

<b>Nova Bros., Inc. v James G. Kennedy &amp; Co., Inc.</b>
2017 NY Slip Op 32823(U)
May 17, 2017
Supreme Court, New York County
Docket Number: 653271/2012
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: ENGORON Justice

PART 37

Index Number : 653271/2012
NOVA BROTHERS, INC. A/K/A
vs
JAMES G. KENNEDY & CO., INC.
Sequence Number : 008
REARGUMENT/RECONSIDERATION

INDEX NO. 653271/2012
MOTION DATE 12/12/16
MOTION SEQ. NO. 008

The following papers, numbered 1 to 3, were read on this motion to/reargue

Notice of Motion/Order to Show Cause - Affidavits - Exhibits No(s) 1
Notice of Cross-Motion + Answering Affidavits - Exhibits No(s) 2
Replying Affidavits No(s) 3

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

HON. ARTHUR F. ENGORON

[Signature]

Dated: 5/17/17

\_\_\_\_\_, J.S.C.

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 37

-----X  
NOVA BROTHERS, INC. a/k/a AVON  
CONTRACTORS,

Plaintiff,

Index Number: 653271/2012

- against -

Sequence Number: 008

JAMES G. KENNEDY & CO., INC.; 200 PARK, L.P.;  
PBC 200 PARK AVENUE, LLC, d/b/a CARR  
WORKPLACES; JAMES G. KENNEDY, JR.;  
CHRISTOPHER VAN DER LINDE; RLI INSURANCE  
COMPANY; COURTHOUSE MANUFACTURING LLC;  
TNA ARCHITECTURAL PRODUCTS, INC.;  
CIROCCO & OZZIMO, INC.; CENTURY CARPET, INC.;  
and NEWPORT PAINTING & DECORATING CO., INC.,

Decision & Order

Defendants.

-----X  
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 3, were used on defendant RLI’s motion, and plaintiff’s cross-motion, to reargue the motion and cross-motion that resulted in this Court’s Decision and Order dated October 14, 2016:

Papers Numbered:

Notice of Motion - Affirmation - Affidavit - Exhibits . . . . .	1
Notice of Cross-Motion + Affirmation in Opposition - Exhibits . . . . .	2
Reply Affirmation . . . . .	3

Plaintiff, Nova Brothers, Inc. a/k/a Avon Contractors (“Nova”), a subcontractor, sues to recover damages for breach of a construction contract, and to foreclose a subsequent mechanics lien, naming as defendants: James G. Kennedy & Co., Inc. (“JGK”), the general contractor; 200 Park L.P. (“200 Park”), the owner of the subject project premises; PBC 200 Park Avenue, LLC d/b/a Carr Workplaces (“Carr”), the commercial tenant; RLI Insurance Company (“RLI”), the surety bond company; and various subcontractors. An agreement (“Agreement”) between 200 Park, Carr, and JGK provide that if JGK and its subcontractors are in “substantial breach”—essentially, failing to “substantially complete” the project—the owner may recoup costs to cure and finish the defective work. Pursuant to the Agreement, JGK was to complete the project by a date certain, which it allegedly failed to meet.

By Decision and Order dated October 14, 2016, this Court granted 200 Park and Carr’s motion for summary judgment, dismissing the complaint as against them *only*, but denied RLI and Nova’s motions for summary judgment, finding that there remained outstanding questions of fact as to whether JGK or its subcontractors, including Nova, “substantially completed” the project. RLI now moves to reargue the prior summary judgment motion, essentially restating that it should only incur liability if Nova can prove that the owners owe JGK outstanding funds. Nova cross-moves for reargument, stating (1) that Carr is not entitled to summary judgment because it is listed as principal on the bond, and (2) that dismissal of its reasonable expectation of payment for equipment and services claim is not supported by the Court’s prior decision. The instant motion and cross-motion are granted, and upon reargument, this Court adheres its original determination, except to the extent that it granted summary judgment in favor of Carr.

The underlying issue here is as follows: “Did JGK and its subcontractor “substantially complete the project?” This Court stands by its original determination that there are outstanding questions of fact that cannot be determined at the summary judgment stage. The record does not clearly and unambiguously show whether, pursuant to the Agreement, JGK and its subcontractors failed to meet their final obligations.

Thus, RLI has not established its entitlement to summary judgment. The Court agrees that RLI’s only potential liability is if Nova proves that there were funds due and owing to JGK and its subcontractors from 200 Park and/or Carr. However, as Nova has not proven, nor has RLI disproven, that JGK “substantially completed” the project, the Court cannot determine whether RLI has any outstanding obligations pursuant to Nova’s mechanics lien. Therefore, it would be inappropriate to grant RLI or Nova summary judgment at this stage.

Upon further review, the Court finds that it was hasty in its decision to grant Carr summary judgment in its October 14, 2016 Decision and Order. As Nova correctly points out, Carr remains listed as principal on RLI’s October 12, 2012 bond. As such, New York Lien Law § 37(7) requires Nova to join as parties the surety on the bond, RLI, and the principal, Carr. See Bryant Equip. Corp. v A-1 Moore Contr. Corp., 51 AD2d 792, 793 (2d Dept 1976) (Lien Law § 37(7) “sets forth the classes of persons who shall be joined as parties defendant, namely the principal and surety on the bond”) (quotations omitted).

Finally, although the Court did not specifically discuss Nova’s reasonable expectation of payment for equipment and services claim, the Court considered it and found it unavailing, as it does now. Whether Nova’s expectation of payment for the equipment and services it now seeks to collect is “reasonable” is a question of fact that would be premature to determine at this stage. However, for clarification purposes, the Court notes that this particular claim is *not* dismissed against defendants who have not been granted summary judgment and remain in the action.

Accordingly, the motion and cross-motion are granted, and upon reargument, the Court adheres to its original determination, except to the extent that it granted summary judgment in favor of Carr. As to this particular defendant *only*, the Court’s prior judgment is vacated.

#### Conclusion

Motion granted; cross-motion granted. The clerk is hereby directed to vacate the Court’s Decision and Order dated October 14, 2016, as against defendant PBC 200 Park Avenue, LLC d/b/a Carr Workplaces *only*, wherein the Court granted summary judgment in its favor.

Dated: May 17, 2017



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Arthur F. Engoron, J.S.C.