

<b>Robles v 635 Owner LLC</b>
2020 NY Slip Op 34271(U)
December 23, 2020
Supreme Court, New York County
Docket Number: 162049/2015
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 46

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ANGEL ROBLES,

Index No. 162049/2015

Plaintiff

- against -

DECISION AND ORDER

635 OWNER LLC and W5 GROUP LLC,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Defendant 635 Owner moves to reargue and renew its motion for summary judgment on its cross-claim for contractual indemnification against defendant W5 Group LLC, which the court granted in part, and plaintiff's motion for summary judgment on his claim under New York Labor Law § 240(1), which the court granted, both in an order dated February 13, 2020. C.P.L.R. § 2221(d) and (e). Defendant W5 Group LLC separately moves to reargue and renew the same motions and its motion to amend its answer to allege a defense based on New York Workers' Compensation Law §§ 11 and 29(6) and for summary judgment dismissing plaintiff's claims on that ground, which the court denied in the same order dated February 13, 2020.

II. THE COURT'S ORDER DATED FEBRUARY 13, 2020

A. Plaintiff's Labor Law § 240(1) Claim

Defendants point to the deposition testimony of Socorro Chavez Dominguez, plaintiff's former wife, and Mark Gladstein M.D., plaintiff's treating physician, and Dr. Gladstein's medical records pertaining to plaintiff to support renewal of plaintiff's motion for summary judgment on his Labor Law § 240(1) claim. The court rejected renewal based on this evidence in an order dated October 15, 2020, which denied 635 Owner's motion to supplement the record of plaintiff's motion for partial summary judgment. In light of the court's decision on the parties' summary judgment motions in the February 2020 order, the court treated 635 Owner's motion to supplement the record as a motion to renew plaintiff's motion, found that the testimony and medical records did not affect the court's prior decision, and denied renewal. Thus, none of the evidence that 635 Owner now presents would change the prior determination granting plaintiff's motion for summary judgment on 635 Owner's liability for a violation of Labor Law § 240(1), to provide a basis for renewal of plaintiff's motion. C.P.L.R. § 2221(e)(2); Omansky v. 160 Chambers St. Owners, Inc., 155 A.D.3d 460, 462 (1st Dep't 2017); Jones v. City of New York, 146 A.D.3d 690, 691 (1st Dep't 2017); Sarfati v. Palazzolo, 142

A.D.3d 877, 877-78 (1st Dep't 2016); South Bronx United v. New York City Indus. Dev. Agency, 138 A.D.3d 462, 462-63 (1st Dep't 2016). Since W5 Group seeks renewal of the same motion based on the same evidence, the court denies W5 Group's separate motion regarding its liability under Labor Law § 240(1) as well.

B. Summary Judgment on 635 Owner's Cross-Claim for Contractual Indemnification

635 Owner also seeks to reargue its motion for summary judgment on its cross-claim for contractual indemnification, which the court granted only to the extent that 635 Owner's negligence did not contribute to plaintiff's injury. This determination was based on the factual issues whether the ladder that plaintiff fell from was the functional equivalent of a staircase and posed a hazard and whether 635 Owner received notice of that condition. 635 Owner maintains that the court overlooked plaintiff's discontinuance of his Labor Law § 200 and negligence claims against 635 Owner. Regardless of plaintiff's discontinuance of his claims, W5 Group's answer nonetheless pleads that if:

Plaintiff, recovers at time of trial against this Defendant, such recovery for non-economic loss shall not exceed this Defendant's equitable share determined in accordance with the relative culpability of each person, party and/or entity, which caused or contributed to the total liability for non-economic loss; provided that the liability of this

Defendant is found to be fifty (50%) percent or less of the total liability of all persons, parties and/or entities liable pursuant to CPLR Article 16.

Aff. of Debora Pitman Ex. 4, at 3. While labeled an affirmative defense, its text pleads contribution by 635 Owner. Under these circumstances, the unresolved issues regarding 635 Owner's potential contributory fault preclude unconditional summary judgment on its contractual indemnification claim. Hewitt v. NY 70th St. LLC, 187 A.D.3d 574, 575 (1st Dep't 2020); Cackett v. Gladden Props. 183 A.D.3d 419, 422 (1st Dep't 2020); Higgins v. TST 375 Hudson L.L.C., 179 A.D.3d 508, 511 (1st Dep't 2020); Gonzalez v. G. Fazio Constr. Co., Inc., 176 A.D.3d 610, 611 (1st Dep't 2019).

C. W5 Group's Workers' Compensation Defense

W5 Group also seeks to reargue its motion to amend its answer to allege an affirmative defense based on Workers' Compensation Law §§ 11 and 29 and for summary judgment dismissing the complaint against W5 Group on that ground. W5 Group maintains that the court overlooked plaintiff's supplemental deposition testimony dated October 14, 2019, that Waldorf Demolition and Calvin Maintenance were the same entity and that he listed Waldorf Demolition as his employer on a sign-in sheet in Dr. Gladstein's office. While this supplemental deposition

and Dr. Gladstein's sign-in sheet were not part of the record of W5 Group's prior motion, plaintiff also testified at this deposition that he did not know if he worked for Waldorf Demolition because he received checks from Calvin Maintenance. He further testified that "one is interior and the other is exterior," Aff. of Kevin Fitzpatrick Ex. I, at 84, but did not testify which entity was interior and which was exterior.

W5 Group further contends that the court misapprehended project manager James Costello's testimony regarding plaintiff's relationship to W5 Group, but W5 Group merely reiterates the testimony that the court found inconsistent and insufficient in the February 2020 order to establish the relationship between Waldorf Demolition and Calvin Maintenance. Therefore W5 Group has failed to show that the court overlooked or misapprehended any facts or law in denying W5 Group's motion to amend its answer and for summary judgment dismissing the complaint against W5 Group. C.P.L.R. § 2221(d); Jones v. City of New York, 146 A.D.3d at 690; Pezhman v. Chanel, Inc., 126 A.D.3d 497, 497 (1st Dep't 2015); 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). W5 Group also seeks renewal, but fails to present any other new evidence to support that

relief. Kolchins v. Evolution Mkts., Inc., 182 A.D.3d 408, 410 (1st Dep't 2020); Eurotech Constr. Corp. v. Fischetti & Pesce, LLP, 169 A.D.3d 597, 597 (1st Dep't 2019); Redstone v. Herzer, 162 A.D.3d 583, 584 (1st Dep't 2018).

III. CONCLUSION

For all the reason explained above the court denies both defendants' motions for reargument and renewal in their entirety. C.P.L.R. § 2221(d) and (e).

DATED: December 23, 2020



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LUCY BILLINGS, J.S.C.

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