[* 1]

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

PRESENT: Hon Joan A. Madden Justice PART 11

Index Number : 110826/2007
MUNOZ, VICTOR
VS.
HILTON HOTELS
SEQUENCE NUMBER : 008
REARGUMENT/RECONSIDERATION

INDEX NO. _____
MOTION DATE 10-28-10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for reargument

	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 the annexed Memorandum Decision + Order.

FILED

JAN 31 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 19, 2011

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 11

----------X

VICTOR MUNOZ and ELVIA MUNOZ,

Plaintiffs,

-against-

Index No. 110826/07

HILTON HOTELS CORPORATION, FC 42 HOTEL LLC, SUNSTONE 42ND STREET, LLC, SUNSTONE 42ND STREET LESSEE, INC., EMPIRE STATE DEVELOPMENT CORPORATION, 42ND STREET DEVELOPMENT PROJECT, INC., and NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Defendants.

----------X

FC HOTEL LLC,

Third-Party Plaintiff,

-against-

Third-Party
Index No. 590086/08

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Third-Party Defendant.

----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE, HILTON HOTELS CORPORATION, SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Fourth-Party Plaintiffs,

-against-

Fourth-Party
Index No. 590617/09

FIRST NEW YORK PARTNERS and FC 42ND STREET ASSOCIATES, L.P.,

Fourth-Party Defendants.

----------X

SUNSTONE 42ND STREET, LLC and
SUNSTONE 42ND STREET LESSEE, INC.,

Fifth-Party Plaintiffs,

-against-

SUNSTONE HOTEL PROPERTIES, INC., FIRST NEW YORK PARTNERS MANAGEMENT, LLC and FC 42ND STREET ASSOCIATES, LP,

Fifth-Party Defendants.

Fifth-Party
Index No. 590690/09

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EMPIRE STATE DEVELOPMENT CORPORATION, 42ND STREET DEVELOPMENT PROJECT, INC. and NEW YORK STATE URBAN DEVELOPMENT CORPORATION d/b/a EMPIRE STATE DEVELOPMENT CORPORATION,

Third-Party Plaintiffs,

-against-

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Third-Party Defendant.

Third-Party
Index No. 590617/08

----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a HILTON TIMES SQUARE,

Fourth-Party Plaintiff,

-against-

FIRST NEW YORK PARTNERS and FC 42ND STREET ASSOCIATES, L.P.,

Fourth-Party Defendants.

Fourth-Party
Index No. 590618/09

----------X

SUNSTONE HOTEL PROPERTIES, INC. d/b/a

HILTON TIMES SQUARE,

Fifth-Party Plaintiff,

-against-

Fifth-Party
Index No. 590847/09

SUNSTONE 42ND STREET, LLC and SUNSTONE 42ND STREET LESSEE, INC.,

Fifth-Party Defendants.

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JOAN A. MADDEN, J.:

In this action arising out of a construction site accident, third-party defendant/fourth-party plaintiff/fifth-party plaintiff/fifth-party defendant Sunstone Hotel Properties, Inc. d/b/a Hilton Times Square (SHP) moves, pursuant to CPLR 2221 (d), for leave to reargue that portion of the court's decision and order dated July 19, 2010 (the prior decision), which denied its motion for summary judgment on its fifth-party claim for contractual indemnification against defendant/fifth-party plaintiff Sunstone 42nd Street Lessee, Inc. (Sunstone Lessee). Sunstone Lessee opposes the motion.

The relevant facts are set forth in detail in the prior decision, and will only be repeated here to the extent necessary to this decision. Plaintiff, Victor Munoz, was injured on June 16, 2007, when he fell off a ladder at a loading dock located at the Hilton Times Square. The building is divided into two units: a Hotel unit and an Entertainment/Retail unit. The owner and lessee of the Hotel unit are defendants Sunstone 42nd Street, LLC (Sunstone LLC) and Sunstone Lessee, respectively. Fourth-party defendants/fifth-party defendants FC 42nd Street Associates, L.P. and First New York Partners Management, LLC are the owner and managing agent of the Entertainment/Retail unit. Plaintiff was an employee of SHP, the managing agent of the Hotel

unit.

Pursuant to a Hotel Management Agreement (HMA) dated March 17, 2006, Sunstone Lessee hired SHP to "manage and operate the Hotel and all of its facilities and activities." Sunstone Lessee was identified therein as the "Owner," and SHP was referred to therein as the "Operator."

As relevant here, SHP moved for contractual indemnification from Sunstone Lessee and Sunstone LLC, pursuant to article 22.2 of the HMA, which provides as follows:

> "Except as provided in Section 22.1, Owner agrees to indemnify, defend and hold Operator (and Operator's agents, principals, shareholders, partners, members, officers, directors and employees) harmless from and against all liabilities, losses, claims, damages, costs and expenses (including, but not limited to, reasonable attorneys' fees and expenses) that may be incurred by or asserted against such party and that arise from or in connection with . . . (b) *the performance of Operator's services under this Agreement (including compliance with Section 3.3 hereof)*, (c) any act or omission (whether or not willful, tortious, or negligent) of Owner or any third party or (d) or any other occurrence related to the Hotel (including but not limited to environmental or life-safety matters) and/or Operator's duties under this Agreement whether arising before, during or after the Term" (emphasis added).

(Prior Decision, at 30).

SHP argued, inter alia, that the HMA was to be interpreted under Maryland law,[1] and that it was entitled to indemnification because plaintiff's accident arose out of SHP's performance of services under the HMA.

In opposition, Sunstone Lessee and Sunstone LLC agreed that the HMA should be

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[1]Article 24.6 of the HMA states that the agreement is to be "construed, both as to its validity and as to the performance of the parties, in accordance with the laws of the State of Maryland, without reference to its conflict of laws provisions" (Prior Decision, at 31). The court notes that neither side has provided the HMA on this motion. Although the court attempted to retrieve the underlying papers from the County Clerk file, it was unable to locate the motion papers and accompanying exhibits in the file.

interpreted pursuant to Maryland law, but argued that the accident arose from SHP's negligence, and that they were not required to indemnify SHP because article 22.2 lacks explicit language unequivocally showing an intent to indemnify SHP for its own negligence. Additionally, Sunstone Lessee and Sunstone LLC contended that no indemnification obligation had been triggered, since the loading docks were not part of SHP's responsibilities pursuant to the language of the HMA.

In the prior decision, the court stated that:

> "In this case, the evidence shows that plaintiff's accident arose out of the means and methods of the work, not a dangerous or defective condition on the premises. Significantly, the evidence shows that plaintiff was only supervised by his supervisor, Guido Tamayo (Plaintiff Continued EBT, at 116, 118-119; Tamayo EBT, at 9, 49-50; Chavez EBT, at 67)"

(Prior Decision, at 19).

As for SHP's motion for contractual indemnification, the court noted that under Maryland Code, Courts & Judicial Proceedings § 5-401 [a], "a covenant, promise, agreement or understanding in, or in connection with or collateral to, a contract or agreement relating to the construction, alteration, repair, or maintenance of a building, structure . . . *purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, his agents or employees, is against public policy and is void and unenforceable*" ([emphasis supplied]).

It also recognized that, under Maryland law, a "contract will not be construed to indemnify a person against his own negligence unless an intention to do so is expressed in those very words or in other unequivocal terms" (*Heat & Power Corp. v Air Prods. & Chemicals, Inc.*,

320 Md 584, 596, 578 A2d 1202, 1208 [1990]; *Crockett v Crothers*, 264 Md 222, 227, 285 A2d 612, 615 [1972]). The court, therefore, ruled that Sunstone Lessee and Sunstone LLC were not obligated to defend or indemnify SHP as a matter of law, reasoning that:

> "the indemnification clause at issue is virtually identical to the clause at issue in *Heat & Power*, where the Maryland Court of Appeals ruled as a matter of law that there was no contractual duty to indemnify. The HMA does not expressly or unequivocally provide that Sunstone Lessee agrees to indemnify SHP against its own negligence (*compare Mass Transit Admin. v CSX Transp., Inc.*, 349 Md 299, 301, 708 A2d 298, 300 [1998] [indemnification provision requiring indemnification for 'liability of every kind arising out of the Contract Service' included railroad's own negligence]; . . ."

(Prior Decision, at 32).

SHP now moves for leave to reargue, contending that the court misapprehended and misapplied Maryland law. Relying upon *MTA* (349 Md 299, 708 A2d 298, *supra*) and *Kreter v HealthSTAR Communications, Inc.* (172 Md App 243, 914 A2d 168 [Md Ct Spec App 2007]), SHP argues that article 22.2 unequivocally provides for indemnification against claims arising out of its own negligent performance under the HMA. SHP contends that, where an indemnification clause provides for indemnification of an indemnitee for the indemnitee's performance of the contract, the clause perforce requires that the indemnitee be indemnified against claims that it performed negligently. SHP further argues that, if the indemnification provision did not cover such an eventuality, the provision would be rendered meaningless.

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Cuomo v Ferran*, 77 AD3d 698, 700-701 [2d Dept 2010]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv*

dismissed in part and denied in part 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]). Applying this standard, leave to reargue is granted, but upon reargument, the court adheres to its original determination.

As noted in the prior decision, the general rule under Maryland law is that "contracts will not be construed to indemnify a person against his own negligence unless an intention so to do is expressed in those very words or in other unequivocal terms" (*Crockett*, 264 Md at 227, 285 A2d at 615; *see also Adloo v H.T. Brown Real Estate, Inc.*, 344 Md 254, 261-262, 686 A2d 298, 302 [1996]; *Heat & Power*, 320 Md at 593, 578 A2d at 1206; *Farrell Lines, Inc. v Devlin*, 211 Md 404, 421, 127 A2d 640, 648 [1956]). The reasons for the rule are to protect the "unwary and uninformed promisor," to remedy the unequal bargaining power of the parties, and to allay fears of encouraging negligent conduct by the indemnitee (*see Kreter*, 172 Md App at 254-256, 914 A2d at 175-177). However, the Maryland Court of Appeals has noted that:

> "[t]he policy consideration against implying agreements to indemnify one for one's own negligence are inapplicable to liability insurance contracts which generally have as their primary purpose indemnification against own's own negligence. Also, one of the reasons why contracts to indemnify must be expressed in unequivocal terms is to protect the unwary or uninformed promisor. A liability insurer is rarely an unwary or uninformed promisor"

(*Heat & Power*, 320 Md at 596, 578 A2d at 1208).

In *MTA*, the Maryland Court of Appeals interpreted an indemnification provision in a

state procurement contract between the State Mass Transit Administration (MTA) and a railroad corporation which was to provide a commuter railroad service, CSX Transportation, Inc. (CSXT) (*Mass Transit Admin.*, 349 Md at 301, 708 A2d at 300). The indemnification provision required the MTA to indemnify CSXT from "liability of every kind *arising out of* the Contract Service under this Agreement, up to a maximum amount of One Hundred Fifty Million Dollars ($150,000,000) per occurrence" (*id.* [emphasis in original]). The MTA also agreed "to self-insure Five Million Dollars ($5,000,000) per occurrence of any casualty claim or loss for which it is responsible" (*id.* at 302, 708 A2d at 300). Additionally, the MTA agreed to procure and maintain excess liability insurance in the amount of $145 million in excess of the $5 million "self-insured retention" (*id.*). While recognizing the general rule, the Court held that "the indemnification provision in the instant matter applies to CSXT's liability based solely on its own negligence" (*id.* at 307, 708 A2d at 302).

The *MTA* Court first distinguished *Heat & Power* by saying:

> "The indemnification provision in the instant matter, [], reverses the direction of the indemnification from that more commonly encountered. Here, the hirer of the service gives the indemnity, and the party performing the service is indemnified. It appears that the railroad industry historically has sought and obtained indemnifications. In E.R. Tan, Annotation, *Validity, Construction, and Effect of Agreement, In Connection with Real-Estate Lease or License by Railroad, for Exemption from Liability or for Indemnification by Lessee or Licensee, for Consequences of Railroad's Own Negligence*, 14 A.L.R.3d 446 (1967), the author summarizes: 'The validity of an exculpatory or indemnity clause discussed in this annotation has been recognized in numerous cases' . . . "

(*id.* at 309, 708 A2d at 303-304). The Court concluded that "the indemnification was intended, at a minimum, to serve as liability insurance for CSXT for the first $5 million of CSXT's liability" (*id.* at 310-311, 708 A2d at 304). As explained by the Court,

> "In 'unequivocal terms,' the indemnification in the instant matter includes the liability of CSXT for its own acts or omissions. As the party rendering the commuter rail service, CSXT does not have any exposure to vicarious liability for the negligence of MTA arising out of the Contract Service; the exposure to any vicarious liability in that circumstance runs in the other direction. Under the Contract MTA indemnifies the first $5 million of CSXT's liability, arising out of Contract Service, and MTA either provides public liability insurance at its expense for CSXT's exposure from $5 million to $150 million, or MTA indemnifies the CSXT for any uninsured balance of that exposure. In addition to the very words used in expressing the indemnification, the fact that it extends to $150 million clearly indicates that the parties were contemplating a possible disaster, such as a wreck of a train filled with commuters, due to CSXT's negligence"

(*id.* at 310, 708 A2d at 304). The Court then examined insurance liability case law and insurance law treatises to determine whether the indemnification clause applied in that case, focusing on the "arising out of" language (*id.* at 311-318, 708 A2d at 304-309).

Notably, the Court of Special Appeals of Maryland commented, in *Kreter,* that "[t]he [*MTA*] Court held that the State's promise to indemnify included liability for the sole negligence of the railroad corporation *because the State's indemnification was in the nature of insurance*" (*Kreter*, 172 Md App at 258 n 8, 914 A2d at 177 n 8 [citation omitted and emphasis added]).

The court finds *MTA* to be inapposite to these facts. *MTA* concerned the railroad industry, which the *MTA* court found has historically sought and obtained indemnification from the State for its negligence. Here, the circumstances are distinguishable as an entity such as Sunstone Lessee historically has not insured a subcontractor's performance.

As to *Kreter,* it involved an indemnification agreement between an ex-wife and a company that purchased the stock of companies owned by the ex-wife and her ex-husband (*id.* at 247-250, 914 A2d at 171-173). In connection with the stock sale and termination of an executive employment contract, the ex-wife agreed to indemnify the company for "any claim, loss, damage,

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judgment or expense" brought by her ex-husband related to a stock purchase agreement, the employment agreement, or incentive compensation agreement (*id.* at 253, 914 A2d at 174). The ex-husband commenced an action against the company alleging that his ex-wife and the company defrauded him in the stock purchase (*id.* at 249, 914 A2d at 172). The company then brought a declaratory judgment action seeking a declaration that the ex-wife was obligated to indemnify it for her ex-husband's fraud claims asserted against the company (*id.* at 250, 914 A2d at 173). The ex-wife brought a counterclaim for a declaration that she was not required to indemnify the company in her ex-husband's litigation (*id.*). The Court of Special Appeals held that the general rule did not apply, "because this indemnification agreement differs significantly from the circumstances in which Maryland has previously applied it" (*id.* at 258, 914 A2d at 177). According to the Court, the indemnification agreement was not part of an ongoing contractual relationship in which liability could arise in the course of future contract performance, but rather the agreement was part of a contract that extinguished the relationship between the ex-wife and the company and addressed liability for actions that had already taken place (*id.* at 258-259, 914 A2d at 178).

Kreter also does not apply here. In this case, in contrast, there is an ongoing contractual relationship between Sunstone Lessee and SHP. SHP was charged with managing and operating the hotel and all of its facilities for a set period of time. Thus, liability could arise in the course of SHP's future contract performance.

As noted above, article 22.2 provides that Sunstone Lessee agrees to indemnify SHP for all claims that arise from or in connection with "the performance of [SHP's] services under this Agreement." Sunstone Lessee did not expressly or unequivocally agree to indemnify SHP

against its own negligence. Therefore, SHP is not entitled to indemnification from Sunstone Lessee (*see Heat & Power*, 320 Md at 592-593, 578 A2d at 1206-1207 [where contract between owner and contractor stated that contractor would indemnify owner for any liability "resulting from or arising out of or in connection with the performance of this contract by Contractor," the contract did not expressly or unequivocally indemnify owner against its own negligence]; *Crockett*, 264 Md at 228, 285 A2d at 615 [where contract between engineer and contractor provided that contractor would indemnify engineer from all claims, damages, and losses arising out of or resulting from the performance of work on sewerage system, the contract did not require the contractor to indemnify the engineer against the engineer's own negligence in preparing plans and specifications]).

The court notes that at oral argument, counsel for SHP argued that *MTA* is dispositive here as the indemnification provision in *MTA* and the instant case both inure to the benefit of the party providing services, and that under such circumstances, since the party to be indemnified is performing the work, the word "negligence" need not be included since "the court takes the intentions of the party to mean that there is indemnification for negligence" (Transcript of October 28, 2010 oral argument, at 10). Counsel contrasted these circumstances to those in *Heat & Power* which, he argued, involved a contractual risk transfer from an owner to a service provider identical to common law indemnification.

This argument is unavailing. As indicated above, *MTA* involved the railroad industry, which the *MTA* court found has historically sought and obtained indemnification for its negligence, which may be considered in the nature of insurance. These unique facts distinguish *MTA* from the instant case. Additionally, Maryland law, which requires that "contracts will not

be construed to indemnify a person against his own negligence unless an intention so to do is expressed in those very words or in other unequivocal terms"(*Crockett*, 264 Md at 227, 285 A2d at 615), is controlling here and precludes the enforcement of the indemnification provision based on any implicit intention by the parties to indemnify SHP for its own negligence.

Accordingly, it is

ORDERED that the motion (sequence number 008) of third-party defendant/fourth-party plaintiff/fifth-party plaintiff/fifth-party defendant Sunstone Hotel Properties, Inc. d/b/a Hilton Times Square for leave to reargue the court's decision and order dated July 19, 2010 is granted, and upon reargument, the court adheres to its original determination.

Dated: January 24, 2011

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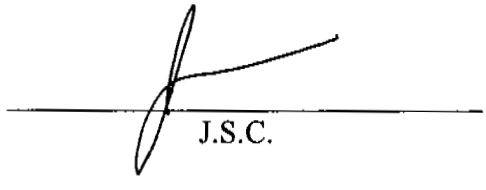

J.S.C.