Arias v Beauce Atlas Steel Fabricator
2017 NY Slip Op 32783(U)
December 6, 2017
Supreme Court, Bronx County
Docket Number: 304955/08
Judge: Ben R. Barbato
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX
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HENRY ARIAS,

Plaintiff(s),

- against -

BEAUCE ATLAS STEEL FABRICATOR, B&R STEEL LLC, JEM CONTRACTING, JM3 CONSTRUCTION, LLC, STONELEDGE SCAFFOLDING COMPANY LLC, THE J CONSTRUCTION COMPANY LLC, BANNER AVENUE LLC AND TIEGRE MECHANICAL CORP.,

Defendant(s).

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THE J CONSTRUCTION COMPANY LLC, BANNER AVENUE LLC AND TIEGRE MECHANICAL CORP.,

Third-Party Plaintiff(s),

- against -

BEAUCE ATLAS STEEL FABRICATOR AND B&R STEEL LLC,

Third-Party Defendant(s).
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DECISION AND ORDER

Index No: 304955/08

Third-Party
Index No: 83891/09

In this action for personal injuries arising from, *inter alia*, violations of Labor Law §200, § 240(1), (2), and § 241(6), defendant/third-party defendant B&R STEEL, LLC (B&R) moves seeking an order rearguing portions of this Court's Decision and Order dated May 11, 2017. Specifically, B&R seeks to have the Court (1) strike the portion of the Court's prior decision and order which held that plaintiff's accident arose solely from the means and

methods employed by B&R as it is inconsistent with the record; (2) reverse the portion of the prior decision and order which granted defendants/third-party plaintiffs THE J CONSTRUCTION COMPANY LLC (J Construction) and BANNER AVENUE LLC's (Banner) motion seeking summary judgment on their cross-claim against B&R for common law indemnification on grounds that the record is bereft of evidence that plaintiff suffered a grave injury; (3) limit the portion of the prior decision and order which granted J Construction and Banner summary judgment with respect to their contractual indemnification claim against B&R to the terms of the relevant agreement; and (4) reverse its prior decision and order to the extent it denied B&R's cross-motion for summary judgment with regard to all claims asserted against it. Plaintiff opposes B&R's motion to the extent B&R seeks to have the Court grant it summary judgment on all claims asserted against it. Significantly, plaintiff contends that the Court properly denied B&R's prior cross-motion upon concluding that B&R, in failing to negate its liability, B&R failed to establish prima facie entitlement to summary judgment. Defendant/third-party defendant BEAUCE ATLAS STEEL FABRICATOR (Beauce) and defendant JEM Contracting Corp. (JEM) oppose B&R's motion insofar as it seeks to have the Court strike its holding that plaintiff's accident arose solely from the means and methods employed by B&R since it is clear that at the time of the instant accident, plaintiff was performing B&R's work at B&R's

direction.

For the reasons that follow hereinafter, the instant motion is granted, in part.

The instant action is for alleged personal injuries arising from, *inter alia*, alleged violations of the Labor Law. A review of plaintiff's second supplemental complaint establishes, in relevant part, the following: On February 8, 2008, while working within premises located at 1121 Banner Avenue, New York, NY (1121), plaintiff sustained injury. Specifically, it is alleged that plaintiff, an employee of BARONE STEEL FABRICATORS, INC., was involved in an accident. It is alleged that defendants owned and maintained 1121, that they were general contractors for a construction project occurring thereat and that they violated Labor Law §§ 200, 240(1) and (2), and 241(6); said violation causing plaintiff's accident and the injuries resulting therefrom.

Within the third-party complaint, Banner and J Construction allege that in connection with the project identified in plaintiff's complaint, they retained Beauce to perform work thereat, that Beauce then retained B&R Steel, LLC (B&R) to perform part of that work, that B&R was plaintiff's employer, and that B&R directed and controlled plaintiff's work. Based on the foregoing, Banner and J Construction interpose several causes of action for contribution and contractual indemnification against Beauce and B&R.

To the extent relevant, on May 11, 2017, upon Banner and J Construction's motion seeking summary judgment with respect to plaintiff's direct claims sounding in common law negligence and a violation of Labor Law § 200, and J Construction and Banner's motion for summary judgment on their cross-clams against B&R for contractual and common law indemnification, the Court granted the same holding that

> Banner and J Construction's motion for summary judgment is granted, in part. With respect to plaintiff's common law and Labor Law § 200 claim, they establish entitlement to summary judgment by tendering evidence which demonstrates **that plaintiff's accident arose solely from the means and methods employed by B&R**, which neither Banner nor J Construction controlled. With respect to Banner and J Construction's claims seeking contractual indemnification from Beauce, JEM and B&R, movants establish entitlement to summary judgment and an order of conditional indemnification inasmuch as the evidence tendered establishes the absence of any active negligence by movants and the existence of clauses requiring indemnification in the relevant agreements.

In denying B&R's cross-motion seeking summary judgment with respect to all claims asserted against it[1], the Court stated that

> B&R's motion seeking dismissal of all claims

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[1] While the Court's prior decision only discussed dismissal of the cross-claims asserted against B&R by the other defendants, and should have discussed dismissal of any direct claims asserted by plaintiff against B&R, no party has noted the foregoing omission. In any event, B&R's motion seeking dismissal of any direct claims asserted by plaintiff against it would have been denied for the very same reasons the Court denied its motion seeking dismissal of all cross-claims asserted against it.

> for contribution and indemnification asserted against it is denied. Significantly, because B&R directed and controlled plaintiff's work at the time of this accident and because the record is bereft of any evidence regarding the cause of plaintiff's fall, B&R fails to negate its liability. As such, it fails to establish prima facie entitlement to summary judgment.

B&R's motion seeking reargument of this Court's prior decision and order is granted, in part. Specifically, reargument is granted to the extent of modifying the language of the Court's prior decision and order so as to omit the word "solely." Indeed, while it is clear that based on the record, the instant accident arose while plainitff performed work for B&R at its direction and control, the instant accident could have also arisen from the failure of the scaffold at issue, which the record indicates could have been placed at the instant location by JEM. Reargument is also granted to the extent of limiting the grant of J Construction and Banner's motion for contractual indemnification to the terms of the relevant agreement, which only requires that B&R indemnify J Construction and Banner to the extent and to the degree of B&R's negligence, if any.

CPLR § 2221(d)(1), authorizes the reargument of a prior decision on the merits and states that such motion

> 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.

Accordingly,

> [a] motion for reargument, addressed to the discretion of the Court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principal of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided

(*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see also*, *Fosdick v Town of Hemstead*, 126 NY 651, 652 [1891]; *Vaughn v Veolia Transp., Inc.*, 117 AD3d 939, 939 [2d Dept 2014]). Thus, because reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

A motion to reargue, must be made within 30 days after service of a copy of the underlying order with notice of entry (CPLR § 2221[d][3]; *Perez v Davis*, 8 AD3d 1086, 1087 [4th Dept 2004]; *Pearson v Goord*, 290 AD2d 910, 910 [3rd Dept 2002]).

Here, a review of the Court's prior decision establishes that it erred in characterizing B&R's means and methods as the sole reason for plaintiff's accident. To be sure, the foregoing characterization was made solely in relation to J Construction and Banner's motion seeking dismissal of plaintiff's Labor Law § 200 claim and was meant as a reference to prevailing law which proscribes liability under Labor Law § 200 to an owner and general

contractor when, as here, the same neither controls nor directs the work and when the accident arises from the means and methods employed by the contractor. To be sure, where the defect or dangerous condition arises from a sub contractor's methods and the owner or general contractor exercises no control or supervision over the activity at issue, the owner and general contractor will not be liable under Labor Law §200, even if the same had notice of the sub-contractor's defective methods (*Comes v New York State Eelectric and Gas Corporation*, 82 NY2d 876, 877 [1993]; *Allen v Cloutier Construction Corp.*, 44 NY2d 290, 299 [1978]. Stated differently, with respect to the sub-contractor's improper methods or the use of defective materials, liability is only established when the owner has maintained the ability to control the work giving rise to the injury or has actually exercised supervision or control of the same (*Allen* at 299).

Nevertheless, the Court's inartful use of the word "solely" was an error - more so here, where the evidence establishes that JEM's methods, as the contractor who on this record is said to have placed the scaffold planks upon which plaintiff worked at the time of the accident. Thus, JEM's means and methods could also be deemed the source of plaintiff's accident. Significantly, here, as previously noted by the Court, Joseph Molina, JEM's president, testified that to perform its work, JEM would move the planks to the areas of the scaffolding adjacent to those portions of the

buildings on which it was required to work. Molina testified that JEM would also move the planks to allow B&R to perform its work as well. Thus the use of the word solely was error.

The Court also erred in failing to limit the grant of J Construction and Banner's motion on its claim for contractual indemnification against B&R by the terms of the relevant agreement. Significantly, as previously noted by the Court, with regard to an indemnification agreement, absent a violation of law or some transgression of public policy, people are free to enter into contracts, making whatever agreement they wish, no matter how unwise they may seem to others (*Rowe v Great Atlantic & Pacific Tea Company, Inc.*, 46 NY2d 62, 67-68 [1978]). Consequently, when a contract dispute arises, it is the court's role to enforce the agreement rather than reform it (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). In order to enforce the agreement, the court must construe it in accordance with the intent of the parties, the best evidence of which being the very contract itself and the terms contained therein (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). It is well settled that "when the parties set down their agreement in a clear, complete document, their writing should be enforced according to its terms" (*Vermont Teddy Bear Co., Inc. v 583 Madison Realty Company*, 1 NY3d 470, 475 [2004] [internal quotation marks omitted]) Moreover, "a written agreement that is complete, clear and unambiguous on its face must be enforced

according to the plain meaning of its terms" (*Greenfield* at 569).

Here, while the Court noted that paragraph 9 of the agreement between Beauce and B&R, governing indemnification to J Contruction and Banner from B&R states that B&R would "indemnify, defend and hold harmless Owner . . . [and] Construction Manager," for "any negligent act or omission of the Subcontractor," the Court failed to also apply the terms of a rider to the contract submitted by B&R which at paragraph 28 limits indemnification by B&R

> only to the extent [of damages] caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable.

Based on the foregoing, the Court properly conditionally granted J Construction and Banner's motion for indemnification upon concluding that they were not negligent. However, such conditional indemnification should have also been limited by the degree and the extent to which B&R was negligent, if at all.

The remainder of B&R's motion to reargue is denied. Significantly, the portion of the motion seeking reversal of the Court's prior decision granting J Construction and Banner summary judgment on their claim against B&R for common law indemnification must be denied insofar as the arguments asserted in support thereof are being asserted for the first time on reargument. As noted above, reargument is not a vehicle by which a party can get a second bite at the same apple, a motion for reargument preludes a

litigant from advancing new arguments or taking new positions which were not previously raised in the original motion (*Foley* at 567).

Here, irrespective of the merit of the arguments asserted by B&R, a review of its prior cross-motion - wherein B&R interposed opposition to J Construction and Banner's motion - evinces that it is bereft of any of the arguments now being asserted on reargument. Indeed, B&R never urged denial of J Construction and Banner's motion on the issue of common law indemnification on grounds of the absence of a grave injury. Instead, the sole argument previously asserted by B&R on this issue was that it was not negligent. Thus, reargument of the foregoing portion of the prior order must be denied.

Reargument of the portion of this Court's prior order denying B&R's cross-motion for summary judgment and dismissal of the claims asserted against it is also denied because the Court neither misapprehended the facts nor misapplied the law. Indeed, as previously noted, the evidence submitted by B&R failed to negate its negligence such that B&R failed to establish prima facie entitlement to summary judgment. It is hereby

ORDERED that to the extent that this Court's Decision and Order dated May 11, 2017 indicates "that plaintiff's accident arose **solely** from the means and methods employed by B&R," the same be amended to omit the word solely. It is further

ORDERED that if J Construction and Banner are found liable for

plaintiff's accident and B&R is found negligent, that B&R indemnify J Construction and Banner for any damages awarded against them but only to the extent and to the degree of B&R's negligence. It is further

ORDERED that B&R serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof.

This constitutes this Court's decision and Order.

Dated : December 6, 2017
Bronx, New York

BEN BARBATO, JSC.