

Crave Foods Inc. v Rapetti Rigging Servs.

2014 NY Slip Op 30712(U)

February 10, 2014

Supreme Court, New York County

Docket Number: 769000/2008

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDWARDS
Justice

PART 35

Index Number : 117452/2008
CRAVE FOODS INC.

INDEX NO. _____

vs
RAPETTI RIGGING SERVICES
Sequence Number : 012

MOTION DATE 1/15/14

MOTION SEQ. NO. _____

REARGUMENT/RECONSIDERATION
The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). _____
Answering Affidavits — Exhibits No(s). _____
Replying Affidavits No(s). _____

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

East 51st Street moves for leave to reargue its partial summary judgment motion (the "Motion") with respect to its contractual indemnification causes of action against Reliance Construction, Ltd. d/b/a RCG Group, Ltd. and Joy Contractors, Inc. ("JCI"), and upon reargument, granting East 51st Street's summary judgment on its contractual indemnification causes of action against JCI.

Factual Background

East 51st Street's previous Motion sought partial summary judgment against RCG and JCI on its contractual indemnification claim. East 51st Street relied on this Court's October 22, 2010 Decision and Order, in which the Court held that although "the indemnification provisions in the CMA and RCG-JCI [Joy] Agreement have been triggered and RCG and JCI are obligated to indemnify East 51st [Street] for all losses, including defense costs, which arose out of or in connection with the 'Work'..." East 51st Street failed to "establish its freedom from negligence for the underlying accident." (Decision, p. 5). In denying East 51st Street's Motion, the Court explained that "East 51st Street demonstrated that it was not negligent or otherwise responsible for the crane collapse accident." (Decision, p. 17). However, the Court held, "the opponents and non-parties (by adoption) raised an issue of fact as to whether East 51st Street bore responsibility for the crane's design, installation and operation" and that issues of fact existed "as to whether East 51st Street was responsible for the decision to use, and continued use of the tower crane and its design and placement at the project site," rendering summary judgment unwarranted.

Dated: 2/6/14 _____, J.S.C.

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

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

Now in support of reargument, East 51st Street points out that unlike RCG, JCI did not file any opposition to its Motion, and no opposition or request for additional time to oppose East 51st Street's Motion was made on JCI's behalf. Thus, since the Court held that East 51st Street met its *prima facie* burden of demonstrating its freedom from negligence, this Court misapprehended the law and/or facts that JCI did not oppose the motion, and East 51st Street is entitled to judgment against JCI.

In opposition, RCG argues that a movant's failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the lack of opposing papers. The sole issue before this Court was whether East 51st Street demonstrated that it was free from negligence. In denying East 51st Street's motion, the Court held that issues of fact existed as to East 51st Street's negligence. Thus, granting East 51st Street's partial summary judgment on its contractual indemnification claim as against JCI would contradict the Court's determination that questions of fact exist as East 51st Street's negligence. Plaintiff John D. LaGreco (in a related action) adds that there cannot be a finding of issues of fact exist as to all but JCI and that such finding applies across the board to all. Thus, East 51st Street should be sanctioned for its frivolous Motion.

In reply, East 51st Street points out that JCI failed to oppose its reargument motion, RCG does not dispute that East 51st Street met its *prima facie* burden, and JCI admitted all of the facts set forth in East 51st Street's prior Motion by failing to submit opposition thereto. RCG failed to cite any case where summary judgment was denied against a defaulting party where the movant met its *prima facie* burden. And, LaGreco's arguments should not be considered since the granting of East 51st Street's Motion against JCI will not affect LaGreco.¹ Further, the granting of East 51st Street's Motion will not affect the prior determination regarding East 51st Street's negligence.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588; *Pahl Equip. Corp. v Kassis*, 182 AD2d at 27). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

The Court finds that reargument is warranted based on East 51st Street's claim that this Court overlooked the fact that JCI did not oppose the Motion.

Turning to the merits of East 51st Street's arguments, a "summary judgment motion

¹ The Court notes that to the degree LaGreco was previously permitted to oppose East 51st Street's prior motion and East 51st Street seeks to reargue that Motion, LaGreco may similarly oppose the instant motion. Nonetheless, LaGreco raised no arguments materially different from RCG.

should not be granted merely because the party against whom judgment is sought failed to submit papers in opposition to the motion (i.e., “defaulted”)” (*Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d 276, 277, 820 NYS2d 49 [2006] citing *Vermont Teddy Bear Co. v 1-800 Beargram Co.*, 373 F3d 241, 244 [2d Cir 2004] [“the failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the . . . court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law”]; and *Cugini v System Lbr. Co.*, 111 AD2d 114, 115 [1985], *appeal dismissed* 65 NY2d 1053 [1985] [“A movant’s failure to sufficiently demonstrate its right to summary judgment requires a denial of the motion regardless of the sufficiency, or lack thereof, of the opposing papers”]). It has been stated that an “*unopposed* summary judgment motion will be denied upon a movant’s failure to establish *prima facie* entitlement to summary judgment *or where the evidence creates a question of fact* (*Yonkers Ave. Dodge, Inc. v BZ Results, LLC*, 95 AD3d 774, 945 NYS2d 280 [1st Dept 2012] citing *Myers v Bartholomew*, 91 NY2d 630, 674 NYS2d 259, 697 NE2d 160 [1998] and *Liberty Taxi Mgt., Inc. v Gincherman*, 32 AD3d at 277) [emphasis added]). Therefore, despite East 51st Street’s initial showing in its prior Motion that it was not negligent, based on the evidence it presented, other evidence in the record indicated otherwise, thereby creating an issue of fact. Once an issue is raised as to an element of the movant’s *prima facie* case, the movant is unable to establish *prima facie* entitlement to summary judgment and therefore, the motion must be denied, even as against JCI which did not oppose the Motion.

The cases cited by East 51st Street are not controlling, especially in light of the First Department caselaw noted above (*cf. Deutsche Bank Nat. Trust Co. v Rodriguez*, 2013 WL 4206090 (Trial Order) [Supreme Court, Suffolk County 2013] [granting motion to dismiss answer of defendants who defaulted on a mortgage and note, and for appointment of referee in foreclosure action, motion for summary judgment was *unopposed by all defendants*]; *Madison Park Invs. LLC v Atlantic Lofts Corp.*, 33 Misc 3d 1215(A), 941 NYS2d 538 (Table) [Supreme Court, Kings County 2011] [granting summary judgment in foreclosure action against unopposing defendants and defendants who opposed the motion as the opponents failed to raise a triable issue of fact regarding their “*affirmative defenses*”]; *Kuehne & Nagel v Baiden*, 36 NY2d 539, 369 NYS2d 667 [1975] [stating that facts in the movant’s papers which the opposing party does not controvert, may be deemed to be admitted where defendants opposed the motion and did not challenge the veracity of the alleged facts]). Here, issues of fact were raised by an opponent as to the *prima facie* elements of East 51st Street’s contractual indemnification claim, *to wit*: East 51st Street’s freedom from negligence, as opposed to issues of fact raised concerning an affirmative defense thereto. That JCI did not oppose the motion is of no moment since East 51st Street’s satisfaction of its initial burden on its *prima facie* case was overcome by factual issues raised in opposition (*Stukas v Streiter*, 83 AD3d 18, 918 NYS2d 176 [2d Dept 2011] [“In the context of any motion for summary judgment, a party’s *prima facie* showing of entitlement to judgment as a matter of law shifts the burden to the nonmoving party, *not to prove his or her entire case*, as he or she will have the burden of doing at trial, but merely to raise a triable issue of fact with respect to *the elements or theories established by the moving party*”] [emphasis added]). This is not an instance where there were no issues of fact raised as to East 51st Street’s *prima facie* case for contractual indemnification.

Because summary judgment on a contractual indemnity claim may be granted in favor of a party/indemnitee against another party/indemnitor “when there is no possibility that the [indemnitee] will be found actively negligent” (*Sosa v 46th Street Development LLC*, 101 AD3d 490, 955 NYS2d 589 [1st Dept 2012]), in light of the possibility that East 51st Street may be found actively negligent, denial of its motion is mandated, irrespective of the absence of JCI’s opposition to the Motion.

Nevertheless, it cannot be said that East 51st Street’s motion herein was frivolous so as to warrant sanctions (*see* 22 NYRCC 130-1.1[a]; *Chase v Stendhal*, 16 Misc 3d 1137(A), 851 NYS2d 57 [Sup Ct, New York County 2007]).

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by East 51st Street to reargue its prior motion, and upon reargument, granting it partial summary judgment on its contractual indemnification claim against JCI, is granted to the extent that reargument is granted; however, upon reargument, summary judgment against JCI for contractual indemnification in favor of East 51st Street is denied; and it is further

ORDERED that LaGreco’s request for sanctions against East 51st Street is denied as unwarranted; and it is further

ORDERED that East 51st Street shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated 02.10.2014

ENTER:  J.S.C.

HON. CAROL TORRES

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE