

Sacks v Knolls at Pinewood, LLC

2017 NY Slip Op 32809(U)

September 18, 2017

Supreme Court, Westchester County

Docket Number: 58955/2014

Judge: Charles D. Wood

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
LOIS SACKS,

Plaintiff,

- against -

THE KNOLLS AT PINWOOD, LLC.,
PINWOOD DEVELOPMENT CORP.,
URI HASON, EDMOND GEMMOLA, and
GEMMOLA & ASSOCIATES,

Defendants,

CRONIN ENGINEERING PROFESSIONAL
ENGINEERING, P.C., JOHN DOE 1, JOHN DOE 2
and JOHN DOE 3,

Supplemental Defendants

JASON FARINA in his capacity as President of the
unincorporated association known as THE BOARD
OF MANAGERS OF THE HOME OWNERS
ASSOCIATION OF THE PRESERVE AT
GREENBURGH CONDOMINIUM,

Additional Supplemental
Defendants,

-----X
THE KNOLLS AT PINWEED, LLC, PINWOOD
DEVELOPMENT CORP., and URI HASON,

Third Party Plaintiffs

-against-

EURO STYLE ENTERPRISES, INC., EURO STYLE

DECISION and ORDER

Index No. 58955/2014
Sequence No. 11

CONCRETE CORPORATION, TESTWELL, INC.,
TESTWELL LABORATORIES, INC., TESTWELL
CRAIG LABORATORIES, INC., TESTWELL
EQUITY HOLDINGS, INC., TESTWELL CRAIG,
INC., TESTWELL-CRAIG, INC., ROCKAWAY
INDUSTRIES, INC., NELSTAD MATERIAL
CORPORATION and NELSTAD READY MIX
CONCRETE CORPORATION,

Third-Party Defendants.

-----X
THE KNOLLS AT PINWOOD, LLC, PINWOOD
DEVELOPMENT CORP., and URI HASON,

Second Third-Party Plaintiffs

-against-

CRONIN ENGINEERING PROFESSIONAL
ENGINEER, P.C.,

Second Third-Party Defendant

-----X

WOOD, J.

The following papers were read in connection with plaintiff's motion to reargue this court's decision and order on its cross-motion for summary judgment against defendants Edmond Gemmola and Gemmola & Associates, Architects and Planners, Gemmola & Associates ("Gemmola"):

- Plaintiff's Notice of Motion, Memorandum of Law In Support.
- Gemmola Memorandum of Law in Opposition.
- Plaintiff's Memorandum of Law in Reply.

In this action, plaintiff seeks an award for damages against the Sponsor, its principals, contractors and others, arising from alleged defects to her condominium unit located at the Preserve Court in Greenburgh.

Based upon the foregoing, the motion is decided as follows:

Plaintiff moves for leave to reargue the decision and order of this court (Seq 10) dated June 7, 2017, wherein the court found in pertinent part, that plaintiff had not demonstrated that it had a contractual or other relationship with Gemmola, and thus, plaintiff may not recover for negligence from Gemmola. Thus, in the absence of privity, plaintiff's fourth cause of action for negligence could not be maintained. In light of that, plaintiff's motion for partial summary judgment was denied as to Gemmola.

Plaintiff argues that the court has overlooked controlling Appellate Division, First Department case law that states "The economic loss doctrine does not apply to negligence claims arising out of a violation of a professional duty" (Dormitory Auth. Of the State of N.Y. v Samson Constr. Co., 137 AD3d 433, 436 [1st Dept 2016]). Gemmola opposes the motion raising that the court may find for an exception to the economic loss doctrine when the particular project is so affected with the public interest that the failure to perform competently can have catastrophic consequences. This is not present here as the effects of the purported settling of a portion of the foundation of a condominium building is limited.

Under CPLR 2221(d), motions for reargument are "addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some [other] reason mistakenly arrived at its earlier decision" (*Mazzei v Licardi*, 47 AD3d 774 [2d Dept 2008], citing *Carillo v PM Realty Group*, 16 AD3d 611 [2d Dept 2005]; *Singleton v Lenox Hill Hospital*, 61 AD3d 956, 957 [2d Dept 2009]). A motion for reargument is "not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented" (*Gellert & Rodner v Gem Community Management, Inc.* 20 AD3d 388 [2d Dept 2005]; *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]). Nor does it function as a forum to proffer

arguments “different from those originally tendered” (*Amato v Lord & Taylor*, 10 AD3d 374, 375 [2d Dept 2004]) or on a new theory of law not previously advanced (*Frisenda v X Large Enterprises, Inc.*, 280 AD2d 514, 515 [2d Dept 2001]). Rather, the movant must satisfactorily demonstrate matters of fact or law allegedly overlooked or misapprehended on the prior motion (*Matter of Hoffman v Debello-Teheny*, 27 AD3d 743 [2d Dept 2006]). New facts may not be submitted or considered by the court (*Trahan v Gallea*, 48 AD3d 791, 792 [2d Dept 2008]; *Quinn v Menzel*, 282 AD2d 513 [2d Dept 2001]). Moreover, a motion for leave to reargue must be identified specifically as such, and must be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry (*see* CPLR 2221(d)(3)). Courts have allowed a motion for reargument to be made after the statutory time frames in CPLR 2221(d)(3) have expired if a timely notice of appeal has been served and filed (*Itzkowitz v King Kullen Grocery Co*, 22 AD3d 636[2d Dept 2005]). Indeed, this court has discretion pursuant to CPLR 2004 to extend the time fixed by statute “as may be just and upon good cause shown” CPLR 2004; *Itzkowitz at 638*. In addition, courts have automatically denied motions to reargue based upon the movant’s failure to include with the motion a complete set of the original papers, as they are germane to said motion to reargue (*see*, Connors, Supplementary Practice Commentaries McKinney’s Cons. Laws of N.Y. C2221:7;).

After a thorough review of the papers presented on the original motion, the court finds that there was a substantial basis for its decision. Since plaintiff failed to show that the court overlooked or misapprehended the facts or law or for some other reason mistakenly arrived at its earlier decision, plaintiff’s application for reargument is not supported by the record or the case law, and is denied.

This constitutes the Decision and Order of the Court.

THEREFORE, based upon the stated reasons, it is hereby:

ORDERED, that plaintiff's motion for leave to reargue is denied; and it is further

ORDERED, that Gemmola shall serve a copy of this order with notice of entry upon the parties within ten (10) days of entry, and file proof of service within five (5) days of service in accordance with the NYSCEF protocols.

Dated: September 18, 2017
White Plains, New York



HON. CHARLES D. WOOD
Justice of the Supreme Court

TO: Daniel P. Mevorach, Esq.
Gallo Vitucci Klar LLP
Attorneys for Defendants
The Knolls at Pinewood, LLC,
Pinewood Development Corp.,
URI Hason
90 Broad Street, 3rd Floor
New York, New York 10004

Schillinger & Finsterwald, LLP
Attorneys for Defendant Board of Managers of
Preserve at Greenburgh Condominium
81 Main Street, Suite 307
White Plains, New York 10601

Silverberg, P.C.
Attorney for Plaintiff
320 Carleton Avenue, Suite 6400
Central Islip, New York 11722

Law Office of Lori D. Fishman
Attorneys for Defendants
Edmond Gemmola and Gemmola & Associates,
Architects/Planners i/s/h/a Gemmola & Associates
120 White Plains Road, Suite 220
Tarrytown, New York 10591