the claim against Glassolutions. There is still no reference to any contract, or provision of any contract which would provide the parties and the court with notice of the claim being alleged (see CPLR 3013; Prior Decision, at 2, n 2). Since the proposed Second "Cross Complaint" is insufficient as a matter of law, leave to amend in order to assert this claim is denied.

The proposed Third "Cross-Complaint" appears to be an attempt to allege a cross claim sounding in breach of contract by failure to procure insurance naming CCC as an additional insured (one ambiguity is that the cross claim states that *Glassolutions* "shall insure [CCC] against such damages and all other costs ..."). Once again, CCC is attempting to assert a contractual claim without any reference to a contract or contractual provision to indicate the merit of the claim, or to give the parties and the court notice of the proposed cause of action. Because the proposed Third "Cross-Complaint" is insufficient as a matter of law, leave to amend in order to assert this claim is denied.

TDX's Cross Motion to Reargue Its Claim for Common-Law Indemnification From Kuritzky and for Summary Judgment on That Claim

TDX's motion for leave to reargue its prior motion is granted, but upon reargument, the court adheres to its Prior Decision.

TDX correctly asserts that the court applied inapplicable reasoning in setting forth the general/special employer/employee analysis used in considering whether Kuritzky was negligent or not. However, while the court, in the Prior Decision, found that Glassolutions was negligent, no such finding was made with respect to Kuritzky. In fact, the conflicting testimony set forth in the Prior Decision's pages 38 to 41 indicates that such a finding must be left to the trier of fact. As such, no claim for common-law indemnification yet lies as against Kuritzky, and summary judgment in TDX's favor, at this time, must be denied.

Plaintiff's Cross Motion to Reargue and Modify the Prior Decision, to Reinstate Plaintiff's Labor Law § 240 (1) Claim, and for Summary Judgment on the Section 240 (1) Claim

Plaintiff alleges that this court overlooked several cases which deal with the issues of elevation-related risks, the "same level rule," and usual and ordinary hazards of the workplace. The court's conclusions in the Prior Decision were based on appropriate, applicable case law. Plaintiff's cross motion is denied.

Defendants' Motion (motion sequence number 016) for Leave to Reargue

A. For Contractual Indemnification from CCC

The part of defendants' motion which seeks leave to reargue this court's determination concerning the denial of contractual indemnification against CCC is granted.

As set forth in the Prior Decision, section 4.6.1 of the

TDX/CCC subcontract obligates CCC to indemnify defendants for claims arising out of CCC's work, to the extent caused by negligent acts or omissions of CCC, Glassolutions, or Kuritzky (Prior Decision, at 46). This court has already found Glassolutions negligent (*id.* at 35, 50). Thus, CCC's obligation to indemnify defendants has been triggered, and CCC must pay defendants' costs, damages and expenses, including attorneys' fees, incurred in this action, with the amount to be determined by a Special Referee or as part of a plenary declaratory judgment action.

B. Whether There is a Need for a Separate Declaratory Judgment Action

The part of defendants' motion which seeks reargument of the Prior Decision's denial of a declaratory judgment as to Glassolutions' obligation to pay defendants' costs and attorneys' fees is granted, and upon reargument, the court adheres to its prior determination.

CPLR 3001 does not obligate a court to render a declaratory judgment as part of a pending action, and the court considers such a step to be inappropriate in this matter. The court is already aware of two insurance companies with whom various parties have contracted, and there may be more. Moreover, there are already two related declaratory judgment actions pending before J.H.O. Gammerman (*CCC v Hartford Cas. Ins. Co.*, 112185/09; *Hartford Cas. Ins. Co. v QBE Ins. Co.*, 590376/10). In considering the totality of the facts and circumstances of this action, the court again

states that this request is not properly before the court, and that, should defendants so choose, they can bring a plenary action for a declaratory judgment.

C. For Common-Law Indemnification from Kuritzky

The part of defendants' motion which seeks reargument of their common-law indemnification claim against Kuritzky is granted, and upon reargument, the court adheres to its prior determination.

A determination concerning whether or not Kuritzky's glaziers were special employees of Glassolutions is not necessary in order to conclude that there are numerous questions of fact which preclude a finding that Kuritzky was or was not negligent. So long as those questions remain, defendants are not entitled to summary judgment on their common-law indemnification claim against Kuritzky.

Accordingly, it is

ORDERED that Calcedo Construction Corporation's motion for leave to reargue (motion sequence number 015) its motion for summary judgment is denied; and it is further

ORDERED that Calcedo Construction Corporation's cross motion which seeks leave to amend its pleading is denied; and it is further

ORDERED that TDX Construction Corporation's cross motion for leave to reargue is granted, but upon reargument, summary judgment on its claim for common-law indemnification against Kuritzky Glass

Co., Inc. is denied; and it is further

ORDERED that plaintiff's cross motion is denied; and it is further

ORDERED that City of New York and Brooklyn Navy Yard Development Corporation's motion for leave to reargue (motion sequence number 016) is decided as follows:

A. reargument is granted with respect to the Prior Decision's denial of summary judgment on their contractual indemnification claim against Calcedo Construction Corporation, and upon reargument, ORDERS that Calcedo Construction Corporation must pay City of New York and Brooklyn Navy Yard Development Corporation's costs, damages and expenses, including attorneys' fees, incurred in this action, with the amount to be determined either by a Special Referee or as part of a plenary declaratory judgment action; and it is further

ORDERED that, should City of New York and Brooklyn Navy Yard Development Corporation choose to use the services of a Special Referee to determine the amount of damages which Calcedo Construction Corporation owes City of New York and Brooklyn Navy Yard Development Corporation, this issue shall be referred to a

Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that, should City of New York and Brooklyn Navy Yard Development Corporation choose to use the services of a Special Referee, this part of the motion shall be held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that, should City of New York and Brooklyn Navy Yard Development Corporation choose to use the services of a Special Referee, counsel for the party seeking the reference, or absent such party, counsel for City of New York and Brooklyn Navy Yard Development Corporation shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,² upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50 R) for the earliest convenient date; and it is further

²Copies are available in Rm. 119 at 60 Centre Street, and on the court's website.

ORDERED that

B. reargument is granted with respect to the Prior Decision's denial of a declaratory judgment as to Glassolutions Unlimited Corp.'s obligation to pay City of New York and Brooklyn Navy Yard Development Corporation's costs and attorneys' fees, and upon reargument, the court adheres to its prior determination;

C. reargument is granted with respect to the Prior Decision's denial of summary judgment on City of New York and Brooklyn Navy Yard Development Corporation's common-law indemnification claim as against Kuritzky Glass Co., Inc., and, upon reargument, the court adheres to its prior determination.


Dated: April 17, 2013

ENTER:

FILED

APR 22 2013

NEW YORK
COUNTY CLERK'S OFFICE



JOAN M. KENNEY J.S.C.
J.S.C.