McCabe v Incorporated Vil. of Flower Hill
2012 NY Slip Op 33271(U)
November 30, 2012
Sup Ct, Nassau County
Docket Number: 1345-2009
Judge: James P. McCormack
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

[* 1]

Scan

SUPREME COURT - STATE OF NEW YORK
TRIAL/IAS TERM, PART 43 NASSAU COUNTY

PRESENT:

Honorable James P. McCormack
Acting Justice of the Supreme Court

---x

ROBERT MCCABE AND KATHLEEN MCCABE,

Plaintiff(s),

-against-

THE INCORPORATED VILLAGE OF FLOWER HILL, KEM CONSTRUCTION CORP., ROCON PLUMBING & HEATING, INC., and CORSONS MASONRY CONSTRUCTION, INC.,

Defendant(s).

---x

THE INCORPORATED VILLAGE OF FLOWER HILL,

Third-Party Plaintiff(s),

-against-

KEM CONSTRUCTION CORP., ROCON PLUMBING & HEATING, INC. and MADHUE CONTRACTING INC.,

Third-Party Defendant(s).

---x

Index No. 1345-2009

Motion Seq. No.: 010, 011 & 012
Motion Submitted: 9/13/12

The following papers read on this motion:

Notice of Motion/Supporting Exhibits..X
Affirmation in Opposition..X
Reply Affirmation..X

Motion by third-party plaintiff, Village of Flower Hill ("Village"), for an Order of

this Court, pursuant to CPLR §2221 granting leave to reargue the Order of this Court dated April 16, 2012, and upon re argument, granting summary judgment, pursuant to CPLR §3212, on its claim for contractual indemnity over and against third-party defendant, Madhue Contracting, Inc. ("Madhue"), is denied; however, the prior determination of this Court is clarified.

Cross Motion by defendant, Corsons Masonry Construction ("Corsons"), for an Order of this Court, pursuant to CPLR §2221 granting leave to reargue the Order of this Court dated April 16, 2012, and upon reargument, granting summary judgment, pursuant to CPLR §3212, dismissing the plaintiff's second supplemental summon and second amended complaint and cross claims asserted against Corsons, is denied.

Cross Motion by defendants, KEM Construction Corp ("KEM"), for an Order of this Court, pursuant to CPLR §2221 granting leave to reargue the Order of this Court dated April 16, 2012, and upon reargument, granting its motion for summary judgment, pursuant to CPLR §3212, or alternatively, denying Summary Judgment to the Village, is denied.

The instant motions arise out of plaintiffs', Robert McaCabe's and Kathleen McCabe's, underlying personal injury action alleging acts of negligence and violations of certain Labor Law by the defendants, and the defendants' ensuing and protracted motion practice.

Plaintiffs initially commenced the action against the Village for injuries sustained

in a slip and fall accident on December 13, 2007 during a renovation and construction project on Village Hall and the Village garage complex. The plaintiff, Robert McCabe, at all relevant times herein, was an employee of Madhue, the electrical contractor on the project.

PROCEDURAL HISTORY

Plaintiffs first commenced the underlying personal injury action in January 2009, against the Village alleging acts of negligence and violations of Labor Law §§200, 240, and 241. The Village then brought a third-party complaint against KEM, Rocon, and Madhue seeking contribution, indemnification, and alleging a breach of contract in that the defendants failed to procure the requisite insurance. KEM and Madhue asserted cross claims against Rocon seeking contribution, indemnification, and alleging a breach of contract in that the defendant failed to procure the requisite insurance.

Plaintiffs later amended their complaint to include KEM, Rocon Plumbing & Heating, Inc (" Rocon ") and Corsons, as direct defendants. As the main action as against Rocon, was discontinued, the co-defendants' cross claims against Rocon remained.

Rocon moved this Court for an Order granting Summary Judgment dismissing the cross-claims against it, which was granted by this Court in the subject Order.

The Court, within the referenced Order, denied Corsons' motion for Summary Judgment seeking dismissal of the plaintiff's complaint and all the co-defendants' cross claims against it, and KEM's motion for Summary Judgment dismissing plaintiff's

complaint and the Village's third-party complaints, as well as its motion under CPLR §3211 (a)(7) dismissing any and all cross claims against it. KEM also sought an Order denying the motions of Corsons and the Village, which was also denied.

The Village's summary judgment motion seeking dismissal of the plaintiff's Labor Law §200 and common law negligence causes of action and all cross claims of all defendants was granted, while its motion seeking summary judgment on its claims for contractual indemnity over and against third-party defendant, Madhue Contacting, Inc. was denied.

ARGUMENTS

Village

The Village argues that this Court misapprehended the facts and the law in holding that its seeking contractual indemnity was premature and moot. However, the Village is requesting clarification as it only sought dismissal of the claims under common law negligence and Labor Law §200. The Village's interpretation of the Order was that the Court dismissed the entire matter as against it, including the claims under Labor Law §241 (6).

Further, the Village contends that the indemnity clause, set forth in Section 10.2.2.1 of the construction contact, applies irrespective of whether this Court found a question of facts as to Madhue's conduct. Additionally, if the common law negligence and Labor Law §200 claims were dismissed as against the Village, no question of facts

remains.

It is noted that in the Village's Partial Affirmation in Support, the affirmant "takes no other position" on its instant motion as she only requests that this Court issue a decision clarifying that only the plaintiff's claims under Labor Law §200 and common law negligence are dismissed.

In opposition, KEM, argues that it was not the general contractor, and the other contractors were also prime contractors within their particular area of expertise. Further, the Village, as owner , was responsible for overseeing the construction project. KEM also contends that the project "fell under the mandate of Wick's Law [u]nder Generla Municipal Law §101" and because the municipality must coordinate the work of the all the contractors, there can "be no general contractor under these circumstances".

Madhue, in opposition to the Village's motion, argues that Section 10.2.2.1 of the general construction agreement, on which the Village relies, does not require it to defend and hold the Village harmless for the acts of other contractors. Further, although the Village argues to the contrary, there is a direct conflict between the provisions of Section 3.18.1 and Section 10.2.2.1. In such cases, ambiguities must be read in its favor and against the Village as the drafter of the contract.

Corsons

Corsons contends that the plaintiff clearly identified what he tripped over and that the Court relied on "boilerplate" allegations of negligence as set forth in plaintiffs' Bill of

Particulars. Further, its creation of the "stair structure" and "stoop/walkway", "has nothing to do with" what the plaintiff describes as to what he tripped over.

In opposition, KEM contends that Corsons was responsible for cleaning up its work area, and that the debris from the cinder block and the cinder block itself which contributed to the accident, were the same and/or similar materials that were used by Corsons during the phase of its work.

KEM

KEM, while ostensibly repeating the argument that it was not the general contractor, does not deny that its motion to reargue, filed after the statutory 30-day time period, was untimely . However, it contends that the Court may consider the motion on the merits as its arguments arise out of the identical set of facts as the motion in chief.

DISCUSSION

A motion to reargue is addressed to the discretion of the court and is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. It is not designed as a vehicle to afford the unsuccessful party an opportunity to argue once again the very questions previously decided (*Gellert & Rodner v. Gem Community Mgt., Inc.*, 20 AD3d 388 [2nd Dept.2005]), nor is it designed to provide an opportunity for a party to advance arguments different from those originally tendered (*Amato v. Lord & Taylor, Inc.* 10 AD3d 374, 375 [2nd Dept.2004]).

[* 7]

Although this Court understands and appreciates the movants' various positions, a reminder regarding the essential purposes of Summary Judgment is appropriate. If the movant can, *on paper proof alone and without the aid of oral testimony*, convince the Court that there is no material issue of fact outstanding and that the facts mandate judgment in its favor, that side can move for and ultimately receive an Order granting Summary Judgment. However, Summary Judgment is a drastic remedy and *should not be granted where there is any doubt as to the existence of a triable issue* (see CPLR §3212, Practice Commentaries by David Siegel, C3212:1, The Motion for Summary Judgment, Generally).

The proponent of a motion for summary judgment must establish, *prima facie,* its entitlement to judgment as a matter of law, and must provide sufficient evidence demonstrating the absence of triable and material factual issues (*Alvarez v. Prospect Hosp.,* 68 NY2d 320 [1986]; *Walden Woods Homeowners Assn. v. Friedman,* 36 AD3d 691 [2d Dept 2007]).

VILLAGE

The Village argues that Madhue, as per the agreement between the two parties, is obligated to indemnify the Village and hold it harmless for claims arising out of the construction project. The Village argues that Article 1 of the contract incorporates the General Condition of the Contract for Construction. Article 1 is provided herein in its entirety:

[* 8]

> "...The Contract Documents consist of this Agreement, Conditions of the Contract (General, Supplementary and other Conditions). Drawings, Specifications, addenda issued prior to execution of this Agreement, other documents listed in this Agreement and Modifications issued after execution of this Agreement; these form the Contract, and are fully part of the Contract as if attached to this Agreement or repeated herein. The Contract represents the entire and integrated agreement between the parties hereto and supersedes prior negotiations, representations or agreements, either written or oral. An enumeration of the Contract Documents other than Modifications appear in Article 9.."

The General Condition of the Contract for Construction Agreement was cited in Article 9 as the "Standard Form of Agreement Between Owner and *Contractor*". However, there was no clarification as to the identity of the "Contractor". The fact that the Village omitted the signature page and the mailing address of the Contractor in that agreement, gives this Court even more pause for concern. This issue is critical and it can hardly be resolved solely by the Village's papers.

Further, try as it might, the Village still has not resolved the issue regarding any negligence on Madhue's part. As already stated by this Court, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the non-delegable duty imposed by Labor Law Section 240(1) (see *McDermott v. City of New York*, 50 N.Y.2d 211 [1st Dept 1999]). As such, the Village's motion seeking indemnification as to Madhue, is denied.

[* 9]

CORSONS

Regarding Corsons' flawed reasoning that this Court relied on the plaintiffs' "boilerplate" language in their Bill of Particulars to deny its motion, it should perhaps review the language of the Bill and the Court's decision:

> "...[Corsons] avers that it 'played no role' in the construction project on the date of the accident nor did it have any control over any aspect of the contractors who did perform work on that date. *Although the foregoing may indeed be accurate*, the Verified Bill of Particulars specifically sets forth:
>
> The negligence of the defendant, its agents, servants, and/or employees consisted of maintaining said premises in such a dangerous and defective condition that it was rendered unsafe and liable to cause injury to visitors of the premises and others walking thereon and more particularly to plaintiff herein; *in causing and allowing a dangerous condition, more specifically, a defective and improperly maintained stoop/walkway with a height differential of several inches in, on, or about the aforesaid premises* , which was liable and did cause injury to the plaintiff... (see Corsons' Notice of Motion, Exhibit A, p. 18)"

The Court, in considering Corsons underlying motion, noted that it failed to submit evidence to refute, or even address, the specific factual allegations of negligence nor did it did not even offer a single argument as to this issue in its motion (see *Faicco v. Golub,* 91 AD3d 817 [2nd Dept 2012]), *Carr v. KMO Transp., Inc.*, 58 AD3d 783 [2nd Dept 2009]). This omission is fatal to its establishment of a prima facie entitlement to summary judgment. As such, its motion to reargue is denied.

MADHUE

As to the Village's reliance on Section 10.2.2.1 of the construction agreement, the Court has determined that such reliance is misplaced. The disputed language is set in

relevant part:

> "...The Contractor shall indemnify and hold harmless the Own, its Architect and the Architects Consultant of and from any and all liability for violation of such laws and regulations and shall defend any claims or actions which may be brought against the Owner, its Architect and the Architects Consultant as the result thereof..."

The evidence already established that KEM was the general contractor of the project and the referenced Contractor in the general construction agreement. Again, the Court notes the following deposition testimony by KEM's vice-president, Steven Eberhardt, where he first testifies that KEM was the general contractor and mechanical contractor on the project. Then, in an attempt to rehabilitate his testimony, he later attempts to "clear something up", by testifying that KEM was the "general construction, not the general contractor". Eberhardt then contends that KEM was the prime for the general construction (see Village Notice of Motion, Exhibit O, Tr. Eberhardt. tr. p. 13 ln. 14 - 20, p. 14, ln. 2-3, p. 15, ln. 23-25; p. 44, ln. 15-23, p. 45).

Further, Eberhardt also testified that he would speak to a "particular prime" contractor regarding a dangerous condition it created as it was *his* responsibility (see Village Notice of Motion, Exhibit O, Tr. Eberhardt. tr. p. 45). As such, Eberhardt's attempt at undermining its role as a general contractor, is unconvincing, while at the same time, confusing. Even the Village's own building inspector consultant testified that KEM was the prime contractor for general construction (see Exhibit N, Tr. Gilhooly, p. 39, ln. 15-25, p. 40, ln. 1-3).

Further, such evidence supports that the foregoing issues cannot be resolved on the Village's motion papers.

This foregoing discussion is also relevant as to the Village's argument regarding Madhue's obligation to indemnify. Section 10.2.2.1 of the subject general construction agreement references indemnification as to the General Contractor and there is nothing in that entire section, nor any other evidence that indicates any clear reference to Madhue as the general contractor for purposes of the subject construction agreement.

KEM

It is noted that KEM does not dispute that its cross motion seeking reargument is untimely. KEM, however, argues that since its application is filed as a cross motion and addresses issues and facts already before this Court, it should not be precluded from proceeding on the merits. The Court in *Dugas v. Bernstein,* 5 Misc3d 818, (NY Sup Ct 2004), addressed this issue.

A cross motion is an application for an order of the court, and it is therefore an actual motion. Therefore, a cross motion is made when a notice of cross motion is served. CPLR §2221(d)(3) provides in relevant part"...[a] motion for leave to reargue:... shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry..."

The *Dugas* court while holding that a cross motion to reargue is procedurally incorrect against a nonmoving party, the plaintiff in the instant case, this procedural gaffe

can be overlooked by the court if the plaintiff is not prejudiced thereby or if the cross motion to reargue was timely (*Mango v. Long Is. Jewish–Hillside Med. Ctr.*, 123 AD2d 843[2d Dept.1986]; *see* CPLR 2215).

Here, this Court's Order is dated April 16, 2012 and the same was entered on May 4, 2012. The co-defendant, Rocon, served the Notice of Entry upon KEM on May 23, 2012 and the plaintiff served the notice on May 24, 2012. KEM's Cross Motion to Reargue is dated July 16, 2012. Based on the foregoing, KEM's cross motion is untimely.

There are few exceptions to the statutory time constraint, in that courts have allowed a motion for reargument to be made after the time frames set forth in CPLR §2221(d)(3) have expired if a timely notice of appeal has been served and filed (see *Itzkowitz v. King Kullen Grocery Co.*, 22 AD3d 636 [2nd Dept 2005]), *Dugas v. Bernstein*, supra). KEM has not provided any evidence or argument to indicate that such an appeal has been filed or is pending before the appropriate court.

Based on the foregoing, the Court need not address the merits of KEM's application before this Court. Its cross motion to reargue is not only procedurally defective, it is untimely.

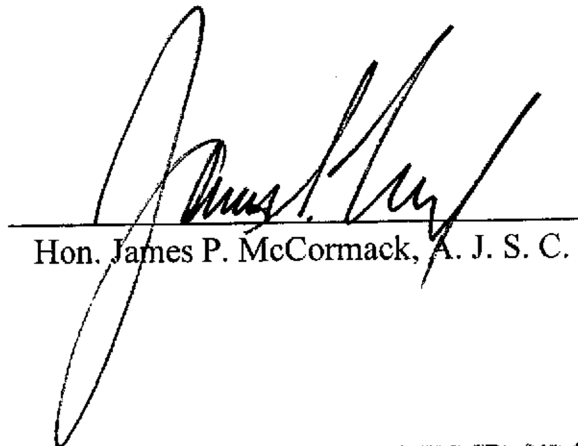
CONCLUSION

Accordingly, the Village's motion to reargue is denied and the Court clarifies its prior Order in that the Village's motion for summary judgment seeking indemnification

from Madhue, is denied, and only the branch of the plaintiff's complaint against the Village, under Labor Law §200 and common law negligence are dismissed. Corsons' motion to reargue is denied, and KEM's motion to reargue is denied.

This constitutes the Decision and Order of the Court.

Dated: November 30, 2012
Mineola, N.Y.



Hon. James P. McCormack, A. J. S. C.

ENTERED
DEC 07 2012
NASSAU COUNTY
COUNTY CLERK'S OFFICE