

<b>Dejesus v 888 Seventh Ave., LLC</b>
2015 NY Slip Op 31747(U)
April 3, 2015
Supreme Court, New York County
Docket Number: 108417/07
Judge: Geoffrey D. Wright
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4/23/15  
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

JUDGE GEOFFREY D. WRIGHT

PRESENT: \_\_\_\_\_  
Justice

PART 17

Index Number : 108417/2007  
DEJESUS, ANTHONY  
vs  
888 SEVENTH AVENUE  
Sequence Number : 004  
RENEW

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_

The following papers, numbered 1 to 5, were read on this motion to/for Renew

Notice of Motion/Order to Show Cause — Affidavits — Exhibits \_\_\_\_\_ No(s) 1

Answering Affidavits — Exhibits \_\_\_\_\_ No(s) 2, 3

Replying Affidavits \_\_\_\_\_ No(s) 4

Memo  
Upon the foregoing papers, it is ordered that this motion is Decided in accordance  
with the annexed hereto decision.

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

## FILED

APR 23 2015

NEW YORK  
COUNTY CLERK'S OFFICE

RECEIVED  
APR 23 2015  
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NYS SUPREME COURT - CIVIL

GEOFFREY D. WRIGHT  
AJSC, J.S.C.

Dated: 4/3/15

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: ..... MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
- 3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

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FILED

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FEDERAL BUREAU OF INVESTIGATION  
U. S. DEPARTMENT OF JUSTICE

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

-----X  
ANTHONY DEJESUS AND JEANNETTE DEJESUS,

Plaintiff,

Index # 108417/07

-against-

DECISION/ORDER

888 SEVENTH AVENUE, LLC, R&R SCAFFOLDING  
LTD., and KBI, INC.,

Defendants.

Present:

Hon. Geoffrey D. Wright

-----X Acting Justice Supreme Court

888 SEVENTH AVENUE, LLC, R&R SCAFFOLDING  
LTD., and KBI, INC.,

Third-Party Plaintiffs,

Third-Party Index No590327/08

-against-

SMB WINDOWS, LLC,

**FILED**

APR 23 2015

Third-Party Defendant  
**NEW YORK COUNTY CLERK'S OFFICE**

-----X  
RECITATION , AS REQUIRED BY CPLR 2219(A), of the papers considered in the  
review of this Motion/Order for summary judgment.

PAPERS	NUMBERED
Notice of Motion and Affidavits Annexed.....	_____ 1, _____
Order to Show Cause and Affidavits Annexed	_____
Answering Affidavits.....	_____ 2, 3 _____
Replying Affidavits.....	_____ 4 _____
Exhibits.....	_____
Other.....Memoranda.....	_____ 5 _____

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Plaintiff, Anthony Dejesus ("Plaintiff") was injured when he fell off a scaffold while lowering an electrical cord from an upper level roof to a lower level roof at the premises at 888 Seventh Avenue, in New York County . Plaintiff , an employee of Building Maintenance

Services, LLC (“BMS”) was in the process of moving the window washing rig after it had been used by a third party contractor , KBI, who was caulking portions of the building. 888 Seventh Avenue, LLC (“888 Seventh”) owns the building and had a contract with SMB (“SMB”) for window washing services. KBI had an oral contract to do caulking on the roof but SMB was to provide workers to operate the washer rig so workers could get to the roof.

Plaintiff commenced this action against defendant 888 Seventh Avenue, LLC (888 Seventh). Thereafter, 888 Seventh commenced a third party action against SMB Windows, LLC (“SMB”). By Decision and Order, Justice Scarpulla, granted summary judgment to 888 Seventh and dismissed all direct, cross and counter claims against it; dismissed the third party complaint against SMB; dismissed as against R&R Scaffolding, LTD only, Plaintiff’s Labor Law 202, 240(1) and 241(6) claims leaving Plaintiff’s Labor law 200 and common law negligence claims against 888 Seventh. In addition, Justice Scarpulla denied the Plaintiff’s cross motion for summary judgment on Labor Law 240(1). In the decision, Justice Scarpulla made clear that 888 Seventh’s third-party complaint against SMB for contractual indemnification was administratively dismissed and was not dismissed on the merits. Thereafter, Plaintiff appealed and the First Department; (1) denied 888 Seventh’s motion as to Labor Law 240(1), 200 and common law negligence claims against it; (2) granted Plaintiff’s motion against 888 Seventh for summary judgment on Labor Law 240(1); (3) granted R&R’s motion as to Labor Law 200 claim; (4) denied R&R’s motion as to 888 Seventh’s cross claims against it; and (5) denied SMB’s motion. 888 Seventh seeks an Order pursuant to CPLR 2221 for renewal and, upon renewal, for summary judgment against Third-Party Defendant, SMB Windows, LLC on its claim for contractual indemnity.

CPLR 2221 (e) states, in pertinent part:

"(e) A motion for leave to renew:

2. 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; and

3. shall contain reasonable justification for the failure to present such facts on the prior motion."

“A motion to renew should not be granted based upon evidence known to the moving party at the time of the original motion unless the moving party offers a reasonable excuse for not having submitted such evidence in the original motion” (Leonard Fuchs, Inc. v Laser Processing Corporation, 222 AD2d 280, 280, 635 N.Y.S.2d 224 [ 1st Dept 1995]). “[R]enewal 'is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation” ( Atiencia v MBBCO II, LLC, 2009 N.Y. Misc. LEXIS 6596 (N.Y. Sup. Ct. Oct. 23, 2009 *citing* Rubinstein v. Goldman, 225 AD2d 328, 328-329, 638 N.Y.S.2d 469 [1st Dept 1996], quoting Matter of Bieny, 132 AD2d 190, 210, 522 N.Y.S.2d 511 [1st Dept 1987];

Chelsea Piers Management v Forest Electric Corporation, 281 AD2d 252, 252, 722 N.Y.S.2d 29 [1st Dept 2001]).

A motions for reargument is addressed to the sound discretion of the court which decided the prior motion and may be granted upon a showing that the court overlooked or misapprehended facts or law or mistakenly arrived at its earlier decision (Marini v Lombardo, 17 AD3d 545, 546, 793 N.Y.S.2d 460 [2d Dept 2005]; Carrillo v PM Realty Group, 16 AD3d 611, 611, 793 N.Y.S.2d 69 [2d Dept 2005]). A motion for leave to reargue is not designed to provide an unsuccessful party with successive opportunities to present arguments different from those originally presented (Pryor v Commonwealth Land Title Insurance Company, 17 AD3d 434, 436, 793 N.Y.S.2d 452 [2d Dept 2005]; Amato v Lord & Taylor, Inc., 10 AD3d 374, 375, 781 N.Y.S.2d 125 [2d Dept 2004]). New questions which were not previously advanced may not be raised on a motion to reargue (Levi v Utica First Insurance Company, 12 AD3d 256, 258, 786 N.Y.S.2d 3 [1st Dept 2004]).

888 Seventh argues the renewal is based on a material change in circumstances based on the reversal of a prior decision in the underlying action between plaintiff's and Defendant 888 Seventh. They argue that with the reinstatement of Plaintiff's claims against 888 Seventh, its third-party claims against SMB for indemnity are now ripe for adjudication given there is confirmed liability on their part. In particular, they reference a portion of the First Department's Decision where they specifically state 888 Seventh may be entitled to indemnification from SMB.

SMB initially argues that 888 Seventh Avenue's motion is procedurally flawed because the First Department's decision which reversed the grant of summary judgment dismissing plaintiff's case did not expressly authorize renewal of the indemnity motion.

This argument is without merit. I find nothing in the Appellate Division's decision which precluded or limited 888 Seventh from seeking renewal of their indemnity claims against SMB. On the contrary, that portion of the motion was not decided on the merits and was procedurally dismissed as summary judgment was originally granted to 888 Seventh Avenue dismissing all direct, cross and counter claims against them. Therefore 888 Seventh Avenue's case against SMB for contractual indemnity was also dismissed as academic.

To the extent SMB argues 888 Seventh should have brought a motion to reargue as opposed to a motion to renew, this argument also fails. A motion to renew is based on a change in circumstance or new facts, whereas a motion to reargue which seeks to convince the Court they were incorrect in their interpretation. As previously mentioned, the claims for indemnification were never decided and were procedurally dismissed.

In their opposition, SMB contends that Plaintiff was not injured while performing the window washing services contemplated in the contract, and Plaintiff was not an employee of SMB but was in fact an employee of BMS. In addition they allege Plaintiff was doing work at

the request of BMS or building management and the work was on behalf of KBI another contractor at the site. Moreover they argue Plaintiff's work for BMS cannot be used to trigger the contract provisions imposed on SMB which is the entity that contracted with 888 Seventh and not BMS. In addition SMB argues the Contract provides for window washing and related services and does not specifically encompass the operation of operating the window washing rig as part of the window washing services.

888 Seventh argues they are entitled to indemnity against SMB based on their contract. 888 Seventh Avenue and SMB entered into a contract for window washing and supervisory services at the building, the hiring supervision, direction and monitoring of all employees retained and the movement and operation of the window washing rig located on the roof level of the building. In addition, SMB was also responsible to provide all equipment necessary for the window washers. The contract provided that:

*SMB will perform window washing services and supervisory services and "select, hire, pay, supervise, monitor the performance of and direct all employees necessary for the performances of the Services ..."*

The Indemnification Clause states:

*(c) "SMB Windows shall indemnify and hold harmless Owner from and against all liabilities, claims, suits, damages, judgments, costs and expenses of whatever nature, including reasonable attorney's fees and disbursements, to which the Indemnitees may become subject by reason of or arising out of any injury or death to any person in connection with the performance of SMB Window's obligations under this Agreement."*

In addition they argue that in 2002, SMB filed a "Certificate of Assumed Name" with the New York State Department of State, in which SMB assumed the name "BMS Windows and that BMS is an assumed named for SMB rather than a separate entity and they are operating interchangeably.

I find SMB's argument regarding BMS as a separate entity unconvincing as the record shows BMS is an assumed name for SMB.

As to 888 Seventh's claims for indemnification against SMB, the in their Decision and Order the First Department stated:

*"The testimony of plaintiff's supervisor that 888 Seventh Avenue's property manager had the authority to direct plaintiff's work raises a triable issue of fact whether 888 Seventh Avenue supervised or controlled plaintiff's work for purposes of the Labor Law 200 and common-law negligence claims against it."*

In addition they stated:

*“In light of our disposition of the claims against it, 888 Seventh Avenue’s cross claims and third-party claims for contribution and common-law indemnification against R&R and SMB should not be dismissed, since there is evidence in the record that supports a finding of proportionate negligence among these parties.... Moreover, on this record, 888 Seventh Avenue may be entitled to contractual indemnification by SMB under their Windows Contract”.*

Contrary to SMB’s arguments in the instant case, this Court finds there is strong evidence in the record that 888 may be entitled to contractual indemnification by SMB however I find that issue premature based on the testimony of Plaintiff’s supervisor that 888 Seventh’s property manager had the authority to direct Plaintiffs work as discussed by the First Department in their Decision and Order.

Accordingly, 888 Seventh’s motion for renewal is granted. Upon renewal the motion is denied as premature, based on triable issues of fact as to whether 888 Seventh Avenue’s property manager had the authority to direct plaintiff’s work.

This constitutes the decision and order of the Court.

Dated: April 3, 2015

  
**GEOFFREY D. WRIGHT**  
**AJSC**

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JUDGE GEOFFREY D. WRIGHT  
Acting Justice of the Supreme Court

**FILED**  
APR 23 2015  
NEW YORK  
COUNTY CLERK'S OFFICE

FILED

CLERK OF DISTRICT COURT  
AT WASHINGTON, D.C.