

Banks v Bovis Lend Lease, Inc.
2019 NY Slip Op 32286(U)
July 31, 2019
Supreme Court, New York County
Docket Number: 151117/2013
Judge: Margaret A. Chan
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARGARET A. CHAN

PART

IAS MOTION 33EFM

Justice

-----X

BANKS, THOMAS

Plaintiff,

- v -

BOVIS LEND LEASE, INC.

Defendant.

-----X

THE MOUNT SINAI MEDICAL CENTER, INC., THE MOUNT
SINAI HOSPITAL, MORGAN CONSTRUCTION
ENTERPRISES, INC.

Plaintiff,

-against-

RIGID ELECTRIC, INC.

Defendant.

-----X

THE MOUNT SINAI MEDICAL CENTER, INC., THE MOUNT
SINAI HOSPITAL, MORGAN CONSTRUCTION
ENTERPRISES, INC.

Plaintiff,

-against-

LINEAR CONTRACTING, INC.

Defendant.

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INDEX NO. 151117/2013

MOTION DATE 04/05/2019

MOTION SEQ. NO. 007

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 590501/2013

Second Third-Party
Index No. 595943/2016

The following e-filed documents, listed by NYSCEF document number (Motion 007) 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191 were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER

In this Labor Law matter, defendants/third-party plaintiffs The Mount Sinai Medical Center, Inc., The Mount Sinai Hospital (collectively, "Mount Sinai"), and Morgan Construction Enterprises, Inc. ("Morgan") move in motion sequence 007 to

reargue this court's March 4, 2019 Decision and Order ("March 4 Order")¹ pursuant to CPLR 2221(d) and, upon reopening, grant summary judgment. The movants claim that this court erred in determining that they were not entitled to summary judgment against third-party defendant Rigid Electric, Inc. ("Rigid") on claims for contractual indemnification and that this court erred in severing the claim of second third-party defendant Linear Contracting, Inc. ("Linear") contrary to this court's discussion at oral argument on February 13, 2019. Rigid and Linear oppose the motion. The Decision and Order is as follows:

FACTS

This is a Labor Law matter in which plaintiff Thomas Banks claims that he tripped over a Masonite board at a work site at Mount Sinai Medical Center. In a March 4, 2019 Decision and Order, this court ruled on motion sequence numbers 004-006 (NYSCEF #162 – March 4, 2019 Order). First, Rigid's motion for summary judgment to dismiss Mount Sinai's and Morgan's third-party complaint was granted (*id.* at 4). Second, Mount Sinai's cross-motion for summary judgment on its third-party claim for contractual indemnity against Rigid was denied (*id.*). Third, Linear's motion for summary judgment to dismiss the second third-party complaint and all cross-claims asserted against it was granted (*id.*). Fourth, Linear's motion for summary judgment to dismiss plaintiff's Labor Law §200 and common law negligence claims was denied (*id.*). Fifth, Linear's motion for summary judgment on plaintiff's Labor Law §240(1) was granted (*id.*). Sixth, Linear's motion for summary judgment on Labor Law §241(6) was granted for plaintiff's claims under Industrial Code sections 23-15, 23-2.1, and 23-1.7(e)(2) (*id.*).

DISCUSSION

Defendants Mount Sinai's and Morgan's motion to reargue is denied. The movants have failed to demonstrate that this court misapprehended or overlooked any facts or law.

A motion for CPLR 2221(d) reargument "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". The movant bears the burden of demonstrating that "the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision" (*id.*). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present argument different from those originally asserted" (*id.*). Thus, the motion is not intended as a vehicle to rehash what has already been argued or for raising new questions (*see Simpson v Loehmann*, 21 NY2d 990, 990 [1968]).

¹ The written Decision and Order at issue here was signed February 13, 2019 but was not issued until March 4, 2019.

First, the movants claim that this court erred in determining that they were not entitled to summary judgment against third-party defendant Rigid on claims for contractual indemnification. The March 4 Order states that “there is no evidence that [Rigid] created the alleged defective condition or that it had the duty to maintain the premises” and that “the indemnification provision was not triggered” (NYSCEF #162 at 2). Plaintiff’s injury occurred while he was walking from the bathroom to his work site, and “since Plaintiff’s injury did not occur in the course of performing electrical work, the indemnification provision is inapplicable” (*id.*).

The movants point the court to *Worth Construction Company, Inc. v Admiral Insurance Company*, 10 NY3d 411, 415 [2008] for the proposition that “arising out of the work” in the Labor Law indemnification context means “originating from, incident to, or having connection with”. The movants additionally point to *Hoyos v NY-1095 Avenue of the Americas, LLC*, 156 AD3d 491 [1st Dept 2017] for the proposition that when a laborer is obligated to follow an owner’s work site policy that restricted the laborer’s access and movement to his work site and the laborer is injured in transit, the transit is considered part of the work.

However, *Hoyos* has nothing to do with indemnification and merely held that a plaintiff-painter who fell from an elevated loading deck was a protected person under Labor Law §240 regardless of whether he was painting at the time of his injury or simply at the construction site on his way to the work area. As such, *Hoyos* is completely inapplicable in this situation.

Worth is also unavailing as the court properly applied the same standard in the March 4 Order. Plaintiff’s injury did not arise out of or have any connection with his electrical work and thus the indemnification provision at issue between Rigid and the movants is inapplicable.


Second, the movants argue that this court improperly severed and dismissed the second third-party action against Linear and they claim that a “review of the transcript of the [oral] argument shows the Court’s clear intent to leave the Common Law indemnity claims intact” (NYSCEF #169 – Movants’ Aff in Support at ¶21). At the February 13, 2019 oral argument, the court stated that “Linear’s motion is not granted, but there are parts that are granted and there are parts that are actually conceded, especially the contractual claim. But just know that you’re still in the case” (NYSCEF #170 – Tr. February 13, 2019 Oral Argument at 12-13). The written decision, however, states that “Mt. Sinai’s claim for common law indemnification is be [sic] dismissed since there is no evidence that Linear’s actions caused Plaintiff’s accident or that it was negligent” and “since Linear was not negligent, the second third-party complaint and all cross-claims are dismissed against it” (NYSCEF #162 at 2-3).

For the sake of clarity, the March 4, 2019 written decision supersedes any oral decision. As discussed in the written order, there is no evidence that Linear's actions caused plaintiff's accident or that it was negligent. The movants' argument on this motion that Linear placed the Masonite board that allegedly caused plaintiff's accident and that Linear had an obligation to inspect the hazard simply rehashes what was already decided. Movants do not identify any misapplied or misapprehended facts or law. As the March 4 Order correctly stated, Morgan's superintendent testified that Morgan was responsible for the protection put on the floor (NYSCEF #139 – Conroy Tr., pp. 53:3-9). Linear was not responsible for the tripping hazard and therefore there can be no common law indemnity claim against it.

Accordingly, it is ORDERED that Mount Sinai's and Morgan's motion for reargument is denied in its entirety.

This constitutes the decision and order of the court.

7/31/2019
DATE


MARGARET A. CHAN, J.S.C.

CHECK ONE: CASE DISPOSED DENIED NON-FINAL DISPOSITION

APPLICATION: GRANTED GRANTED IN PART OTHER

CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN FIDUCIARY APPOINTMENT REFERENCE