Board of Mgrs.of the Bldg. Condominium v 13th & 14th St. Realty, LLC
2015 NY Slip Op 31021(U)
June 16, 2015
Supreme Court, New York County
Docket Number: 100061/11
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE A BUILDING CONDOMINIUM,

Plaintiff,

-against-

13th & 14th STREET REALTY, LLC, *et al.*,

Defendants.

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Index No. 100061/11

Mot. seq. no. 28

DECISION & ORDER

BARBARA JAFFE, JSC:

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By notice of motion, defendants Crystal Curtain Wall System Corp. and Crystal Window and Door System, Ltd. (Crystal) move pursuant to CPLR 2221 for an order granting them leave to reargue a decision and order granting dismissal of its cross claims against third third-party defendant Gordon H. Smith Corporation (GHSC) and also cross-move pursuant to CPLR 3025 for leave to amend its pleading to add a claim against GHSC for negligent misrepresentation. Third third-party plaintiff Hudson Meridian Construction Group, LLC, s/h/a Hudson Meridian Construction Group (Hudson) supports the motion, and GHSC opposes.

In its cross claims against all of the third-party defendants, including GHSC, Crystal conclusorily asserts in its first cross claim that if plaintiff sustained damages, they were caused by third-party defendants, and that if it, Crystal, is found liable to plaintiff or to any other party, then the third-party defendants must indemnify it, and their relative responsibilities must be

apportioned. As a second cross claim, Crystal alleges that if it is found liable to plaintiff, then its liability arose out of the carelessness, recklessness and negligence of third-party defendants, thereby entitling it to common-law and contractual contribution and/or indemnification. (NYSCEF 914).

By order dated December 18, 2014, I granted GHSC's motion to dismiss the third third-party complaint filed against it by Hudson and all cross-claims; Crystal had opposed dismissal only of its claim for contribution. (NYSCEF 1328).

Crystal now argues that I overlooked and failed to address its cross claim for negligence against GHSC, in which it actually alleges negligent misrepresentation, that it and GHSC were in privity, and that even absent privity, GHSC may be held liable to it. (NYSCEF 1370). Hudson supports Crystal's arguments and offers no independent argument. (NYSCEF 1378).

GHSC contends that the motion for leave to reargue should be denied as Crystal's cross claims were properly dismissed, and the motion to amend is defective absent a copy of the proposed amended pleading and as the new claim for negligent misrepresentation is legally insufficient. (NYSCEF 1411).

In reply, Crystal maintains that it sufficiently established a meritorious claim for negligent misrepresentation, which I failed to address, that it and GHSC were in privity, and that its failure to annex a copy of the proposed amended cross claim is not fatal to its motion to amend. (NYSCEF 1427).

The record on the motion to dismiss clearly reflects that Crystal opposed GHSC's motion to dismiss solely to the extent of opposing dismissal of its claim for contribution; there is no mention in any of its papers of a cross claim against GHSC for negligence. (*Id.*).

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." (CPLR 2221[d][2]). Whether to grant re-argument is committed to the sound discretion of the court. (*Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979], *lv denied* 56 NY2d 507 [1982]). The movant may not advance new arguments not previously presented. (*Kent v 534 E. 11th St.*, 80 AD3d 106 [1st Dept 2010]; *Mazinov v Rella*, 79 AD3d 979 [2d Dept 2010]).

By failing to address its negligence cross claim in its original opposition papers, Crystal waived any argument related to the claim, thereby failing to demonstrate that I overlooked or misapprehended its opposition or failed to address the merits of dismissing its negligence cross claim. (*See Blair v Allstate Indemn. Co.*, 124 AD3d 1224 [4th Dept 2015] [motion to reargue not available for movant to present new theory of liability or arguments different from those in original papers]).

A motion for leave to amend may not be interposed for the first time in seeking leave to reargue. (*See Am. Trading Co. v Fish*, 87 Misc 2d 193 [Sup Ct, New York County 1975] [denying motion for leave to amend complaint as it was improperly submitted on application for leave to reargue or renew; reargument may not used to seek new forms or relief]; *see eg Fox v Schrader Corp.*, 36 AD2d 591 [1st Dept 1971] [plaintiff moved to reargue and also to strike first affirmative defense; motion denied as reargument not meant for seeking new forms of relief]; *see also Metropolitan Steel Indus., Inc. v Perini Corp.*, 23 AD3d 205 [1st Dept 2005] [observing that while defendant argued that it should have been permitted to amend its pleadings, it did not request such leave until moving to reargue and renew]).

In any event, the motion is defective absent a copy of the proposed amended pleading. (CPLR 3025[b]; *Mendoza v Akerman Senterfitt LLP*, 128 AD3d 480 [1st Dept 2015] [as plaintiff did not submit proposed amended pleading, court could not judge whether proposed amendment would have merit or be sufficient]). Moreover, GHSC had no notice of the proposed cross claim as Crystal did not set forth the elements of a claim for negligence or negligent misrepresentation in its original cross-claim, or any supporting facts, nor did it or does it now support its motion with an affidavit or statement based on personal knowledge showing that GHSC intended that Crystal rely on GHSC's representations or that GHSC was aware of Crystal's reliance. Consequently, Crystal has not established that the existence of the functional equivalent of privity required to plead a claim for negligent misrepresentation. (*See eg Beck v Studio Kenji, Ltd.*, 90 AD3d 462 [1st Dept 2011] [while it was alleged in third-party complaint that architect for condominium building reviewed and approved plans submitted by architect for design and construction of plaintiff's apartment, it was not alleged that building architect intended other architect to rely on it in or that it had such understanding, and thus apartment architect failed to state claim for negligent misrepresentation based on functional equivalent of privity]; *McNar Indus. Inc. v Feibes & Schmitt, Architects*, 245 AD2d 993 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998] [general contractor did not state claim against architect hired by school district to provide architectural services or contractor to oversee project; while plaintiff argued it had privity with defendants as it relied on their proper performance of duties in connection with project, it did not establish functional equivalent of privity as any services performed by defendants were not performed for plaintiff's benefit]; *see also Marcum, LLP v Silva*, 117 AD3d 917 [denying motion to amend to add counterclaim for negligent misrepresentation as proposed

counterclaim failed to plead sufficiently required element of justifiable reliance]; *Nichols v Curtis*, 104 AD3d 526 [1st Dept 2013] [denying motion to amend absent affidavit of merits]).

Accordingly, it is hereby

ORDERED, that defendants Crystal Curtain Wall System Corp. and Crystal Window and Door System, Ltd.'s motion for leave to reargue is denied; and it is further

ORDERED, that their motion for leave to amend is denied.

ENTER:

Barbara Jaffe, JSC

DATED: June 16, 2015
New York, New York