

Romano v New York City Tr. Auth.
2022 NY Slip Op 31969(U)
June 24, 2022
Supreme Court, New York County
Docket Number: Index No. 153015/2014
Judge: Suzanne Adams
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. SUZANNE ADAMS PART 39

Justice

-----X

MICHAEL ROMANO,

Plaintiff,

- v -

NEW YORK CITY TRANSIT AUTHORITY,
METROPOLITAN TRANSPORTATION AUTHORITY, FIVE
STAR ELECTRIC CORP.,

Defendant.

-----X

INDEX NO. 153015/2014

MOTION DATE 02/02/2022

MOTION SEQ. NO. 017

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 017) 596, 597, 637, 639, 640

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

This is a personal injury action arising out of an incident that occurred on August 26, 2013, at the site of the Mother Clara Hale Bus Depot construction project at 721 Lenox Avenue in Manhattan. The site was owned by defendants/second third-party plaintiffs New York New York City Transit Authority and Metropolitan Transportation Authority (collectively, "Transit"). Defendant/third-party plaintiff Five Star Electric Corp. ("Five Star") was the primary electrical subcontractor on the project, and plaintiff was employed by the non-party general contractor as a laborer at the site, charged with performing "clean-up" duties, among other things. By order dated December 17, 2021, this court denied Five Star's motion for summary judgment, except it granted the portion of the motion seeking dismissal of the Labor Law § 240(1) claim. Five Star now moves pursuant to CPLR 2221(d) for leave to reargue its motion, and pursuant to CPLR § 2219 for clarification and resettlement of said order; and upon reargument, to vacate that part of the order denying dismissal of the Labor Law § 241(6) claim and all cross-claims as against it, and to resettle

the order for clarification. Transit opposes the motion. For the reasons that follow, Five Star's motion to reargue is granted, and upon reargument, the prior order of December 17, 2021, is vacated and resettled as set forth hereinbelow.

CPLR 2221(d)(2) requires that a motion for leave to reargue be "based on matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion." Here, Five Star maintains that this court erred in failing to dismiss the claim under Labor Law § 241(6), which claim may only be brought against contractors, owners, and their agents. This court indeed overlooked the fact that plaintiff dropped his § 241(6) claim as to Five Star, a subcontractor on the underlying project with no authority over plaintiff or his work, and did not oppose that portion of Five Star's underlying motion. Moreover, absent a direct claim by plaintiff, neither Transit nor any other co-defendant may assert this claim against Five Star, as any statutory liability under the statute "created rights running only to plaintiff, not from one tortfeasor to another" *Diamond Bank of N.Y.*, 199 A.D.2d 65, 66-67 (1st Dep't 1993) (citing *D'Amico v. Manufacturers Hanover Tr. Co.*, 177 A.D.2d 441, 443 (1st Dep't 1991)).

Five Star also seeks resettlement of the December 17, 2021, order to reflect dismissal of the cross-claims asserted by those parties who were granted summary judgment, and by Transit that were asserted only in a superseded pleading. "It is well settled law in this Department that a motion for resettlement [of a prior order] is a procedural vehicle by which errors may be corrected or clarification made." *Ansonia Assoc. v. Ansonia Tenants Coalition*, 171 A.D.2d 411, 412 (1st Dep't 1991) (citing *Foley v. Roche*, 68 A.D.2d 558, 566 (1st Dep't 1979)). Five Star is correct in stating that dismissal of the cross-claims asserted against it by parties dismissed from this action should have been reflected in the order deciding Five Star's summary judgment motion, as dismissal of cross-claims was part of the requested relief. Dismissal of Transit's cross-claims

should also have been reflected in the order, because the record in this action reflects that Transit never answered plaintiff's amended complaint, and thus never asserted cross-claims as against Five Star. Transit interposed its Verified Answer to Complaint with cross-claims in April 2014. In April 2015, plaintiff timely filed a Supplemental Summons and Amended Complaint, which "superseded the original complaint and became the only complaint in the case, and therefore required that a new responsive pleading be substituted for the original superseded answer." *Hoppenfeld v. Hoppenfeld*, 220 A.D.2d 302, 303 (1st Dep't 1995); *see also Halmar Distribs. v. Approved Mfg. Corp.*, 49 A.D.2d 841 (1st Dep't 1975); CPLR 3025(d). However, Transit never served an answer to the Amended Complaint, and as such, has not asserted cross-claims against Five Star.

Accordingly, it is hereby

ORDERED that Five Star's motion for leave to reargue its motion for summary judgment and for resettlement of the December 17, 2021, order deciding its motion is granted; and it is further

ORDERED that upon reargument, Five Star's motion for summary judgment is granted to the extent that all claims, cross-claims, counterclaims and third-party claims under Labor Law §§ 240(1) and 241(6) are dismissed, and all other cross-claims, counterclaims and third-party claims asserted against Five Star are dismissed, and the remainder of the motion is denied; and it is further

ORDERED that the Decision and Order of this court dated December 17, 2021, as to Motion 014 is resettled as follows:

"Accordingly, it is hereby

ORDERED that Five Star's motion for summary judgment is granted to the extent that all claims, cross-claims, counterclaims and third-party claims under Labor Law §§ 240(1) and 241(6)

are dismissed, and all other cross-claims, counterclaims and third-party claims as against Five Star are dismissed; and it is further

ORDERED that except as set forth hereinabove, the remainder of Five Star's motion is denied."

This constitutes the decision and order of the court.



6/24/2022
DATE

SUZANNE ADAMS, 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"/>	DENIED	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE