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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

LUIS RAMIREZ
Plaintiffs,
-against-
A.W.&S. CONSTRUCTION CO., INC., EMPIRE STATE BUILDING COMPANY, L.L.C., EMPIRE STATE BUILDING ASSOCIATES L.L.C., and W5 GROUP, LLC, d/b/a WALDORF DEMOLITION,
Defendants.

INDEX NO. 154988/2013
MOTION DATE 06/29/2016
MOTION SEQ. NO. 005
MOTION CAL. NO.

A.W.&S. CONSTRUCTION CO., INC.,
Third-Party Plaintiff,
-against-
W5 GROUP, LLC d/b/a WALDORF DEMOLITION,
Third-Party Defendants.

The following papers, numbered 1 to 7 were read on this motion for leave to reargue.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 4
Answering Affidavits — Exhibits	5; 6
Replying Affidavits	7

Cross-Motion: ☐ Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that Defendants' Empire state Building Company, L.L.C., Empire State Building Associates, L.L.C., and A.W. & S. Construction Co., Inc.'s motion to reargue is granted.

Plaintiff commenced this action for personal injuries sustained while performing demolition work as part of a gut renovation on the 73rd floor of the Empire State Building, located at 350 Fifth Avenue, New York, New York. Plaintiff asserted causes of action for negligence, Labor Law §§200, 240(1), and 241(6) against Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. (herein collectively "Empire Defendants"), A.W.&S. Construction Co., Inc. (herein "A.W.&S."), and W5 Group, LLC, d/b/a Waldorf Demolition (herein "Waldorf").

The Empire Defendants and A.W.&S. commenced a third party action against Waldorf for contribution and indemnification. Waldorf cross-claimed and counter-claimed against the Empire Defendants and A.W.&S. for contribution and indemnification.

By motion dated June 4, 2015, the Empire Defendants and A.W. & S. sought (1) partial summary judgment dismissing Plaintiff's complaint as to the causes of action for negligence and labor Law §200; (2) summary judgment on the cross-claims and third-party complaint against Waldorf for contractual indemnification; and (3) dismissal of all cross-claims and counterclaims asserted by Waldorf.

By Order dated February 18, 2016, this Court granted the summary judgment motion to the extent of dismissing Plaintiff's claims for violation of Labor Law §200 asserted in the first and second causes of action. The remainder of the relief sought was denied.

A.W. & S. and the Empire Defendants (herein "movants") now move for leave to clarify and re-argue this Court's February 18, 2016 Decision, and upon re-argument, amending the prior Order to clarify that all claims for negligence against A.W. & S. and the Empire Defendants are dismissed, and granting summary judgment for contractual indemnification against Waldorf. Plaintiff takes no position on the motion to reargue, and does not oppose that portion of the motion to clarify dismissing his negligence causes of action solely as to A.W.& S. and the Empire Defendants.

Movants contend that summary judgment dismissing Plaintiff's Labor Law §200 cause of action was properly granted in the prior Order. However, the Court did not rule on dismissing Plaintiff's cause of action for negligence and any cross-claims or counterclaims raised by Waldorf based in negligence such as apportionment or common law indemnity, even though such relief was sought.

Movants also argue that this Court misapplied the law of contractual indemnity when it denied their application for summary judgment against Waldorf on the cross-claims and third party complaint for contractual indemnification. Movants claim it was error to hold that the movants had to prove that they were not only free from negligence, but that the indemnitor was also guilty of some negligence. There is no requirement that an indemnitee prove negligence of the indemnitor prior to granting contractual indemnification, unless the language of the indemnification provision requires it. The subcontractor agreement, nor the purchase order agreement, contained language requiring a finding of indemnitor negligence. Both clauses contained in those agreements were purely "arising out of" clauses. This Court misconstrued the law by applying cases holding that indemnity is not triggered without a finding of indemnitor negligence, or denial of an application for indemnity because issues of fact remain regarding the indemnitee's negligence. Movants

contend that regardless of whether there remain issues of fact concerning Waldorf's liability, that has nothing to do with determining movants' entitlement to contractual indemnification.

Movants also contend that this Court erred in finding it premature to grant summary judgment for indemnification on either contractual agreement. The Order stated that there remained issues of fact as to the parties intent and the relationship between A.W. & S and "Alexander Wolf & Son", as indicated on the subcontractor and purchase order agreements. Movants argue the evidence submitted clearly established that Alexander Wolf & Son is not a legal entity, therefore any activity undertaken by this division of A.W. & S. is in fact an activity performed and undertaken by A.W. & S. As a last contention, movants argue that this Court did not rule on the Empire Defendants entitlement to summary judgment on contractual indemnity, nor give an explanation as to why it was not entitled to such relief, although such an application was made.

Waldorf opposes the motion in its entirety arguing that the movants have not established a basis entitling them to re-argument because the movants do not cite where the Court overlooked or misapprehended any matters of fact or law. Waldorf also argues that the movants did not seek dismissal of the cross-claims and counter-claims for contribution and indemnification in the earlier motion, therefore they are not entitled to reargument on that issue. Waldorf states that the Court dismissed the Labor Law §200 claim but failed to dismiss Plaintiff's common law negligence claim. In the event reargument is granted, Waldorf contends that the court should not only deny all of the relief sought in the original summary judgment motion, but should reinstate the claim for Labor Law §200 because there remain issues of fact as to whether the movants were negligent and violated Labor Law §200.

CPLR § 2221(d) states that a motion for leave to Reargue (1) shall be identified specifically as such, (2) shall 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, and (3) shall be made within 30 days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law "(Kent v. 534 East 11th Street, 80 A.D. 3d 106, 912 N.Y.S. 2d 2 [1st Dept., 2010] citing to Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [N.Y.A.D. 1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. The movant cannot merely restate previous arguments (Kent v. 534 East 11th Street, 80 A.D. 3d 106, supra and Ul Haque v. Daddazio, 84 A.D. 3d 940, 922 N.Y.S. 2d 548 [N.Y.A.D. 2nd Dept., 2011]).

Upon review of the movants' prior summary judgment motion, and the subsequent Decision and Order dated February 18, 2016, reargument is granted to the extent of that part of movants' motion requesting (1) summary judgment dismissing Plaintiff's common law negligence cause of action as against movants, (2) contractual indemnification between A.W. & S. and Waldorf, and (3) summary judgment dismissing Waldorf's cross-claims and counter-claims for indemnification/contribution as against A.W. & S. Reargument is denied as to contractual indemnification, and dismissal of the cross-claims and counter-claims for indemnification/contribution for Waldorf against the Empire Defendants.

The movants are correct in stating that this Court overlooked dismissing Plaintiff's cause of action for negligence. The summary judgment motion requested such relief, and did set forth arguments establishing that they were entitled to dismissal of not only the cause of action under Labor Law §200, but also dismissal of Plaintiff's first cause of action for common law negligence. Therefore, upon reargument, the relief sought in the summary judgment motion dismissing Plaintiff's first cause of action for negligence as against the movants, is granted.

Upon reargument of that portion of the summary judgment motion seeking contractual indemnification in favor of A.W. & S. against Waldorf, this is granted to the extent of conditional contractual indemnification. Movants moved for contractual indemnification in their favor against Waldorf, pursuant to either the subcontractor agreement and/or the purchase order agreement, or both.

The subcontractor agreement was entered into between Waldorf, as subcontractor, and A.W. & S. by its Alexander Wolf & Son Division, as contractor. (Mot. Exh. 31). The subcontractor agreement's indemnification provision provides:

> "To the fullest extent permitted by applicable law, Subcontractor agrees to indemnify, defend and hold harmless Contractor, Owner, the fee owner of the property and/or building where the project is located, leaseholder, and any other person or entity whom Contractor is required to defend, indemnify and hold harmless and/or for whom Contractor is performing Work...(hereinafter "Indemnitees"), from any and all claims, suits, damages, liabilities, professional fees (including attorneys fees), costs, disbursements, expenses and losses of every kind (hereinafter "Claims"), including those brought by any employee of Contractor, subcontractor, their subcontractors, suppliers and/or lower tier contractors and/or suppliers, arising from or related to...bodily and personal injuries...brought against any of the Indemnitees, arising from, in connection with, incidental to, or as a consequence of performance of Subcontractor's Work hereunder (including any additional, extra, change order, and/or add-on work)...whether or not caused in whole or in part by Subcontractor or its subcontractors, suppliers or lower tier contractors and/or suppliers. This indemnification provides for (1) full indemnity as to any Indemnitee upon whom liability is imposed without negligence; and (2) partial indemnity as to any

> Indemnitee in the event of any actual negligence on the part of such Indemnitee causing or contributing to the Claim or occurrence, in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault of Indemnitee, whether imposed by statute, operation of law or otherwise. Nothing contained herein shall be construed as requiring or providing for indemnification of an Indemnitee where a Claim or occurrence arises solely out of the negligence of such Indemnitee."

(Emphasis added)

The purchase order agreement, written on the letterhead of Alexander Wolf & Son, a division of A.W. & S, clearly identifies Waldorf as the "Vendor" but does not clearly identify A.W. & S. as the purchaser. (Mot. Exh. 32). In this Court's prior Order, it was held that summary judgment on this purchase agreement at that time would be premature because there remained issues of fact as to the parties intent and the relationship between A.W. & S. and "Alexander Wolf & Son." The indemnification provision of this agreement states:

> "To the fullest extent permitted by applicable law, Vendor/Contractor agrees to indemnify, defend and hold harmless Purchaser, Owner, and any other person or entity whom Purchaser is required to defend, indemnify and hold harmless, and/or for whom Purchaser is performing work, their tenants, mortgagees, officers, directors, agents, employees and partners and each of them (hereinafter "Indemnitees"), from any and all claims, suits damages, liabilities, professional fees (including attorneys fees), costs, disbursements, expenses and losses of every kind (herein after "Claims"), including those brought by any employee of Vendor/Contractor, its subcontractors, suppliers and/or lower tier contractors or suppliers, arising from or related to...bodily and personal injuries...brought against any of the Indemnitees, arising from, in connection with or as a result of performance of Vendor/Contractors Work hereunder...whether or not caused in whole or in part by Vendor/Contractor or its subcontractors, suppliers or lower tier contractors and/or suppliers. This indemnification provides for (1) full indemnity as to any Indemnitee upon whom liability is imposed without negligence; and (2) partial indemnity as to any Indemnitee in the event of any actual negligence on the part of such Indemnitee causing or contributi9ng to the Claim, in which case, indemnification will be limited to any liability imposed over and above that percentage attributable to actual fault of Indemnitee, whether imposed by statute, operation of law or otherwise. Nothing contained herein shall be construed as requiring or providing for indemnification of an Indemnitee where a Claim arises solely out of the negligence of such Indemnitee..."

(Emphasis added)

An indemnification provision establishing liability must be strictly construed, it requires clear and unambiguous language to avoid the inference of a duty that was not intended by the parties. (Cordeiro v. Ts Midtown Holdings, LLC, 87 A.D.3d 904, 931

N.Y.S.2d 41 [1st Dept. 2011] and Martinez v. Benau, 103 A.D.3d 545, 962 N.S.2d 57 [1st Dept. 2013]). However, summary judgment on contractual indemnification is proper when the indemnitee is held not to be liable under Labor Law §200 or the common law...the indemnification clause is not invoked to indemnify the indemnitee for their own negligence..and the indemnification clause is invoked upon a loss arising out of the indemnitor's work. (Reilly v. Newireen Associates, 303 A.D.2d 214, 756 N.Y.S.2d 192 [1st Dept. 2003]). Broad language in an indemnification provision evidences a clear intent by the parties for the indemnitor to assume all liability arising out of their work. (Vey v. Port Authority of New York and New Jersey, 54 N.Y.2d 221, 429 N.E.2d 762, 445 N.Y.S.2d 84 [1981]), citing Margolin v. New York Life Ins. Co., 32 N.Y.2d 149, 297 N.E.2d 80, 344 N.Y.S.2d 336 [1973]).

Upon dismissal of common-law negligence and Labor Law §200 causes of action, any liability that may be imposed on the defendants will be vicarious pursuant to Labor Law 241(6), and there will be no bar to their recovery of complete indemnification pursuant to [the] contract. (Best v. Tishman Construction Corp. Of New York, 120 A.D.3d 1081, 993 N.Y.S.2d 16 [1st Dept. 2014]).

As was held in this Court's prior Decision and Order on the summary judgment motion, A.W. & S. stated a prima facie case establishing lack of liability pursuant to Labor Law §200. (See prior Decision and Order, Mot. Exh. H). Further it was established, in the instant motion upon reargument, that A.W. & S. should have also been granted summary judgment on the issue of common law negligence, and is in fact granted such relief now. That, together with the language identified in the subcontractor agreement by itself, entitles A.W. & S. to contractual indemnification. The only remaining causes of action are under Labor Law 240(1)- which is a strict liability claim, and Labor Law 241(6)- which any liability found against A.W. & S., if any, would be vicarious. To the extent there is some question of fact as to A.W. & S. being specifically identified as the purchaser on the purchase order agreement, the subcontractor agreement alone suffices for summary judgment on the contractual indemnification claim.

In light of the above findings, it is likewise held that upon reargument, A.W. & S., is also entitled to dismissal of the cross-claims and counter-claims for indemnification and/or contribution asserted against it by Waldorf.

Movants have also stated a basis for reargument on this Court's decision to deny summary judgment on the contractual indemnification claims, and dismissal of the cross-claims and counter-claims, in favor of the Empire Defendants against Waldorf. It was held in the previous Order that the Empire Defendants stated a prima facie case establishing lack of liability pursuant to Labor Law §200 (Mot. Exh. H), and upon reargument in the instant motion, the Empire Defendants have now been granted summary judgment dismissing the common-law negligence claims. As it was determined that the Empire Defendants were the owner/leaseholder of the premises where the accident occurred, and such parties are clearly within the contemplation of

the indemnification provisions, there is a basis to also grant the Empire Defendants contractual indemnification as third party beneficiaries. Likewise, dismissal of the cross-claims and/or counterclaims against the Empire Defendants for contractual indemnification by Waldorf is also granted.

Accordingly, it is ORDERED that Defendants' Empire State Building Company, L.L.C. and Empire State Building Associates, L.L.C. (herein the "Empire Defendants"), and defendant/third-party plaintiff, A.W. & S. Construction Co., Inc.'s (herein "A.W. & S.") motion for reargument is granted for reargument on (1) summary judgment dismissing Plaintiff's common law negligence cause of action as against movants, (2) contractual indemnification of A.W. & S. and the Empire Defendants, and (3) summary judgment dismissing defendant/third-party defendant W5 Group L.L.C. d/b/a Waldorf Demolition's (herein "Waldorf") cross-claims and counter-claims for indemnification/contribution as against A.W. & S. And the Empire Defendants, and it is further,

ORDERED, that upon reargument Plaintiff's common-law negligence claims asserted in the first cause of action in the amended complaint against the Empire Defendants and A.W. & S., are hereby severed and dismissed, and it is further,

ORDERED, that upon reargument Waldorf's cross-claims and counterclaims for indemnification and/or contribution asserted against A.W. & S. and the Empire Defendants, are hereby severed and dismissed, and it is further,

ORDERED, that upon reargument, contractual indemnification from Waldorf in favor of A.W. & S. and the Empire Defendants, is granted, and it is further,

ORDERED, that the Clerk of the Court shall enter judgment accordingly.

ENTER: MANUEL J. MENDEZ
J.S.C.

Dated: August 26, 2016

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE