

Cathedral Gardens Condo Assn. v 110th St. Equities, LLC.
2018 NY Slip Op 32618(U)
October 15, 2018
Supreme Court, New York County
Docket Number: 600175/2009
Judge: William Franc Perry
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NYSCEF DOC. NO. 283

RECEIVED NYSCEF: 10/15/2018

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. W. FRANC PERRY **PART** **IAS MOTION 23EFM**

Justice

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CATHEDRAL GARDENS CONDO ASSOCIATION, THE
COLLEGE BOARD OF MANAGERS OF CATHEDRAL GARDENS
CONDO, THE NON-COLLEGE BOARD OF MANAGERS OF
CATHEDRAL GARDENS CONDO,

INDEX NO. 600175/2009

MOTION DATE 09/21/2018

MOTION SEQ. NO. 008

Plaintiff,

- v -

110TH STREET EQUITIES, LLC., ARTIMUS CONSTRUCTION
INC., ROTHZEID KAISERMAN THOMAS & BEE P.C.,

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 259, 260, 261, 262, 263, 264, 265, 270, 271, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282

were read on this motion to/for

REARGUMENT

Upon the foregoing documents, Second Third Party Defendants', Chris Sideris and Sideris Kefelas Engineers, P.C. i/s/h/a Chris Sideris, P.E, P.C., (hereinafter "Sideris") Motion seeking to Reargue this Court's June 13, 2018 Order which denied Sideris' motion to dismiss the Amended Verified Complaint as it pertains to claims asserted for contribution, as well as Sideris' motion to dismiss for laches, or in the alternative to sever the Second Third Party Action from the underlying action, is denied.

In support of its motion, Sideris argues that this court overlooked or misapplied facts and caselaw which Sideris claims demonstrates that the complaint does not allege a valid tort claim and that the third-party action seeking contribution should be dismissed, as the damages sought by plaintiff in the underlying action were for economic loss, and that there was no right to contribution on the grounds that Sideris did not owe a duty to plaintiff or to third party plaintiff

Rothzeid Kaiserman Thompson & Bee P.C., (hereinafter "RKTB"). Additionally, Sideris contends that the court erred and overlooked certain facts in denying its motion to dismiss based on laches. RKTB opposes the motion.

STANDARD OF REVIEW/ANALYSIS

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. NY CPLR §2221(d). While the determination to grant leave to reargue a motion lies within the sound discretion of the court, a motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided. *Kent v 534 E. 11th St.*, 80 AD 3d 106, 116 (1st Dept. 2010)(“Reargument is not a vehicle permitting a previously unsuccessful party to once again argue the very questions previously decided or to assert new, never, previously offered arguments.”); *Foley v Roche*, 68 AD2d 558, 567 (1st Dept. 1979)(a motion to reargue does not properly serve as a “vehicle to permit the unsuccessful party to argue once again the very questions previously decided.”).

Sideris maintains that the court misapplied the holdings in *Dormitory Auth. Of State of N.Y. v. Sanchez Constr. Co.*, 30 N.Y.3d 704 [2018] and *Structure Tone v. Universal Services Group, Ltd.*, 87 A.D.3d 909 [1st Dept. 2011]. Sideris argues that because the negligence allegations in the Complaint against RKTB are merely a reinstatement of the implied contractual obligations asserted in the cause of action for breach of contract, no claim for contribution can be maintained by RKTB against Sideris.

This same argument was advanced by Sideris in support of its motion to dismiss and was rejected by this court, when it held: “Sideris’ argument that the contribution claim asserted by RKTb must be dismissed because the damages sought against RKTb are solely for economic losses, *ignores the fact that plaintiffs have alleged a violation of RKTb’s professional duty and damages flowing therefrom*. That claim forms the basis for a valid contribution claim by RKTb against Sideris, to the extent that RKTb can prove that, in the event RKTb is found liable to plaintiffs for damages, those damages were contributed to by Sideris’ alleged negligence or breach of duty in performing its design services, controlled inspection of the mechanical ventilation system and certifying the October 7, 2005 TR-1.” [citations omitted; emphasis added]. (NYSCEF Doc. No. 255).

In addition, the facts at issue in *Dormitory Auth. Of State of N.Y. v. Sanchez Constr. Co.*, supra, are completely distinguishable from the facts and legal issues presented here and do not alter this court’s decision which denied Sideris’ motion to dismiss the cause of action for contribution alleged in the third-party complaint. The Court in *Dormitory Auth. Of State of N.Y. v. Sanchez Constr. Co.*, supra, discussed contract third-party beneficiaries and duplication of causes of action in contract and malpractice asserted against design professionals; the Court held that the City was not a beneficiary and that Dormitory Authority’s malpractice cause of action was duplicative of its contract cause. *Dormitory Auth. Of State of N.Y. v. Sanchez Constr. Co.*, 30 N.Y.3d at 713.

Here, plaintiff’s breach of contract claim against RKTb was dismissed with leave to replead, specifically because the court found that plaintiff did not sufficiently plead the element of third-party beneficiary to sustain its contract cause of action against RKTb.¹ The court

¹ To date, plaintiffs have not replead the breach of contract cause of action against RKTb.

however, did not dismiss the Sixth cause of action against RKTB which was for architectural malpractice, noting that the record was insufficient to determine the end date for completion of construction in order to ascertain the accrual date of the alleged professional malpractice. Specifically, the court held, “[t]here has been no discovery here, and plaintiff should have the opportunity to make a document request and depose Bafitis on the issue of when the work was completed.” (NYSCEF Doc. No. 169, p.18).

As such, the only cause of action that remains against RKTB is one for malpractice which led this court to conclude that RKTB “may be subject to tort liability for failure to exercise reasonable care, irrespective of [its] contractual duties” (*Sommer v. Federal Signal Corp.*, 79 N.Y.2d 540, 551, 583 N.Y.S.2d 957, 593 N.E.2d 1365 [1992]), and the damages sought by plaintiffs here are not limited to the benefit of the bargain (see *Tower Bldg. Restoration v. 20 E. 9th St. Apt. Corp.*, 295 A.D.2d 229, 229, 744 N.Y.S.2d 319 [2002]).” (NYSCEF Doc. No. 255). Upon review of the papers and caselaw cited in support of Sideris’ motion to reargue, the Court finds it did not overlook any relevant facts or misapply controlling principles of law.

Similarly, this court did not overlook any facts or controlling authority with respect to Sideris’ contention that the third-party complaint should be dismissed due to laches or in the alternative, that the third-party complaint should be severed. (NYSCEF Doc. No. 255). Plaintiff’s deadline to file the Note of Issue has been extended to January 15, 2019 to allow Sideris a full opportunity to complete discovery.

As Sideris merely restates the previous arguments regarding the issue of laches and the alternative request to sever the third-party action, these issues have already been decided by the court and the motion to reargue is denied. (*Hamlet at Willow Creek Development Co., LLC v Northeast Land Development Corp.*, 64 AD3d 85, 878 NYS2d 97 [2nd Dept. 2009]); (*Renna v*

Gullo, 19 AD3d 472, 797 NYS2d 115 [2nd Dept. 2005]; *Rubinstein v Goldman*, 225 AD2d 328, 638 NYS2d 469 [1st Dept. 1996]) (Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted).

ORDERED that Sideris' motion for leave to reargue its motion to dismiss the third-party complaint, is denied in its entirety.

<u>10/15/2018</u>			
DATE		W. FRANC PERRY, J.S.C.	
CHECK ONE:	☐ CASE DISPOSED	☒ NON-FINAL DISPOSITION	
	☐ GRANTED	☐ GRANTED IN PART	☐ OTHER
APPLICATION:	☒ DENIED	☐ SUBMIT ORDER	
	☐ SETTLE ORDER	☐ FIDUCIARY APPOINTMENT	☐ REFERENCE
CHECK IF APPROPRIATE:	☐ INCLUDES TRANSFER/REASSIGN		