

**Burgund v Verizon N.Y. Inc.**

2018 NY Slip Op 32072(U)

August 23, 2018

Supreme Court, New York County

Docket Number: 155887/2014

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

**KELLY O'NEILL LEVY**

**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19**

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JAMES BURGUND,

Plaintiff,

- v -

VERIZON NEW YORK INC., ON TRAC CONSTRUCTION ASSOCIATES, INC., TRISTATE FILTER & HVAC SUPPLIES INC., NKD CONSTRUCTION INC., A&S CONSTRUCTION GROUP INC., A&S CONSTRUCTION CORP., JOHN DOE, the Name being fictitious, true name being unknown, and JOHN SMITH, the Name being fictitious, true name being unknown,

Defendants.

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VERIZON NEW YORK INC., ON TRAC CONSTRUCTION ASSOCIATES, INC., and STRUCTURE TONE CONTRACTING CORP.,

Third-Party Plaintiffs,

- v -

CUSHMAN AND WAKEFIELD, INC.,

Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 105, 107, 108, 110, 113, 114, 115, 116, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127

were read on this motion to/for

RENEWAL

HON. KELLY O'NEILL LEVY:

This is a Labor Law action arising from a trip and fall accident. Plaintiff James Burgund moves for an order, pursuant to CPLR § 2221(e), granting renewal of the previous motion of defendant JT&T Air Conditioning Corp. (hereinafter, JT&T) for summary judgment and dismissal of this action against it. JT&T opposes.

**BACKGROUND**

This action arises from an alleged injury sustained by plaintiff when he tripped on a condenser pump from a spot cooler on the second floor of the building located at 360 Bridge Street in Brooklyn (hereinafter, the premises), while employed as a mechanic for Verizon.

This court granted JT&T’s motion for summary judgment and dismissed the action as against it on April 25, 2017, finding that JT&T had established it did not own or control the spot cooler at issue [April 25, 2017 Decision and Order (ex. E to the Wiener aff.)]. The testimony of Nicholas Castell, a service mechanic for JT&T, established that JT&T did not own any spot coolers prior to 2013 and that the work performed by JT&T at the time was on the roof of the premises and not on the second floor, where the accident had allegedly occurred.

After this court granted the motion, a “Subcontractor Agreement” dated November 21, 2012 in which defendant, On Trac Construction Associates, Inc. (hereinafter, On Trac), engaged JT&T to perform work at the premises was provided to plaintiff’s counsel by counsel for defendants Verizon New York, Inc., On Trac, and Structure Tone Contracting Corp. [Subcontractor Agreement (ex. F to the Wiener aff.)]. The Subcontractor Agreement provides that JT&T replace the air conditioning system of the second floor of the premises.

**DISCUSSION**

CPLR § 2221(e) governs motions to renew and provides that a motion for leave to renew must satisfy three conditions: “(1) shall be identified specifically as such; (2) 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 (3) shall contain reasonable justification for the failure to present such facts on the prior motion.”

Plaintiff alleges that since the Subcontractor Agreement specifically mentions work to be done on the second floor of the premises, this contradicts Mr. Castell's testimony, which creates an issue of fact precluding the granting of summary judgment. Plaintiff also asserts that he was unable to effectively cross-examine Mr. Castell without the Subcontractor Agreement which allegedly disproved his testimony. Plaintiff contends that he had a reasonable justification for failing to present the Subcontractor Agreement in the prior motion because he had repeatedly requested the document during the discovery process and that JT&T's refusal to comply with discovery led to this issue.

JT&T asserts that plaintiff's motion fails to satisfy the second and third requirements of CPLR § 2221(e) because plaintiff has failed to demonstrate any new facts that would change the prior determination and plaintiff has failed to provide a reasonable justification for the failure to present such facts in the prior motion. JT&T claims that the Subcontractor Agreement does not negate Mr. Castell's testimony or provide a proper basis to overturn this court's prior decision granting summary judgment because Mr. Castell's testimony established that JT&T's work for the air conditioning system was performed from the roof of the premises and that he did not have access to the second floor (Deposition of Nicholas Castell (ex. G to the Rice aff. for mot. seq. 003) at 11-13, 30-31]. JT&T also contends that plaintiff did not make reasonable efforts to secure the Subcontractor Agreement in that its efforts were untimely and its subpoena of Verizon lacked due diligence. JT&T also provides an affidavit by its Executive Vice President, Puran Tolani, attesting that JT&T's work at the premises in April 2013 was confined to the roof [Puran Tolani Affidavit (ex. A to the Lansky aff.) at ¶ 4]. Mr. Tolani also addressed the Subcontractor Agreement and clarified that the agreement was for second floor air conditioning replacement and that work was performed on the roof of the premises (*id.*).

It is undisputed that JT&T and On Trac failed to produce a copy of the Subcontractor Agreement in a timely manner, prior to both the deposition of Mr. Castell and JT&T's previous motion for summary judgment. This is despite three court orders that spanned nearly two years (April 8, 2015, March 2, 2016, and February 17, 2017). As a result, plaintiff was not able to cross-examine Mr. Castell regarding the contents of the Subcontractor Agreement. The court cannot excuse this failure to comply with discovery orders. Thus, this motion shall be held in abeyance pending a further deposition of JT&T service mechanic, Nicholas Castell, to be taken on or before September 23, 2018. Plaintiff shall write a letter to the court, copying all parties, if he would like to supplement the present motion following the deposition.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED, that plaintiff James Burgund's motion for an order, pursuant to CPLR § 2221(e), granting renewal of the previous motion of defendant JT&T Air Conditioning Corp. for summary judgment and dismissal of this action against it is held in abeyance; and it is further

ORDERED, that a further deposition of Nicholas Castell shall be held on or before September 23, 2018; and it is further

ORDERED, that plaintiff James Burgund shall write a letter to the court, copying all parties, if he would like to supplement the present motion following the deposition.

This constitutes the decision and order of the court.

08/23/18  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.  
KELLY O'NEILL LEVY

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION  JSC

APPLICATION:  GRANTED  SETTLE ORDER  SUBMIT ORDER  OTHER

CHECK IF APPROPRIATE:  INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

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