

Pena v New York Univ.
2017 NY Slip Op 32193(U)
September 12, 2017
Supreme Court, Bronx County
Docket Number: 305345-12
Judge: Fernando Tapia
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SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

ADALBERTO PEÑA

Plaintiff,

v.

Index No. 305345-12

NEW YORK UNIVERSITY AND PRIORITY N.Y., INC.

Defendants.

DECISION

New York University [NYU] moves for leave to reargue and renew under CPLR 2221(e) the portion of this Court's 2 August 2016 decision regarding NYU's cross-claim against Priority N.Y., Inc. [Priority] for contractual indemnification.

After careful review of the motion papers, this Court **DENIES** NYU's motion for leave to reargue and renew under CPLR 2221(e), as there are no new facts and as there was no misapprehension of the law or overlooking of any relevant facts.

A CPLR 2221 motion for leave to reargue and renew is in the sound discretion of the court and may be granted only upon a showing "that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision." *William P. Pahl Equipment Corp. v. Kassis*, 182 AD2d 22, 27 (App Div, 1st Dept 1992). A motion to renew is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and therefore not brought to the court's attention. *Id.*; *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 (App Div, 1st Dept 2005).

Which party is responsible for the clean-up of paint supplies from the subject premises?

This is the main issue which determines whether or not ¶ 8 [the indemnification clause of the NYU-Priority Purchase Order] is triggered, or if ¶ 8 is deemed void and unenforceable under GOL § 5-322.1.¹ This is also the main issue that determines whether NYU is entitled to summary judgment based on liability.

Although the 2 August 2016 Decision erroneously dubbed Mr. Burke's attestations as an affidavit instead of an EBT,² this Court still stands by its conclusion that because of the conflicting EBTS between Ms. Husovic [the NYU Facilities Manager] and Mr. Burke [the owner of Priority] as to which party has the responsibility for clean-up efforts, NYU's summary judgment motion must be denied because material issues of fact exist.

NYU asserts that it is not liable for Mr. Peña's injuries from his trip and fall, based on the plain, express language in the NYU-Priority contract which states that NYU has contractual indemnification from Priority and that Priority must therefore defend and indemnify NYU, even if NYU is partially at fault. See ¶ 8 of Purchase Order.³ In support of its motion to renew/reargue, NYU relies on *Balzano v. BTM Dev. Partners LLC, et al.*, 137 AD3d 691, 693

¹ Under GOL § 5-322.1, an agreement in connection with a contract relative to the repair or maintenance of a building purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injuries caused by the negligence of the promisee whether in whole or in part, is against public policy and is void and unenforceable. Here, "promisee" is NYU.

² See Donnelly Aff. at ¶ 21. While NYU's attorney contends that this Court failed to review and take into account its 19 January 2016 Reply, this Court stresses that it actually read the Reply, as seen by the highlights and "circles" marked on ¶¶ 4-8.

³ Under ¶ 8, "[I]f any person shall make a claim for any loss, damage, or injury . . . whether such claim is based upon Seller's alleged sole active or passive negligence or willful misconduct, **or upon a wrong in which Buyer is alleged to have participated** . . . Seller agrees to indemnify Buyer and hold it safe and harmless from and against any and all . . . liability . . . that Buyer may incur or sustain as the result of any such claim." Here, "Seller" is Priority and "Buyer" is NYU.

(App Div, 1st Dept 2016)⁴ in which the *Balzano* court simply stated that the contractual indemnification claims of the Target-Getronics contract do not run afoul with GOL § 5-322.1.

Although *Balzano* did not provide any analysis as to how the subject contract did not run afoul with GOL §5-322.1, NYU cited *Ezzard v. One E. Riv. Place Realty Co., LLC*, 137 AD3d 648, 649 (App Div, 1st Dept 2016), in which the *Ezzard* court explained that the contract between the building owners and the elevator company had an indemnification clause that does not run afoul of GOL §5-322.1 because the indemnification clause did not purport to indemnify the building owners for their own negligence. The *Ezzard* court also explained that since the building owners established that the injured plaintiff's claim arose out of the elevator company's work, the indemnification clause was triggered. *Id.*

Here, unlike in *Ezzard*, there is a material issue as to whether Mr. Peña's claim arose out of NYU's actions or Priority's actions. As such, ¶ 8 of the indemnification clause is void and unenforceable under GOL § 5-322.1 because ¶ 8 expressly states that Priority is to defend and hold harmless NYU for NYU's alleged wrongs. An indemnification clause clashes with GOL §5-322.1 when that clause indemnifies the owner for its own negligence. *Cavanaugh v. 4518 Associates*, 9 AD3d 14, 18 (App Div, 1st Dept 2004). That is, GOL §5-322.1 prohibits enforcement of a contract indemnifying an owner/promisee for its own negligence. *Id.* Here, because a material issue of fact exists regarding the degree of fault by the co-defendants, ¶ 8 cannot be triggered because it expressly allows Priority to defend and hold harmless NYU's alleged wrongs, which is unenforceable, based on GOL §5-322.1.

Here, as NYU's Facilities Manager for the subject building, Ms. Husovic had supervisory responsibility over Priority and Collins Building Services because she oversaw Priority's

⁴ *Id.* at ¶ 28.

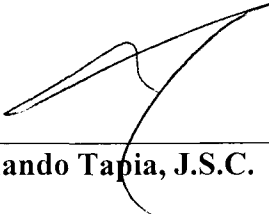
painting job; at the same time, however, Mr. Burke also supervised the painting job, as owner and supervisor of Priority. As such, it appears that Co-Defendants had some degree of supervisory responsibility.⁵ Whether a dangerous or defective condition exists on property so as to create liability depends on the peculiar facts and circumstances of each case. *Coakley v. City of NY*, 286 AD2d 576, 577 (App Div, 1st Dept 2001).

In sum, NYU's CPLR 2221(e) motion for leave to renew and reargue is **DENIED**, as there are no new facts to sway this Court otherwise. More importantly, ¶ 8 is unenforceable because under GOL §5-322.1, an indemnification provision is void when such provision indemnifies a party for its own negligence in whole or in part. Furthermore, this Court did not misapprehend or overlook facts, especially since this Court took into careful consideration all of the motion papers. Simply because this Court did not cite the Reply does not mean that it did not review it.

The parties are **ORDERED** to appear in Bronx Supreme Court before J.H.O. Paul Victor on **Thursday, 9 November 2017, Room 705, at 9:30 a.m.**

This constitutes the Decision and Order of this Court.

Dated: September 12, 2017
Bronx, NY



Hon. Fernando Tapia, J.S.C.

⁵ Because NYU is the landowner of the Barney Building, it has the duty to maintain the property in a reasonably safe condition, a standard which is not unreasonable. *Peralta v. Henriquez*, 100 NY2d 139, 143 (App Ct 2003); *Westbrook v. WR Activities-Cabrera Mkts.*, 5 AD3d 69, 71-72 (App Div, 1st Dept 2004); *Bolte v. City of New York*, 48 Misc3d 1208(A) at *4 (Sup Ct, Bronx Cty 2015).