

Greenwich Ins. Co. v M&R Hotel 343 W. LLC
2015 NY Slip Op 32954(U)
January 21, 2015
Supreme Court, New York County
Docket Number: 111303/09
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

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GREENWICH INSURANCE COMPANY, as
Subrogee of TEAMS MANAGEMENT, LLC and
NOVITA, LLC

Plaintiff,

-against-

Index No.: 111303/09

M&R HOTEL 343 WEST LLC, TRITEL
CONSTRUCTION COMPANY, URBAN
FOUNDATION ENGINEERING LLC, M&R HOTEL
TIMES SQUARE, LLC and MIKESAM
CONSTRUCTION CORP.,

Motion Seq. No.: 012

Defendants.

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MIKESAM CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

Third-Party Index No.:
590392/11

1ST CLASS WRECKING CORP. and FEGARI SITE
CONSTRUCTION CORP.,

Third-Party Defendants.

FILED

JAN 22 2015

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HON. DORIS LING-COHAN, J.S.C.:

COUNTY CLERK'S OFFICE
NEW YORK

Defendants Tritel Construction Company ("Tritel") and Urban Foundation Engineering LLC ("Urban")(collectively "movants") have moved for leave to reargue: (1) the prior motion of plaintiff Greenwich Insurance Company ("Greenwich") for summary judgment against movants, pursuant to CPLR 3212; and (2) the prior cross-motion of Brisam Times Square LLC ("Brisam") and LG-39 LLC ("LG") for summary judgment as against movants.

Pursuant 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 leave to reargue pursuant to 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. Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted [internal citations and quotation marks omitted]”

(William P. Pahl Equipment Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992], appeal denied in part, dismissed in part 80 NY2d 1005[1992]).

Greenwich’s Prior Motion for Summary Judgment

Defendants Tritel and Urban’s motion which seeks to reargue the portion of this court’s decision/order dated October 17, 2013 which granted a default judgment in that favor of Greenwich and against Tritel and Urban, based upon their failure to file an answer in the subrogation action and failure to oppose the summary judgment motion is granted. In support of the within motion, Tritel and Urban have provided proof that they did in fact serve answers to the subrogation action (on September 4, 2009 [Exh. C, Notice of Motion] and October 13, 2009 [Exh. B, Notice of Motion]) and had served opposition papers to Greenwich’s motion, despite that they were not in the papers sent to this Part for consideration. Nevertheless, as it is not disputed that answers were in fact filed by Tritel and Urban, and that they also opposed Greenwich’s prior motion for summary judgment, reargument is warranted. The court notes that this court’s decision/order dated October 17, 2013 resolved seven (7) motions, with submitted

papers which were quite voluminous, thus, it is not inconceivable that papers were served and filed, but did not reach this Part for consideration. Upon reargument, Greenwich's prior motion for summary judgment is denied, as it is undisputed there is an issue of fact as to the depth of the excavation, which warrants that this case proceeds to trial. Significantly, Greenwich has not supplied opposition papers to the within motion to reargue by Tritel and Urban. Thus, reargument is granted with respect to Greenwich's prior motion for summary judgment, and, upon reargument, this court's decision/order is amended to reflect that Greenwich's motion for summary judgment is denied as to Tritel and Urban.

Brisam and LG's Prior Cross-Motion for Summary Judgment

In this court's decision/order dated October 17, 2013, Brisams' motion for summary judgment on its cross-claims for contractual indemnification as against Tritel and Urban was granted to the extent that it was determined that Tritel and Urban have duty to defend Brisam in the underlying action, however, indemnification was conditionally granted, upon a finding of liability against Tritel and Urban. LG's motion for summary judgment on its cross-claims against Tritel and Urban for contractual indemnification was granted, to the extent that Tritel and Urban were directed to reimburse LG for the legal fees and costs associated with the defense of the underlying action, as, significantly, the complaint in the underlying action was severed and dismissed with respect to defendant LG.

Upon review, movants failed to establish that this court overlooked or misapprehended the facts


or the law or for some reason mistakenly arrived at its earlier decision, and, thus, the motion of Tritel and Urban to reargue is denied, with respect to that portion of the motion which seeks to reargue Brisam and LG's prior cross-motions for summary judgment. Contrary to the assertions by movants herein, the contractual indemnification provision in the agreement that was assigned to LG imposed not only the obligation to indemnify, but, also the obligation to defend. As the underlying complaint was dismissed as against LG and, thus, no question as to LG's lack of negligence, it was not premature to grant summary judgment on cross-claims with respect reimbursement of LG's defense costs, as it was determined that there was a duty to defend. Similarly, with respect to Brisam, a determination that Tritel and Urban had a duty to defend Brisam was appropriate, however, as to contractual *indemnification*, a finding of negligence/liability on the part of Tritel and/or Urban was warranted.

Based on the above, it is

ORDERED that Tritel and Urban's motion to reargue is granted only to the extent that Greenwich's prior motion for summary judgment is denied as to Tritel and Urban; and it is further

ORDERED that within 30 days of entry of this order, Tritel and Urban shall serve a copy upon all parties, with notice of entry.

Dated: 1/21/15


 Doris Ling-Cohan, J.S.C.

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JAN 22 2015