At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 19th day of August 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

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HADDON BROWN,

Plaintiff,

-against-

685 FIRST REALTY COMPANY LLC, SECOND AVE. SOLOW DEVELOPMENT CORP. and SOLOW BUILDING COMPANY, LLC,

Defendants.

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SECOND AVE. SOLOW DEVELOPMENT CORP.,

Third-Party Plaintiff,

-against-

R & J CONSTRUCTION CORP.,

Third-Party Defendants.

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Index No.: 509921/2019

DECISION & ORDER

The following e-filed papers read herein: NYSCEF Doc Nos.

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In this action, defendant/third-party plaintiff Second Ave. Solow Development Corp. ("Solow") moves for an order; (1) pursuant to CPLR 2221 (a) granting reargument of Third-Party Defendant R&J Construction Corp.'s ("R&J") motion to dismiss the third-party complaint, which was granted by an order entered on January 27, 2023 and (2) upon reargument, denying R&J's motion on the basis that (i) it failed to adhere to Justice Knipel's Order, dated January 21, 2022, which specifically required that R&J move to preclude Solow pursuant to CPLR 3126 (2) as a condition precedent to any preclusion; (ii) that Solow had a viable defense to the preclusion motion

if brought; and (iii) that R&J came to the court with unclean hands and should not be rewarded by obtaining either a dismissal or a preclusion (Mot. Seq. No. 6). R&J opposes the motion.

Plaintiff Haddon Brown, an employee of R&J, commenced this action by filing a summons and complaint against Solow, 685 First Realty Company LLC and Solow Building Company, LLC, seeking compensation for injuries allegedly sustained while working on a construction project located at 685 First Avenue in New York, New York. On February 21, 2020, the general contractor Solow commenced a third-party action against R&J, asserting the following causes of action: breach of contract, contractual indemnification, failure to procure insurance common law indemnification and contribution.

On December 13, 2021, R&J moved to vacate the Note of Issue, which was filed on November 18, 2021, and to compel certain outstanding discovery including a further deposition of Solow as well as any contract between Solow and R&J. On January 21, 2022, Justice Knipel issued an Order denying that part of R&J's motion seeking to vacate the Note of Issue but directed Solow to provide all documentary discovery by February 22, 2022, and to appear for a further deposition. The Order specifically stated that:

> Failure to comply with this order, will result in the non-complying party being precluded form offering evidence, testifying at trial, or submitting an affidavit in response to any dispositive motion, upon further motion for same, pursuant to CPLR 3126 (2) (emphasis added).

On April 8, 2022, R&J moved for an order pursuant to CPLR 3212 granting leave for R&J to serve a late motion for summary judgment pursuant to CPLR 3212, dismissing the third-party complaint and all cross-claims against R&J (Mot. Seq. No. 5). On October 7, 2022, Solow submitted its affirmation in opposition along with two annexed pages (2 and 3) of a purported three-page document titled "CONTRACTOR INSURANCE AND INDEMNITY AGREEMENT". Solow argued that this document was only recently discovered. In its reply, R&J argued that Solow, by February 22, 2022, had produced a letter of intent and an affidavit that it did not have any contract entered into by R&J. Furthermore, R&J argues that Solow was precluded from introducing these pages, as the February 22, 2022, deadline in Justice Knipel's order had passed.

On January 9, 2023, this Court rendered its decision, and held that (1) because the contract between the parties had not been produced by the February 22, 2022, deadline, Solow was "precluded from consideration of its opposition to R&J's motion," (2) in the absence of Solow's

opposition, R&J had established its prima facie entitlement to summary judgment, and (3) summary judgment is granted dismissing the third-party complaint of Solow against R&J in its entirety.

Now, Solow contends that this court was not "compelled to dismiss" the Third-Party Complaint against R&J and upon reargument, this Court's order, entered on January 27, 2023, should be reversed. Solow argues that a close examination of Justice Knipel's order reveals that R&J was required to first move to preclude, which it failed to do; thus, Solow was not precluded from introducing the subject indemnification agreement in opposition to R&J's motion to dismiss. Moreover, Solow argues that it can avoid the adverse impact of a conditional preclusion order because searching their records unsuccessfully for a contract is a reasonable excuse for the failure to comply with the earlier order. Further, Solow argues that after locating an indemnification agreement signed by R&J, there is a meritorious cause of action. Finally, Solow argues that R&J came to the court with unclean hands and should not be rewarded.

Solow argues that the court should deny R&J's motion because in his affidavit, dated April 5, 2022, Vice President of R&J Arthur Scott Horak states that "R&J did not locate a signed contract between itself and Solow in connection with the project." However, Solow avers that R&J's counsel was in possession of the Letter of Intent at the time. Solow further claims that R&J withheld the first page of the indemnification agreement from theVice-President of R&J John Neville, who submitted an affidavit wherein he stated that R&J entered into some written contracts in connection with other projects with Solow but indicated that the "signature page itself does not identify the project in any manner."

In opposition, R&J argues that the critical phrase in Justice Knipel's order is read as "Failure to comply with this order will result in the non-complying party being precluded from submitting an affidavit in response to any dispositive motion pursuant to CPLR 3126(2)." R&J also argues that Justice Knipel's order does not require the filing of a subsequent motion to preclude the consideration of the subject indemnification agreement. Further, R&J argues that Solow does not have a reasonable excuse for the indemnification agreement's late production.

In reply, Solow reiterates that the plain language of Justice Knipel's order requires a "further motion" to preclude evidence. Solow argues that an automatic preclusion was never Justice Knipel's intent, and Solow was not precluded from offering the indemnification agreement in opposition to R&J's motion for summary judgment.

The decision to grant leave to renew or reargue is at the sound discretion of the court (*see Rodney v New York Pyrotechnic Prod. Co.*, 112 AD2d 410, 411 [2d Dept 1985] [internal citation omitted]; *Gold v Gold*, 53 AD3d 485, 487 [2d Dept 2008]). A motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221 [d] [2]). Moreover, a motion for leave to reargue is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999] [internal citations omitted]). Accordingly, the movant must demonstrate in what manner the court, in rendering its original determination, overlooked or misapprehended the relevant facts or law and cannot include facts not offered on the prior motion (*Anthony J. Carter, DDS, P.C. v Carter*, 81 AD3d 819, 820 [2d Dept 2011]). Upon the court's review of the merits of the movant's arguments, the motion for reargument is essentially granted (*see McNamara v Rockland Cnty. Patrolmen's Benevolent Ass'n., Inc.*, 302 AD2d 435, 436 [2d Dept 2003]). Thus, the only remaining question is whether the Court will adhere to its prior determination.

A self-executing order regarding the production of discovery by a date certain means that upon the party's failure to timely produce, it is automatically precluded without the need for a further motion or order of the Court. Here, Justice Knipel's order is not a self-executing order; therefore, R&J had to have affirmatively moved to preclude Solow upon the latter's failure to comply with the discovery order. It is undisputed that R&J never filed that additional motion to preclude any evidence. Accordingly, Solow was not precluded from submitting the Contractor Insurance and Indemnity Agreement (the "Agreement"), purportedly signed on behalf of R&J on April 10, 2017.

Nonetheless, whether or not the Court considers the two- or three-page Agreement,[1] the Court's outcome remains the same but on different grounds. "A private document offered to prove the existence of a valid contract cannot be admitted into evidence unless its authenticity and genuineness are first properly established" (*NYCTL 1998-2 Trust v Santiago*, 30 AD3d 572, 573 [2d Dept 2006]). "Authenticity may be established by, inter alia, submitting the document with a

[1] Solow failed to produce the complete Agreement in its opposition to Motion Seq. No. 5. In support of the instant motion, Solow included as an exhibit an email to opposing counsel, dated October 6, 2022, with the complete Agreement attached with the Certificate of Liability Insurance (NYSCEF Doc No. 152).

certificate of acknowledgment, introducing the testimony of a witness who was present at the time and saw the person make or sign the instrument, a handwriting comparison, self-authentication of official publications or certified copies of public documents, deposition testimony, or other circumstantial evidence" (*Young v Crescent Coffee, Inc.*, 222 AD3d 704, 705 [2d Dept 2023] [internal citations and quotation marks omitted]). If a party "fail[s] to adequately authenticate the alleged agreement containing [an indemnification provision], [that agreement is] unenforceable and insufficient to sustain [that party's] burden of demonstrating the existence of" a written agreement to indemnify (*Andreyeva v Haym Solomon Home for the Aged, LLC*, 190 AD3d 801, 802 [2d Dept 2021]).

The only document purporting to contain an indemnification provision is the Agreement. Solow argues that Mr. Neville acknowledged signing similar agreements but could not tell whether this particular agreement was for the subject project since the first page was missing. Mr. Neville further stated that he had "no recollection of actually signing [the Agreement] in connection with the project at issue" and R&J had "not located such signed agreement in its files." Solow has not produced any evidence from anyone with personal knowledge who can attest to this Agreement being signed by Mr. Neville in relation to the subject project. In fact, in its opposition to R&J's motion, it acknowledged that the signature "cannot be authenticated by SOLOW at this time" (NYSCEF Doc No. 153, ¶ 10). In *Velentzas v 685 First Realty Co. LLC*, a personal injury action involving the same construction site, Justice Paul A. Goetz found that 685 First Realty Company LLC, Solow Realty & Development Company LLC, and Second Ave. Solow Development Corp. failed to authenticate the Contractor Insurance and Indemnity Agreement[2] or the signature they allege was signed by R&J's John Neville (2024 NY Slip Op 30612[U], *3-4 [Sup Ct, NY County 2024]). Thus, even if the Court erroneously disregarded Solow's opposition in considering R&J's motion, Solow has failed to establish that there was a written indemnification agreement between the parties concerning the subject construction project.

Accordingly, it is hereby

[2] It appears from the face of the document that it is the same agreement Solow attached to the present motion (*compare* NYSCEF Doc No. 152, *with* NYSCEF Doc No. 642, index No. 161081/2018).

ORDERED, that that the portion of the Solow's motion for leave to reargue (Mot. Seq. No. 6) is granted; and upon reargument, the Court adheres to its original determination.

All other issues not addressed herein are either without merit or moot.

This constitutes the decision and order of the Court.

Hon. Ingrid Joseph, J.S.C.

Hon. Ingrid Joseph
Supreme Court Justice