

Titanium Constr. Servs., Inc. v Nicholas Indus. & Constr. Servs., Inc.
2017 NY Slip Op 31947(U)
September 12, 2017
Supreme Court, Kings County
Docket Number: 504961/2016-E
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 9**

TITANIUM CONSTRUCTION SERVICES, INC.,

Plaintiffs,

-against-

**NICHOLAS INDUSTRIES & CONSTRUCTION
SERVICES, INC. AND CONGRESS STREET
DEVELOPMENT, LLC,**

Defendants.

**NICHOLAS INDUSTRIES & CONSTRUCTION
SERVICES, INC.,**

Third-Party Plaintiff,

-against-

DARWIN NATIONAL ASSURANCE COMPANY,

Third-Party Defendant.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of the defendant's motion to reargue and plaintiff's motions for sanctions.

Papers	Numbered
Notice of Motion, Affirmation and Exhibits annexed	<u>1 – 5, 6-10, 11-13</u>
Affirmation in Opposition and Exhibits annexed	<u>14 – 16</u>
Reply	<u>17</u>

Upon the foregoing cited papers, the Decision/Order on these motions is as follows:

By order dated October 31, 2016 and entered November 1, 2016, the undersigned granted plaintiff's motion for summary judgment (Seq. #1) and, *inter alia*, canceled and discharged the mechanics lien filed by defendants, and severed the third-party action. By order dated April 5, 2017 and entered April 6, 2017, the court denied defendants' motion

(Seq. #2) to reargue. Plaintiff's counsel and defendant Congress Street Development, LLC then filed a stipulation discontinuing the action as to this defendant on April 15, 2017. Then, on May 17, 2017, plaintiff presented a proposed judgment and bill of costs to the County Clerk, and judgment was entered against defendant Nicholas Industries & Construction Services, Inc. plus the sum \$565.00 in costs. Then, within twenty-four hours of the e-filing of the judgment with notice of entry, defendant filed a motion (Seq. #3) to "vacate the costs from the judgment." By order dated June 29, 2017, after oral argument, the court denied the motion and stated in the short form order that the motion was meritless and "the prevailing party is always entitled to costs pursuant to CPLR 8101 unless the judge specifically provides to the contrary." Plaintiff then made a motion (Seq. 4) for sanctions, including attorneys' fees and expenses incurred in defending the motion (Seq. #3). Defendant then cross-moved to reargue (Seq. #5) and plaintiff then moved (Seq. #6) for sanctions, including the attorneys' fees and expenses incurred in connection with opposing defendant's motion to reargue and in making the motions for sanctions. Opposition was filed by defendant to motion #4. Motion #6 is the plaintiff's opposition to defendant's motion #5, but there was no opposition filed to motion #6 by defendant. Oral argument was held on September 7, 2017 and decision was reserved.

Plaintiff claims it is entitled to Part 130 sanctions against the defendant on the ground that the defendant's motion to vacate the costs and the defendant's subsequent motion to reargue the order denying the motion to vacate the costs are without merit in law and are frivolous. Counsel argues that sanctions are appropriate because the amount of the costs awarded by the County Clerk is nominal and the motions have no merit, nonetheless, plaintiff had to oppose them and thus should be reimbursed for the

attorneys' fees and expenses incurred in doing so and for making the motions for sanctions.

The defendant, in opposition, submitted counsel's affirmation in which he merely states that if the court does not grant the motion to reargue, then a hearing should be directed on the amount of the sanctions as the amount plaintiff seeks for the attorneys' fees incurred is unreasonable.

With regard to the motion to reargue, defendant's counsel states "the County Clerk is empowered to sign Judgments for sums certain. . . There was no monetary amount listed in the . . . Order dated November 2016 . . . [which granted plaintiff's motion for summary judgment and, *inter alia*, an order discharging the mechanic's lien] and, therefore, the County Clerk could not docket a Judgment [as] the order. . . was for relief other than money . . . therefore the Court has to determine the form of the Judgment, not the County Clerk." Defendant is not correct. CPLR 8101 entitles a prevailing party in any action to costs. As is clearly stated in the commentary in McKinney's to this section, C8101:1 "costs are an amount that the victorious party is generally entitled to recover from the losing party in partial reimbursement for the winner's expenses." The action does not need to be one for monetary relief. (*Rahabi v Morrison*, 81 AD2d 434 [2nd Dept 1981].)

The motion to reargue is denied. There is no law or fact that the court misapprehended in the decision issued on Motion Seq. #3 dated June 29, 2017. CPLR 2221.

Pursuant to 22 NYCRR 130-1.1, the court, in its discretion, may award a party to an action "costs in the form of reimbursement for actual expenses reasonably incurred and

reasonable attorney's fees, resulting from frivolous conduct as defined in this Part," and, in addition to awarding such costs, may impose financial sanctions upon a party. Conduct constitutes "frivolous conduct" under this section where it "is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law," or where "it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another" 22 NYCRR 130-1.1 (c) provides that "[i]n determining whether the conduct undertaken was frivolous, the court shall consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, should have been apparent, or was brought to the attention of counsel or the party."

Defendant's counsel fails to establish that the motion to vacate the costs and the motion to reargue the court's denial of that motion are legally or factually meritorious, nor can he. Counsel could have come to the County Clerk's office and had a conversation with the judgment clerk, if he wished to, but the motions were completely unwarranted. "This abuse of the judicial process [by creating unnecessary litigation] supports the imposition of sanctions" (*Maroulis v 64th St.-Third Ave. Assoc.*, 77 NY2d 831, 833, 567 N.E.2d 978, 566 N.Y.S.2d 584 [1991]).

For the foregoing reasons, the imposition of appropriate sanctions is warranted under 22 NYCRR 130-1.1. Since the motions constitute frivolous conduct, plaintiff is entitled to an award of the reasonable attorneys' fees and expenses incurred in opposing

the motion (Seq. #3) and the motion to reargue and in making the instant motions for sanctions (see 22 NYCRR 130-1.1 [a]; *Asim v City of New York*, 117 AD3d 655, 656, 987 N.Y.S.2d 49 [2014]; *Weissman v Weissman*, 116 AD3d 848, 850, 985 N.Y.S.2d 93 [2014], *lv denied* 24 NY3d 902, 995 N.Y.S.2d 710, 20 N.E.3d 656 [2014]; *Trajkovic v Trajkovic*, 98 AD3d 575, 576, 949 N.Y.S.2d 706 [2012]; *Matter of Herskowitz v Tompkins*, 184 AD2d 402, 404, 585 N.Y.S.2d 386 [1992], *appeal dismissed* 80 NY2d 1023, 607 N.E.2d 818, 592 N.Y.S.2d 671 [1992]).

Accordingly, it is

ORDERED, that plaintiff's motions for an order, pursuant to 22 NYCRR 130-1.1 (Part 130), imposing sanctions (Motion Seq. 4 and 6) are granted to the extent that plaintiff is awarded the reasonable attorney's fees and expenses that it incurred in opposing the motions (Seq. 3 and 5) and in making the sanctions motions (Seq. 4 and 6), after a hearing is conducted to determine the amount of those attorney's fees and expenses; and it is further

ORDERED, that this matter is referred to the Referee/Judicial Hearing Officer Part for a Referee to hear and determine, with regard to the reasonable attorney's fees and expenses that plaintiff incurred. The parties are to appear in Room 524 of the Court on October 12, 2017 at 10 a.m. to complete a Referee/JHO Referral Form, which can be obtained from the Part Clerk.

This constitutes the decision and order of this court.

Dated: September 12, 2017

ENTER:



Hon. Debra Silber, J.S.C.

Hon. Debra Silber
Justice Supreme Court