

Harriet Tubman Gardens Apt. Corp. v H.T. Dev. Corp.
2022 NY Slip Op 34342(U)
October 11, 2022
Supreme Court, New York County
Docket Number: Index No. 652532/2014
Judge: Laurence L. Love
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LAURENCE L. LOVE PART 63M

Justice

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HARRIET TUBMAN GARDENS APARTMENT CORPORATION,

Plaintiff,

- v -

H.T. DEVELOPMENT CORPORATION, BLUESTONE ORGANIZATION, YORK RESTORATION CORPORATION,

Defendant.

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BLUESTONE ORGANIZATION

Plaintiff,

-against-

JOB OPPORTUNITIES FOR WOMEN, INC., LINDEN CONSTRUCTION CORP., OLDCASTLE PRECAST INC. A/K/A OLDCASTLE PRECAST EAST INC., N. WEXLER, P.E., INC., ARTHUR KAHANE ARCHITECT, P.C., CAR-WIN CONSTRUCTION, INC., B & N ROOFING & SHEET METAL, INC., KINGS COUNTY WATERPROOFING CORP., JOHN ELLIS AND ASSOCIATES ARCHITECTS

Defendant.

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YORK RESTORATION CORPORATION

Plaintiff,

-against-

ARTHUR KAHANE ARCHITECT, P.C., BANTA HOMES CORPORATION

Defendant.

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INDEX NO. 652532/2014

MOTION DATE 05/19/2022, 05/23/2022

MOTION SEQ. NO. 004 005

DECISION + ORDER ON MOTION

Third-Party
Index No. 595358/2017

Second Third-Party
Index No. 595034/2022

The following e-filed documents, listed by NYSCEF document number (Motion 004) 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 222, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 242, 243, 244

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 223, 224, 225, 237, 238, 239, 240, 241, 245

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

Upon the foregoing documents,

Third – Party Defendant – Arthur Kahane Architect, P.C. (“Kahane”), motion sequence no. 004, seeks to dismiss the complaint of Third – Party Plaintiff – York Restoration Corp., and any cross – claims, per CPLR 3211(a)(1), CPLR 3211(a)(5), and CPLR 3211(a)(7).

Defendant – York Restoration Corp. (“York”), motion sequence no. 005, seeks leave to renew and reargue, CPLR 2221, this Court’s prior Decision and Order that denied York Restoration Corp.’s motion for summary judgment, CPLR 3212 (see NYSCEF Doc. No. 188).

Plaintiff states causes of action for i) breach of contract, the purchase agreement, against Bluestone Organization; ii) breach of contract, new contract for repair, against Bluestone Organization; iii) breach of express warranty against Bluestone Organization; iv) breach of implied warranty against Bluestone Organization; v) breach of contract- third party beneficiary York Restoration Corporation; and vi) breach of express warranty against defendant York Restoration Corporation.

Per the complaint, “[t]his action arises out of the defective construction of the Harriet Tubman Gardens Condominium, located at 2235 Frederick Douglas Boulevard, New York, NY” (see NYSCEF Doc. No. 151 Par. 1).

The complaint states in pertinent part, “Defendant York entered into a contract or contracts with the Bluestone defendants by which, among other things, Defendant York agreed to repair the façade of the Building. Defendant York breached said contract or contracts with the Bluestone Defendant in that, among other things, the repair work was not completed in accordance with proper architectural practices, prevailing local standards, and in compliance

with applicable codes, rules and ordinances. Defendant York provided a letter guarantee that provided a warranty for ‘all work and materials’ and the ‘quality and workmanship ... against all defects for period of five years. The Building continues to suffer from numerous defects of the façade Defendant York supposedly repaired. These defects are a result of inadequate workmanship and construction practices which Defendant York has refused to correct” (see NYSCEF Doc. No. 151 Par. 93 – 94, 103 - 104).

Plaintiff commenced this action against H.T. Development Corporation, Bluestone Organization, and York on or about August 15, 2014. Defendant York filed an Answer on or about December 1, 2014. Bluestone Organization filed a third-party complaint on May 5, 2017 against many defendants including Arthur Kahane Architect, P.C.

On August 18, 2017, third-party defendant, Arthur Kahane Architect, P.C. moved to dismiss the third-party complaint. On October 30, 2017, Bluestone Organization filed a motion for summary judgment. A July 3, 2019 decision granted both Arthur Kahane Architect, P.C.’s motion and Bluestone Organization’s motion. On March 4, 2021, the Appellate Division, First Department, reversed Bluestone Organization’s motion for summary judgment.

DISMISS

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any

cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

The affidavit from Arthur Kahane, shareholder and President of third – party defendant Arthur Kahane Architect, P.C. affirms, “[Arthur Kahane Architects, P.C.] has performed no services at the Building since August 3, 2008. It my (sic) understanding that all claims against [Arthur Kahane Architects, P.C.] were already dismissed by the Court on or about July 3, 2019. [Arthur Kahane Architects, P.C.]’s contract for the project was with Banta, and no one else. [Arthur Kahane Architects, P.C.] simply did not have a contract with York and York was not an intended third party beneficiary of the [Arthur Kahane Architects, P.C.]/Banta agreement” (see NYSCEF Doc. No. 197 Pars. 10, 11, 13).

Patricia York, President of York Restoration Corporation affirms, “[t]he following information is based upon my review of York’s contracts, company records and interviews and reports from former employees. On September 5, 2007, York and Banta entered into a ‘standard form of agreement between contractor and subcontractor’ with Banta as the Contractor and York as Subcontractor. The ‘owner’ is plaintiff and the ‘architect’ is Kahane. York only conducted repairs according to Kahane’s directives as required by the York/Banta Subcontract. It is my understanding that if leaks subsequent to the repairs occurred, it is due to the fact that Kahane’s plans and specifications were not sufficient to effectuate the necessary repairs” (see NYSCEF Doc. No. 233 Par. 4, 7, 12, 13).

The “Field Investigation Report form Christian Martos, P.E. affirms,

“The investigation was requested by the building co-op board due to persistent water infiltrations issues. A previous repair was completed in 2007 after initial water infiltration issues occurred. The repairs designed by Arthur Kahane Architect, PC and detailed

in drawings prepared by their officed dated 5/01/2007 and 6/20/2007. The water infiltration issues present throughout the structure are due to poor workmanship, detailing, and material selection at the time of construction” (see NYSCEF Doc. No. 166 Ps. 1, 4).

Questions remain on whether the “water infiltration issues” were due to “poor workmanship” or “material selection” or the design of the repair. Questions of fact remain must be further explored.

RENEW / REARGUE

A motion to reargue is addressed to the sound discretion of the court and is designed to afford a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts or misapplied controlling principles of law (see, *Schneider v. Solowey*, 141 AD2d 813 [2d Dept 1988]; *Rodney v. New York Pyrotechnic Products, Inc.*, 112 AD2d 410 [2d Dept 1985]). A “motion to reargue is not an opportunity to present new facts or arguments not previously offered, nor it is designed for litigants to present the same arguments already considered by the court” (see, *Pryor v. Commonwealth Land Title Ins. Co.*, 17 AD3d 434 [2d Dept 2005]; *Simon v. Mehryari*, 16 AD3d 664 [2d Dept 2005]).

A motion to renew must be based upon new facts that were not offered in the prior motion, and the party must set forth a reasonable justification for the failure to present such facts in the prior motion (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, 271 AD2d 636 [2d Dept 2000]; *McNeill v. Sandiford*, 270 AD2d 467 [2d Dept 2000]; *Shapiro v. State*, 259 AD2d 753 [2d Dept 1999]); or the motion must demonstrate that there has been a change in the law that would change the prior determination (see, CPLR § 2221[e]; *Delvecchio v. Bayside Chrysler Plymouth Jeep Eagle Inc.*, supra).

York's affirmation states, "[t]he Court mistakenly relied on the field investigation report of Plaintiff's engineer, Christian Martos, P.E., which refers solely to defects in the original construction of the building in concluding:"

"Conclusions/Recommendations: The water infiltration issues present throughout the structure are due to poor workmanship, detailing, and material selection *at the time of construction.*" (NYSCEF Doc. No. 166).

"Because it is established and undisputed that York was not involved in the original construction of the Building, it is clear the Court misapprehended this part of Mr. Martos' report and improperly attributed defects in the original construction of the Building to York's remedial work when denying summary judgment. The Court overlooked Mr. Martos' conclusion attributing defects in the Building to the limited extent of repairs as designed by Kahane and the use of caulk, a material chosen by Kahane for the repairs (Doc. 166). Regarding the actual repairs themselves as executed by York, Mr. Martos concluded they are 'sound' and may be left in place as long as caul is removed. *Id.* The Court also overlooked Kahane's letter, stating York's work was satisfactorily completed pursuant to Kahane's plans (Doc. 165). Additionally, the Court overlooked the final meeting minutes for repairs, indicating Plaintiff's representative, the engineering firm of Lawless and Mangione LLP, agreed the remedial work was successful, which also establishes York satisfactorily completed its work pursuant to its contract (Doc. 164). Furthermore, the Court overlooked that because York satisfactorily completed its work pursuant to Kahane's plans, any leaks following the remedial repairs must have been the result of Kahane's defective plans. The Court also overlooked the case law holding that York, as a contractor, cannot be held liable for damages resulting from an architect's defective plans. *MG Hotel, LLC v Bovis Lend Lease, LMB, Inc.*, 133 A.D.3d 519 [1st Dept. 2015]. The Court overlooked York's arguments that dismissal of Kahane from this action, the party responsible for

the defective repairs, requires dismissal of York, a subcontractor whose job was merely to follow Kahane's directives. Finally, the Court overlooked that York has no contractual or common law duty to indemnify because it was not responsible for the alleged damages" (see NYSCEF Doc. No. 213 Pars. 8 – 16).

Plaintiff – Harriet Tubman Gardens Apartment Corporation's affirmation in opposition argues, "the Court laid forth a reasoned explanation for why open issues of fact existed in this case which prevented summary judgment. Plaintiff's affirmation states, '[t]he language of the Banta – York Contract establishes that plaintiff is a third – party beneficiary of the contract' (Doc. No. 170 P. 13). The contract between Banta – Contractor and York – Subcontractor provides, '[f]inal payment shall be due when the work described in this subcontract is fully completed and performed in accordance with the contract documents and is satisfactory to the architect. [...] Further, '[t]he subcontractor warrants to the Contractor and Owner that all work performed and all materials and products furnished' (Doc. No. 184 Art. 11.9). A field investigation report, prepared by Professional Engineer Christian Martos, P.E., S.E. was submitted to this Court [...]. 'Conclusions/Recommendations: The water infiltration issues present throughout the structure are due to poor workmanship, detailing, and material selection at the time of construction (Doc. No. 166)" (see NSYCEF Doc. No. 223 Pars. 5 – 6(d)(e)).

Bluestone Organization, Inc. submits an affirmation in opposition, that highlights the January 23, 2013 Decision and Order entitled *Banta Homes Corporation v. Job Opportunities for Women*, Index No: 603029/2007, and to Plaintiff's expert Christian Marcos, P.E. (see NYSCEF Doc. No.237 Par. 7, 13).

Christina Marcos P.E. submitted a "Field Investigation Report," that states in various parts, "[a]n investigation of current conditions ... conducted from March through August of

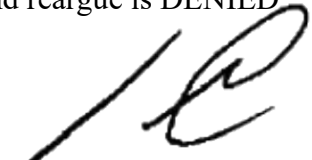
2016. The major shortcoming of the implemented flashing repairs was its limited extent” (see NYSCEF Doc. No. 240).

The affidavit of Christian Marcos P.E. defining “repairs” and “from March through August of 2016” show that the repairs were not of the “original construction.”

Also, Defendant York does not explain how the January 23, 2013 Decision and Order entitled *Banta Homes Corporation v. Job Opportunities for Women*, Index No: 603029/2007 had a “reasonable justification for the failure to present such facts in the prior motion.”

ORDERED that Third – Party Defendant – Kahane motion to dismiss the complaint of Third – Party Plaintiff – York Restoration Corp., is DENIED; and it is further

ORDERED that Defendant – York’s motion to renew and reargue is DENIED

<u>10/11/2022</u> DATE	 LAURENCE L. LOVE, J.S.C.
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CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE