Skanska USA Bldg., Inc. v Atlantic Yards 82 Owner, LLC
2020 NY Slip Op 30930(U)
April 13, 2020
Supreme Court, New York County
Docket Number: 652680/2014
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **IAS MOTION 39EFM**

Justice

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SKANSKA USA BUILDING, INC.,

Plaintiff,

- v -

ATLANTIC YARDS B2 OWNER, LLC,FOREST CITY RATNER COMPANIES, LLC,ABC COMPANIES #'S 1-25, JOHN DOES #'S 1-25

Defendant.

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INDEX NO. 652680/2014

MOTION DATE 01/30/2020

MOTION SEQ. NO. 008

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 008) 342, 343, 344, 345, 346, 347, 348, 349, 350, 352, 354, 358, 361, 362

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, it is

In this breach of contract action, plaintiff Skanska USA Building Inc. ("Skanska") moves, pursuant to CPLR 2221, for leave to reargue this Court's decision and order, dated October 7, 2019 (the "October Order"), to the extent that I denied Skanska's motion for leave to file and serve a Second Amended Complaint (the "SAC"). Defendants Atlantic Yards B2 Owner, LLC ("B2 Owner"), and Forest City Ratner Companies, LLC ("FCRC") oppose this motion.

The facts giving rise to this matter are set forth more fully in the October Order. In sum, Skanska entered into a construction management agreement ("CM Agreement") with B2 Owner on October 31, 2012. Pursuant to the CM Agreement, Skanska agreed to fabricate, deliver and erect a thirty-four floor, residential high-rise building ("the B2

tower") using prefabricated modular units ("the modules") assembled at a factory and then stacked together to form the B2 tower at a site adjacent to the Barclays Center.

A separate related agreement between Skanska Modular LLC (a Skanska affiliate) and FCRC Modular LLC (an FCRC affiliate) created a limited liability company named FC+Skanska Modular, LLC (now known as FC Modular) to make the B2 tower modules (the "LLC Agreement").

Skanska sent a termination notice to B2 Owner on August 8, 2014 which listed several alleged breaches of the CM Agreement (the "Termination Notice"). Then, on September 2, 2014, Skanska commenced this action. Skanska's first amended complaint asserted three claims; the first claim for breach of the CM Agreement contained numerous subparts.

By decision and order dated July 16, 2015 (the "July 2015 Decision"), I denied B2 Owner's and FCRC's motion to dismiss the first amended complaint, except as to subparts f and h of Skanska's breach claim. The First Department modified the July 2015 Decision by reinstating subpart h and dismissing the claim for piercing the corporate veil. *Skanska USA Bldg. Inc. v. Atlantic Yards B2 Owner, LLC*, 146 A.D.3d 1 (1st Dept. 2016) (the "First Department Decision"). The Court of Appeals then affirmed the dismissal of Skanska's claim that B2 Owner breached the CM Agreement by failing to comply with Lien Law § 5. *Skanska USA Bldg. Inc. v. Atlantic Yards B2 Owner, LLC*, 31 N.Y.3d

1002 (2018) (the "COA Decision"). Skanska's motion to reargue the COA Decision was denied.[1]

Five years after commencing this action, Skanska moved to serve and file the SAC. In the October Order, I denied Skanska's request with respect to the proposed claims for veil-piercing, negligent misrepresentation, fraudulent misrepresentation and Guaranty/Lien Law § 5.

Skanska now argues that my decision in the October Order: 1) "misapprehended or overlooked case law within Skanska's briefs and/or misconstrued applicable law (under veil-piercing and/or fraudulent conveyance theories)"; 2) "misapprehended precedent, the prior court decisions, and the tenor of the allegations of the [guaranty/lien law section 5 claim]"; and 3) "misapprehended the law and overlooked key facts in dismissing the misrepresentation claims."

Discussion

Motions to reargue are "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." *Kent v. 534 East 11th Street*, 80 A.D.3d 106, 116 (1st Dept. 2010) (citations omitted). Determinations of whether to grant a motion for leave to reargue are

[1] Additionally, there are two related action before me: 1) the AYB2 Action, Index No. 652681/2014; and 2) the Modular Action, Index No. 652721/2014. In the Modular Action, which will be tried jointly with the action currently before me, I granted a motion by FCRC Modular, LLC, FC Modular, LLC, FCRC and Forest City Enterprises, Inc. to dismiss Skanska's counterclaims and third-party complaint (the "August 2016 Modular Decision"). The August 2016 Modular Decision was affirmed by the First Department. *See FCRC Modular, LLC v. Skanska Modular LLC*, 159 A.D.3d 413 (1st Dept. 2018).

within the court's discretion. *Id*. Further, motions to reargue "shall not include any matters of fact not offered on the prior motion. *See* CPLR Rule 2221(d)(2). And, leave to reargue "is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." *Matter of Setters v. AI Props. and Devs. (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dept. 2016) (internal quotation marks and citation omitted).

Guaranty/Lien

Skanska argues that I "misread" prior rulings and misunderstood that the Guaranty/Lien Law claim was not a previously dismissed breach of contract claim premised on the CM Agreement but was instead suing based on the Guaranty itself. The October Order, however, explicitly recognized that Skanska's proposed claim was based on the Guaranty rather than the CM Agreement. Further, the Lien Law § 5 arguments advanced by Skanska in support of this motion are a rehash of its original arguments which were considered, and rejected, in the October Order.

Skanska also proffers a new argument based on Lien Law § 34. Motions to reargue are not "appropriate vehicle[s] for raising new questions… which were not previously advanced." *People v. D'Alessandro*, 13 N.Y.3d 216, 219 (2009) (internal quotation marks and citation omitted). "Necessarily, where a new argument is presented on the motion, that argument could not have been "overlooked or misapprehended" by the [court] in the first instance." *Id*. Thus, Skanska's Lien Law § 34 argument in support of its position that it should have been allowed to add a claim based on the Guaranty will not be considered.

Lastly, Skanska argues that I "failed to address alternative relief sought by Skanska on this branch of the underlying motion, *i.e.*, that if the Court does not permit the addition of the [Guaranty/Lien Law claim] due to some deficiency in the Guaranty, then AYB2 Owner has failed to provide the statutorily mandated security and it should be required to post a bond/undertaking in the penal sum of $116,875,078 (the contract value of the CM Agreement)." This same request appeared, without support or elaboration, in Skanska's reply motion for leave to file the SAC.[2] All arguments and requests made by Skanska in support of adding this claim were previously reviewed. That I did not expressly address this request does not furnish a grounds for reargument. *See Center for Judicial Accountability, Inc. v. Cuomo*, 167 A.D.3d 1406, 1408 (3d Dept. 2018) (stating that "[a] court need not address, in its decision, every argument raised by a party…").

In sum, I find that Skanska has failed to meet the standard for reargument for the Guaranty/Lien Law claim.

Veil-Piercing

Skanska argues that the law of the case doctrine is not applicable here and that my finding in the October Order, that the veil piercing claim was barred by precedent, reflects a misunderstanding of the appellate decisions in this case and the Modular Action. Skanska previously advanced the same argument concerning law of the case which I rejected in the October Order. *See Simon v. Mehryari*, 16 A.D.3d 664, 665 (2d

[2] The reply brief conclusion stated: "[a]lternatively, given the absence of statutorily-mandated security, if the Court does not grant this entire motion, it should require B2 to post a bond/undertaking required by law in the penal sum of $116,875,078."

Dept. 2005) (stating that "[a] motion for leave to reargue is not designed to allow a litigant to propound the same arguments the court has already considered.")

Skanska also claims that the October Order misapprehended or overlooked: 1) caselaw contained in Skanska's briefs; and 2) non-cited, general caselaw on veil-piercing and/or fraudulent conveyance theories. First, Skanska's motion to reargue has not established that, in reaching the October Order decision, I either overlooked or misapprehended the law it cited in its briefs. *See, e.g.*, *Kent*, 80 A.D.3d at 116.

Second, Skanska's argument that I overlooked/misapprehended relevant, non-cited caselaw is misplaced. On this motion, Skanska cites several New York state cases in support of its position and some non-binding New York federal cases – none of which were included in its original briefs, even though those cases pre-dated the briefs.[3] Thus, I will not consider these cases on this motion to reargue.[4]

In light of the foregoing, Skanska is not entitled to reargument on its veil-piercing claim.

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[3] *Chase Manhattan Bank (Nat. Ass'n) v. 264 Water St. Assocs.*, 174 A.D.2d 504 (1st Dept. 1991); *ABN AMRO Bank, N.V. v. MBIA Inc.*, 81 A.D.3d 237, 254 (1st Dept. 2011) (Abdus-Salaam, J. dissenting); and *Ross v. Jill Stuart Int'l Ltd.*, 275 A.D.2d 650 (1st Dept. 2000); *Path Instruments Int'l Corp. v. Ashai Optical Co.*, 312 F. Supp. 805 (S.D.N.Y. 1970); *Kinetic Instruments, Inc. v. Lares*, 802 F.Supp. 976 (S.D.N.Y. 1992).

[4] In any event, Skanska concedes that these cases "comport with those cited by Skanska in its moving brief" and the cited cases were considered in the October Order.

Misrepresentation claims

Skanska asserts that I: 1) erred in giving res judicata effect to decisions in the Modular Action; 2) overlooked controlling law cited by Skanska to the effect that FCRC had "superior knowledge" of its unique invention and stood in a "special relationship" to Skanska such that it had a duty to speak truthfully; and 3) overlooked key facts set forth in the SAC's incorporated 146-page Termination Notice which provided sufficient particularity.

Skanska's argument concerning my "plain error" in giving res judicata effect to Modular Action decisions, as well as its argument that FCRC had "superior knowledge" of its unique invention and stood in a "special relationship" to Skanska, are simply restatements of its original arguments. Additionally, Skanska has not demonstrated that I overlooked controlling law pertaining to its misrepresentation claims.[5]

Skanska's Termination Notice argument is raised for the first time on this motion to reargue and, accordingly, will not be considered. *See Independent Chemical Corp. v. Puthanpurayil*, 165 A.D.3d 578, 578 (1st Dept. 2018) (finding that motions to reargue "may not be based on new facts (*see* CPLR 2221[d][2]) or arguments different from those previously asserted….") (citation omitted); *Matter of Setters,* 139 A.D.3d at 492 (noting that the purpose of reargument is not to present arguments that differ from

[5] Further, Skanska states that in *Kimmell v. Shaefer*, 89 N.Y.2d 257 (1996), the court found a special relationship even when the parties to the transaction stood at "arm's length." *Kimmell* does not state this and Skanska's attempt to mislead the Court by using quotation marks for language not found in that decision is inappropriate.

the original arguments). I have considered Skanska's remaining arguments and find them unavailing.

Conclusion

As evident by the highly critical language found in its brief and attorney affirmation for this motion, Skanska disagrees with many aspects of the October Order. However, Skanska's desire for a do-over fails because that is not the purpose of a reargument motion. *See William P. Pahl Equip. Corp. v. Kassis,* 182 A.D.2d 22, 27 (1st Dept. 1992). Upon review of the papers submitted, Skanska has not demonstrated that that I overlooked or misapprehended either the facts or the law in arriving at the decision in the October Order, and its motion to reargue is denied. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72, 73-74 (1st Dept. 1994).

In accordance with the foregoing, it is hereby

ORDERED that Skanska's motion for leave to reargue this Court's decision and order, dated October 7, 2019, is denied in its entirety.

This constitutes the decision and order of this Court.

4/13/20
DATE

SALIANN SCARPULLA, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE