

**Barnes v Metropolitan Transp. Auth.**

2014 NY Slip Op 30104(U)

January 10, 2014

Sup Ct, New York County

Docket Number: 109485/09

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. MICHAEL D. STALLMAN  
*Justice*

PART 21

ELEISE JOY BARNES,

INDEX NO. 109485/09

Plaintiff,

MOTION DATE 10/9/13

- v -

MOTION SEQ. NO. 007

METROPOLITAN TRANSPORTATION AUTHORITY et al.,

Defendants.

(And a third-party action).

The following papers, numbered 1 to 7 were read on this motion to renew and reargue

Notice of Motion – Affidavit of Service – Affirmation – Exhibits A-C \_\_\_\_\_ | No(s). 1-3

Affirmation in Opposition – Exhibits A-G – Affidavit of Service \_\_\_\_\_ | No(s). 4-5

Reply Affirmation – Affidavit of Service \_\_\_\_\_ | No(s). 6-7

Upon the foregoing papers, it is ordered that this motion to renew and reargue by defendants/third-party defendants Mainco Elevator and Electrical Corp. and Thyssenkrupp Elevator Corp., individually and as success to Mainco Elevator and Electrical Corp., is decided in accordance with the annexed memorandum decision and order.

# FILED

JAN 15 2014

## NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/10/14  
New York, New York

[Signature], J.S.C.

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

- 1. Check one:.....
- 2. Check if appropriate:..... MOTION IS:
- 3. Check if appropriate:.....

- CASE DISPOSED
- GRANTED
- DENIED
- GRANTED IN PART
- OTHER
- SETTLE ORDER
- SUBMIT ORDER
- DO NOT POST
- FIDUCIARY APPOINTMENT
- REFERENCE
- NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY: IAS PART 21

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ELEISE JOY BARNES,

INDEX NO. 109485/09

Plaintiff,

MOTION SEQ. NO. 007

-against-

METROPOLITAN TRANSPORTATION AUTHORITY,  
METRO-NORTH RAILROAD, MAINCO ELEVATOR  
AND ELECTRICAL CORP. and THYSSENKRUPP  
ELEVATOR CORPORATION, individually and as a  
successor in interest to MAINCO ELEVATOR AND  
ELECTRICAL CORP.,

Defendants.

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METROPOLITAN TRANSPORTATION AUTHORITY,  
and METRO-NORTH RAILROAD,

THIRD PARTY INDEX  
NO. 590976/09

Third-Party Plaintiffs,

-against-

MAINCO ELEVATOR AND ELECTRICAL CORP., and  
THYSSENKRUPP ELEVATOR CORPORATION,  
individually and as a successor in interest to MAINCO  
ELEVATOR AND ELECTRICAL CORP.,

**FILED**

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NEW YORK

COUNTY CLERKS OFFICE

Third-Party Defendants.

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**HON. MICHAEL D. STALLMAN, J.:**

Familiarity with the prior decision and order of the court, dated July 12,  
2013 (the July 12, 2013 Decision), in motion sequence numbers 004 and 005, is  
presumed.

Defendants/third-party defendants Mainco Elevator and Electrical Corp.

(Mainco) and ThyssenKrupp Elevator Corporation (ThyssenKrupp), individually and as successor in interest to Mainco Elevator and Electrical Corp., (together, Mainco Defendants) move, pursuant to CPLR 2221 (e) and (d), for leave to renew and reargue the July 12, 2013 Decision and, upon renewal and reargument, for an order: (1) denying that branch of the motion by defendants Metropolitan Transportation Authority (MTA) and Metro-North Railroad (Metro-North) (together, MTA Defendants) that sought summary judgment on MTA Defendants' claim for contractual indemnification asserted against Mainco Defendants, and (2) granting that branch of the motion for summary judgment by Mainco Defendants to dismiss MTA's claims for contractual indemnification.

### **BACKGROUND**

In this action, plaintiff Elise Joy Barnes alleges that, on December 29, 2008, she tripped and fell (the incident) while descending a stationary escalator (the subject escalator) leading to the dining concourse within Grand Central Terminal.

MTA Defendants and Mainco Defendants entered into a contract (the Contract), pursuant to which Mainco Defendants agreed to provide ongoing preventative maintenance for the subject escalator.

On the day of the incident, Mainco Defendants' employees shut down the subject escalator in order to measure one of its handrails that had to be replaced

and left the subject escalator stationary (July 12, 2013 Decision, at 4-6). The following day, Mainco Defendants' employees replaced the handrail and re-started the subject escalator (*id.* at 6-7).

The Contract contains an indemnification clause (the Indemnification Clause), which, in relevant part, provides:

“In the event that installation or any other work in connection with the goods or services purchased hereunder is to be performed on Buyer’s premises, by Seller,<sup>1</sup> his employees or agent, the following terms and conditions shall apply:

A. Seller, his employees or agents shall take, use, provide and make all necessary and proper precaution against the occurrence of any accident or injury to any person or property during the progress of the installation or other work herein covered and shall be responsible for and shall indemnify and save harmless Buyer from the payment of all sums of money and costs and expenses incurred by reason of all, or any such accident or injury that may happen or occur upon or about such work, howsoever caused, and all fines, penalties and loss incurred for or by reason of the violation of any state, county, municipal or local ordinance or regulation or the law of any state or the United States while the said work is in progress”

(Contract § 19 [A]).

In the July 12, 2013 Decision, the court held that, pursuant to the

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<sup>1</sup> “Buyer” is Metro-North, and “Seller” is Mainco.

Indemnification Clause, Mainco Defendants were obligated to reimburse MTA defendants for legal fees incurred in defending this action (July 12, 2013 Decision at 17). Mainco Defendants now move for leave to renew and reargue this determination.

### **DISCUSSION**

#### **Renewal**

CPLR 2221 provides, in relevant part, that “[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” (CPLR 2221 [e] [2]).

Mainco Defendants have not offered any new facts, nor demonstrated that there has been a change in the law, that would change the July 12, 2013 Decision. Hence, leave for renewal is denied.

#### **Reargument**

A motion for 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” (CPLR 2221 [d] [2]; *Pryor v Commonwealth Land Tit. Ins. Co.*, 17 AD3d 434, 435-436 [2d Dept 2005]). “[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” (*Pro Brokerage v Home Ins. Co.*, 99 AD2d 971, 971 [1st Dept 1984] [internal quotation marks and citation omitted]). “Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided or to present arguments different from those originally asserted” (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992] [internal citations omitted]; *see also Pryor*, 17 AD3d at 436 [“[t]he motion does not offer an unsuccessful party . . . successive opportunities to present arguments not previously advanced”]).

Mainco Defendants argue that the language of the Indemnification Clause does not provide for reimbursement by Mainco Defendants for MTA’s Defendants’ legal fees incurred in defending this action. Mainco Defendants did not previously advance this argument. Mainco Defendants’ contention that the court sua sponte raised the issue of attorney’s fees (10/07/13 Weisburd reply affirmation, ¶ 15) is contradicted by the record before the court. In their original motion papers (10/10/12 Wu affirmation in support ¶ 39), MTA Defendants specifically argued that they are entitled to all costs and expenses, including attorneys’ fees, incurred in defending this action (09/18/13 Wu affirmation in

opposition, exhibit B).

Mainco Defendants also contend that the requirement of the Indemnification Clause, that “any such accident or injury that may happen or occur upon or about such work,” was not satisfied, because the incident did not happen “upon or about [Mainco’s] work.” In the July 12, 2013 Decision, the Court addressed this argument (*see* July 12, 2013 Decision at 15-16) and held that “the incident occurred ‘upon or about such work’ and ‘during the progress of the installation or other work herein covered’ as provided in the Indemnification Clause” (*id.* at 16).

Mainco Defendants further maintain that issues of fact exist as to whether the incident occurred “during the progress of the installation or other work herein covered,” as required by the Indemnification Clause. Mainco Defendants contend that the court: (1) relied on the testimony of MTA Defendants’ witnesses, Steven Stroh and Brian Connolly, who testified that the subject escalator was left stationary until the handrail was replaced; and (2) disregarded the testimony of Mainco Defendants’ witnesses, Andrew Geraci (Geraci) and Anthony Carpentiere (Carpentiere), who testified that their work on the day of the incident was limited to measuring the handrail.

Mainco Defendants made this argument previously and the court considered it. In the July 12, 2013 Decision, the court summarized the deposition testimony

of Geraci and Carpentiere: that, in relevant part, on the day of the incident, they “*measured one of the subject escalator’s handrails* so that it could be replaced;” “they shut down the subject escalator,” and after “they finished taking measurements, . . . left the subject escalator shut down” (July 12, 2013 Court, at 4-5 [emphasis added]). The court also stated “on the day of the incident, *after they finished taking measurement of the handrail* of the subject escalator, Mainco employees decided to leave the subject escalator stationary” (*id.* at 15 [emphasis added]). Accordingly, the court considered the testimony of Geraci and Carpentiere. The testimony and affidavit of MTA Defendants’ witnesses did not conflict with the testimony of Geraci and Carpentiere. No issue of material fact exists as to whether the incident occurred “during the progress of the installation or other work herein covered,” as required by the Indemnification Clause.

Accordingly, upon reargument, the court adheres to the prior determination.

### **CONCLUSION**

For the foregoing reasons, it is hereby

**ORDERED** that the motion of defendants/third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation, individually and as successor in interest to Mainco Elevator and Electrical Corp., for leave to renew is denied; and it is further

**ORDERED** that the motion of defendants/third-party defendants Mainco Elevator and Electrical Corp. and ThyssenKrupp Elevator Corporation, individually and as successor in interest to Mainco Elevator and Electrical Corp., for leave to reargue is granted; and it is further

**ORDERED** that, upon reargument, the Court adheres to its Decision and Order dated July 12, 2013.

Dated: January 10, 2014

ENTER:

  
\_\_\_\_\_  
J.S.C.

**FILED**  
JAN 15 2014  
NEW YORK  
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