

<b>Stone &amp; Broad Inc. v Nextel of N.Y., Inc.,</b>
2020 NY Slip Op 30857(U)
March 25, 2020
Supreme Court, New York County
Docket Number: 156297/18
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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STONE & BROAD INC., Plaintiff,

- v -

NEXTEL OF NEW YORK, INC., SPRINT CORPORATION, 88 BROAD REALTY CORP., LANA 28 CORP., BENJAMIN-PARK, INC., GULIANO-PARK 88 BROAD STREET INC., GIULIANO GOURMET PIZZA & DELI, FRANK RENE0, PETER RENE0, VITO RENE0, ADA MIZUKOVSKI, ROBERT PARK, KUI SUN PARK, and TECH NEL ELECTRIC, INC., Defendants.

Table with 2 columns: Field Name, Value. INDEX NO. 156297/18, MOTION DATE, MOTION SEQ. NO. 006

DECISION + ORDER ON MOTION

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HON. BARRY R. OSTRAGER

Before the Court is a motion by defendant Nextel of New York, Inc. ("Nextel") to renew its motion to dismiss, which had been made jointly with defendant Sprint Corporation (mot. seq. 001). In the decision and order entered March 4, 2019, the Court granted motion sequence 001 to the extent of dismissing all claims against Nextel's parent Sprint for lack of personal jurisdiction (NYSCEF Doc. No. 67). The Court also dismissed the claims against Nextel for failure to state a claim, specifically, the Second Cause of Action sounding in common law indemnification and the Third Cause of Action sounding in restitution (see Complaint, NYSCEF Doc. No. 2). However, because the motion did not directly address the cross-claims filed by certain co-defendants, the Court determined that none of the cross-claims against Nextel would be dismissed at that time. Those generic cross-claims for indemnification and contribution had been asserted by co-defendants Ada Mizukovski and Lana 28 Corp. (the "Mizukovski Defendants") by co-defendants 88 Broad Realty Corp., Frank Reneo, Peter Reneo and Vito Reneo (the "Reneo Defendants") against all other defendants (NYSCEF Nos. 11 and 28, respectively).

Nextel now moves to renew the implicit request in its earlier motion for dismissal of all cross-claims based on this Court’s decision on an intervening motion by co-defendant Tech Nel Electric, Inc. wherein the Court dismissed the very same cross-claims as asserted against Tech Nel. Only the plaintiff has opposed the present motion. For the reasons stated below, the motion is granted and all the co-defendants’ cross-claims against Tech Nel are dismissed.

This case involves efforts by plaintiff Stone & Broad Inc. (“Stone”) as Tenant to recoup \$750,000 that it paid to its Landlord non-party 88 Broad Street, LLC to settle a 2014 lawsuit filed under Index No. 652833/14 after Stone had surrendered possession of the subject premises at 88 Broad Street in Manhattan (“the Premises”). As relevant here, the Landlord had claimed in the 2014 suit that Stone had breached its lease for the Premises by having failed to maintain the property in good repair. Stone then commenced this suit against its subtenant, sub-subtenants, and various contractors who had had access to the Premises, claiming that those parties were liable for the \$750,000 based on their subleases or as tortfeasors who had caused damage to the Premises.

Stone named Nextel, the movant here, as a defendant because Nextel had allegedly entered into a “Communications Tower Agreement” with defendant Guliano-Park 88 Broad Street, Inc., purportedly the assignee of the sub-sublease for the Premises, for the installation of telecommunications equipment at the Premises. Nextel in turn had retained defendant Tech Nel Electric, Inc. (“Tech Nel”) to complete the installation work on the roof of the Premises. Stone named both parties as defendants to this action, claiming the installation damaged the Premises.

Similar to the situation here, Tech Nel moved in this action to dismiss Stone’s indemnification and restitution claims against it (mot. seq. 002). The Court granted the motion by decision entered March 28, 2019, finding, among other things, that Stone had no relationship

with Tech Nel that would render Stone vicariously liable for Tech Nel's conduct, and that Stone could not establish a lack of fault on its own part for the failure to maintain the Premises in good repair, as its own net lease with its Landlord expressly obligated it to do (NYSCEF Doc. No. 74). Therefore, neither an indemnification nor a restitution claim had been stated.

Also similar to the situation here, the Court when deciding Tech Nel's motion did not dismiss any cross-claims, as no specific request for such relief had been made. Tech Nel then moved to reargue, claiming the Court's decision dismissing plaintiff's claims implicitly required the dismissal of the co-defendants' cross-claims and that the Court could order such a dismissal as part of the "other and further relief" requested in the original motion (mot. seq. 004). Plaintiff opposed the motion, as did Nextel based on its contractual relationship with Tech Nel. After reviewing the papers and hearing argument, the Court granted the motion by decision dated September 24, 2019, to the extent of dismissing all cross-claims except any asserted by Nextel, finding that Tech Nel had no relationship with the other co-defendants that would form a basis for liability for indemnification or restitution. (NYSCEF Doc. No. 166).

Based on the decision dismissing the cross-claims against Tech Nel, Nextel promptly filed the instant motion, arguing that the decision in favor of Tech Nel entitled Nextel to the dismissal of the very same cross-claims asserted by the very same Mizukovski and Reneo co-Defendants against Nextel. Tech Nel has no cross-claim against Nextel. Therefore, Nextel argues that all pending cross-claims against it should be dismissed. Just as with Tech Nel, Nextel asserts it had no relationship with any of the cross-claiming co-defendants and that Nextel owes no common law duty of contribution or indemnification to any of the cross-claiming co-defendants.

Only plaintiff Stone has opposed the motion, contending that the motion does not qualify as one for "renewal" and that, in any event, Nextel is not entitled to the requested relief on the

merits. Regarding its first point, Stone argues that CPLR 2221(e)(3) allows renewal only upon a demonstration of “new facts” or a “change in the law that would change the prior determination.” This Court’s decision dismissing the cross-claims against Nextel’s subcontractor Tech Nel does not qualify, Stone contends. Stone also argues that Nextel should not be permitted to “renew” a request for relief not made in the original dismissal motion. As to the merits, Stone urges the Court, at a minimum, to leave in any cross-claims Tech Nel has asserted against Nextel based on the relationship between those two parties.

In reply, Nextel correctly notes that plaintiff Stone no longer has any direct claims against Nextel and that none of the cross-claiming co-defendants, nor even Tech Nel, has opposed the motion. Thus, it is questionable whether Stone even has standing to oppose the motion. In any event, Nextel asserts that Stone’s opposition lacks merit. First, this Court’s substantive ruling dismissing the identical cross-claims at issue here as against Nextel’s subcontractor Tech Nel justifies renewal, and none of Stone’s cited cases dictate otherwise. Further, Nextel asserts its original request “for such further relief as the court deems just and proper” “enables the court to grant relief that is not too dramatically unlike that which was actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced.” *Tirado v Miller*, 75 AD3d 153, 158 (2d Dep’t 2010).

The Court agrees with Nextel. Passing the issue whether Stone, who has no claims against Nextel, can oppose the motion, the Court finds that Stone’s opposition lacks merit, and none of the affected cross-claiming defendants has opposed the dismissal of the cross-claims. This Court’s substantive decision in favor of Tech Nel suffices under CPLR 2221(e)(3) to support the renewal request under the rather unique circumstances presented here, and the *Tirado* case and the cases and treatises cited therein support the grant of the requested relief at this time,

even though it was not specifically requested in the original dismissal motion. From the viewpoint of the efficient administration of justice, it simply makes no sense to keep Nextel in the case as a defendant on cross-claims by co-defendants which have expressed no interest in pursuing those claims, particularly when plaintiff's claims against Nextel have been dismissed, along with all claims relating to Tech Nel, the only party with whom Nextel had a relationship.

Accordingly, it is hereby

ORDERED that the motion by defendant Nextel of New York, Inc. for renewal is granted, and upon renewal, all cross-claims against defendant Nextel of New York, Inc. are severed and dismissed. The Clerk shall enter judgment accordingly.

Counsel for the remaining parties shall appear before this Court in Room 232 with full settlement authority on Tuesday, June 23, 2020 at 9:30 a.m.

Dated: March 25, 2020

  
BARRY R. OSTRAGER, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: