

**Northeast Restoration Corp. v T.A. Ahern Contrs.
Corp.**

2013 NY Slip Op 33713(U)

October 25, 2013

Supreme Court, Bronx County

Docket Number: 0020679/2010

Judge: Mary Ann Brigantti-Hughes

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This opinion is uncorrected and not selected for official publication.

2

PART 15

Case Disposed
 Settle Order
 Schedule Appearance

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF BRONX:

NORTHEAST RESTORATION CORP

Index No. 0020679/2010

-against-

Hon. MARYANN BRIGANTTI-HUGHES

T.A. AHEARN CONTRACTORS

Justice.

The following papers numbered 1 to _____ Read on this motion, **SUMMARY JUDGMENT**
 Noticed on **January 31 2013** and duly submitted as No. _____ on the Motion Calendar of _____

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed		
Answering Affidavit and Exhibits		
Replying Affidavit and Exhibits		
_____ Affidavits and Exhibits		
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law		

Upon the foregoing papers this

*Motion is decided in accordance with the Court's
 Decision and Order of the same date.
 This constitutes the Decision and order of the Court.*

Motion is Respectfully Referred to:

Justice: _____

Dated: _____

Dated: 10/25/13

Hon. 

**MARYANN BRIGANTTI-HUGHES,
 J.S.C.**

**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15**

PRESENT: Honorable Mary Ann Briganti-Hughes
-----X
NORTHEAST RESTORATION CORP.,

Plaintiff,

-against-

DECISION / ORDER

Index No. 20679/10

T.A. AHERN CONTRACTORS CORP., NEW
YORK CITY SCHOOL CONSTRUCTION AUTHORITY
and SAFECO INSURANCE COMPANY OF AMERICA,
and GRAHAM ARCHITECTURAL PRODUCTS CORP.,

Defendants.

-----X
T.A. AHERN CONTRACTORS CORP.

Third-Party Plaintiff,

Index No. 83989/12

-against-

CALIBER WINDOW, INC.

Third-Party Defendant,

-----X
The following papers numbered 1 to 15 read on the below motions noticed on April 19, 2013,
and December 31, 2012 and duly submitted on the Part IA15 Motion calendar of **June 21, 2013**
and **July 8, 2013**:

<u>Papers Submitted</u>	<u>Numbered</u>
Ahern's Aff. In Support of RRRR Motion, Exhibits, Memo of Law	1,2,3
Graham's Memo of Law in Opposition	4
Ahern's Reply Aff., Memo of Law	5,6
Ahern's Aff. In Support of SJ Motion, Exhibits, Memo of Law	7,8,9
Caliber's Aff. In Opp., Exhibits, Memo of Law	10,11,12
Ahern's Reply Aff., Exhibits, Memo of Law	13,14,15

Upon the foregoing papers, the following motions are before this court. First, defendants
T.A. Ahern Contractors Corp. ("Ahern") and Safeco Insurance Company of America
("Safeco")(collectively referred to as "Ahern") move for an Order (1) granting leave to reargue

the prior motion for partial summary judgment filed by defendant Graham Architectural Products Corp. (“Graham”), pursuant to CPLR 2221, and upon reargument, (2) denying the motion and holding it in abeyance or denying it without prejudice pursuant to CPLR 3212(f), with leave to renew following completion of discovery, or reserving Ahern and Safeco’s right to “fully oppose” Graham’s motion for summary judgment following discovery, and (2) an Order “denying, as a matter of law,” Graham’s motion that sought interest for unpaid invoices regarding Graham’s contract with Caliber Window, Inc. (“Caliber”), as well as fuel surcharges and storage costs. Graham opposes the motion.

Separately, Ahern moves for partial summary judgment against Caliber, pursuant to CPLR 3212, in the amount of \$143,290.75, the amount previously determined by this Court as due and owing defendant Graham under subcontract with Caliber, together with any interest costs, and fees as may be awarded to Graham. Caliber opposes the motion.

In the interest of judicial economy, the two motions are consolidated and disposed of in the following Decision and Order.

I. Background

On or around September 6, 2006, Ahern entered into a prime contract with defendant New York City Construction Authority (“SCA”) to perform certain construction work in connection with a public improvement contract known as the Aircraft Noise Abatement Program/Window Replacement/AC/Roofs/Parapets at the Samuel Gompers Vocational High School, Bronx, New York (the “Project”). Safeco issued a performance and labor and material payment bond on behalf of its principal, Ahern. On April 2, 2007, Ahern entered into a subcontract with Caliber to furnish and install replacement windows for the Project. Graham then entered into a contract with Caliber wherein Graham was to fabricate and furnish the replacement windows required for the Project. On or about July 16, 2009, Graham filed in the offices of the SCA a Notice Under Mechanic’s Lien Law for a Public Improvement, in the amount of \$342,264.59. This lien was discharged by defendant Safeco, acting as surety for Ahern.

This action was commenced by another Ahern sub contractor for the Project, Northeast

Restoration Corp. (“Northeast”), due to alleged contract disputes it had with Ahern. Northeast seeks to foreclose the public improvement lien it had filed against monies due Ahern. Graham was named as a defendant to the action because it had filed its public improvement mechanic’s lien against monies due Ahern in connection with the project, and Northeast was required to name all other lienors in this action. Graham counterclaimed and crossclaimed both foreclosing on its public improvement lien and the lien discharge bond, and seeking to recover the monies due it under the payment bond furnished by Safeco as surety for Ahern for the Project.

After limited participation in discovery, Graham filed a motion for partial summary judgment on its cross-claims against Ahern and Safeco. Graham sought, among other things, \$143,290.75 that it was owed from subcontractor Caliber for materials provided under the Caliber-Graham subcontract. Ahern opposed the motion and argued, among other things, that the motion should be held in abeyance until Caliber was brought into the action as a third-party defendant and discovery was taken, since Caliber and not Ahern was in contractual privity with Graham. Ahern had argued that discovery from Caliber was necessary to determine Graham’s claim for remaining proceeds under the Caliber-Graham subcontract. Knowledge and proof of the contractual back-charges, off-sets, and other defenses to Graham’s claims of liability rested “exclusively with Caliber.”

After the motion was briefed and following several conferences, this Court “so-ordered” a stipulation that, among other things, granted Ahern leave to implead Caliber as a third-party defendant. Thereafter, Ahern commenced an action against Caliber and, pursuant to this Court’s directive, the parties submitted additional briefs on the motion and engaged in efforts to resolve the matter. On September 18, 2012, his Court issued a decision granting Graham’s motion for summary judgment on its cross-claims against Ahern and Safeco for the alleged outstanding contractual amount (\$143,290.75) as well as “extra work” performed (\$34,842.00), and deciding that factual issues precluded summary judgment on Graham’s “extra contractual” claims for interest, storage fees, and fuel costs.

Ahern and Safeco now moves for reargument of the summary judgment motion, and upon reargument, (1) pursuant to CPLR 3212(f), denying the motion and holding it in abeyance or denying it without prejudice with leave to renew following completion of discovery, or reserving

Ahern and Safeco's right to "fully oppose" Graham's motion for summary judgment following discovery, and (2) an Order "denying, as a matter of law," Graham's motion that sought "extra contractual" amounts including interest for unpaid invoices regarding Graham's contract with Caliber, and fuel surcharges and storage costs, as these claims were not recoverable under the labor and material payment bond and/or the lien discharge bond.

Separately, and relying on this Court's September 18, 2012 Decision and Order, Ahern moves for partial summary judgment against Caliber in the amount of \$143,290.75, plus interests, costs and fees.

II. Applicable Law and Analysis

Ahern's Motion to Reargue

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. (*Foley v. Roche*, 68 A.D.2d 558, 567 [1st Dep't 1979]; *see also* CPLR 2221[d][2]; *Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72 [1st Dep't 1994]). It is not designed to provide the unsuccessful party with successive opportunities to argue once again the very issues previously decided. (*William P. Pahl Equip. Corp. v. Kassiss*, 182 A.D.2d 22 [1st Dep't], *lv. dismissed in part, denied in part* 80 N.Y.2d 1005 [1992]; *Matter of Bliss v. Jaffin*, 176 A.D.2d 106 [1st Dep't 1991]). Leave to reargue is also not an opportunity to present arguments different from those originally asserted. (*Foley v. Roche*, 68 A.D.2d 558, *supra.*). Whether to grant reargument is discretionary with the court in the interests of justice (*Sheridan v. Very, Ltd.*, 56 A.D.3d 305 [1st Dept. 2008], citing *Sciasca v. Nevins*, 130 A.D.2d 649, 650 [2nd Dept. 1987]).

A. Contractual Amount and "Extra Work" Sought

Ahern argues that, in granting the branch of Graham's motion seeking proceeds of its Graham-Caliber contract balance from Ahern and Safeco, this Court essentially overlooked the fact that discovery was needed to obtain facts necessary to oppose the motion. This Court decided that the motion could not be defeated pursuant to CPLR 3212(f), since there was no

indication that Ahern sought discovery from Graham during the pendency of this litigation (citing *Voluto Ventures, LLC. v. Jenkins & Gilchrist Parker Chapin LLP*, 44 A.D.3d 557 [1st Dept. 2007], and *Housebank (SB), N.A. v. Mitchell*, 12 A.D.3d 568 [2nd Dept. 2004]). Ahern now contends, however, that at the time they opposed the motion, they were seeking crucial discovery from Caliber who would have documents and evidence pertaining to Graham's performance under the Caliber-Graham subcontract. "Without this evidence, Ahern had no means to defend against Graham's claims for remaining sub-subcontract proceeds." Ahern argues that the motion should not have been determined until Caliber was joined as a party and participated in discovery. They argue that Tim Ahern, who submitted an affidavit in opposition to the original motion, could not dispute Graham's claims at the time because "upon information and belief... [Caliber] will have additional documents from its Project files" necessary to determine the merits of the claims. Ahern submits that the Tim Ahern affidavit set forth that facts indeed existed, but were not yet available to Ahern, and thus denial of Graham's motion was required under CPLR 3212(f).

Ahern also contends that this Court erred in holding that any set-offs claimed by Ahern to lower liability under the Caliber-Graham contract were irrelevant in deciding Ahern's liability under the payment bond. In so deciding, this Court reasoned that a "set-off defense" is only available where, unlike here, the plaintiff is a subcontractor or materialman of the general contractor and thus is in direct contractual relations with the counterclaimant, citing *United States of America for Use and Benefit of Bartec Industries., Inc. v. United Pacific Company, et al.*, 976 F.2d 1274 (9th Cir. 1992). Ahern argues that the 9th Circuit case is against New York case law interpreting State Finance Law §137, which limit recovery under a public improvement payment bond to the terms of the bonded contract. In addition, Ahern contends that Graham would enjoy a "windfall" if, after discovery, it is determined that Caliber did not owe Graham any money on the subcontract.

In opposition, Graham contends that reargument must be denied, since Ahern is merely re-stating the arguments made in its original opposition papers. Graham notes that Ahern failed to implead Caliber despite having more than two years to do so prior to the motion for summary judgment. Graham states that this Court correctly recognized that relief could not be defeated

under CPLR 3212(f). Moreover, the Court properly held that, absent contractual privity, any offsets Ahern may or may not have against Caliber were not assertable in defense of Graham's claims under the payment bond.

After review of the papers and in the interests of justice, this Court will vacate its September 18, 2012 decision to the extent that it entered summary judgment in favor of Graham for \$143,290,75 due on the contract, and payment for extra work performed in the amount of \$34,842.

In the original decision, this Court determined that any "set-offs," or credit-deduct change orders which were assessed against Caliber's remaining proceeds to which Ahern was entitled under the subcontract would not reduce its liability to Graham under the payment bond. Still, considering the fact that limited discovery had been taken on the issue, and considering the fact this Court expressly granted leave to implead Caliber after the motion was filed, Graham's motion for summary judgment should have been denied, with leave to renew following discovery. This Court remains cognizant that Ahern may not be able to assert the "set-off defense" against Graham's cross-claims, especially if it is determined after discovery that Graham fully complied with its obligations under the Caliber subcontract (*see Certified Industries Inc. v. Royal Indemn. Co.*, 43 Misc.2d 761 [Sup Ct 1964]). However, Ahern should be afforded the opportunity to seek disclosure from Caliber prior to entry of summary judgment on this issue (*Urcan v. Cocarelli*, 234 A.D.2d 537 [2nd Dept. 1996]). The Ahern affidavit, submitted in opposition to the original motion, sufficiently demonstrated that information was necessary from Caliber in order to sufficiently oppose the Graham motion (CPLR 32112[f]). Accordingly, upon reargument, that branch of Graham's motion for summary judgment is denied, with leave to renew following completion of discovery.

B. "Extra-Contractual" amounts due

Regarding interest, storage, and fuel surcharges, Mr. Ahern's affidavit stated that a large percentage of the claimed amount, specifically storage fees (\$62,963.98); fuel surcharge (\$4,500); and interest on the contract balance (\$255,889.91) commencing 3/3/08, were due to a directive from SCA which postponed window installation in 2008. Further, Ahern argued that

any claim for these “extra-contractual” charges are not recoverable under the terms of the payment bond or the lien discharge bond. Graham argued in its initial motion papers that it was entitled to interest pursuant to its sales contract with Caliber. Ahern disagreed, contending that this charge cannot be included in the payment bond, which covered only labor and materials expended in furtherance of the Project.

This Court previously held that Graham’s application for interest on the unpaid balance was facially appropriate, pursuant to *SFL* §137(4)(c), but there were factual issues that precluded entry of judgment to either side on the issue of interest due. Upon reconsideration, this Court dismisses Graham’s claims against Ahern for the outstanding interest. “[A] surety’s obligations are limited to those it undertakes in its bond, and...the bond attaches to the principal contract and must be construed in conjunction therewith.” (*Sette-Juliano Contracting, Inc./Halycon Constr. Corp. v. Aetna Cas. and Sur. Co.*, 246 A.D.2d 142 [1st Dept. 1998], citing *Varlotta Constr. Corp. v. Sette-Juliano Constr. Corp.*, 234 A.D.2d 183 [1st Dept. 1996]). Here, the bonded contract (between Ahern and Caliber) did not authorize payment based on interest to Ahern, or to any of its subcontractors. (Sections 8.01 and 8.02, 15.01[b]). Since interest was not recoverable under the payment bond, it is irrelevant that there may be factual issues as to whether the delays leading to interest accrual were attributable to factors beyond Ahern’s control.

Moreover, Graham’s claims against the payment bond for storage and fuel surcharges should have been dismissed. In their original motion papers, Graham had argued that it incurred increased fuel charges, in part, “due to the delays in shipment of the windows caused by the defendants’ inability to accept timely delivery.” The Miller affidavit also stated that the “storage charges” were incurred due to “defendants’ inability to accept timely delivery of the windows at the Project” and commenced in March 2008. Ahern’s affidavit in opposition indicated that this delay was due to circumstances not under Ahern’s direct control or supervision. The bonded contract, however, did not provide recovery for fuel surcharges or storage fees, and thus Graham cannot secure recovery of these fees against the payment bond (*Varlotta, supra*). To the extent that Graham relied, and continues to rely on a 9th Circuit decision, *Mai Steel Service, Inc. v. Blake Construction Co.*, 981 F.2d 414 (9th Cir. 1992) that extends the coverage of a payment bond, this case should have been disregarded unpersuasive and inconsistent with New York law.

Ahern's Motion for Summary Judgment against Caliber

Considering this Court's vacatur of the previously-entered Decision and Order, and for the reasons stated above, Ahern's motion for summary judgment against Caliber is denied, with leave to renew following completion of discovery (CPLR 3212[f]).

III. Conclusion

Accordingly, it is hereby

ORDERED, that Ahern's motion to reargue this Court's Decision and Order dated September 18, 2012 is hereby granted, and it is further,

ORDERED, that upon reargument, this Court's Decision and Order dated September 18, 2012 is hereby vacated, and it is further,

ORDERED, that the judgment entered in favor of Graham against Ahern and Safeco, dated March 29, 2013, is hereby vacated, and it is further,

ORDERED, that Graham's motion for summary judgment on its cross-claims against Ahern for \$143,290,75 due on the contract, and extra work performed in the amount of \$34,842, is denied without prejudice, with leave to renew following discovery, and it is further,

ORDERED, that Graham's cross-claims seeking storage fees (\$62,963.98); fuel surcharge (\$4,500); and interest on the contract balance (\$255,889.91) against Ahern and Safeco are dismissed, and it is further,

ORDERED, that Ahern's motion for partial summary judgment against Caliber is denied, with leave to renew following completion of discovery.

This constitutes the Decision and Order of this Court.

Dated: 10/25, 2013



Hon. Mary Ann Brigantti-Hughes, J.S.C.