

Koulermos v A. O. Smith Water Prods.

2017 NY Slip Op 32456(U)

November 9, 2017

Supreme Court, New York County

Docket Number: 190406/2016

Judge: Lucy Billings

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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PETER KOULERMOS, as Executor of the
Estate of MICHAEL KOULERMOS, Deceased,
and MARION KOULERMOS, Individually, Index No. 190406/2016

Plaintiffs

- against -

DECISION AND ORDER

A.O. SMITH WATER PRODUCTS, et al.,
Defendants

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LUCY BILLINGS, J.S.C.:

Defendants National Grid USA and National Grid USA Service Company, Inc., move to reargue, C.P.L.R. § 2221(d), their prior motion for summary judgment on their cross-claims against co-defendants Courter & Company, Inc., Thomas O'Connor & Company, Inc., and Treadwell Corporation for attorneys' fees incurred in defending plaintiffs' claims. C.P.L.R. § 3212(b). The court (Moulton, J.) denied that motion for summary judgment in an order dated June 12, 2017.

I. THE CONTRACTS

The contracts between the National Grid defendants and each of the three co-defendants on which the National Grid defendants rely to entitle them to attorneys' fees refer to the National Grid defendants as "the Company" and each co-defendant as "the Contractor." The contracts provide that:

The Contractor hereby undertakes and agrees to indemnify and hold harmless the Company . . . from and against all losses, damages, claims . . . arising out of or in any way connected with the work . . . ; and in any case,

the Company shall have the right to demand that the Contractor shall undertake, to defend . . . all claims whether justified or not . . . against the Company

Aff. of John J. Burbridge Ex. A, Exs. K-M art. XX. The contracts define "work" as "things herein agreed to be furnished or done by or on the part of the Contractor." Id. art. II.

Thus co-defendant contractors' obligation to indemnify the National Grid defendants is only when the National Grid defendants' loss, including their costs incurred to defend plaintiffs' claims, arises from or is connected with the contractors' work. Matter of New York City Asbestos Litig., 142 A.D.3d 408, 410 (1st Dep't 2016); Nigri v. Liberty Apparel Co., Inc., 76 A.D.3d 842, 844 (1st Dep't 2010); DiPerna v. American Broadcasting Cos., 200 A.D.2d 267, 269-70 (1st Dep't 1994); Breed, Abbott & Morgan v. Hulko, 139 A.D.2d 71, 73-74 (1st Dep't 1988). The National Grid defendants' right to demand a defense, distinct from their right to be indemnified for defense costs that the National Grid defendants have incurred, is whenever a claim is made against the Company, whether the claim is justified or not.

The contracts' ensuing paragraph confirms the interpretation that the National Grid defendants are not automatically entitled to indemnification for fees incurred in defending all claims, whether justified or not.

In case any such claim or claims shall be made . . . against the Company . . . , the amount of such claim or claims, together with a sum estimated to cover interest and costs, may be retained by the Company out of any monies due or thereafter growing due to the Contractor . . . as security for the payment of such claim or claims. Upon

receipt of written notification by the Insurer under the Protective Liability Policy or by the Insurer providing contractual coverage, furnished to the Company pursuant to the terms of this Agreement . . . , that the Insurer will defend said claim or claims and that if and when the liability of the Company . . . has been fully established by a court . . . , said Insurer will pay the claim or claims together with interest and costs, the Company will . . . release to the Contractor any monies retained

Burbridge Aff. Ex. A, Exs. K-M art. XX (emphases added). Thus the National Grid defendants' remedy to secure co-defendant contractors' payment for losses incurred due to plaintiffs' claims against the National Grid defendants, if and when owed, was to retain an estimated amount of those losses from any further payments owed by the National Grid defendants to co-defendants.

For the first time, either in this motion or in their prior motion for summary judgment, the National Grid defendants, in reply to the opposition to this motion, rely on their demand to co-defendants that co-defendants' insurer procured under their contracts defend the National Grid defendants against plaintiffs' claims. This new basis for the National Grid defendants' claim for indemnification of their attorneys' fees is not now grounds for reargument, of course, both because the demand was not grounds for their prior motion for summary judgment, Olingswan v. Chase Home Fin., LLC, 104 A.D.3d 543, 544 (1st Dep't 2013); Toukara v. Fernicola, 63 A.D.3d 648, 649 (1st Dep't 2009); DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d 715, 718 (1st Dep't 2005); Frisenda v. X Large Enters., 280 A.D.2d 514, 515 (1st Dep't 2001), nor raised in support of their motion for

reargument. Sylla v. Brickyard Inc., 104 A.D.3d 605, 606 (1st Dep't 2013); Calcano v. Rodriguez, 103 A.D.3d 490, 491 (1st Dep't 2013); Martinez v. Nguyen, 102 A.D.3d 555, 556 (1st Dep't 2013); JPMorgan Chase Bank, N.A. v. Luxor Capital, LLC, 101 A.D.3d 575, 576 (1st Dep't 2012). In any event, even if the National Grid defendants did demand a defense by co-defendants' insurer, the National Grid defendants were entitled to a defense only if the insurer notified them that it would defend them against plaintiffs' claims. The contract did not obligate co-defendants to assume the National Grid defendants' defense. The contract allowed them instead to reject the demand and await a determination establishing that plaintiffs' claim, the deceased Michael Koulermos's exposure to asbestos, arose from or was connected with co-defendants' work at the injury site: Unit 1 or 2 of a power station in Northport, New York. Matter of New York City Asbestos Litig., 142 A.D.3d at 410. Then, upon such a determination, co-defendants' obligation is actually to indemnify the National Grid defendants, for both their liability and their defense costs.

II. THE LAW OF THE CASE

Before the National Grid defendants moved for summary judgment, Courter & Company, Thomas O'Connor & Company, and Treadwell Corporation each moved for summary judgment dismissing the National Grid defendants' cross-claims against each of these three co-defendants. In denying Courter & Company's and Treadwell Corporation's motions, the court already found factual

questions regarding when Michael Koulermos worked at Units 1 and 2 of the power station in Northport and whether his work thus coincided with or followed and also was in the vicinity of those defendants' installation of boiler equipment using products with asbestos. Koulermos v. A.O. Smith Water Prods., 137 A.D.3d 575, 576 (1st Dep't 2016). In denying Thomas O'Connor & Company's motion, the court also found factual questions "regarding whether plaintiff worked contemporaneously with, and in the vicinity of, O'Connor's employees." Matter of New York City Asbestos Litig., 2016 WL 2606742, at *3 (Sup. Ct. N.Y. Co. May 5, 2016). Those decisions remain the law of the case with preclusive effect. People v. Evans, 94 N.Y.2d 499, 503 (2000); Excelsior 57th Corp. v. Excel Assoc., 150 A.D.3d 540, 540 (1st Dep't 2017); Sasson v. TLG Acquisition LLC, 150 A.D.3d 459, 460 (1st Dep't 2017); Arkin Kaplan Rice LLP v. Kaplan, 138 A.D.3d 415, 415 (1st Dep't 2016).

Neither in the National Grid defendants' prior motion for summary judgment, nor in this motion, have the National Grid defendants pointed to any determinative evidence that was not part of the record of the motions for summary judgment by Courter & Company, Thomas O'Connor & Company, and Treadwell Corporation. As shown in opposition to the National Grid defendants' motion for summary judgment, Michael Koulermos testified at his deposition that he worked at the Northport power station during the 1950s while employed by George Campbell & Sons, corroborated by his Social Security Administration records that reflect his employment by that employer during 1955-61. This evidence

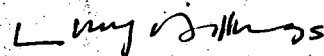
conflicted with the National Grid defendants' evidence that construction of the facility spanned from 1960 to 1966 and that Courter & Company and Treadwell Corporation were not at the site until 1965. The evidence also suggested that Michael Koulermos's work both predated Thomas O'Connor & Company's work at the site and was removed from where Thomas O'Connor & Company worked. If Michael Koulermos's work was not proximate in both time and place to co-defendants' work, in fact if his work predated their presence at the work site by even a day, then his injury would not have arisen from or been connected with their work.

III. CONCLUSION

Even if those co-defendants were not responsible for Michael Koulermos's injury, they well may be obligated to indemnify the National Grid defendants for their defense costs as long as they were incurred for a claim that arose from or was connected with co-defendants' execution of their work at the Northport power station. Robinson v. Brooks Shopping Ctrs., LLC, 148 A.D.3d 522, 523 (1st Dep't 2017); Matter of New York City Asbestos Litig., 142 A.D.3d at 410; Espinal v. City of New York, 107 A.D.3d 411, 412 (1st Dep't 2013). Upon this record, however, the court may not draw that conclusion. For all the reasons explained above and by Justice Moulton, that issue remains for trial. Therefore the court denies the motion by defendants National Grid USA and National Grid USA Service Company, Inc., to reargue their prior motion for summary judgment on their cross-claims against co-defendants Courter & Company, Inc., Thomas O'Connor & Company,

Inc., and Treadwell Corporation for attorneys' fees incurred in defending plaintiffs' claims. C.P.L.R. § 2221(d); Windham v. New York City Tr. Auth., 115 A.D.3d 597, 600 (1st Dep't 2014); Hernandez v. St. Stephen of Hungary School, 72 A.D.3d 595, 595 (1st Dep't 2010).

DATED: November 9, 2017



LUCY BILLINGS, J.S.C.

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