

Quail v Mohawk Indus. Werks, LLC
2019 NY Slip Op 33335(U)
September 16, 2019
Supreme Court, Cortland County
Docket Number: 15-723
Judge: Jeffrey A. Tait
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At a Term of the Supreme Court of the State of New York, held in and for the Sixth Judicial District, at the Broome County Courthouse, in the City of Binghamton, New York on the 31st day of May 2019.

PRESENT: HONORABLE JEFFREY A. TAIT
JUSTICE PRESIDING

STATE OF NEW YORK
SUPREME COURT : COUNTY OF CORTLAND

WILFRED QUAIL, JR. and DEBORA QUAIL,

Plaintiffs,

-against-

DECISION AND ORDER

**Index No. 15-723
RJI No. 2016-0444-C**

**MOHAWK INDUSTRIAL WERKS, LLC,
EQUIPMENT SURPLUS, LLC, and MOHAWK
LTD.,**

Defendants.

MOHAWK LTD.,

Third-Party Plaintiff,

-against-

**KASSBOHRER ALL TERRAIN VEHICLES,
INC.,**

Third-Party Defendant.

MOHAWK LTD.,

Second Third-Party Plaintiff,

-against-

**PEAK RESORTS, INC. and GREEK PEAK
HOLDINGS, LLC,**

Second Third-Party Defendants.



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DECISION AND ORDER
Elizabeth Larkin, County Clerk

APPEARANCES:

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HON. JEFFREY A. TAIT, J.S.C.

This matter is before the Court on the motion of the Second Third Party Plaintiff Mohawk Ltd. (Mohawk) for reargument of the Court's Decision and Order dated October 23, 2019. Defendant Peak Resorts, Inc. and Greek Peak Holdings, LLC (together referred to as Greek) oppose the motion. Mohawk seeks to vacate the portion of the Decision and Order which imposed a \$1,500.00 sanction on Mohawk on the basis that allegations in the Second Third Party Verified Complaint and the failure to respond to counsel's inquiries about them, taken together, showed both frivolous conduct and a refusal to respond.

In support of the motion, Mohawk submits the affirmation of its attorney with exhibits. In opposition to the motion, Greek submits the affirmation of its attorney. The motion was heard on May 31, 2019.

Law

Pursuant to CPLR 2221(d), a motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry.

“A motion for reargument is addressed to the sound discretion of the court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law” (*McGill v. Goldman*, 261 AD2d 593, 594 [2d Dept 1999]).

Analysis

The affirmation in support of the motion points out two significant facts. First, it notes the cause of action which was the basis for the sanction was withdrawn prior to the motion seeking imposition of the sanction. Second, the Decision and Order makes no mention of this.

The Decision and Order makes it clear the Court is not inclined to sanction attorney conduct unless the conduct is clearly frivolous and egregious. It was this Court’s view that Mohawk’s attorney failed and refused to withdraw what was clearly a baseless claim despite numerous requests that she do so.

The exhibits submitted on the original motion do establish that the offending (baseless) claim was withdrawn just prior to the time Greek made its motion. A detailed reading of the exhibits would have disclosed this. I did not do that detailed reading.

For that reason, the motion to reargue is granted.

Neither counsel made any reference to the fact that the claim had been withdrawn. Perhaps they felt this was not necessary, as page 124 of 260 pages of exhibits and memorandum of law submitted with the original moving papers contains a line in an interrogatory response reading: “Mohawk Ltd withdraws the claim of breach of contract for failing to procure insurance.” That apparently is the only reference from which I could (should) have gleaned that the claim had been withdrawn.

Counsel for Greek likely felt this did not matter, as the claim should not have been made in the first instance and should, in any event, have been withdrawn long before that time.

Counsel for Mohawk likely felt this was no longer an issue, as the claim was withdrawn before Mohawk made a motion seeking a sanction for the failure to withdraw it.

I certainly strive to read affidavits, affirmations, and exhibits submitted on all contested motions. Those documents made specific reference to the alleged sanctionable conduct. No one made any reference in an affidavit or affirmation that the claim had been withdrawn prior to the making of the motion.

The amount of the sanction was in recognition of the fact that counsel for Greek was put to the task of drafting a letter detailing the baseless nature of the claim and then following up with no response from Mohawk's counsel.

It is true that the fact that a motion was not required to ultimately compel withdrawal of the claim is better than withdrawal only after the motion was made. Mohawk's defense seems to be that the claim was frivolous, but its counsel withdrew it just before the Court had to get involved. To Greek, this eleventh hour withdrawal caused it to expend time and effort that could have been avoided by a casual response to its earlier inquiries.

The letter from Greek's counsel which laid out in detail the basis for withdrawal of the failure to procure insurance claim is dated December 29, 2017. Mohawk's supplemental response to the first set of interrogatories withdrawing the claim is dated May 24, 2018 – a Thursday. It was presumably mailed that day or the next day (a Friday). The three-day weekend for Memorial Day followed. The notice of motion is dated June 5, 2018 and was filed June 11, 2018. This left five days or less for Mohawk to glean the withdrawal from the

interrogatory responses.

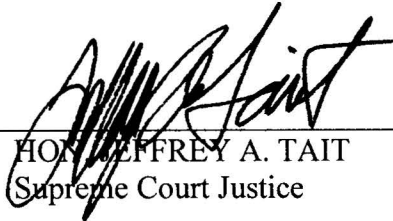
In light of the foregoing, given the lack of factual or contractual support for the claim and the failure to respond to Greek’s counsel’s requests to withdraw it thereafter, the Court adheres to and reaffirms the October 23, 2019 Decision and Order.

Conclusion

The motion to reargue is granted, but the Court adheres to and reaffirms the October 23, 2019 Decision and Order.

This Decision shall also constitute the Order of the Court pursuant to rule 202.8(g) of the Uniform Rules for the New York State Trial Courts and it is deemed entered as of the date below. To commence the statutory time period for appeals as of right (CPLR 5513[a]), a copy of this Decision and Order, together with notice of entry, must be served upon all parties.

Dated: September 16, 2019
Binghamton, New York



HON. JEFFREY A. TAIT
Supreme Court Justice