

Kukaj v 100 Prop. LLC
2010 NY Slip Op 31859(U)
June 24, 2010
Supreme Court, New York County
Docket Number: 111187/08
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD

PART 35

Index Number : 111187/2008

28

KUKAJ, SHEFKIJE

vs

100 PROPERTY LLC

Sequence Number : 002

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE 6/11/10

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
FILED
JUL 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by third-party defendant, Pritchard Industries, Inc. for leave to renew and reargue is granted; and it is further

ORDERED that upon renewal, summary judgment dismissing the remaining third-party contractual indemnification claim of 100 Property LLC, Hiro Real Estate Co., and Craven Management, Corp. is granted in Pritchard's favor, and the third party complaint is hereby severe and dismissed; and it is further

ORDERED that third-party defendant, Pritchard Industries, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: 6/24/10

HON. CAROL EDMEAD 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 35

-----X
SHEFKIJE KUKAJ,

Plaintiff,

Index No.: 111187/08

-against-

100 PROPERTY LLC, HIRO REAL ESTATE CO.
and CRAVEN MANAGEMENT, CORP.,

Defendants.

-----X
100 PROPERTY LLC, HIRO REAL ESTATE CO.
and CRAVEN MANAGEMENT, CORP.,

Third-Party Plaintiffs,

Index #: 590856/08

-against-

PRITCHARD INDUSTRIES, INC.,

Third-Party Defendant.

-----X
HON. CAROL R. EDMEAD, J.S.C.

FILED
JUL 02 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this slip and fall personal injury action, third-party defendant, Pritchard Industries, Inc. ("Pritchard") moves to reargue and renew that portion of this Court's order dated February 11, 2010 which denied Pritchard's motion for summary judgment to dismiss the third-party contractual indemnification claim of 100 Property LLC, Hiro Real Estate Co., and Craven Management, Corp. ("defendants" or "third-party plaintiffs").

Factual Background

On January 22, 2007, plaintiff Shefkije Kukaj ("plaintiff") was working as a day porter for Pritchard, the cleaning subcontractor, at 100 Broadway, when she slipped and fell on water in

the bathroom on the 19th floor.

After commencing her action against defendants, defendants commenced a third party action against Pritchard for, *inter alia*, contractual indemnification (third cause of action).

On February 11, 2010, the Court dismissed all third party claims,¹ except for the contractual indemnification (third cause of action) claim, explaining:

The indemnification clause requires Pritchard to indemnify defendants/third-party plaintiffs where plaintiff's accident (1) arose out of the work of Pritchard, (2) resulted from performance of Pritchard's work or (3) resulted from any act or omission of Pritchard. The "Work" for which Pritchard agreed to indemnify defendants/third-party plaintiffs is described in the subject contract as "custodial and other specified services throughout the Building, including but not limited to all . . . lavatories." In regard to the "restrooms," Pritchard was responsible for sweeping and mopping floors, replenishing supplies, and cleaning various areas inside the restroom.

To the extent that plaintiff's accident was caused by a leaking water condition of the pipe in [the] stall, . . . Pritchard was responsible for providing cleaning services only, and was not responsible for maintaining any plumbing equipment. Instead, Pritchard was obligated to "Report all damage breakage and/or apparent plumbing" problems to security and the Property Manager. The record indicates that plaintiff reported the plumbing problems she observed on prior occasions to the Saranda of Craven Management, as required.

As to the wet condition in the 19th floor ladies' room that allegedly caused plaintiff's accident, . . . Pritchard had no prior notice of this a wet condition. . . . [T]here is no indication that Pritchard received any notice of the water condition at issue prior to the date of plaintiff's alleged accident.

However, that Pritchard did not have notice of the water condition prior to the plaintiff's accident is not dispositive as to whether plaintiff's accident arose out of the work of Pritchard, resulted from performance of Pritchard's work or resulted from any act or omission of Pritchard. . . . [T]he contract required Pritchard to mop the floors, and Sabala testified that the night shift was responsible for mopping the bathroom floors. According to Sabala, Pritchard's night shift consisted of "eight to nine employees" who mopped the bathroom floors on "nightly basis" and their supervisor was "Sulj Kosj" who inspected the work performed by the night shift. Ferraro testified that in the event a night porter observed a leaking condition, he or she would report it to their supervisor, Sulj Kosj, and the night supervisor "would leave a list for the engineering staff for the

¹ The third party claims were for negligence (first cause of action), contribution based on negligence (second cause of action), common law indemnification (fourth cause of action), and failure to procure insurance (fifth cause of action).

following day." *There is no affidavit, deposition testimony, or documentary evidence as to whether the night shift mopped the bathroom floor as required, or reported the alleged leaking condition, if any. Pritchard failed to establish whether its porters during the night shift in fact mopped the subject floor on the night before plaintiff's accident, or that the leaking and/or wet condition was either not present, or was observed and reported to the proper person.* Therefore, it cannot be said that plaintiff's accident did not arise or result from the performance of Pritchard's scope of work under the contract, or act or omission of Pritchard. (Emphasis added) (see "Court order").

In support of reargument, Pritchard argues that the Court overlooked the testimony of the plaintiff that the water was actively leaking at the time of her accident. Thus, Pritchard argues, whether Pritchard employees mopped the floor the night before is irrelevant because the leak was occurring at the time of plaintiff's accident, approximately noon of that day. Even a thorough mopping of the floor the night before would not have prevented the water from accumulating in this area at the time of plaintiff's fall.

Pritchard also seeks to reargue the issue of notice by a Pritchard employee to the building of the re-occurring leak. Pritchard points out that plaintiff, as a Pritchard employee, complained to the building on several occasions. The building concierge, Saranda Gjonbalaj, testified that she was aware of the leak and received several complaints from plaintiff about the leak, and that she advised the building engineer and manager each time plaintiff complained.²

In support of renewal, Pritchard submits an affidavit from Pritchard's night porter, Gerald Swalls ("Swalls"), who mopped the subject bathroom the night prior to plaintiff's accident and did not see any leak at that time. Pritchard claims that it did not include this affidavit due to the failure of "defense counsel" to identify the correct porter on the night in question, and the night

² The Court notes that its prior decision acknowledged that plaintiff was required to report plumbing problems to "the Property Manager" and that plaintiff "reported the plumbing problems she observed on prior occasions to [] Saranda of Craven Management, as required." (Decision, p. 12).

supervisor, as testified to by Pritchard's day porter, Juan Sabala ("Sabala") did not have the requisite knowledge in this matter.

In opposition, third-party plaintiffs argue that Pritchard failed to establish any facts overlooked or misapprehended by the Court. Whether the leak was active or non-active, issues of fact relating to the negligence of Pritchard remain. To the extent a jury believes plaintiff's testimony that there was an ongoing water condition, the jury could find that this resulted from Pritchard's failure to properly clean/mop any water condition or failure to report the water condition to the building as it was contractually obligated to do. To the extent the water condition arose from a non-active leak, a jury could find Pritchard negligent for not mopping the water condition. To the extent a jury finds that the alleged leak was an active leak, Pritchard could be found negligent for failing to report the water condition.

Third-party plaintiffs further argue that Swalls's affidavit is insufficient. Swalls was not identified as a notice witness and there is no explanation for how Swalls could recall his activities in mopping the subject bathroom on January 21, 2007 three years ago. Further, renewal requires a "reasonable justification for the failure to present such facts on the prior motion." However, it is merely stated that counsel failed to identify the correct porter for the night in question without any information as to what would have prevented counsel from discovering the correct night porter and what investigation was undertaken to identify Swalls. And, Swalls's affidavit should be disregarded; statements are tailored to meet the arguments in the summary judgment motion. Although third-party plaintiffs agreed that plaintiff failed to establish notice, should a jury find notice, it could be chargeable to Pritchard's negligence.

In reply, Pritchard points out that the Court overlooked the fact that the toilet was leaking

at the time of the accident. Further, the Court's focus on whether a Pritchard employee gave notice of a leak on the night prior to the accident is also irrelevant. Plaintiff is a Pritchard employee who gave notice of the leak on several prior occasions. There is no evidence that the leak was addressed by the building owner, or that the leak occurred the night before. Ongoing water leaks are not the responsibility of Pritchard. Further, it is within the Court's discretion to accept Swalls's affidavit, especially where there is no evidence against Pritchard that it was negligent.

Discussion

A motion for leave to reargue under CPLR 2221, "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept] *lv. denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 472 NYS2d 661) or to present arguments different from those originally asserted (*Foley v Roche*, 68 AD2d 558, 418 NYS2d 588)" (*William P. Pahl Equipment Corp. v Kassis, supra*). On reargument the court's attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (*see Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

The motion to renew, when properly made, posits newly discovered facts that were not previously available or a sufficient explanation is made why they could not have been offered to

the Court originally (*see discussion in Alpert v Wolf*, 194 Misc 2d at 133, 751 NYS2d 707; D. Siegel New York Practice § 254 [3rd ed.1999]). A motion to renew, "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention" (*Beiny v Wynyard*, 132 AD2d 190, 522 NYS2d 511, *lv. dismissed* 71 NY2d 994, 529 NYS2d 277).

A motion to renew should not be granted based upon facts known to the moving party at the time of the prior motion, unless the moving party offers a reasonable excuse for not having submitted such facts on the prior motion (*Poag v Atkins*, 3 Misc 3d 1109 [Supreme Court New York County 2004]). However, this rule was not inflexible, and courts retained broad discretion to grant renewal, in the interest of justice, upon facts known to the moving party at the time of the prior motion (*Id.*)

While frequently invoking the general rule that leave to renew should be denied in the absence of a reasonable justification for the movant's failure to present the facts on the prior motion (*Poag v Atkins, supra, citing e.g. Loperena v Buona*, 309 AD2d 592, 765 NYS2d 355 [1st Dept 2003]; *Cuccia v City of New York*, 306 AD2d 2, 761 NYS2d 31 [1st Dept 2003]; *Solomon v Ryty Inc.*, 302 AD2d 275, 755 NYS2d 387 [1st Dept 2003]; *Burgos v City of New York*, 294 AD2d 177, 742 NYS2d 39 [1st Dept 2002]), the court has continued to apply the pre-amendment exception thereto permitting the exercise of discretion to grant a motion for leave to renew, based upon facts inexplicably omitted on the prior motion (*Poag v Atkins, supra, citing Trinidad v Lantigua*, 2 AD3d 163, 767 NYS2d 618 [1st Dept 2003]; *Mejia v Nanni*, 307 AD2d 870, 763 N.Y.S.2d 611 [1st Dept 2003]; *Garner v Latimer*, 306 AD2d 209, 761 NYS2d 657 [1st

Dept 2003]; *Daniels v City of New York*, 291 AD2d 260, 737 NYS2d 598 [1st Dept 2002]; see also Siegel's Prac Rev No 149, p 4 [2004]).

Here, Pritchard argues that the Court overlooked the fact that, according to plaintiff's testimony, the water was actively leaking at the time of her accident. Upon review of the prior decision, and the deposition of plaintiff, reargument is granted. However, even accepting the testimony that the water was actively leaking at the time of plaintiff's accident, such fact is insufficient to overcome the possibility that Pritchard's night shift observed the alleged water condition and failed to report same to the proper person. Thus, summary judgment dismissing the third party indemnification claim is not warranted on reargument.

However, as to renewal, Pritchard claims that "defense counsel" failed to identify the correct porter on the night in question. Under the circumstances in this case, and in the interest of justice, this court will exercise that discretion, and grant the plaintiff's motion for leave to renew.

Contrary to third-party plaintiffs' contention, whether there was an ongoing water condition or a non-active leak, the record establishes that Pritchard complied with its obligations under the contract and that plaintiff's accident did not result from any failure of Pritchard to properly clean/mop the water condition or failure to report the condition.

Swalls attested that he mopped the subject bathroom on the night before plaintiff's accident, and that he did not see any leak from any of the toilets. When he "left the bathroom, the floor was clean and there were no puddles of water anywhere." (Swalls's affidavit, ¶2). Such affidavit, coupled with the underlying record, establishes that the night shift mopped the bathroom floor as required, and that at that time, the leaking and/or wet condition was not

present, and that reports of the alleged leaking condition of the pipes were made to the building, as required. Pritchard was not responsible for maintaining any plumbing equipment, and Pritchard did not have any notice of the subject water on the bathroom floor prior to plaintiff's accident, for which it failed to report. Therefore, as plaintiff's accident did not arise or result from the performance of Pritchard's scope of work under the contract, or act or omission of Pritchard, Pritchard is entitled to summary judgment dismissing the third-party contractual indemnification claim.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by third-party defendant, Pritchard Industries, Inc. for leave to renew and reargue is granted; and it is further


ORDERED that upon renewal, summary judgment dismissing the remaining third-party contractual indemnification claim of 100 Property LLC, Hiro Real Estate Co., and Craven Management, Corp. is granted in Pritchard's favor, and the third party complaint is hereby severe and dismissed; and it is further

ORDERED that third-party defendant, Pritchard Industries, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: June 24, 2010

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Hon. Carol Robinson Edmead, J.S.C.
HON. CAROL EDMED