Supreme Court of the State of New York
County of Kings

Index Number 502741/2018
Seq. 005

Part LL1M

JOHN DIMICELLI,

Plaintiffs,

against

CREDIT SHELTER TRUST, A. OTTAVINO PROPERTY CORP., SKANSKA USA INC., BOWLING CONSERVATION AUTHORITY AND IRONSIDE CONSTRUCTION INC.,

Defendants.

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

Papers	Numbered
Notice of Motion and Affidavits Annexed	1
Order to Show Cause and Affidavits Annexed.	
Answering Affidavits	2
Replying Affidavits	3
Exhibits	
Other	

Upon the foregoing papers, plaintiff's motion to reargue (Seq. 005) is decided as follows:

Introduction and Procedural Background

Plaintiff John DiMiceli commenced this action claiming violations of Labor Law §§ 200, 240 (1), and 241 (6) on February 9, 2018. A. Ottavino Property Corp. (Ottavino), Credit Shelter Trust (Credit Shelter), Skanska USA Inc. (Skanska USA), Bowling Green Conservation Authority (Bowling Green), and Ironside Contracting, Inc. (Ironside) were named as defendants. Defendants Bowling Green and Ironside have never appeared in the action.

On October 26, 2022, Plaintiff made motion to (1) permit plaintiff to amend the complaint *nunc pro tunc* to add Skanksa USA Civil Northeast Inc. (Skanska NE) as a defendant pursuant to CPLR 3025 under the doctrine of relation-back/united in interest, or (2) substitute Skanska NE for Skanska USA under the misnomer doctrine.

On July 14, 2023, the court denied plaintiff's motion. Plaintiff failed to establish personal jurisdiction over Skanska NE and did not serve the summons and complaint on Skanska NE until filing the instant motion and serving it on Skanska NE. Plaintiff also did not provide

NE until filing the instant motion and serving it on Skanska NE. Plaintiff also did not provide adequate evidence to show that Skanska USA and Skanska NE were legally united in interest for purposes of the relation-back doctrine. Plaintiff now moves to renew and reargue its prior motion.

Legal Analysis

To establish a basis for re-argument, plaintiff must show that this court overlooked or misapprehended a point of law or fact, without resorting to arguments different from those originally stated (*NYCTL 1998 1 Tr. v Rodriguez*, 154 AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966-67 [2d Dept 2016]; CPLR 2221 [d]). As set forth in CPLR 2221 (e), plaintiff in renewing his motion must prove new facts not offered on the prior motion that would change the determination or demonstrate that there has been a change in the law that would change the prior determination, and plaintiff must further provide reasonable justification for the failure to present such facts on the prior motion.

Plaintiff's basis for re-argument is that the court misapprehended the facts and law in its analysis of whether to include Skanska USA NE as a party through 1) substitution or 2) the doctrine of relation-back/united in interest. Plaintiff's basis for renewal is founded on new evidence contained in a notice to admit to which plaintiff alleges Skanska USA never responded (and therefore admitted per CPLR 3123) and a newly issued decision from the Court of Appeals.

Substitution

Plaintiff contends that the court misapprehended the facts in the underlying decision by failing to recognize that Skanska NE was served with the original summons and complaint. However, the underlying decision addressed service, noting that the plaintiff's delivery of the summons and complaint to Mr. Rothschild did not constitute service sufficient to establish

personal jurisdiction.

On his motion to renew, plaintiff does not offer any new law or previously unavailable evidence for his re-argument of the substitution claim. Plaintiff claims that it is a "new fact" that he served the instant motion, including the summons and complaint, on Skanska NE on August 24, 2023. However, plaintiff does not provide any justification for why he could not have served Skanska NE prior to the original motion. Renewal is therefore denied.

Relation-Back/United in interest

Plaintiff's basis for re-argument is that the court misapprehended facts in its relation-back/united in interest analysis in the underlying decision. Specifically, plaintiff states that the court failed to consider that a) Skanska NE was a subsidiary of Skanska USA and that b) Skanska NE hired plaintiff's employees. However, the court addressed the corporate relationship between Skanska USA and Skanska NE in its underlying decision. In addition, this court addressed the fact that Skanska NE transacted with Ottavino (plaintiff's employer) in its underlying decision.

As to renewal, plaintiff offers alleged new evidence for the relation-back/united in interest argument. The first is in the form of a notice to admit which was served on May 9, 2022, to Skanska USA. However, defendant properly objects, noting that plaintiff does not provide a justifiable excuse, or any excuse, for why the notice to admit was not offered in support of the previous motion. Plaintiff's original motion was made on July 11, 2022, 63 days after the notice to admit was served. Defendants' time to respond to the notice to admit had already elapsed at that point. Therefore, the notice to admit is not a "new fact" sufficient to warrant renewal (CPLR 2221 [e] [3]; *Ghoneim v Vision Enterprise Management, LLC*, 165 AD3d 893 [2d Dept 2018]). Accordingly, it cannot be considered by the court.

The second is a letter demonstrating that Skanska USA has sought defense and indemnification from Harleysville Worcester Insurance Company, the insurers for Ottavino and Credit Shelter. Skanska USA's tender and demands for defense and indemnification were denied by both insurers due to Skanska NE not being a "party" to the herein action—plaintiff argues that this supports the proposition that the two Skanska entities are united in interest.

However, as the prior decision held, corporate relationships and involvement in joint enterprises alone does not prove the necessary jural relationship required by a relation-back/united in interest analysis (*see Prudential Ins. Co. v Stone*, 270 NY 154, 159 [1936] [parties are united in interest if they "stand and fall together and that judgment against one will similarly affect the other]; *see also Connell v Hayden*, 83 AD2d 30 [2d Dept 1981]). Likewise, new information about these parties' insurance carriers is inadequate to show that these entities were united in interest.

Finally, plaintiff offers ostensibly new law on the issue of the relation-back doctrine: *Namath v K-Tooling*, 2023 WL 6976445 (2023). *Namath* differs from the instant action in that it involved nonconforming use of real property, and therefore a judgment against any one user would identically impact the others. Here, the Skanska entities have different insurance policies and claim different roles with respect to the project. There is no evidence presented that the Skanska entities are so intertwined that they stand and fall together; the plaintiff has not demonstrated how a judgment against one entity would have similar effects on the other.

Conclusion

Plaintiff's motion to renew and reargue (Seq. 005) is denied.

This constitutes the decision of the court.

December 21, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court