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

PRESENT: Hon Walter B Tolub PART 15

Index Number : 600282/2006
SPATOLA, GINO
vs.
ONE BRYANT PARK
SEQUENCE NUMBER : 003
RENEWAL

INDEX NO.
MOTION DATE 9/5/2008
MOTION SEQ. NO.
MOTION CAL. NO.

...ls motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED
JAN 14 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 1/13/9

WALTER B. TOLUB, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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GINO SPATOLA and FRANCISCA SPATOLA,

Plaintiffs,

Index No.
600282/06

-against-

Motion Sequence No.
003

ONE BRYANT PARK, LLC, TISHMAN CONSTRUCTION CORP., CORNELL CO., INC. and JOHN F. EBERTH ASSOCIATES, INC.,

Defendants.

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ONE BRYANT PARK, LLC, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK and CORNELL & COMPANY, INC.,

Third-Party Plaintiffs,

Third-Party
Index No.
590275/06

-against-

JOHN F. EBERTH ASSOCIATES, INC.,

Third-Party Defendants.

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WALTER B. TOLUB, J.:

By this motion, plaintiffs move pursuant to CPLR 2221 for leave to renew that portion of this court's July 31, 2008 Decision and Order that denied plaintiffs leave to amend their Bill of Particulars. Defendants One Bryant Park, LLC (Bryant Park), Tishman Construction Corporation of New York (Tishman), and Cornell & Company, Inc. (Cornell) cross-move for leave to

reargue that portion of this court's Decision and Order that denied those defendants: (1) dismissal of plaintiffs' common-law negligence and Labor Law § 200 claims; and (2) an order of entitlement to contractual indemnification as against co-defendant John F. Eberth Associates, Inc (Eberth).

For the reasons stated below, plaintiffs' motion is denied. Additionally, defendants' cross motion for leave to reargue this court's July 31, 2008 Decision and Order is granted, and upon reargument, the court adheres to its original Decision and Order.

Background

Monetary damages are sought in this action based upon an alleged September 26, 2005 construction accident, in which plaintiff Gino Spatola (Spatola), an employee of non-party Civetta Cousins (Civetta), was injured by a scaffold that toppled over onto him. Plaintiffs allege that, as the result of the scaffold hitting Spatola, he suffered injuries to his head, back, left shoulder, and arm.

According to plaintiffs, Civetta had been hired by Tishman, the manager of construction at a commercial office building, owned by Bryant Park and located at 42nd and 43rd Streets, between Broadway and the Avenue of the Americas, in New York, New York. Defendant Cornell was the subcontractor retained to erect steel columns at the site, and Eberth was hired by Cornell to perform surveying duties. Plaintiffs seek to recover monetary damages

against all defendants under the theory of common-law negligence, as well as for violations of Labor Law §§ 200 and 241 (6).

In a Decision and Order dated July 31, 2008, this court dismissed plaintiffs' common-law negligence and Labor Law § 200 claims against Cornell, dismissed plaintiffs' Labor Law § 241 (6) claims against all defendants, and granted conditional contractual indemnification to Cornell as against Eberth.

Plaintiffs' original cross motion to amend their May 19, 2006 Bill of Particulars was denied because no proposed amended Bill of Particulars was attached to the motion papers. In denying plaintiffs' cross motion, this court noted that the new proposed violation (of regulation 12 NYCRR 23-5.18 [h]), would have been applicable to the facts in this action. As such, this court gave plaintiffs the opportunity to renew their application upon the presentation of proper papers.

Discussion

Plaintiffs and defendants seek renewal and reargument, under the provisions of CPLR 2221 (d) and (e), respectively.

Motion to Renew

Pursuant to CPLR 2221 (e) (2), a motion for leave to renew "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." Additionally, there is a requirement that

the party or parties requesting such leave provide "reasonable justification for the failure to present such facts on the prior motion." *See* CPLR 2221 (e) (3).

This court has previously ordered that plaintiffs would be granted leave to renew upon proper papers. *See* Notice of Motion, Exh. C. Proper papers in this instance would include a copy of the proposed Amended Bill of Particulars, specifically naming a violation of the proper Industrial Code section. Plaintiffs have now provided this court with a proposed Bill of Particulars that includes an allegation of a violation of 12 NYCRR 23-5.18.

Plaintiffs thus seek reinstatement of their Labor Law § 241 (6) claims against Bryant Park and Tishman.

However, plaintiffs have not submitted all of the proper papers, as required by statute. Included must be a reasonable justification as to why the proper papers were not included with the previous motion. *See* CPLR 2221 (e) (3). Instead, the plaintiffs reiterate their original assertion that the language of the allegations in the May 19, 2006 Bill of Particulars "was essentially what is mentioned in Rule 23-5.18" (see Affirmation in Support of Motion to Amend Bill of Particulars and to Reinstate the § 241 (6) Claim, ¶ 3), and that, therefore, there is no prejudice to defendants.

Plaintiffs failure to provide a reasonable justification, as required by statute, is fatal to their renewal motion.

Generally, "[r]enewal is not available as a 'second chance' for parties who have not exercised due diligence in making their first factual presentation." *Chelsea Piers Mgt. v Forest Elec. Corp.*, 281 AD2d 252, 252 (1st Dept 2001); *see also NYCTL 1999-1 Trust v 114 Tenth Ave. Assoc., Inc.*, 44 AD3d 576 (1st Dept 2007). This court has already given plaintiffs a "second bite of the apple" by allowing them leave to renew upon proper papers. In their instant motion, plaintiffs have not done so. "Proper papers" includes the minimal requirements provided for under CPLR 2221 (e). Therefore, plaintiffs' motion is denied.

Motion to Reargue

Under subsection (d) (2), leave to reargue must 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." Additionally, any such motion "shall be made within thirty days after service of a copy of the order determining the prior motion and notice of entry." CPLR 2221 (d) (3).

Eberth asserts that Bryant Park, Tishman, and Cornell's cross motion was filed in an untimely manner and should be denied on that basis. According to the affidavit attached to plaintiffs' instant motion papers, they were served by mail on August 4, 2008. There is no question that the filing took place within 30 days of this court's July 31, 2008 Decision and Order.

Therefore, for the purposes of CPLR 2221 (d) (3) defendants' cross motion was timely.

As respects the filing of a response to a motion, CPLR 2214 (b) requires "[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." When an additional five days are added for when mailing, the August 18, 2008 return date that plaintiffs chose was within the minimum time limits allowed. CPLR 2215 requires a cross motion to be filed at least three days prior to the return date.

By coincidence as respects the timing of the instant motion and cross motion, the parties to this action had a conference scheduled on August 15, 2008. At that conference, defendants requested an adjournment of the motion's return date until September 8, 2008. That request was denied, however, this court did hear oral argument on the instant motion and cross motion on September 5, 2008, and, at that time, agreed to address the merits of them. There was enough time of all parties to address all the issues and, it was within this court's discretion to do so. *See Walker v Metro-North Commuter R.R.*, 11 AD3d 339 (1st Dept 2004). Therefore, this court holds that the cross motion was timely filed and will be addressed herein.

In their motion, defendants first contend that, in its July 31, 2008 Decision and Order, this court misconstrued the evidence

as respects plaintiffs' common-law negligence and Labor Law § 200 claims. Specifically, defendants assert that the court misconstrued the evidence proffered regarding the openings in the floor, which may have been a part of the collapse of the scaffolding that allegedly hit Spatola. Defendants aver that the court should have determined that Bryant Park and Tishman had no constructive or actual notice of the possible dangerous condition in the floor.

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law. Its purpose is not to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided." *Foley v Roche*, 68 AD2d 558, 567 (1st Dept 1979).

This court described in detail in its July 31, 2008 Decision and Order why there are material questions of fact as to whether or not there was a dangerous condition at the construction site, and whether or not Bryant Park and Tishman had notice or should have had notice of it. Additionally, there are material questions of fact as to how long the holes in the floor had existed at the site, and at what point such holes had been uncovered prior to Spatola's alleged accident.

These issues will not be rehashed here.

Further, although defendants did attempt to affix possible blame for Spatola's alleged injuries on Eberth in their original motion, they did not assert that Eberth's conduct as respects the scaffold was a superceding act that would absolve them of liability. A motion to reargue a court's decision and order does not "serve to provide a party an opportunity to advance arguments different from those tendered on the original application." *Id.* at 568. This court, will not, therefore, entertain this new theory in this motion to reargue.

Finally, defendants maintain that this court was incorrect in failing to find that Bryant Park was the "OWNER" for the purposes of contractual indemnification as against Eberth. Additionally, according to defendants, "it is entirely inconsistent for the Court to find [Bryant Park] to be the 'owner' for Labor Law liability purposes but not necessarily the 'OWNER' for indemnity purposes." *See* Affirmation of Melissa R. Callender-Lee, at ¶9.

Defendants are entirely incorrect in their assertions. In the law, the same word can be defined in different ways in different documents. It is unclear from the proffered documents whether or not this is such a case. The word "OWNER" is capitalized in the Purchase Order that was proffered in support of defendants' original motion. Unfortunately, there was no explanation as to the highlighted and differentiated word "OWNER"

in the portion of the Purchase Order that was proffered. This is contractual language that must be supported by documents to receive an order of entitlement to contractual indemnification on motion.

In contrast, when determining whether or not any of the partes was an "owner" within the meaning of the Labor Law in the original motion, this court looked to the definition in Labor Law § 315. Under that definition, an owner is "the owner of the premises, or the lessee of the whole thereof, or the agent in charge of the property."

The difference between the word "OWNER" in the Purchase Order and the word "owner" in the Labor Law may, in fact, be non-existent, but given the proffered documents, it is impossible to tell. Thus, questions of fact remain precluding this court ordering contractual indemnification to Bryant and Tishman from Eberth.

Order

Accordingly, it is hereby

ORDERED that plaintiffs' motion for leave to renew is denied; and it is further

ORDERED that defendants One Bryant Park, LLC, Tishman Construction Corporation of New York, and Cornell & Company, Inc.'s cross motion for leave to reargue this court's July 31,

2008 Decision and Order is granted, and upon reargument, this court adheres to its previous Decision and Order.

Counsel for the parties are directed to appear for a Pre-Trial Conference on February 20, 2009 at 11:00 a.m. in TA Part 15, Room 335, 60 Centre Street, New York New York.

This constitutes the decision and order of the court.

Dated: 1/13/09

ENTER:

Hon. Walter B. Tolub J.S.C.