

Cahn v Ward Trucking, Inc.

2013 NY Slip Op 33275(U)

December 7, 2013

Supreme Court, New York County

Docket Number: 106110/04

Judge: Paul Wooten

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOHN CAHN,
Plaintiff,

Index No.: 106110/04

-against-

Motion Seq.: 013

WARD TRUCKING, INC., R.C. DOLNER, LLC,
J.T. FALK COMPANY, INC., TACONIC
MANAGEMENT COMPANY, LLC, 450 PARK, LLC,
and 460 PARK AVENUE SOUTH ASSOCIATES,
LLC,
Defendants.

J.T. FALK & COMPANY, LLC,

Third-Party Plaintiff,

TP Index No.: 590947/05

-against-

CHEMTREAT, INC.,

Third-Party Defendant.

J.T. FALK & COMPANY, LLC,

Second Third-Party Plaintiff,

2d TP Index No.:590446/07

-against-

ATLANTIC COASTAL TRUCKING, INC. and
TRIANGLE TRUCKING, a division of
ATLANTIC COASTAL TRUCKING, INC.,

Second Third-Party Defendant.

FILED

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ATLANTIC COASTAL TRUCKING, INC. and
TRIANGLE TRUCKING, a division of
ATLANTIC COASTAL TRUCKING, INC.,

NEW YORK
COUNTY CLERK'S OFFICE

Third Third-Party Plaintiffs,

3d TP Index No.:490446/07

-against-

ROBINSON BERMUDEZ,

Third Third-Party Defendant.

TACONIC MANAGEMENT COMPANY, LLC and
450 PARK, LLC,

Fourth Third-Party Plaintiffs

4th TP Index No.: 590189/09

-against-

ATLANTIC COASTAL TRUCKING, INC. and
TRIANGLE TRUCKING, a division of
ATLANTIC COASTAL TRUCKING, INC.,

Fourth Third-Party Defendants.

The following papers were read on this motion by defendant R.C. Dolner, LLC to renew, pursuant to CPLR 2221.

Notice of Motion — Affidavits — Exhibits

Answering Affidavits — Exhibits (Memo) _____

Replying Affidavits (Reply Memo) _____

PAPERS NUMBERED

Cross-Motion: Yes No

This is an action to recover for personal injuries allegedly sustained by John Cahn (plaintiff) when he was struck in the leg by a barrel or drum that fell off a pallet in the lobby of 450-460 Park Avenue, New York, New York, where plaintiff worked. The accident occurred on March 12, 2003. Now before the Court is a motion filed by R.C. Dolner, LLC (Dolner) on February 8, 2013, pursuant to CPLR §§ 2221 and 5015, for leave to renew its prior cross-motion¹ for summary judgment, and upon renewal Dolner seeks an order granting it summary

¹ The Court notes that in its Notice of Motion, Dolner states that it is seeking to renew the denial of its previous motion for summary judgment, however, as noted by the Court above, Dolner originally brought a cross-motion. The Court will treat this mistake as a clerical error, and the motion will be decided as if the Notice of Motion properly states that it is a motion to renew its cross-motion (see

judgment dismissing the complaint and all cross-claims as asserted against it, and summary judgment on its cross-claims for indemnification against Falk.

BACKGROUND

The facts and parties herein are fully set out in prior decisions in this action, familiarity with which is presumed. In motion sequence number 008, Chemtreat moved, pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross-claims asserted against it. Falk cross-moved, pursuant to 22 NYCRR 202.21, to strike this matter from the trial calendar and for an order directing plaintiff to furnish certain discovery.

In motion sequence number 009, Falk moved, pursuant to CPLR 3212, for summary judgment dismissing the complaint asserted as against it, as well as for summary judgment on its second third-party complaint against Chemtreat for common-law and contractual indemnification, and for summary judgment on its third third-party complaint for common-law and contractual indemnification against Atlantic, Triangle, and Ward. Dolner cross-moved, pursuant to CPLR 3212, for summary judgment dismissing 450 and 460's cross-claims asserted as against it for common-law indemnification and contribution, and granting Dolner common-law indemnification and contribution from 450 and 460, including reimbursement for all reasonable attorney's fees and costs of defense incurred in this matter. Dolner also cross-moved, pursuant to CPLR 3212, for summary judgment in its favor on its claims for contractual and common-law indemnification, and reimbursement for all reasonable attorney's fees and costs of defense of this matter from Falk. Additionally, Dolner sought in its cross-motion summary judgment on its claims for common-law indemnification and contribution from Ward, dismissing all cross-claims asserted by Ward as against it, as well as summary judgment on its claims for common-law indemnification and contribution from Chemtreat. Dolner also cross-

CPLR 2001).

moved, pursuant to CPLR 3212, for summary judgment on its claims for common-law indemnification and contribution from Atlantic and Triangle, including all reasonable attorney's fees and costs of defense in this matter, and dismissing the counterclaims asserted by Atlantic and Triangle as against it for indemnification and contribution. Finally, Dolner also cross-moved, pursuant to CPLR 3212, for summary judgment on its claims for common-law indemnification and contribution from Robinson Bermudez, R. Bermudez Trucking and Bermudez Trucking, LLC, and dismissing their counterclaims for indemnification and contribution asserted as against Dolner.

In a Decision and Order of this Court, dated February 3, 2011 and entered on February 16, 2011 (Previous Order), this Court denied Chemtreat and Falk's motions for summary judgment. Moreover, the Court denied Falk's cross-motion to strike the Note of Issue and Dolner's cross-motion for summary judgment. Specifically, this Court found that Falk and Dolner were seeking relief against nonmoving parties, and a "cross motion is an improper vehicle for seeking affirmative relief from a nonmoving party" (*Terio v Spodek*, 25 AD3d 781, 785 [2d Dept 2006] [internal quotation marks and citation omitted]).

Chemtreat and Falk appealed this Court's Previous Order. In a Decision dated December 11, 2012, the Appellate Division, First Department modified the Previous Order of this Court to the extent that it granted Chemtreat's motion dismissing the third-party complaint and all cross-claims as asserted against it. The Appellate Division also granted Falk's motion to the extent that it dismissed plaintiff's complaint as against Falk, but otherwise affirmed this Court's Previous Order, including denial of Falk's motion seeking summary judgment on its third-party and second-third party claims for indemnification.

Now before the Court is a motion filed by R.C. Dolner, LLC (Dolner) on February 8, 2013, pursuant to CPLR §§ 2221 and 5015, for leave to renew its prior cross-motion for summary judgment, and upon renewal Dolner seeks an order granting it summary judgment

dismissing the complaint and all cross-claims as asserted against it, and summary judgment on its cross-claims for indemnification against Falk. Atlantic, Triangle, plaintiff, Taconic and 450 submit opposition to Dolner's motion. Falk opposes the portion of Dolner's motion which seeks renewal of its summary judgment motion on its claim for contractual indemnification over and against Falk, but takes no position on the part of Dolner's motion which seeks renewal of the portion of Dolner's summary judgment motion for dismissal of plaintiff's complaint against Dolner.

DISCUSSION

A renewal motion "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination . . . [and a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][2] and [3]). "Renewal is granted sparingly, and only in cases where there exists a valid excuse for failing to submit the additional facts on the original application" (*Matter of Weinberg*, 132 AD2d 190, 210 [1st Dept 1987], *appeal dismissed sub nom Matter of Beiny*, 71 NY2d 994 [1988] [internal citation omitted]); *CPA Mut. Ins. Co. of Am. Risk Retention Group v Weiss & Co.*, 80 AD3d 431, 432 [1st Dept 2011]). Renewal "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (*Queens Unit Venture, LLC v Tyson Court Owners Corp.*, __AD3d__, 2013 NY Slip Op 07820 * 1 [1st Dept 2013]; *see also Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010], *citing Matter of Weinberg*, 132 AD2d at 210, *app dismissed*, 15 NY3d 820 [2010], *reconsideration denied*, 16 NY3d 726 [2011]).

Dolner's motion for leave to renew this Court's Previous Order is denied. In the Previous Order of February 16, 2011, this Court denied Dolner's cross-motion because it improperly sought affirmative relief against nonmoving parties, a procedural deficiency. Dolner

did not move to reargue this Court's Previous Order, pursuant to CPLR 2221, nor did Dolner appeal the Previous Order as did Falk and Chemtreat. As such, Dolner's motion to renew, brought approximately two years after the underlying motion, is an improper attempt to rectify its previous error. However, even on substantive grounds, Dolner's motion for renew must be denied. Dolner fails to meet the relevant standard in as much as it fails to demonstrate there is a change in facts not offered in its previous cross-motion or a "change in the law" warranting a change in this Court's Previous Order (see CPLR 2221[e][2]; *Rodriguez v Ford Motor Co.*, 106 AD3d 525, 526 [1st Dept 2013] [plaintiff's submission fails to offer new facts or demonstrate that there has been a change in the law that would change the prior determination]; *Otto v Otto*, 110 AD3d 620 [1st Dept 2013]). The Appellate Division's Decision addressed the liability of Chemtreat and Falk, the sole appellants, and does not set forth a new legal standard in this action that would render a change in the Court's previous determination.

CONCLUSION

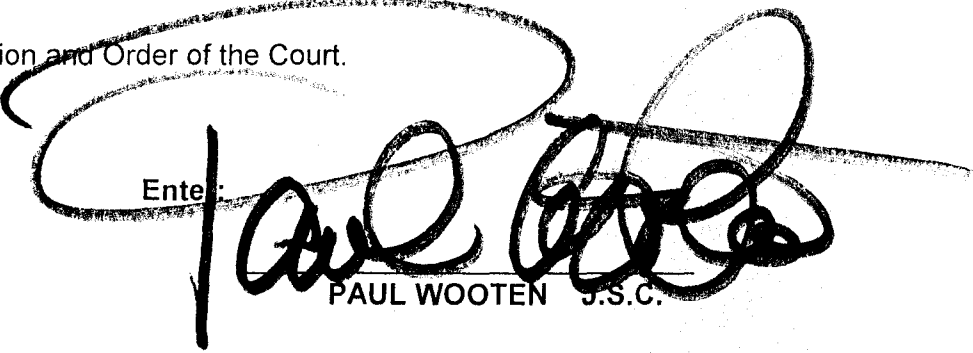
Based on the foregoing, it is hereby

ORDERED R.C. Dolner, LLC's motion for leave to renew, pursuant to CPLR §§ 2221 and 5015 is denied; and it is further;

ORDERED that counsel for plaintiff is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 12/7/13

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT POST REFERENCE

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