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

PRESENT: HON. PAUL WOOTEN Justice PART 7

NORA TERESA DEVLIN and IAN MEL DEVLIN,

Plaintiffs,

- against-

BLAGGARDS III RESTAURANT CORP. d/b/a BLAGGARDS PUB, BLAGGARDS RESTAURANT CORP. d/b/a BLAGGARDS PUB, and FRAGLOW REALTY LLC,

Defendants.

INDEX NO. 113986/2007

MOTION DATE

MOTION SEQ. NO. 003

MOTION CAL. NO.

The following papers, numbered 1 to 3, were read on this motion by defendants Blaggards III Restaurant Corp. d/b/a Blaggards Pub and Blaggards Restaurant Corp. d/b/a Blaggards Pub to renew and reargue, pursuant to CPLR 2221.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	3

Cross-Motion: ☐ Yes ■ No

Defendants Blaggards III Restaurant Corp. d/b/a Blaggards Pub ("Blaggards III") and Blaggards Restaurant Corp. d/b/a Blaggards Pub (collectively "defendants") move to reargue and renew, pursuant to CPLR 2221, the Order of this Court entered on May 26, 2010, which granted their motion for summary judgment with respect to plaintiffs' claims, but did not address dismissal of the cross-claims of defendant Fraglow Realty LLC ("Fraglow") seeking contractual and common-law indemnification from defendants.[1] They seek summary judgment dismissing Fraglow's cross-claims in their entirety, pursuant to CPLR 3212, on the basis that Fraglow is not entitled to indemnity because it is covered by an applicable insurance policy. Fraglow opposes

[1]The underlying facts are set forth in the prior decision.

the motion, and defendants have filed a reply.

DISCUSSION

Defendants argue that Fraglow's cross-claims against them must be dismissed, as a matter of law, because Fraglow was covered by an applicable insurance policy at the time of the accident and, as such, is not entitled to indemnity pursuant to the terms of the lease agreement between the parties.[2] Specifically, they argue that Fraglow is only entitled to indemnification to the extent that it is not reimbursed by insurance, as provided in paragraph 8 of the lease which states:

> "Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs and expenses *for which Owner shall not be reimbursed by insurance* . . . incurred as a result of any breach by tenant . . . of any covenant or condition of this lease . . . ." (Not. of Mot., Ex. E) (emphasis added).

Defendants submit Fraglow's response to discovery demands which indicates that Fraglow is covered by an insurance policy that was issued by Greater New York Mutual Insurance Company (*see id.*, Ex. H). They argue that Fraglow has not claimed any damages or expenses that have not been reimbursed by insurance, and that dismissal is thus required pursuant to *Diaz v Lexington Exclusive Corp.*, 59 AD3d 341 [1st Dept 2009]).

In opposition, Fraglow argues that defendants have failed to demonstrate their entitlement to reargument (*see* CPLR 2221 [d]), and that their reliance upon *Diaz* is misplaced. They contend that the lease contained a rider that superceded paragraph 8 and entitled Fraglow to indemnification notwithstanding any vicarious liability it may have had. They cite paragraph 47A of the rider which required Blaggards III to procure insurance naming Fraglow as an additional insured, and paragraph 47B which provides in pertinent part:

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[2]Fraglow is the owner of the building where the claimed accident occurred, and Blaggards III is its lessee.

> "Tenant will indemnify and save Landlord harmless from and against any and all liabilities, obligations, damages, penalties, claims, costs, charges and expenses including reasonable attorneys' fees, which may be imposed upon or incurred by or asserted against Landlord by reason of any of the following occurring during the term of this Lease . . . ." (*id.*, Ex. E).

In reply, defendants argue that Fraglow has attempted to create an inconsistency between the terms of the lease and the terms of the rider where none exists. They assert that while the lease and the rider both contain indemnification language, defendants' obligation to indemnify Fraglow only applies to claims for which Fraglow is not reimbursed by insurance, and that the cited terms of the rider are not inconsistent with the terms of the lease.

A motion for reargument is addressed to the sound discretion of the Court, and is designed to give a party a chance to convince the Court that relevant facts or law were overlooked or misapprehended (*see* CPLR 2221 [d] [2]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). The Court finds it appropriate to grant defendants reargument pursuant to CPLR 2221. Upon reargument, the Court concludes that summary judgment dismissing Fraglow's cross-claim for contractual indemnification should be granted.

The Court agrees with defendants that *Diaz*, which involved a similar clause that the tenant "shall indemnify and save harmless Owner against and from all liabilities . . . *for which Owner shall not be reimbursed by insurance*," 59 AD3d at 342 (emphasis added), is dispositive. In *Diaz*, the landlord, which had obtained its own insurance, brought a third-party suit for contractual indemnification against the tenant. The lease between the parties required the tenant to procure liability insurance for the landlord's benefit, and the landlord argued that the indemnification clause only relieved the tenant from indemnification if the tenant's own insurance fully covered liability. The First Department dismissed the landlord's contractual indemnification claim, holding that the words "reimbursed by insurance" did not refer to any party's specific source of coverage. The tenant was thus relieved of its contractual duty to

indemnify because the owner would be reimbursed by its own insurance (*see id.; accord Leidner v Kevin & Stephen Corp.*, 2009 WL 5814121, *3 [NY Sup Ct, NY County 2009] [finding *Diaz* dispositive where indemnification clause was substantially similar to that in *Diaz* and landlord had "already received the benefit of insurance, albeit its own"]; *Sehnert v New York City Transit Auth.*, 2009 WL 4617663 [NY Sup Ct, NY County 2009]).

Here, the clause in paragraph 8 is indistinguishable from that in *Diaz*, in that it requires indemnification "for which Owner shall not be reimbursed by insurance" without reference to any specific party's insurance. It is undisputed that Fraglow has coverage under an applicable insurance policy, and Fraglow's argument that the terms of the lease and the terms of the rider are inconsistent fails to raise a triable issue of fact (*see Diaz*, 59 AD3d at 342). Accordingly, upon reargument, defendants' motion for summary judgment dismissing Fraglow's cross-claims is granted to the extent that the contractual indemnification claim is dismissed. To the extent that defendants seek leave to renew, the motion is denied as academic.

For these reasons and upon the foregoing papers, it is,

ORDERED that defendants' motion to reargue is granted; and it is further,

ORDERED that defendants' motion to renew is denied as academic; and it is further,

ORDERED that, upon reargument, defendants' motion for summary judgment dismissing Fraglow's cross-claim for contractual indemnification is granted; and it is further,

ORDERED that the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Dated: November 22, 2010

Raul Wooten J.S.C.

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST**