

Fama v Cityspire, Inc.

2010 NY Slip Op 33169(U)

November 8, 2010

Supreme Court, New York County

Docket Number: 105370/07

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 105370/2007
FAMA, GARY
vs.
CITYSPIRE
SEQUENCE NUMBER : 002
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

this 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.

FILED

NOV 10 2010

MOTION IS DECIDED IN ACCORDANCE WITH NEW YORK COUNTY CLERK'S OFFICE
THE ACCOMPANYING MEMORANDUM DECISION.

Dated: Nov 8, 2010

HON. JUDITH J. GISCHE *J.S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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 10**

-----X
GARY FAMA and DIANE FAMA, his wife,

Plaintiffs,

-against-

CITYSPIRE, INC., RECKSON ASSOCIATES
REALTY CORP., TISHMAN SPEYER
PROPERTIES, L.P., and ONE SOURCE FACILITY
SERVICES, INC., s/h/a ONE SOURCE
MANAGEMENT, INC.,

Defendants.

-----X

CITYSPIRE, INC. and TISHMAN SPEYER
PROPERTIES, L.P.,

Third-Party Plaintiffs,

-against-

GLOBEOP FINANCIAL SERVICES, LLC,

Third-Party Defendant.

-----X

DECISION/ ORDER
Index No.: 105370/07
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

FILED
NOV 10 2018
Third-Party Index No.: 590384/08
NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Cityspire/Tishman's n/m (rearge) w/NMC affirm, exhs	1
Globeop's opp w/APB affirm, exhs	2
Cityspire/Tishman's reply w/NMC affirm, exhs	3

Upon the foregoing papers, the decision and order of the court is as follows:

This is a personal injury action. Gary Fama ("Fama") contends he was injured in the building owned by defendant Cityspire, Inc. ("Cityspire") and managed by defendant

Tishman Speyer Properties, L.P. ("Fishman"). The building is located at 156 West 56th Street, New York, New York ("building"). Defendant, One Source Facility Services, Inc. s/h/a One Source Management, Inc. ("One Source"), has a janitorial services contract with Cityspire to provide cleaning services at the building.

Cityspire and Tishman previously moved and One Source cross moved for summary judgment dismissing the complaint. Cityspire and Fishman also moved for summary judgment on its third party complaint against GlobeOp Financial Services, LLC ("GlobeOp") for contractual indemnification. Each motion was denied in the court's decision/order dated April 14, 2010 that Cityspire and Tishman now seeks permission to reargue, only to the extent that the court denied the owner and managing agent an order of conditional indemnification. This motion to reargue is opposed by GlobeOp, who argues that the moving defendants seek to put new documents before the court which were not contained in their original motion.

On a motion to reargue, the movant must make an initial showing that the court overlooked or misapprehended the relevant facts, or misapplied a principle of law in reaching the decision that it did (CPLR §2221[d] [2]; Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]). A motion to renew, on the other hand, is based upon the discovery of material facts which existed at the time the prior motion was made, but were not then known to the party and for that reason not disclosed to the court (Foley v. Roche, 68 AD2d 558, 567 [1st Dept. 1979]). The motion to reargue is timely and reargument is permitted.

Background

Fama claims that he slipped and fell on wet paper towels on the floor of the 6th

floor men's restroom of the building. Cityspire and Tishman brought a motion for summary judgment, dismissing Fama's complaint based upon neither defendant having created or notice of the dangerous condition alleged. Cityspire and Tishman argued that Cityspire was an out-of-possession landlord and its tenant, GlobeOp was responsible for the ongoing maintenance and upkeep of the cleanliness of its restrooms.

In the alternative, Cityspire and Tishman argued that if the complaint was not dismissed against them, they were entitled to a conditional judgment on their claim for contractual indemnification against GlobeOp.

GlobeOp is the sublessee of certain space in the building, including the 11th floor where the accident occurred. GlobeOp subleased the space from Thomas Financial, a non-party, pursuant to a sublease agreement dated June 23, 2003 ("sublease"). At that time, the owner of the building was Pennsylvania Business Campus Delaware, Inc. ("previous owner"). The previous owner consented to the sublease ("consent"). The sublease is incorporated by reference in the consent and reference is also made to the master lease between the previous owner and Thomas Financial, the sublessor.

Pursuant to the landlord's consent, GlobeOp was obligated to obtain insurance for the benefit of the landlord and its property manager. GlobeOp also agreed to indemnify and hold harmless the owner.

The landlord's consent contains an insurance and indemnification provision.

These provisions are as follows:

- "11. Indemnity. Tenant's obligation to indemnify and hold Landlord harmless as set forth in the Lease shall include indemnification from any claims arising from the use of the Premises (as defined in the Lease), or any portion thereof, by Subtenant, its agents,

employees, or contractors. Additionally, wherever in the Lease Tenant has agreed to indemnify, save and hold Landlord harmless from and against any action, claim or proceeding, brought against the Landlord by third parties, Subtenant hereby agrees jointly and severally with Tenant to indemnify, defend and hold Landlord harmless with respect to any claim which arises out of or in connection with Subtenant's use and occupancy of the Premises. Subtenant shall obtain a waiver of subrogation pursuant to the Lease for the benefit of the Landlord."

"12. Insurance.

Subtenant shall deliver evidence of the insurance required of it under the Sublease and Lease, showing Landlord, its property manager, and Tenant as additional insureds, as a condition to Landlord's consent hereunder."

The sublease itself separately provides as follows:

"18. Indemnity.

Effective from the Commencement Date, the Sublessee shall assume the risk of responsibility for, have the obligation to insure against, and indemnify Sublessor and hold it harmless from, any and all liability for any loss or damage or injury to any person . . . occurring within the Sublet Space, regardless of cause, except to the extent any loss or damage is caused by the negligence (whether by acts or omissions) or willful conduct of Sublessor, its officers, directors, agents [etc.] from and against any and all losses, costs, damages, expenses and liabilities . . . Sublessee hereby releases Sublessor from any and all liability for same. Sublessor's obligations to indemnify Sublessor hereunder shall include the duty to defend against any claims asserted by reason of such loss, damage or injury and to pay any judgments, settlements, costs, fees and expenses, including reasonable attorney's fees incurred by Sublessor in connection therewith."

The court denied Cityspire and Tishman's motion for a conditional order of contractual indemnification, stating that there are material issues of fact whether the owner and managing agent had notice of the dangerous condition alleged.

The owner and managing agent argue, however, that the clauses at issue are

* 6]

not exculpatory clause which impermissibly excuse them from a claim for their own negligence (GOL 5-321). They contend the lease provisions were negotiated to allocate the risk of liability to third persons by requiring the indemnitor (i.e. GlobeOp) to procure insurance for the benefit of the indemnitee (Cityspire and Tishman). Thus, according to Cityspire and Tishman, the negligence of GlobeOp does not have to be decided to trigger these provisions, nor do the managing agent and owner have to be found free of negligence. They contend the indemnification provisions are triggered once there is any claim by a third party for personal injury "arising from the use of the Premises."

In opposition, GlobeOp raises principally technical arguments, including that Cityspire and Tishman should have, but failed to, provide a copy of the master lease in their original motion and they waited until their reply to provide the court with a copy of the landlord's consent. They contend the consent is the operative document, and although the owner and managing agent provided a copy of the sublease in the moving papers, their motion was defective and should have been denied for that reason. GlobeOp also claims that until the issue of negligence is resolved, Cityspire and Tishman's motion for summary judgment on its indemnification claim is premature.

Discussion

The owner and manager of premises lease to a tenant are entitled to conditional contractual indemnification for any liability "arising out of" an accident at the premises if the lease agreement contains such a provision, provided the accident was not as a result of the defendants' own negligence (Lennard v. Mendik Realty Corp., 43 AD3d 279 [1st Dept 2007]).

The commercial sublease between GlobeOp and Cityspire's predecessor in interest is incorporated by reference in the consent. It broadly provides that GlobeOp is required to indemnify the landlord for any accident arising from the use of the premises, "unless caused solely by landlord's negligence." Such clauses are enforceable despite the General Obligation Law's prohibition against exempting or exculpating a lessor from its own liability for damages or injuries caused by lessor's own negligence (Great Northern Ins. Co. v. Interior Const. Corp., 7 NY3d 412 [2006]). This is because the lease was negotiated between two sophisticated parties and the indemnification provision was coupled with an insurance procurement requirement for tenant. This is tantamount to an agreement for use of insurance to allocate risk of liability to third parties (Great Northern Ins. Co. v. Interior Const. Corp., *supra*; Otero ex rel. Vasquez v. L & M Hub Associates, LLC, 68 A.D.3d 444 [1st Dept 2009]). Thus, the owner and managing agent are entitled to a conditional order of indemnification. The extent of such indemnification will depend on the extent to which each party's negligence (if any), contributed to the accident (Hughey v. RHM-88, LLC, —AD3d—, 2010 N.Y. Slip Opn. 07490 [1st Dept 2010]).

In denying Cityspire and Tishman's motion for summary judgment on their indemnification claims, the court misapprehended the facts and/or misapplied the law. Therefore, Cityspire and Tishman's motion for reargument is granted and upon reargument, the court modifies its order to provide that Cityspire and Tishman are entitled to contractual indemnification by GlobeOp.

Conclusion

In accordance with the foregoing,

It is hereby,

ORDERED that defendants/3rd party defendants' motion for reargument of the court order denying them summary judgment on their contractual indemnification claims against 3rd party defendant GlobeOp Financial Services, LLC (3rd cause of action) is granted; and it is further

ORDERED that upon reargument, the court modifies its prior order dated April 14, 2010 to provide that Cityspire and Tishman are entitled to a conditional order of contractual indemnification by GlobeOp against plaintiff's claims; and it is further

ORDERED that the extent to which Cityspire and Tishman will be entitled to indemnification will depend on the extent to which each of these party's negligence (if any) is determined to have contributed to the accident; and it is further

ORDERED that the court's prior order is otherwise unmodified; and it is further

ORDERED that any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This constitutes the decision and order of the court.

Dated: New York, New York
November 8, 2010

So Ordered:


HON. JUDITH J. GISCHE, J.S.C.

FILED
NOV 10 2010
NEW YORK
COUNTY CLERK'S OFFICE