

Koretnicki v Northwoods Concrete, Inc.

2020 NY Slip Op 33755(U)

October 29, 2020

Supreme Court, Schenectady County

Docket Number: 2017-905

Judge: Michael R. Cuevas

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STATE OF NEW YORK
COUNTY OF SCHENECTADY

SUPREME COURT

**PRESENT: HON. MICHAEL R. CUEVAS
JUSTICE OF THE SUPREME COURT**

GARY KORETNICKI,
Plaintiff,

DECISION AND ORDER

-against-

Index No.: 2017-905
RJI No.: 46-1-2018-0079

NORTHWOODS CONCRETE, INC.,
Defendants.

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NORTHWOODS CONCRETE, INC.
Third Party Plaintiff,

-against-

VILLAGE AIR AND ELECTRIC INC., and
JIMERICO CONSTRUCTION, INC.,
Third Party Defendants.

NOTICE:

PURSUANT TO ARTICLE 55 OF THE CIVIL PRACTICE LAW AND RULES, AN APPEAL FROM THIS JUDGMENT MUST BE TAKEN WITHIN 30 DAYS AFTER SERVICE BY A PARTY UPON THE APPELLANT OF A COPY OF THE JUDGMENT WITH PROOF OF ENTRY EXCEPT THAT WHERE SERVICE OF THE JUDGMENT IS BY MAIL PURSUANT TO RULE 2103 (B)(2) OR 2103 (B)(6), THE ADDITIONAL DAYS PROVIDED SHALL APPLY, REGARDLESS OF WHICH PARTY SERVES THE JUDGMENT WITH NOTICE OF ENTRY.

APPEARANCES:

Lisa Turpin, Esq., Harmon Linder & Rogowsky, Attorney for Plaintiff

Steven V. DeBraccio, Esq., Burke Scolamiero & Hurd, LLP, Attorney for Defendant/Third Party Plaintiff Northwoods Concrete, Inc.

Patricia A. Carbone, Esq., Litchfield Cavo, LLP, Attorney for Third-Party Defendant Jimerico Construction, Inc.

Village Air and Electric, Inc. (unrepresented-no appearance recorded).

MICHAEL R. CUEVAS, J.

INTRODUCTION

Third-Party Defendant Jimerico Construction, Inc. (“Jimerico”) moves this Court pursuant to CPLR §3025 for an Order granting it leave to amend its Third-Party Answer to include counterclaims against Defendant/Third-Party plaintiff Northwoods Concrete Inc. (“Northwoods”) for contractual indemnification, common law indemnification, indemnification for the Labor Law Section 240 claim, contribution, and for such other and further relief as the Court deems just and proper.

FACTUAL/PROCEDURAL BACKGROUND

A. BACKGROUND

The underlying action is for personal injuries allegedly sustained by Plaintiff Gary Koretnicki (“Koretnicki”) on May 9, 2016, when he tripped over a piece of rebar while working at the Rotterdam Square Mall. *Carbone Aff.* ¶¶4, 6, *Exs. A, D*. Koretnicki testified that he was employed by Village Air and Electric at the time of the accident, Jimerico was the general contractor of the project he was working on, Rotterdam Square Mall and Viaport were the owners of the premises, and Northwoods installed the rebar that he tripped on. *Carbone Aff.* ¶6, *Ex. D, p. 11, 23, 33, 35, 40-44, 77, 81,82, 84*. Following the accident, Koretnicki settled his claim, in a written executed document, against Village Air and Electric and Jimerico for \$2,000.00. *DeBraccio Aff.* ¶7.

Koretnicki filed a Complaint against Northwoods on May 5, 2017, and an Amended Complaint on June 22, 2017, alleging common-law negligence and violations of *Labor Law Sections 200, 240, and 241*. *Carbone Aff.* ¶4, *Ex. A*. Northwoods filed an Answer on

August 8, 2017. *Id.* Thereafter, Northwoods brought a third-party action against Jimerico and Village Air And Electric Inc. (“Village”) for common-law indemnification and contribution. *Id.* On December 1, 2017, Jimerico answered the Third-Party Complaint and asserted cross-claims against Village on December 1, 2017 for contractual indemnification, common-law indemnification, contribution, and breach of contract. *Carbone Aff.* ¶4, Ex. A. Village has not answered the cross-claims. *Id.* Jimerico never cross-claimed against Northwoods. *Id.*

On April 9, 2018, Koretnicki served a Verified Bill of Particulars. *Carbone Aff.* ¶5, Ex. B. On October 31, 2018, Koretnicki served a supplemental Verified Bill of Particulars. *Id.*, Ex. C. Koretnicki was deposed on December 16, 2019. *Carbone Aff.* ¶6, Ex. D.

On October 23, 2018, Jimerico brought a motion to dismiss Northwoods’ third-party complaint against Jimerico pursuant to CPLR Section 3211 (a)(5) on the grounds of plaintiff’s release. *DeBraccio Aff.* §8. Alternatively, Jimerico sought to strike Northwoods’ complaint for failure to respond to Jimerico’s demand for bill of particulars and demand for production, or to compel responses. *Id.* On March 5, 2019, Hon. Thomas Buchanan denied the motion to dismiss and/or to strike the complaint, and granted the motion to compel discovery (responses due in 15 days). *Id.* Jimerico then appealed the denial of the motion to dismiss to the Third Department. *Koretnicki v. Northwoods Concrete, Inc.*, 184 A.D. 3d 993 (3d Dept. 2020). The Third Department dismissed Northwoods’ contribution claim, but affirmed the denial of the indemnification claim. *Id.*

On January 7, 2020, Counsel for Jimerico sent a tender letter to Northwoods, seeking indemnification based upon the subcontract and Koretnicki’s testimony. *Carbone Aff.* ¶7, Ex. E. On July 14, 2020, Counsel for Jimerico sent a follow-up letter to Northwoods regarding a response to the January 7, 2020 tender request. *Carbone Aff.* ¶8, Ex. F. Northwoods did not respond. *Id.*

Northwoods opposes the motion to amend and indicates that it relies on the exhibits attached to the Carbone Affirmation and several other exhibits listed. However,

Northwoods identifies the additional exhibits with the same alphabetical letters as the Carbone exhibits, and does not attach these exhibits to an affirmation or request for judicial notice. Northwoods should have completed a request for judicial notice, with the exhibits attached, to ensure the Court had the documents before it for review and consideration. This Court will take judicial notice of the Summons and Verified Complaint as it was attached to the Carbone Affirmation as Exhibit A, and the Notice of Motion dated October 23, 2018, and the Decision and Order dated March 5, 2019, as they are within the Court's file. Since, this Court is not in possession of Jimerico's Third Department Brief filed October 17, 2019; any Memorandum and Order dated June 18, 2020; or any Respondent's Brief filed December 2, 2019, it cannot take judicial notice of these documents, or consider them.

THE LAW AND DISCUSSION

A. STANDARD OF LAW: AMENDING A PLEADING

Whether to allow an amendment to a party's pleading is within the sound discretion of the court. *Barnwell-Hill v. Western Beef Retail Inc.*, 17 Misc. 3d 1109(a) (Sup. Ct. N.Y.Cty. 2007); *see also, Maloney Carpentry Inc., v. Budnik*, 37 A.D. 3d 558 (2d Dept. 2007). *CPLR Section 3025 (b)* states, in pertinent part:

A party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrence, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances.

CPLR §3025 (b).

The court may freely grant leave to amend a pleading as long as the amendment is not defective on its face and does not prejudice or surprise the opposing party. *Goldstein v. St. John's Episcopal Hosp.*, 267 A.D. 2d 426 (2d Dept. 1999). Moreover, the proposed amendment must not be "devoid of merit or palpably insufficient as a matter of law." *Abalcporo v. Daily News*, 102 A.D.3d 815 (1st Dept. 2013); *Rabos v. R&R Bagels &*

Bakery, Inc., 100 A.D. 3d 849 (2d Dept. 2012); *NYAHSA Servs., Inc., Self-Ins. Trust v. People Care Inc.*, 156 A.D. 3d 99 (3d Dept. 2017), quoting *Lucido v. Mancuso*, 49 A.D. 3d 220, 222 (2d Dept. 2008); *LaLima v. Consolidated Edison Co. of N.Y., Inc.*, 151 A.D.3d 832, 834 (2d Dept. 2017). The Second Department details that “the legal sufficiency or merits of proposed amendments will not be examined on a motion to amend unless the insufficiency or lack of merit is clear and free from doubt. *Sentry Ins. Co. v. Kero-Sun, Inc.*, 122 A.D. 2d 204, 205 (2d Dept. 1986).

Jimerico argues that no party will be prejudiced or surprised by an amendment since it does not remove any rights from any party, and since tender correspondence was previously sent to Northwoods. *Carbone Aff.* ¶13. Additionally, Jimerico argues that Koretnicki’s deposition testimony clarified how the accident happened, and the relationship of the parties, providing foundation for the indemnification and contribution claims. *Id.* Jimerico further argues that Northwoods owes Jimerico indemnification pursuant to the subcontract. *Id.* Notably, the subcontract was not adduced as an exhibit to the motion. Conversely, Northwoods argues that the motion to amend should be denied in its entirety, and that the contribution and contractual/common-law indemnification causes of action based upon a claim of a as to Labor Law Section 240 violation lack merit. *DeBraccio Aff.* §9. Northwoods argues that allowing Jimerico to amend the Complaint now, two years after it was filed, will unduly prejudice Northwoods as it is too close to trial. Moreover, that Jimerico offers no reason for the delay.

1. THE THIRD DEPARTMENT DETERMINED THERE IS NO MERIT TO A CONTRIBUTION CLAIM IN THIS CASE WHERE THE PLAINTIFF AND A TORTFEASOR ENTERED INTO A GOOD FAITH SETTLEMENT.

Where a tortfeasor has obtained his own release from liability, that entity is not entitled to contribution from any other person. *General Obligations Law* §15-108 (c); *Glaser v. Fortunoff of Westbury Corp.*, 71 N.Y. 2d 643, 645 (1988); *Rosado v. Proctor & Schwartz*,

66 N.Y. 2d 21, 24 (1985); *Mitchell v. New York Hosp.*, 61 N.Y. 2d 208, 214-215 (1984); *Koretnicki v. Northwoods Concrete, Inc.*, 184 A.D. 3d 993, 994 (3d Dept. 2020). In *Koretnicki*, the Third Department determined, in this case, that the uncontroverted “release executed by plaintiff relieved Jimerico from liability to any other person for contribution.” *Koretnicki, supra*, 184 A.D. 3d, at 994. Accordingly, the Supreme Court should have dismissed Northwood’s contribution claim against Jimerico. *Id.*, *General Obligations Law* §15-108 (b); *Glaser v. Fortunoff of Westbury Corp.*, 71 N.Y. 2d 643, 645-646 (1988); *Rosado v. Proctor & Schwartz*, 66 N.Y. 2d 21, 24 (1985); *Bradt v. Lustif*, 280 A.D. 2d 739, 740 (2001), *appeal dismissed* 96 N.Y. 2d 823 (2001). Conversely, the Court found that the settlement with plaintiff did not preclude Northwoods from seeking common-law indemnification. *Koretnicki, supra*, 184 A.D. 3d, at 994; *Baron v. Grant*, 48 A.D. 3d 608, 610 (2d Dept. 2008), *lv. dismissed*, 11 N.Y. 3d 825 (2008); *see Rosado, supra*, 66 N.Y. 2d, at 24-25; *Bradt v. Lustig, supra*, 280 A.D. 2d, at 740. The Third-Department also stated that the release, and other evidentiary record proof, did not refute the facts alleged in the third-party complaint, and, as such, the Court could not dismiss the common-law indemnification claim, *Koretnicki, supra*, 184 A.D. 3d, at 994; *Whitebox Concentrated Convertible Arbitrage Partners, L.P. v. Superior Well Servs., Inc.*, 20 N.Y. 3d 59, 63-64 (2012); *T. Lemme Mech., Inc., v. Schalmont Cent. School Dist.*, 52 A.D. 3d 1006, 1008-1009 (3d Dept. 2008); *see also, Yacovacci v. Shoprite Supermarket, Inc.*, 24 A.D. 3d 539, 541 (2d Dept. 2005).

The doctrine of collateral estoppel or issue preclusion provides that “an issue of fact or law actually litigated and decided by a court of competent jurisdiction in a prior action may not be relitigated in a subsequent suit between the same parties or their privies. *Ali v. Mukasey*, 529 F. 3d 478, 489 (2d Cir. 2008); *Conti by Conti v. Lende*, 194 A.D. 2d 892 (3d Dept. 1993); *see, Shaid v. Consolidated Edison Co.*, 95 A.D. 2d 610 (2d Dept. 1983); *see also, 111 East 88th Street Partners v. Time*, 110 Misc. 2d 960 (civ. Ct. N.Y. 1981). Additionally, under non-mutual collateral estoppel, if a litigant had an

opportunity to fully and fairly litigate an issue and lost, then third-parties unrelated to the original action can bar the litigant from relitigating that same issue in a subsequent suit. *Austin*, 270 Fed. Appx. At 54, *Deng v. Aramark Educ. Group, Inc.*, No. 04CV453, 2006 WL 752826, at *6 (E.D.N.Y. March 23, 2006); *see, Shaid, supra*, 95 A.D. 2d, at 610. The term “non-mutual” indicates that a new defendant in the plaintiff’s second lawsuit may defensively invoke collateral estoppel regarding issues of law or fact decided in the plaintiff’s first action.” *Jasper v. Sony Music Entm’t Inc.*, 378 F. Supp. 2d 334, 343 (S.D.N.Y. 2006); *see, Shaid, supra*, 95 A.D. 2d, at 610.

Here, because the Third Department already decided the issues based on the facts on the record before it, that Northwoods could maintain causes of action for common law and contractual indemnification but not contribution, this Court’s job is made simple. The doctrine of collateral estoppel and defensive collateral estoppel establish that any party in a related action may use an already determined issue of law. For this reason, Jimerico is granted the ability to amend its Complaint to include causes of action for common law and contractual indemnification, but not contribution.

2. JIMERICO’S PROPOSED CAUSE OF ACTION FOR INDEMNIFICATION FOR LIABILITY UNDER LABOR LAW §240, ET AL., IS WITHOUT MERIT.

Plaintiff alleges violations of Labor Law Sections 200, 240, and 240. *Carbone Aff.* ¶4, Ex. A. Jimerico seeks to amend its third-party answer to assert a counterclaim against Northwoods for indemnification for violation of this Labor Law provision. *Labor Law Section 240* asserts a non-delegable duty upon owners, general contractors, and their agents, to provide safety devices necessary to protect workers from the risks inherent in elevated work sites. *Labor Law §240 (1); McCarthy v. Turner Constr., Inc.*, 17 N.Y. 3d 369, 374 (2011); *see, Felker v. Corning, Inc.*, 90 N.Y. 2d 219, 223-224 (1997); *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y. 2d 494, 500 (1993). Since Koretnicki testified that he was not working at an elevated work site, there is no merit to the claim under

Labor Law Section 240, and accordingly, no resulting right to indemnification. For this reason, Jimerico's request to amend its pleading to include indemnification under Labor Law Section 240 fails. *Carbone Aff.* ¶6, *Ex. 6, p. 86.*

B. NO PREJUDICE WHERE CASE IS STILL IN DISCOVERY PHASE.

Northwoods argues that it will be unduly prejudiced if Jimerico is allowed to amend its Answer to include specific counterclaims for common law and contractual indemnification, contribution, and indemnification under Labor Law Section 240 because two-years have passed since the original Answer was filed. This Court finds this argument unavailing. All parties attended a conference with this Court on September 10, 2020, wherein a new scheduling order was entered. It provides an end date for disclosure of December 31, 2020, the filing of the note of issue by January 15, 2021, dispositive motions by February 21, 2021, and expert disclosure of 60 days before trial. This provides Northwoods with time to conduct any additional discovery it feels is necessary prior to trial. Moreover, this Court accepts Jimerico's explanation that it did not feel the claims against Northwoods were ripe until Koretnicki's deposition in December, 2019. *Carbone Reply Aff.* ¶5.

THE COURT'S RULING

ORDERED that the Defendant/Third-Party Defendant Jimerico Construction Inc.'s motion for leave to amend its Third-Party Answer to include counterclaims against Defendant/Third-Party Plaintiff Northwoods Concrete Inc., for indemnification and contribution, is granted in part and denied in part;

ORDERED that the Defendant/Third-Party Defendant Jimerico Construction Inc.'s motion for leave to amend its Third-Party Answer to include counterclaims against Defendant/Third-Party Plaintiff Northwoods Concrete Inc., for common law and contractual indemnification is hereby granted;

ORDERED that the Defendant/Third-Party Defendant Jimerico Construction Inc.'s motion for leave to amend its Third-Party Answer to include counterclaims against

Defendant/Third-Party Plaintiff Northwoods Concrete Inc., for indemnification related to Labor Law Section 240 claims, is hereby denied;

ORDERED that the Defendant/Third-Party Defendant Jimerico Construction Inc.'s motion for leave to amend its Third-Party Answer to include counterclaims against Defendant/Third-Party Plaintiff Northwoods Concrete Inc., for contribution, is hereby denied;

ORDERED that this decision constitutes the Order of this Court.

Dated: October 29, 2020
at Schenectady, New York


HON. MICHAEL R. CUEVAS
Supreme Court Justice

Papers Considered:

Moving Papers

Notice of Motion of Third-Party Defendant Jimerico Construction, Inc. for Leave to Amend its Third-Party Answer to include counterclaims against Defendant/Third-Party Plaintiff Northwoods Concrete, Inc., for Indemnification and contribution.

Affirmation of Patricia A. Carbine

- Exhibit A: Verified Complaint
Verified Amended Complaint
Third Party Verified Complaint
Verified Answer of Jimerico Construction Inc., to Third-Party Complaint
- Exhibit B: Verified Bill of Particulars
- Exhibit C: Supplemental Bill of Particulars
- Exhibit D: Deposition of Gary Koretnicki
- Exhibit E: January 7, 2020 correspondence from Patricia Carbone to Melissa Smallcombe
- Exhibit F: July 14, 2020 correspondence from Patricia Carbone to Melissa Smallcombe
- Exhibit G: Proposed Verified Answer of Jimerico Construction Inc., to Third-Party Complaint of Northwoods Concrete Inc.

Reply Affirmation of Patricia A. Carbone

Opposition Papers

Affirmation of Steven V. DeBraccio, Esq., in Opposition to Third Party Defendant Jimerico Construction Inc.'s Motion to Amend Its Third-Party Answer