

Breslin v Richmond Univ. Med. Ctr.
2020 NY Slip Op 34160(U)
December 9, 2020
Supreme Court, New York County
Docket Number: 153586/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON PART IAS MOTION 42EFM

Justice

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DONAL BRESLIN, DENISE BRESLIN, MARK GIORDANO,
PATRICIA GIORDANO

Plaintiffs,

- v -

RICHMOND UNIVERSITY MEDICAL CENTER, BARR &
BARR, INC., J.M. BOTTO, INC.,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 010) 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 372

were read on this motion to/for

REARGUMENT/MODIFY ORDER

DECISION + ORDER ON MOTION

In this personal injury action, defendants Richmond University Medical Center (RUMC) and Barr & Barr, Inc. (B&B) move pursuant to CPLR 2221 to reargue the portion of their motion seeking summary judgment on their cross-claim for contractual indemnification against defendant J.M. Botto, Inc. (Botto), or alternatively, pursuant to CPLR 5019(a) or 5015 to modify this court's order dated March 12, 2019, to award unconditional contractual indemnification to RUMC and legal fees and expenses against Botto. RUMC and B&B also seek a judgment awarding contractual indemnification to RUMC, plus pre-judgment interest, and an inquest to determine the amount due. Botto opposes the motion. The motion is denied.

This action arose when two plumbers working for Botto left two acetylene tanks in a closed and locked gang box in an unventilated room, leading to an explosion that seriously injured the plaintiffs at a construction site. RUMC was the owner of the property where the job site was located, and B&B was the construction manager/general contractor for the project. RUMC and B&B moved for summary judgment dismissing the plaintiffs' Labor Law and negligence claims and on their cross-claims for contractual and common law indemnification against Botto (MOT SEQ 005). Plaintiffs Mark and Patricia Giordano cross-moved for summary

judgment on the issue of liability. Plaintiffs Donal and Denise Breslin moved by a separate motion sequence number for the same relief (MOT SEQ 006).

Prior to the determination of those motions, in March 2019 the court was apprised that the main action had settled as between the plaintiffs and Botto. According to RUMC and B&B, Botto settled with no contribution from RUMC and B&B and did not obtain a full release of claims against RUMC and B&B in the settlement documents. Based upon the settlement, RUMC and B&B's summary judgment motion was partially withdrawn, and the plaintiffs' motions for summary judgment were withdrawn. The only remaining issue was the portion of RUMC and B&B's motion seeking contractual and common law indemnification against Botto. By order dated March 12, 2019, that motion was granted to the extent that RUMC was awarded conditional summary judgment on its cross-claim for contractual indemnification against Botto in the event that RUMC was found liable to the plaintiffs for their injuries. Following the decision, RUMC and B&B, via letter filed with the court on March 18, 2019, disputed the conditional nature of the order and requested a hearing on attorney's fees. Thereafter, on July 26, 2019, RUMC and B&B brought a motion seeking a judgment awarding contractual indemnity and prejudgment interest and scheduling a hearing or inquest for attorneys' fees. That motion was withdrawn, without prejudice, pursuant to a stipulation entered by the parties on November 6, 2019. On January 29, 2020 this motion ensued.

The gravamen of the instant motion is that RUMC and B&B wish to recover their defense costs from Botto pursuant to the indemnification clause in the subcontract between B&B and Botto. However, RUMC claims that as this court awarded conditional contractual indemnification and the underlying matter is settled, RUMC will be unable to collect any attorneys' fees from Botto as RUMC cannot be found liable to the plaintiffs. In an attempt to remedy this issue, RUMC and B&B make the instant motion pursuant to CPLR 2221(d), 5019(a) and 5015 seeking to have this court's March 12, 2019 'corrected' to reflect that RUMC is entitled to full, not conditional, contractual indemnification from Botto. However, RUMC and B&B fail to establish entitlement to relief under any of the asserted bases.

The portion of RUMC and B&B's motion seeking reargument must be denied as they have not shown that the court overlooked or misapprehended any facts or relevant law that were presented to it in connection with the prior motion. See CPLR 2221(d)(2); William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22 (1st Dept 1992), *lv dismiss in part and denied in part* 80

NY2d 1005 (1992). The purpose of a motion to reargue is not “to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided” (Pro Brokerage, Inc. v Home Ins. Co., 99 AD2d 971, 971 [1st Dept. 1984], *quoting* Foley v Roche, 68 AD2d 558, 567 [1st Dept. 1979]) “or to present arguments different from those originally asserted” (Matter of Setters v AI Props. and Dev. (USA) Corp., 139 AD3d at 492 [1st Dept. 2016] *quoting* William P. Pahl Equip. Corp. v Kassis *supra* at 27).

The portion of RUMC and B&B’s motion seeking the alternative relief of modifying or vacating this court’s order pursuant to CPLR 5019(a) or 5015 must likewise be denied. CPLR 5019(a) gives a trial court “the discretion to correct an order or judgment which contains a mistake, defect or irregularity not affecting a substantial right of a party.” Adams v Fellingham, 52 AD3d 443, 444 (2nd Dept. 2008); *see* Flores v Parkchester Preservation Co., 42 AD3d 318 (1st Dept. 2007); Bauman v Bauman, 200 AD2d 380 (1st Dept. 1994); *see also* CPLR 2001. However, where, as here, a movant seeks to change an order in a substantive manner, rather than correcting a mere clerical error, CPLR 5019(a) is not the proper procedural mechanism to be employed, and relief should be sought solely through a direct appeal or by a motion to vacate pursuant to CPLR 5015(a). *See* Garrick Aug Assocs. Store Leasing, Inc. v Scali, 278 AD2d 23 (1st Dept. 2000); Blaustein v Blaustein, 145 AD2d 591 (2nd Dept. 1988) *see also* Herpe v Herpe, 225 NY 323 (1919). Furthermore, vacatur pursuant to CPLR 5015(a) is also inapplicable since there is no showing of any of the following: (1) excusable default, (2) newly discovered evidence, which if previously introduced would have probably produced a different result, (3) fraud, misrepresentation, or other misconduct of an adverse party, (4) lack of jurisdiction to render the judgment, or (5) reversal, modification or vacatur of a prior judgment upon which the judgment was based. *See* CPLR 5015(a).

As RUMC has not established its entitlement to an order providing for unconditional contractual indemnification, the portion of RUMC and B&B’s motion seeking a judgment awarding contractual indemnification to RUMC and scheduling an inquest is denied.

Accordingly, it is hereby,

ORDERED that the motion of defendants Richmond University Medical Center and Barr & Barr, Inc. is denied in its entirety.

This constitutes the Decision and Order of the court.



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

12/9/2020

DATE

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

☐

GRANTED

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DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

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SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

☐

FIDUCIARY APPOINTMENT

☐

REFERENCE