

<b>Lusitano Enters., Inc. v Horton Bros., Inc.</b>
2018 NY Slip Op 32011(U)
August 14, 2018
Supreme Court, Suffolk County
Docket Number: 022724-2012
Judge: James Hudson
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Supreme Court of the County of Suffolk  
State of New York - Part XLVI

PRESENT:

HON. JAMES HUDSON  
*Acting Justice of the Supreme Court*

x-----x  
LUSITANO ENTERPRISES, INC. and  
NICHOLAS LIBERATOSCIOLI,

Plaintiffs,

-against-

HORTON BROTHERS, INC., HORTON BROS., INC  
and KEVIN HORTON,

Defendants.

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SEQ. NO.:003-Mot D

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Upon the following papers numbered 1 to 27 read on this motion to Reargue; Notice of Motion/ Order to Show Cause and supporting papers 1-4; Notice of Cross Motion and supporting papers 0; Answering Affidavits and supporting papers 5-25; Replying Affidavits and supporting papers 26-27; Other 0; (~~and after hearing counsel in support and opposed to the motion~~) it is,

**ORDERED** that the Horton Defendants' motion (003) pursuant to CPLR 2221 seeking leave to reargue the prior motion which by Order, dated October 24<sup>th</sup>, 2017 (Hudson, J.), denied their motion to dismiss the second amended complaint is granted; and it is further

**ORDERED** that upon reargument, the motion is once again denied; and it is further

**ORDERED** that the parties are directed to appear in Part XLVI for the purpose of trial scheduling on **Wednesday, September 19<sup>th</sup>, 2018 at 11:30 am.** at the New York State Supreme Court of Suffolk County, One Court Street, Riverhead, NY, Part XLVI.

In the prior motion of this indemnification action, the Horton Defendants sought to dismiss the second amended complaint pursuant to CPLR 3211 (a) (5), (7). In the instant motion, the Horton Defendants now move to reargue their prior motion, pursuant to CPLR 2221, seeking to dismiss the second amended complaint pursuant to CPLR 3211 (a) (5), and

(7) and CPLR 3212.<sup>1</sup>

The second amended complaint contains two causes of action: common law indemnification and contribution. Although the first cause of action alleges facts sounding in breach of contract and negligence, the Court construes that Plaintiffs are alleging that they are entitled to common law indemnification. The Court notes that Plaintiffs have discontinued the second cause of action.

A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221[d]). The purpose is not to permit the unsuccessful party to reargue the very questions previously decided (*Fosdick v Town of Hempstead*, 126 NY 651, 1891 NY LEXIS 1714 [1891]; *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1979]).

In support of the motion to reargue, Defendants submit, *inter alia*, the prior motion papers, the pleadings, and Counsel's affirmation. Defendants contend that the Court misapplied the CPLR with regard to the statute of limitations. Defendants cite CPLR 3211 (e), which provides that a defense based upon the expiration of the statute of limitations is waived unless raised either by a pre-answer motion or in the responsive pleading. Defendants state that they asserted the affirmative defense of the expiration of the statute of limitations in its answer to Plaintiff's second amended complaint, therefore, it need not have made a pre-answer motion to dismiss in order to preserve same.

In addition, Defendants claim that "...while the applicable statute of limitations for a breach of contract claim is six years, a cause of action predicated upon defective construction accrues upon completion of the actual physical work on the construction contract, no matter how a claim is characterized in the complaint, because all liability for defective construction has its genesis in the contractual relationship of the parties." Defendants contend that the work was completed in August, 2005. Defendants further state that there is no such thing as contractual indemnification predicated upon a purported oral contract. With regard to Plaintiff's common law indemnification cause of action, Defendants argue that Plaintiffs are not entitled to such indemnification inasmuch as the oral agreement was not a comprehensive and exclusive parking lot construction agreement meant to fully displace Lusitano's

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<sup>1</sup> The Court declines to consider the Horton Defendants' request for summary judgment on the Plaintiffs' first cause of action, which was not included in the prior notice of motion. It, therefore, is not properly before the court (see *Lee v Colley Group McMontebello*, 90 AD3d 1000, 1000-1001; *DiLacio v New York City Dist. Council of United Bhd. Of Carpenters & Joiners of Am.*, 80 AD3d 553, 554; *Myung Chun v N. Am. Mtge. Co.*, 285 AD2d 42, 45).

contractually assumed responsibilities. Therefore, Defendants argue, Plaintiffs' cause of action for common law indemnification should be rejected by the Court since Plaintiff did not exclusively allege that it was vicariously responsible for Defendants' acts, and in the prior action,<sup>2</sup> that Plaintiff sought recovery for Plaintiff's own, affirmative wrongful acts and/or omissions.

The Horton Defendants rely upon *Kowalczyk v Monticello* (107 AD3d 1365, 969 NYS2d 566 [3d Dept 2013]), and *Abramov v Board of Assessors, Town of Hurley* (257 AD2d 958, 684 NYS2d 326 [3d Dept 1999]), which hold that "a pre-answer to dismiss based upon a statute of limitations defense/objection necessarily must be made prior to the time in which to serve an answer, and the failure to do so will result in a waiver of the defense unless thereafter raised in the responsive pleading." While the Court agrees, the Horton Defendants fail to substantiate their use of a motion to dismiss after asserting the statute of limitations defense in their answer. The Horton Defendants also rely upon *McManus v McManus* (60 AD2d 698, 400 NYS2d 392 [3d Dept 1977]), which holds that Defendants could assert the statute of limitations defense in their answer after the Court denied Defendants' pre-answer motion to dismiss on the ground that the complaint failed to state a cause of action. The Court finds that this case is inapposite to the facts presented in the instant matter.

In opposition, Plaintiffs contend that the statute of limitations has not run, in that payment to STS and Corrado was made approximately eight months prior to the commencement of the instant action. Therefore, the six-year statute of limitations for common law indemnification has not expired and the Horton Defendants have incorrectly applied the breach of contract statute of limitations to these facts. In addition, Plaintiffs assert that the complaint states a cause of action for common law indemnification, in that they gave the Horton Defendants exclusive responsibility for excavating the work site by clearing, grubbing, chipping and removal of debris, site grading, stripping and stockpiling topsoil, backfilling curbs, supplying and installing site drainage and related piping, supplying and installing the septic system with all piping, inspections and certification. After depressions were noted in the parking lot, the Horton Defendants acknowledged that wood chips were in the excavation holes and that wood is not a proper material to be used for backfill because over time wood will decay.

A motion to dismiss based on a ground listed in CPLR 3211 (a) (5) must be made before answering (*see* CPLR 3211 (e)); Siegel, Practice Commentaries, McKinney's Cons

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<sup>2</sup> The prior action is captioned *Suffolk Transportation Service, Inc. and J & J Corrado Real Estate, LLC v Nicholas Liberatoscioli, Jr., Lusitano Enterprises, Inc, Kevin Horton, Horton Brothers Inc., and Horton Bros., Inc.*, Index No. 25560/11.

Laws of NY, Book 7B, CPLR 3211:21). A motion for summary judgment, on the other hand, does not lie until after service of the responsive pleading (*Id.*). Summary judgment is, therefore, a post answer device (*Id.*). Any of the grounds on which a CPLR 3211 motion could have been made before service of the answer can be used as a basis for a motion for summary judgment afterwards as long as the particular objection, although not taken by a CPLR 3211 motion before service of the answer, has been included as a defense in the answer and thereby preserved (CPLR 3211 (e); Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR 3212:20). Having preserved the affirmative defense in their answer, Defendants were not also entitled to serve a pre-answer motion to dismiss, which is a procedural irregularity. Defendants would have been required to move for summary judgment on the statute of limitations issue inasmuch as they had served their answer.

Assuming *arguendo* that the Horton Defendants moved for summary judgment in the prior motion, the outcome would be unchanged. It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397 [2003]). Here, the record reveals that Plaintiffs paid the sum of \$242,222 to STS and Corrado in the prior action on or about November 28, 2011. In addition, the record reveals that Plaintiffs filed and served a summons and complaint seeking common law indemnification on July 27<sup>th</sup>, 2012, less than one year later. Contrary to the Horton Defendants' contention that the action accrued at the time of the breach, CPLR 213 (2) provides that a cause of action for common law indemnification accrues when the person seeking indemnity has paid the underlying claim (*State v Stewart's Ice Cream Co.*, 64 NY2d 83, 484 NYS2d 810 [1984]; *McDermott v New York*, 50 NY2d 211, 428 NYS2d 643 [1980]). The Horton Defendants have effectively failed to take into account the undisputed facts in the record and the evidence presented in the depositions of the parties. As a result, the Horton Defendants have failed to meet their initial burden of establishing, *prima facie*, their entitlement to judgement as a matter of law on the issue of whether the statute of limitations has run in the first cause of action. Therefore, the burden would never have shifted to Plaintiffs to raise a triable issue of fact. Accordingly, the Court adheres to its original determination.

The Court now turns to the Horton Defendants' contention that the second amended complaint should be dismissed on the ground that it fails to state a first cause of action for common law indemnification pursuant to CPLR 3211 (a) (7). In the prior Order, this Court determined that Plaintiffs sufficiently stated a cause of action. Upon reargument and a careful review of the motion papers, this Court finds that the Horton Defendants failed to

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demonstrate that the Court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law in determining the prior motion (*see* CPLR 2221 [d] [2]; *Bigun v Ahmed*, 150 AD3d 1186, 52 NYS3d 896 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 967, 31 NYS3d 97 [2d Dept 2016]; *Ahmed v Pannone*, 116 AD3d 802, 805, 984 NYS2d 104 [2d Dept 2014]).

Accordingly, the Horton Defendants' motion to reargue is granted and upon reconsideration the Court adheres to its original determination.

This foregoing decision constitutes the Order of the Court.

**DATED: AUGUST 14<sup>th</sup>, 2018**  
**RIVERHEAD, NY**

  
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**HON. JAMES HUDSON**  
*Acting Justice of the Supreme Court*