Baum v Millennium Hotel
2007 NY Slip Op 33551(U)
October 19, 2007
Supreme Court, New York County
Docket Number: 0107736/2002
Judge: Eileen A. Rakower
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SCANNED ON 11/1/2007

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

PRESENT: EILEEN A. RAKOWER J.S.C. Justice

PART 5

Baum, J

INDEX NO. 107736/02

MOTION DATE

- v -

MOTION SEQ. NO. 018

City

MOTION CAL. NO.

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2, 3
Replying Affidavits	4, 5

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 0 1 2007
NEW YORK
COUNTY CLERK'S OFFICE

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/19/07

EILEEN A. RAKOWER J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

--X

IRWIN BAUM,

Plaintiff,

Index No.
107736/02

- against -

Decision and Order

Motion Seq. 17 & 18

THE MILLENNIUM HOTEL, THE CITY OF NEW YORK, THE UNITED NATIONS DEVELOPMENT CORPORATION, and CUSHMAN & WAKEFIELD, INC.,

Defendants.

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NEW YORK
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--X

THE UNITED NATIONS DEVELOPMENT CORPORATION,

Third-Party Plaintiff,

Third-Party Index No.
590697/05

- against -

PRITCHARD INDUSTRIES,

Third-Party Defendant.

--X

HON. EILEEN A. RAKOWER

Plaintiff brings this action for a broken left wrist which he allegedly sustained when he slipped and fell on what he claims was an icy substance outside of the Millennium Hotel ("MH"), located at Two United Nations Plaza ("Two UN Plaza") New York, New York. According to plaintiff's notice of claim, the incident occurred on January 1, 2002 at approximately 3:00 a.m. underneath the marquis/canopy ("canopy") of MH. Plaintiff alleges that after attending a party in one of the rooms of the MH he came out and "slipped on ice on the ground which had accumulated as result of dripping water or some other liquid from the hotel marquis/canopy." One United Nations Plaza ("One UN Plaza") and Two UN Plaza are independent but attached buildings located on 44th Street. The Canopy under which plaintiff allegedly

fell extended from One to Two UN Plaza and was attached to the exterior of both buildings.

In a decision dated July 5, 2007, the court addressed a number of motions and cross motions for summary judgment brought by various parties. Third-Party Defendant Pritchard Industries, Inc. ("Pritchard") now moves for leave to reargue the July 5, 2007 motion pursuant to CPLR §2221. Defendants the Millennium Hotel ("Millennium") and Cushman & Wakefield, Inc.("C&W") oppose the motion. Defendant the United Nations Development Corporation ("UNDC") cross-moves for leave to renew and reargue. Pritchard and C&W oppose UNDC's motion. Plaintiff cross-moves for leave to reargue. Millennium and C&W oppose plaintiff's motion. Defendant the City of New York ("City") submits a "response" to UNDC's motion urging it to comply with this court's order that UNDC indemnify City.

Pritchard asserts that "the court, due to the multitude of motions submitted, as well as the numerous issues raised, may have overlooked the cross-motion submitted by Pritchard seeking summary judgment." Pritchard's original cross-motion was not included among the "multitude of motions submitted" to the court. The court was only alerted to the existence of the cross-motion by way of opposition submitted in response to it. Two calls were placed to Pritchard's counsel in an attempt to locate the missing papers. Counsel did not respond to this court's inquiries, and a decision was rendered without considering Pritchard's cross-motion. However, Pritchard appends the original cross-motion here and thus, its motion to reargue is granted.

CPLR §2221 states, in relevant part:

> (d) A motion for leave to reargue:
>
> (1) shall be identified as such;
>
> (2) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue

remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). In addition, bald, conclusory allegations, even if believable, are not enough. *Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255, 309 N.Y.S.2d 341, 257 N.E.2d 890 (1970).

Pritchard is a "Janitorial Contractor" which contracted with UNDC for cleaning services and was subject to direction of C&W, managing agent of Two U.N. Plaza. The Agreement for Cleaning Services for One, Two and Three United Nations Plaza between United Nations Development Corporation and Pritchard Industries, Inc. (The agreement) contains cleaning specifications and states with specificity Pritchard's duties and responsibilities. Relevant here are those portions of the contract and deposition testimony relating to snow and ice removal and the indemnification clause contained therein.

Section 15 of the agreement states, in relevant portion:

> Contractor (Pritchard) shall, to the fullest extent permitted by law and its own cost and expense, indemnify UNDC and the Agent (C&W) . . . the One U.N. Plaza, and the Millennium Hotel, and save them harmless from and against any and all claims, changes, losses, liabilities, suits, judgments, actions and all expenses (including attorney's fees and disbursements) *arising out of or in connection with Contractor's performance of the Work* . . .

The question before the court is whether Pritchard was negligent is failing to remove or otherwise make safe the alleged ice condition that caused plaintiff's injuries. Pritchard argues it had not snowed and it was not called upon to perform ice removal.

The deposition transcript of Thomas W. Calderone, Director of Operations for Pritchard, is appended to C&W's opposition papers. Mr. Calderone testifies that Pritchard was responsible for snow and ice removal under the canopy(Calderone Deposition, Page 23, Lines 11-14). Mr. Calderone was not aware of an ice condition under the canopy prior to plaintiff's accident. (Id. at Page 32, Lines 19-23). If there was a leak and it looked like an obvious hazard, a report would have been filed with C&W. (Id. at Page 61, Lines 23-25& Page 62, Lines 2-5). A Pritchard employee would not normally inspect the outside of the building. (Id. at Page 29, Lines 11-

14).An employee would inspect for snow and ice only if there was a storm. (Id. at 28, Lines 22-25). Pritchard employees came in early and left early, between 4:00 p.m. and 8:00 p.m., on December 31, 2001 because it was New Years Eve. (Id. at Page 74, Lines 18-24). If it did not snow and there were "unusual circumstances" or "extra services" C&W would notify a Pritchard foreman and give directions as to what needed to be done.(Id. at Page 30, Lines 4-7). If Pritchard employees were not on site and there was an ice condition, someone would call Pritchard's twenty-four hour answering service and it would send someone to handle the situation. (Id. at Page 88, Lines 10-18). If ice formed underneath the canopy without there being a snow storm, it would be considered an unusual circumstance and a Pritchard employee would take direction from the manager and chop it up or put down ice melt and/or cones to warn of the condition. (Id. at Page 27, Lines 19-22 & Page 28, Lines 2-8). Pritchard was never advised by anyone from C&W, UNDC or Millennium about an ice condition under the canopy on the night of plaintiff's accident. (Id. at Pages 32-33, Lines 24-25 & 2-13).

Pritchard was under contract to perform snow and ice removal under normal conditions, such as a snow storm or other precipitation event. It was not obligated to inspect the outside of the building for snow and ice unless there was a snowstorm and would only perform "extra services" if it was instructed to do so by C&W. In opposition, the parties do not submit evidence that any such instructions were given on the night of plaintiff's accident. Nor does any party allege that Pritchard had constructive notice of the defect due to a persistent and long-standing leak. Thus, Pritchard had no notice of the ice patch and the accident did not arise out of Pritchard's failure to remove the hazard.

The court now turns to UNDC's and plaintiff's cross motions. UNDC argues that the court overlooked the fact that it had contractually relieved itself of the duty to perform any function whatsoever with respect to the canopy by virtue of its agreements with C&W and Pritchard. A motion to reargue must set forth the facts or law that the court overlooked or misapprehended. Here, UNDC's motion largely reiterates its arguments from its original motion and thus its motion to reargue is denied.

Plaintiff moves to reargue two parts of this courts' decision dated July 5, 2007. First, he is moving to reargue Millennium's motion for summary judgment. Second, he is moving to reargue the issue that C&W had the sole duty of maintaining the canopy. Plaintiff submits four color photographs of the canopy and close ups of the

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alleged defect along with an affidavit by Michael Kravitz, Professional Engineer. Plaintiff states in his affirmation:

> This granting by the Court was based primarily on the absence of photographs that showed the condition and the absence of an expert's report showing a defect. Both these problems have been rectified.

Pursuant to CPLR §2221(d)(2) a motion to reargue shall not include any matters of fact available, but not offered on the prior motion. Thus, the new evidence offered by plaintiff is not properly submitted in a motion to reargue and the motion is denied.

Wherefore it is hereby

ORDERED that defendant Pritchard Industries, Inc.'s motion to reargue is granted, and it is further

ORDERED that defendant Pritchard Industries, Inc.'s motion for summary judgment is granted on reargument, and the complaint is hereby severed and dismissed as against Pritchard Industries, Inc., and the Clerk is directed to enter judgment in favor of said defendant in the third party action, Index number 590697/05; and it is further

ORDERED that defendant United Nation Development Corporation's cross-motion to reargue is denied, and it is further

ORDERED that plaintiff's cross-motion to reargue is denied, and it is further

ORDERED that all other relief requested is denied.

This constitutes the decision and order of the court.

FILED
NOV 0 1 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: October 19, 2007

Eileen A. Rakower, J.S.C.