

Zic v City of New York
2014 NY Slip Op 33185(U)
December 1, 2014
Supreme Court, New York County
Docket Number: 159201/2012
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 5

-----X
VELIMER ZIC and MARILYN ZIC,

Plaintiffs,

-against-

DECISION/ORDER
Index No. 159201/2012
Seq. No. 003

THE CITY OF NEW YORK; THE METROPOLITAN
TRANSPORTATION AUTHORITY; THE NEW YORK
CITY TRANSIT AUTHORITY; TISHMAN
CONSTRUCTION CORPORATION; AECOM
TECHNOLOGY CORPORATION; CITNALTA
CONSTRUCTION CORP., JUDLAU CONTRACTING,
INC.; THE NEW YORK TIMES COMPANY; FOREST
CITY RATNER COMPANIES; FOREST CITY
ENTERPRISES; AMEC CONSTRUCTION
MANAGEMENT INC.; BOSTON PROPERTIES LIMITED
PARTNERSHIP; QUEENS BALLPARK COMPANY, LLC;
HUNT CONSTRUCTION GROUP; LEND LEASE
CONSTRUCTION GROUP; LEND LEASE CORPORATION
LIMITED f/k/a BOVIS LEND LEASE LMB, INC.; and
TOTAL SAFETY CONSULTING,

Defendants.

-----X
CINALTA CONSTRUCTION CORP., METROPOLITAN
TRANSPORTATION AUTHORITY, NEW YORK CITY
TRANSIT AUTHORITY, and JUDLAU CONTRACTING, INC.,

Third-Party Plaintiffs,

-against-

L & L PAINTING CO., INC.,

Third-Party Defendant.

-----X
KATHRYN E. FREED, J.S.C.:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIDAVITS ANNEXED.....	1-2(Exs. A-T)
CO-DEFENDANTS' AFFIDAVITS IN SUPPORT.....3,4.....
ANSWERING AFFIDAVITS.....	.5..(Exs. A-B).
REPLYING AFFIDAVITS.....6.....

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

Defendants Tishman Construction Corporation, Aecom Technology Corporation, and Lend Lease Corporation Limited f/k/a Bovis Lend Lease LMB, Inc. move, pursuant to CPLR 2221, to modify the order of this Court dated October 21, 2013 which dismissed all claims and cross claims asserted against the defendant City of New York (“the City”), to reinstate the said cross claims. The City opposes the motion. After oral argument and a review of the papers presented, all relevant statutes and case law, this Court **grants** the motion.

Factual and Procedural Background:

Plaintiff Velimir Zic alleges that, due to the negligence of the defendants, he sustained injuries resulting from his inhalation of chemicals used during jobs painting and abating lead at various locations over a period of several years. Exs. A, B.¹ His wife asserts a claim for loss of consortium.

Plaintiffs alleged that since the City owned, operated, managed and maintained several of the

¹Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Seth Zuckerman, Esq. submitted in support of the movants’ application.

locations where he worked, it was responsible for the planning and supervising of all lead paint abatement, painting, demolition and construction activities occurring at those sites.

On or about April 16, 2013, the City moved to dismiss the complaint on the ground that the notice of claim was untimely. Ex. H. By order dated October 21, 2013, this Court dismissed the complaint and all cross claims against the City on the ground that plaintiff failed to file a timely notice of claim and that his time to do so had expired. Ex. P.

Movants now seek an order, pursuant to CPLR 2221(a), modifying this Court's order to reinstate the cross claims asserted against the City, and the City opposes the motion.

Positions of the Parties:

In support of the motion, movants assert that the City did not request the dismissal of all cross claims against it. Nor, plaintiff asserts, did the City establish its entitlement to the dismissal of the cross claims. Moreover, assert the movants, they have six years from the date of any judgment against them to cross claim against the City.

Counsel for defendants Total Safety Consulting LLC i/s/h/a Total Safety Consulting and Boston Properties Limited Partnership submit affirmations in support of the motion, asserting that this Court erred in dismissing all cross claims against the City.

In opposition, the City asserts that the motion must be denied since the cross claims sought to be restored seek relief from other defendants found liable to plaintiffs, and the City cannot be found liable to plaintiffs since this Court has "ruled that the City has no liability." City's Aff. In Opp., at par. 4.

In a reply affirmation in further support of their motion, movants assert that the City

incorrectly argues that this Court dismissed the complaint against the City on the ground that it had no liability. They further maintain that the cross claims must be reinstated since the claims against the City were dismissed solely on procedural grounds.

Conclusions of Law:

CPLR 2221(a) allows a court to modify its own order. Here, this Court agrees with movants that its order should be modified since it erred by sua sponte dismissing the cross claims asserted against the City. *See generally Bradford v Burrell*, 2010 NY Misc LEXIS 1380 (Sup Ct New York County 2010). CPLR 2214(a) requires that a party set forth in its notice of motion “the relief demanded” by its application. Here, the City specifically sought dismissal of the complaint but did not request that the cross claims against it be dismissed. Therefore, this Court improperly granted the City relief which it did not seek. *See Arriaga v Michael Laub Co.*, 233 AD2d 244 (1st Dept 1996).

Contrary to the City’s argument, the claims against it were not dismissed on the merits. Although the complaint was properly dismissed on procedural grounds, *i.e.*, failure to file a timely notice of claim, this Court erred when it dismissed the cross claims against the City for indemnification and contribution. “The courts view such cross claims independently of a plaintiff’s complaint against the City (*see, Matter of Valstrey Serv. Corp. v Board of Elections*, 2 NY2d 413, 416 [1957]). Consequently, particularly where, as here, a court dismisses the complaint for procedural rather than substantive reasons, a codefendant’s cross claim is still viable.” *DeLeonibus v Scognamillo*, 183 AD2d 697 (2d Dept 1992).

In accordance with the foregoing, it is hereby:

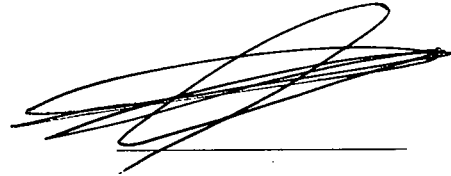
ORDERED that the motion is granted and this Court's order dated October 21, 2013 is hereby modified to the extent of deleting therefrom the provision dismissing all cross claims asserted against the City of New York; and it is further,

ORDERED that the cross claims asserted against the City of New York are hereby reinstated; and it is further,

ORDERED that this constitutes the decision and order of the court.

DATED: December 1, 2014

ENTER:



Hon. Kathryn E. Freed,
J.S.C.

**HON. KATHRYN FREED
JUSTICE OF SUPREME COURT**