

Jones v TDA Constr., Inc.

2023 NY Slip Op 32987(U)

August 29, 2023

Supreme Court, New York County

Docket Number: Index No. 154007/2013

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES

PART 59

Justice

-----X

MICHAEL JONES and JOY JONES,

Plaintiffs,

INDEX NO. 154007/2013

MOTION DATE 08/22/2023

MOTION SEQ. NO. 006

- v -

TDA CONSTRUCTION, INC., WEIDLINGER ASSOCIATES,
INC., and SAFESPAN SCAFFOLDING, L.L.C.,

**DECISION + ORDER ON
MOTION**

Defendants.

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WEIDLINGER ASSOCIATES, INC.,

Third-Party
Index No. 595561/2017

Third-Party Plaintiff,

-against-

SAVIN ENGINEERS, P.C.,

Third Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289

were read on this motion to/for RENEWAL.

ORDER

Upon the foregoing documents, it is

ORDERED that the motion of third party defendant Savin Engineers, P.C., for leave to reargue its motion for summary judgment to dismiss the third-party complaint is granted; and it is further

ORDERED that, upon reargument, the Court adheres to its Amended Decision and Order, dated January 13, 2023, denying such motion for summary judgment in its entirety; and it is further

ORDERED that to the extent that it seeks to renewal of motion for summary judgment dismissing the third party complaint, the motion of third party defendant Savin Engineers, P.C. is denied; and it is further

ORDERED that the cross motion of defendant Weidlinger Associates, Inc. now known as Thornton Tomasetti, Inc., to dismiss the complaint or, alternatively, for an order granting conditional summary judgment on its third party complaint for common law and contractual indemnification from third party defendant Savin Engineers, P.C. is denied; and it is further

ORDERED that, as the Note of Issue and Statement of Readiness were filed on October 25, 2019, counsel shall consult with the Clerk of the Trial Assignment Part 40 with respect to the date for a settlement conference or trial.

DECISION

In Dugas v Bernstein, 5 Misc3d 818, 827 (Sup Ct, NY Co 2004), in considering an untimely motion to reargue, where a notice of appeal was timely filed, the court reasoned:

The First Department has recently held that a motion for reargument, while "technically untimely pursuant to CPLR 2221 (d)," may be considered by the motion court (Garcia v Jesuits of Fordham, Inc., 6 AD3d 163, 165 [2004]). The

Court cited Leist v Goldstein (305 AD2d 468 [2003]), a decision emanating from the Second Department in which the Court noted that a motion court may consider an untimely motion for leave to reargue made after the movant filed a notice of appeal but prior to the perfection of the appeal. The Second Department's decision rested, in part, on Liss v Trans Auto Sys., Inc. (68 NY2d 15, 20 [1986]) in which the Court of Appeals recited the well-established rule that a court, "regardless of statutory time limits concerning motions to reargue, . . . retains continuing jurisdiction to reconsider its prior interlocutory orders during the pendency of the action" (see also e.g. Aridas v Caserta, 41 NY2d 1059 [1977]; General Elec. Real Estate Equities v Bell, 291 AD2d 313 [1st Dept 2002]). In light of Garcia v Jesuits of Fordham, Inc. (*supra*) and Leist v Goldstein (*supra*), the court agrees with Professor Siegel that a motion for leave to reargue, untimely under CPLR 2221 (d) (3), may be considered where a timely taken yet unsubmitted appeal is pending (see Siegel, NY Prac § 254, 2003-2004 Supp Pamph, at 37-38 [3d ed]; 89 Siegel's Practice Review 2, Court Offers Tacit Indication That Motion to Reargue Continues to be Timely if Made While Appeal is Pending [Nov. 1999]; 86 Siegel's Practice Review 1, New Law-Effective Already [and With Pitfalls]-Prescribes Practice on Motions to Reargue or Renew [Aug. 1999]).

So too here, as third party defendant filed a timely notice of appeal from the Decision + Order dated January 17, 2023 of this court, the court considers the motion to reargue on the merits. Nonetheless, the court did not overlook any applicable law or facts. There is no dispute that copy of the contract between third party defendant Savon Engineers, PC and third party Thornton Tomasetti, Inc. was incomplete, as omitted was the scope of work. Without such contract provisions, the court was unable to determine

the extent and the nature of the inspection services that third party defendant promised to perform under such contract.

Likewise, the court must deny third party defendant's motion to the extent that it seeks renewal. As stated in Chelsea Piers Management v Forest Elec. Corp., 281 AD2d 252 (1st Dept 2001), "Renewal is not available as a 'second chance' for parties who have not exercised due diligence in making their factual presentation" (citation omitted). Here, third party defendant failed to exercise due diligence with respect to the submission of a complete copy of the contract, by omitting the pivotal scope of work provisions. It was the terms of such contract, in which it admittedly entered, that were the basis of its defense to the third party complaint and so a complete copy of such contract should have been in its possession or secured before the filing of the motion for summary dispositive relief.

The cross of third party plaintiff Weidlinger Associates, Inc., now known as Thornton Tomasetti, Inc., which seeks to renew its prior motion to dismiss the complaint or alternatively, for an order granting conditional summary judgment on its third party complaint against third party defendant Savin Engineers, Inc., suffers from the same infirmity as the renewal motion made by third party defendant Savin Engineers, P.C. Third party plaintiff Weidlinger Associates, Inc., likewise neglected to append a complete copy of its contract with third party defendant Savin

Engineers, Inc., omitting the scope of work provisions, which were critical to determination of the motion.

Moreover, as stated in Levitz v Robbins Music Corp, 17 AD2d 801 (1st Dept 1962):

Parties will not be permitted to make successive fragmentary attacks upon a cause of action but must assert all available grounds when moving for summary judgment. There can be no reservation of any issue to be used upon any subsequent motion for summary judgment. A court, upon a motion for summary judgment, must examine all of the facts presented by the affidavits, pleadings and documents and decide whether a triable issue is raised. Once having done so, a court may not on a subsequent motion consider matter which a party has withheld or failed to urge as a ground for granting summary judgment theretofore denied.

Debra A. James

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<u>8/29/2023</u>			<u>DEBRA A. JAMES, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	SUBMIT ORDER
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	REFERENCE