

**George v Marshalls of MA, Inc.**

2007 NY Slip Op 33626(U)

November 5, 2007

Supreme Court, Nassau County

Docket Number: 5127-02/

Judge: Ute W. Lally

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SCAN

SHORT FORM ORDER

md,md,mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8  
NASSAU COUNTY

SHEILA GEORGE and LESLIE GEORGE,

Plaintiff(s),

MOTION DATE:9/26/07  
INDEX NO.:5127/02  
SEQ. NO.10,11,12  
CALENDAR NO 2007H0676

-against-

MARSHALLS OF MA, INC., et al.,

Defendant (s)

The following papers read on the motion & cross motions:

- Notice of Motion/ Order to Show Cause..... 1-3
- Notice of Cross Motion..... 4-6
- 2nd Notice of Cross Motion..... 7-9
- Answering Affidavits..... 10-15
- Replying Affidavits..... 16-19
- Briefs: .....

Upon the foregoing papers, it is ordered that the motion by defendants The TJX Companies, Inc. and Marshalls of MA, Inc. for for an order pursuant to CPLR 2221 granting renewal and reargument of their motion for summary judgment, which resulted in an order of this court dated June 26, 2007, and entered in the office of the Nassau County Clerk on June 28, 2007, is denied. Cross-motion by plaintiffs for reargument of the motions by defendants Sullivan Service Co. Inc. and American Industrial Cleaning Co. for an order pursuant to CPLR 2221 granting reargument of plaintiffs' motion to strike the answer of defendant Sullivan is denied. Cross-motion by defendant Sullivan Service Co. for an order pursuant to CPLR 2221 granting reargument of its motion for summary judgment as to all cross claims asserted against Sullivan or, in the alternative, for

summary judgment on Sullivan's cross-claim against defendant American Industrial Cleaning is granted only to the extent indicated below.

This is an action to recover money damages for personal injuries sustained by plaintiff Sheila George as the result of defendants' alleged negligence arising from a slip and fall accident. On March 26, 1999 Sheila George slipped and fell on a wet floor at the Marshalls department store located in East Meadow. The store is owned and operated by defendants TJX Companies, Inc. and Marshalls of MA, Inc. TJX had entered into a cleaning and management service contract with defendant Sullivan Service Co. The contract obligated Sullivan to indemnify TJX for personal injury claims caused by any negligent act or omission on the part of Sullivan or its subcontractors. Sullivan's alter ego, SPC Contract Management, entered into a Janitorial Contract with defendant American Industrial Cleaning Co. to perform cleaning work at the East Meadow Store. The Janitorial Contract contained an indemnification provision requiring American Industrial to indemnify Sullivan and its customer, TJX, for personal injury claims arising from any act or omission of American Industrial.

By order dated June 26, 2007, the court granted defendants Sullivan and American Industrial's motion for summary judgment dismissing the complaint on the ground that those defendants did not owe any duty to the plaintiff. In dismissing as against the cleaning contractors, the court noted that TJX, as the owner of the building, was under a duty to use reasonable care to keep the premises in a reasonably safe condition. This duty may be violated by negligently failing to remedy a dangerous condition, such as a wet floor, even though the dangerous condition was created not by the owner of the building but by a cleaning contractor.

The court further granted defendants TJX and Marshalls' motion for summary judgment on their cross claims against Sullivan Service and American Industrial to the extent of conditional contractual indemnity. If it is determined at trial that an act or omission of an American Industrial employee was a substantial factor in causing plaintiff's injury, Sullivan and American Industrial will

be required to indemnify Marshall and TJX for all damages, including plaintiffs' judgment and the cost of defending the action. Thus, even though Sullivan and American Industrial did not owe any direct duty to plaintiff, they may be liable to Marshalls and TJX on a theory of contractual indemnity. However, the court denied TJX and Marshalls' motion for conditional summary judgment on its cross claim for common law indemnity because there was no proof, as a matter of law, that the owner was negligent or had authority to supervise or control the cleaning work.

Marshalls and TJX move for renewal and reargument of their motion for summary judgment on their cross claims against Sullivan and American Industrial based on common law indemnity. Defendants rely upon a case decided by the Court of Appeals one day after this court's decision on the summary judgment motions ( *BP Air Conditioning Corp. v. One Beacon Ins. Group*, 8 NY3d 708). In that case the Court of Appeals held that an insurer is obligated to provide a defense to an additional insured to the same extent as to the named insured, even though there has been no determination of liability in the underlying personal injury action. However, as this court noted in its decision, Sullivan and American Industrial are not insurers. Thus, their contractual duty to indemnify Marshalls and TJX for counsel fees is not triggered until there has been a finding that an act or omission of an American Industrial employee was a substantial factor in causing the accident. Because defendants have not established that this court overlooked or misapprehended any matter of fact or law, defendants Marshall and TJX's motion for reargument of their motion for summary judgment as to their cross claim for common law indemnity is denied.

In their motion for summary judgment, Marshalls and TJX also sought summary judgment on a cross claim against Sullivan and American Industrial for breach of contract in that the cleaning contractors failed to furnish the Marmaxx Group with commercial general liability and umbrella excess liability coverage as required by the terms of the TJX-Sullivan contract. This claim for breach of contract is pleaded in the fifth cross claim in defendant Marshalls and TJX's answer. The breach of contract claim was not addressed in the court's prior decision.

Defendants Marshalls and TJX have not established *prima facie* that they are entitled to judgment on their cross claim for breach of contract. In her affirmation in support of the motion, Mary C. Azzaretto, Esq., counsel for Marshalls and TJX, alleges that "American submitted an insurance policy wherein Marshalls and TJX were named as additional insureds." Since Marshalls and TJX have not shown that the American Industrial policy did not obligate the insurer to provide a defense in the present action, defendants have not established that American Industrial breached its contractual obligation to provide insurance coverage. The court cannot issue declaratory relief as to whether the insurer is obligated to provide a defense until the insurer is made a party to the action.

Defendants Marshalls and TJX's motion for summary judgment on their cross claim for breach of contract is denied.

Since plaintiffs have not established that the court overlooked or misapprehended any matter of fact or law, plaintiffs' motion for reargument of defendants Sullivan Service and American Industrial's motions for summary judgment is denied (CPLR 2221[d]). Plaintiffs' motion for reargument of their motion to strike defendant Sullivan's answer is similarly denied.

Finally, defendant Sullivan Service Company moves for reargument of its motion for summary judgment with respect to all cross claims asserted against Sullivan, or in the alternative, summary judgment on its cross claim against defendant American Industrial for indemnity. Since Sullivan has not established that the court overlooked or misapprehended any matter of fact or law, defendant Sullivan's motion for reargument of its motion for summary judgment as to cross claims asserted against Sullivan is denied.

In its original decision, the court did not reach Sullivan's cross claim against American Industrial because summary judgment was granted to Sullivan dismissing the main claim asserted by the plaintiffs. However, as noted above, Sullivan may be liable to Marshalls and TJX on a theory of contractual indemnity, if an act or omission of an American Industrial employee was a substantial factor in causing the accident. Since Sullivan may be liable to

Marshalls and TJX on a theory of contractual indemnity, defendant Sullivan's motion for summary judgment on its cross claim against American Industrial for indemnity is granted to the extent of conditional contractual indemnity. If it is determined that an act or omission of an American Industrial employee was a substantial factor in causing plaintiff's injury, Sullivan shall have contractual indemnity against American Industrial.

Dated: NOV 05 2007

*W. H. ...*  
J.S.C.

**ENTERED**  
NOV 09 2007  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE