

**Board of Mgrs. of 141 Fifth Ave. Condominium v 141
Acquisition Assoc. LLC**

2022 NY Slip Op 33702(U)

October 27, 2022

Supreme Court, New York County

Docket Number: Index No. 651426/2013

Judge: Andrew Borrok

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publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

-----X

BOARD OF MANAGERS OF 141 FIFTH AVENUE
CONDOMINIUM,

Plaintiff,

- v -

141 ACQUISITION ASSOCIATES LLC, 141 FIFTH
AVENUE PARTNERS LLC, 141 FIFTH AVENUE
MANAGER LLC, SAVANNA 141 PRINCIPALS LLC, CIF
141 FIFTH LLC, J CONSTRUCTION COMPANY
LLC, CHRISTOPHER SCHLANK, NICHOLAS
BIENSTOCK, CETRA/RUDDY INCORPORATED,
ALFRED KARMAN, FRANK SETA & ASSOCIATES LLC,

Defendant.

-----X

J CONSTRUCTION COMPANY LLC

Plaintiff,

-against-

FRANK A. SETA & ASSOCIATES, LLC, CETRA-RUDDY
INCORPORATED, JOHN A. CETRA ARCHITECTURE, LLC

Defendant.

-----X

J CONSTRUCTION COMPANY LLC

Plaintiff,

-against-

IMPERIAL PAINTING & FIREPROOFING, CITIQUIET, INC.,
ACCURATE ELECTRICAL CONTRACTORS CORP., D&D
ELEVATOR MAINTENANCE, INC., GARDEN STATE
COMMERCIAL SERVICES, LLC, JM3 CONSTRUCTION, LLC,
HUGHES CONTRACTING INDUSTRIES, LTD., M&D
FIREDOOR, RCI PLUMBING CORP., PRITECH
CONTRACTING CORP., WOODBURY CONSTRUCTION
ENTERPRISES INC., PERIMETER BRIDGE & SCAFFOLD CO
INC., NEW YORK CUSTOM WOODWORKS, METRO
MECHANICAL, LIFT TECH ELEVATOR SERVICE, LLC, SIM
SOON CONSTRUCTION, INC.

Defendant.

INDEX NO. 651426/2013
MOTION DATE 08/15/2022,
N/A
MOTION SEQ. NO. 038 039

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595360/2016

Second Third-Party
Index No. 595394/2016

-----X

PRITECH CONTRACTING CORP.

Plaintiff,

-against-

FRANK A. SETA & ASSOCIATES LLC

Defendant.

-----X

Third Third-Party
Index No. 595225/2017

GARDEN STATE COMMERCIAL SERVICES, LLC

Plaintiff,

-against-

NEW ROYAL RESTORATION CORP.

Defendant.

-----X

Fourth Third-Party
Index No. 595322/2017

141 ACQUISITION ASSOCIATES LLC

Plaintiff,

-against-

FRANK SETA & ASSOCIATES LLC

Defendant.

-----X

Fifth Third-Party
Index No. 595414/2017

J CONSTRUCTION COMPANY LLC

Plaintiff,

-against-

ROYAL-PAK SYSTEMS INC., GOTHAM WATERPROOFING AND RESTORATION, LLC, KNS BUILDING RESTORATION INC., CCR SHEET METAL, INC., CROWNE ARCHITECTURAL SYSTEMS, INC., GACE CONSULTING ENGINEERS, D.P.C. F/K/A GOLDSTEIN ASSOCIATES, PLLC, MG ENGINEERING D.P.C. D/B/A MGJ ASSOCIATES INC., QUALITY CONSULTANTS, LLC, PROJECT CONTROL GROUP, INC.

Defendant.

-----X

Sixth Third-Party
Index No. 595639/2017

GOTHAM WATERPROOFING AND RESTORATION, LLC

Seventh Third-Party
Index No. 595676/2018

Plaintiff,

-against-

CLARK & WILKINS INDUSTRIES, INC.

Defendant.

-----X

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 038) 1814, 1815, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1823, 1824, 1825, 1865, 1866, 1867, 1868, 1869, 1870 were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 039) 1833, 1834, 1835, 1836, 1837, 1838, 1839, 1840, 1841, 1842, 1843, 1844, 1845, 1846, 1847, 1848, 1849, 1850, 1851, 1852, 1853, 1857, 1858, 1859, 1860, 1861, 1862, 1863, 1864 were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, The J Construction Company LLC's (**J Construction**) motion (Mtn. Seq. No. 039) for leave to reargue the court's (Scarpulla, J.) partial summary judgment decision (the **Partial Summary Judgment Decision**; NYSCEF Doc. No. 1107) and the Court's summary judgment decision (the **Summary Judgment Decision**; NYSCEF Doc. No. 1476) that determined that J Construction was barred by the doctrine of laches from receiving retroactive compensation for attorneys' fees must be denied. KNS Building Restoration Inc.'s (**KNS**) cross-motion for leave to reargue the Summary Judgment Decision that required KNS to assume J Construction's future defense costs must also be denied. New Royal Restoration Group's (**New Royal**) motion (Mtn. Seq. No. 038) for leave to reargue the Summary Judgment Decision that did not dismiss Garden State Commercial Services, LLC's (**Garden State**) claims for contractual indemnification must be denied.

Pursuant to CPLR 2221(d), a motion for leave to reargue must be based on matters of law or fact 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 (*Jones v City of New York*, 146 AD3d 690, 690-691 [1st Dept 2017]). Pursuant to CPLR 2221(e), a motion for leave to renew must be based on new facts not offered on the prior motion that would change the prior determination and the movant must provide a reasonable justification for failure to present such facts on the prior motion (*id.*).

The court (Scarpulla, J.) in the Partial Summary Judgment Decision considered the argument that laches did not apply and rejected it:

It is undisputed that J Construction did nothing to enforce its contractual right to have Garden State and JM3 defend it in this litigation for at least two years. During that time, J Construction hired and paid its own counsel of choice and made its own strategic decisions with respect to how to defend the lawsuit. Conversely, Garden State and JM3 had no ability to minimize the burden of § 8.3(b) by, for example, coordinating and streamlining their legal costs. Nor did Garden State and JM3 receive the benefit of controlling the defense of the litigation during that two year period (including settlement negotiations).

In light of J Construction's long and inexplicable delay in enforcing its rights under § 8.3(b), its demand for attorneys' fees already incurred is barred by the doctrine of laches. Laches is "an equitable bar, based on a lengthy neglect or omission to assert a right and the resulting prejudice to an adverse party." *Saratoga County Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 816 (2003). Here, J Construction's failure to timely assert its right to a defense from Garden State and JM3 has prejudiced them in efficiently defending their work in this action

(NYSCEF Doc. No. 1107, at 11). In the Summary Judgment Decision, the court agreed that the doctrine of laches applied for the same reasons (NYSCEF Doc. No. 1476, at 23).

A second bite at the apple is simply not an appropriate basis for a motion to renew or reargue.

Thus, the motion must be denied. KNS's cross-motion must also be denied. The court in the

Summary Judgment Decision addressed KNS's argument that J Construction cannot satisfy a condition precedent because it did not make a request of KNS to assume the cost of its defense:

Inasmuch as KNS argues that J Construction cannot satisfy a condition precedent to its defense obligation because it never made the request that KNS "take over the defense" of its claims, this argument is without merit. J Construction tendered a letter concerning its defense and indemnification to KNS's insurers and counsel on or about February 9, 2018 (NYSCEF Doc. No. 1047). This was sufficient notice to meet J Construction's notice requirements

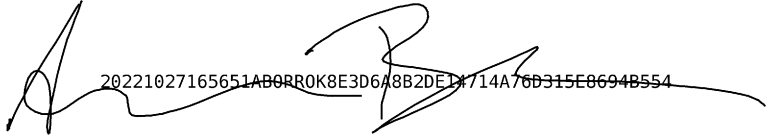
(NYSCEF Doc. No. 1476, at 23). KNS's argument was considered and properly rejected. Thus, the cross-motion must be denied.

New Royal's motion to reargue the Summary Judgment Decision must also be denied. In the Summary Judgment Decision, the court held:

New Royal argues that Garden State's contractual indemnification claim should be dismissed because it seeks to recover for its own negligence in violation of GOL § 5-322.1 because an indemnification agreement may be unenforceable inasmuch as it contemplates full indemnification of a party for its own negligence (*Itri Brick & Concrete Corp. v Aetna Casualty & Surety Co.*, 89 NY2d 786 [1997]). This principle is not applicable here, however, as nothing in the foregoing indemnification provision impermissibly requires Garden State to indemnify New Royal for Garden State's own negligence. In any event, negligence in this proceeding has not yet been established. New Royal's motion to dismiss Garden State's contractual indemnification claim, therefore, must be denied

(NYSCEF Doc. No. 1476, at 32). New Royal argues that the court misapprehended the fact that because Garden State had total direction, supervision, and control over New Royal, any defective work performed by New Royal would have arisen solely from Garden State's negligence, such that Garden State would effectively be indemnified for its own negligence. This argument was considered and rejected. The court did not misapprehend the facts or law in the Summary Judgment Decision. The motion must therefore be denied.

It is hereby ORDERED that the motions for leave to reargue are denied.



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10/27/2022
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input checked="" 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