

MTA Capital Constr. Co. v MTA Capital Constr. Co.

2019 NY Slip Op 31752(U)

June 17, 2019

Supreme Court, New York County

Docket Number: 159912/2014

Judge: Kelly A. O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19**

-----X
CARL LANGER and TARA LANGER,

Index No.: 159912/2014

Plaintiffs,

DECISION/ORDER

-against-

MOT. SEQ. 007 and 008

MTA CAPITAL CONSTRUCTION COMPANY, PLAZA
CONSTRUCTION CORP., PLAZA CONSTRUCTION LLC
and SCHIAVONE CONSTRUCTION CO. LLC.,

Defendants.

-----X
MTA CAPITAL CONSTRUCTION COMPANY, PLAZA
CONSTRUCTION CORP., PLAZA CONSTRUCTION LLC
and SCHIAVONE CONSTRUCTION CO. LLC.,

Third-Party Index No.:
595131/2015

Third-Party Plaintiffs,

-against-

E-J ELECTRIC INSTALLATION COMPANY and HATZEL
and BUEHLER, INC.,

Third-Party Defendants.

-----X
HON. KELLY O'NEILL LEVY :

Motion sequence numbers 007 and 008 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries allegedly sustained by an electrician on April 8, 2013, when, while working at the Fulton Street Transit Center, which is located at the corner of Fulton Street and Broadway in Manhattan, New York (the Center), water spewed out of a ceiling hole that he was drilling, causing him to lose his balance and strike the side of the lift he was working on.

In motion sequence number 007, third-party defendant E-J Electric Installation Company

(E-J Electric) moves (1) pursuant to CPLR 2221 (d), for leave to reargue its motion for summary judgment (motion sequence number 005) and the motion of defendants/third-party plaintiffs Plaza Construction Corp., Plaza Construction LLC and Schiavone Construction Co. LLC. (collectively, the Plaza defendants) and MTA Capital Construction Company (MTA) (the Plaza defendants and MTA together, defendants) (motion sequence number 006), with respect to that part of the court's January 31, 2019 decision and order (the Order) that denied E-J Electric's motion for an order dismissing the third-party claim for breach of contract for failure to procure insurance against it and granted defendants' motion for summary judgment in their favor on said third-party claim; and (2) pursuant to CPLR 3212, for an order granting E-J Electric's motion (motion sequence number 005) for summary judgment dismissing the third-party claim for breach of contract for failure to procure insurance against it and denying defendants' motion (motion sequence number 006) for summary judgment in their favor on said third-party claim.

In motion sequence number 008, the Plaza defendants¹ move (1) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order which granted the cross motion of plaintiffs Carl Langer (plaintiff) and Tara Langer for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims as against them, and upon reargument, for an order denying that branch of plaintiffs' cross motion; and (2) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order denying the Plaza defendants' motion (motion sequence number 006) seeking dismissal of those parts of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.8 (a) and (c) (3) of the Industrial Code as against them; and, upon reargument, (2) pursuant to CPLR 3212, for an order granting that branch of the Plaza

¹It should be noted that MTA was dismissed from this action pursuant to the Order.

defendants' motion seeking dismissal of the Labor Law § 241 (6) claim against them; (3) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order denying the Plaza defendants' motion (motion sequence number 006) for summary judgment in their favor on the third-party claims for contractual indemnification as against third-party defendants Hatzel & Buehler, Inc. (Hatzel) and E-J Electric, and upon reargument, for an order granting that branch of the Plaza defendants' motion; and (4) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order denying the Plaza defendants' motion (motion sequence number 006) for summary judgment in their favor for breach of contract for failure to procure insurance as against Hatzel, and upon reargument, for an order granting that branch of the Plaza defendants' motion.

BACKGROUND

On the day of the accident, MTA was the owner of a project underway at the Center (the Project). Pursuant to a joint venture agreement, the Plaza defendants served as the general contractor on the Project. The Plaza defendants retained E-J Electric to serve as the prime electrical contractor on the Project. E-J hired Hatzel to perform the communications and fiber optic work, which included the installation of a fire alarm system and the low-voltage portions of the electrical work. Plaintiff, a journeyman electrician, was an employee of Hatzel.

DISCUSSION

CPLR 2221 (d) states, in pertinent part:

“(d) A motion for leave to reargue:

* * *

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.”

“[M]otions for reargument are addressed to the sound discretion of the court which decided the prior motion and may be granted upon showing that the court overlooked or misapprehended the facts or law or mistakenly arrived at its earlier decision” (*Marini v Lombardo*, 17 AD3d 545, 546 [2d Dept 2005] [citation omitted]; *Carrillo v PM Realty Group*, 16 AD3d 611, 611 [2d Dept 2005]).

The Plaza Defendants' Motion to Reargue the Common-Law Negligence and Labor Law §§ 200 and 241 (6) Claims Against Them (motion sequence number 008)

Initially, the Plaza defendants argue that they are entitled to reargument of the common-law negligence and Labor Law § 200 claims against them because the only relevant analysis in a means and methods case is whether they had control over the manner in which *plaintiff* performed his work. However, as noted in the Order, the appropriate standard to be applied is whether the Plaza defendants had supervisory control over the work that caused the injury, i.e., the removal of any and all accumulated water at the site (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). That said, the evidence in the record clearly demonstrated that the Plaza defendants supervised and controlled the performance of said work.

In addition, the Plaza defendants have failed to show how the court misapprehended or overlooked a matter of fact or law when, in the Order, it denied the Plaza defendants' motion to dismiss that part of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.8 (a), which requires that workers engaged in operations that may endanger the eyes be supplied with suitable eye protection, and 23-1.8 (c) (3), which requires that workers exposed to wet conditions be provided waterproof apparel.

As it is unclear from the record as to whether the safety goggles and clothing that plaintiff

was wearing at the time of the accident were sufficiently watertight, so as to offer proper protection under the circumstances, the court properly determined that a question of fact exists as to whether sections 23-1.8 (a) and (c) (3) apply to the facts of this case. Moreover, as noted in the Order, questions of fact exist as to whether the activity that plaintiff was performing at the time of the accident created a foreseeable need for such protection in the first place.

Thus, as to the common-law negligence and Labor Law § 200 claim, as well as those parts of the Labor Law § 241 (6) claim predicated on alleged violations of Industrial Code sections 23-1.8 (a) and (c) (3), defendants' motion for reargument is denied.

The court has considered the Plaza defendants' remaining arguments on these issues and finds them to be unavailing.

The Plaza Defendants' Motion to Reargue That Part of the Order Denying their Motion for Summary Judgment In Their Favor on the Third-Party Claims for Contractual Indemnification Against E-J Electric and Hatzel (motion sequence number 008)

The Plaza defendants request that in the event that, upon reargument, the court finds that the accident occurred as a result of plaintiff improperly drilling into the thinner portion of the concrete slab, rather than any negligence on their part, they be granted leave to reargue that part of the Order that denied them summary judgment in their favor on the third-party claims for contractual indemnification as against E-J Electric and Hatzel.

A review of the record reveals that the court did not overlook any testimony or misapprehend any law when it determined that the accident was caused, not by any negligence on the part of plaintiff, but, rather, the Plaza defendants' negligence in failing to properly carry out their duty to clean up accumulated water in the recessed area on the third floor.

Thus, the Plaza defendants' motion to reargue the third-party claims for contractual

indemnification against E-J Electric and Hatzel is denied.

The Plaza Defendants' Motion to Reargue That Part of the Order Denying Their Motion for Summary Judgment In Their Favor on the Third-Party Claim for Breach of Contract for Failure to Procure Insurance Against Hatzel (motion sequence number 008)

The Plaza Defendants move for leave to reargue that part of the Order that denied them summary judgment in their favor on the third-party claim for breach of contract for failure to procure insurance against Hatzel.

The court properly denied the Plaza defendants' request for summary judgment in their favor on said third-party claim against Hatzel because, contrary to the Plaza defendants' assertions in their motion to reargue, Hatzel did, in fact, produce sufficient evidence that it procured appropriate additional insured coverage on behalf of the Plaza defendants through its insurance company, Zurich-American Insurance Group (Zurich) (the Policy). Moreover, that Hatzel procured proper insurance was also evidenced in a letter from Zurich, dated November 18, 2015 (the Letter), wherein Zurich agreed to provide the Plaza defendants with a defense in this matter, pursuant to the Policy's additional insured endorsement's language. Notably, the Letter was attached as an exhibit to the Plaza defendants' own reply papers.

Thus, the Plaza defendants' motion to reargue this issue is denied.

E-J Electric's Motion to Reargue That Part of the Order Granting Defendants' Third-Party Claim for Breach of Contract for Failure to Procure Insurance Against It (motion sequence number 007)

E-J Electric moves for leave to reargue that part of the Order which denied its motion (motion sequence number 005) for an order dismissing defendants' third-party claim for breach of contract for failure to procure insurance against it, granting said third-party claim in defendants' favor (motion sequence number 006).

In its motion to reargue papers, as well as during oral argument held before this court on April 24, 2019, E-J Electric argues for the first time that the court should not have granted summary judgment to MTA on its breach of contract for failure to procure insurance claim because, as MTA was dismissed from the action, it has not and cannot show that it sustained any damages. As such, it argues that MTA has no valid claim for breach of contract for failure to procure insurance against it.

However, 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 Tit. Ins. Co.*, 17 AD3d 434, 436 [2d Dept 2005]; *Amato v Lord & Taylor, Inc.*, 10 AD3d 374, 375 [2d Dept 2004]).

As E-J Electric has failed to otherwise show how the court misapprehended or overlooked a matter of fact or law when, in the Order, it denied its motion to dismiss this third-party claim for breach of contract for failure to procure insurance against it, E-J Electric's motion to reargue this issue is denied.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby


ORDERED that third-party defendant E-J Electric Installation Company's (E-J Electric) motion, (1) pursuant to CPLR 2221 (d), for leave to reargue its motion for summary judgment (motion sequence number 005) and the motion of defendants/third-party plaintiffs Plaza Construction Corp, Plaza Construction LLC and Schiavone Construction Co. LLC. (collectively, the Plaza defendants) and MTA Capital Construction Company (MTA) (the Plaza defendants and MTA together, defendants) (motion sequence number 006), with respect to that part of the

court's January 31, 2019 decision and order (the Order) that denied E-J Electric's motion for an order dismissing the third-party claim for breach of contract for failure to procure insurance against it and granted defendants' motion for summary judgment in their favor on said third-party claim; and (2) pursuant to CPLR 3212, for an order granting E-J Electric's motion (motion sequence number 005) for summary judgment dismissing the third-party claim for breach of contract for failure to procure insurance against it and denying defendants' motion (motion sequence number 006) for summary judgment in their favor on said third-party claim, is denied; and it is further

ORDERED that the Plaza defendants' motion (1) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order which granted the cross motion of plaintiffs Carl Langer and Tara Langer for summary judgment in their favor on the common-law negligence and Labor Law § 200 claims as against them, and upon reargument, for an order denying that branch of plaintiffs' motion; and (2) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order denying the Plaza defendants' motion (motion sequence number 006) for dismissal of those parts of the Labor Law § 241 (6) claim predicated on alleged violations of sections 23-1.8 (a) and (c) (3) of the Industrial Code against them; and, upon reargument, (2) pursuant to CPLR 3212, for an order granting that branch of the Plaza defendants' motion seeking dismissal of the Labor Law § 241 (6) claim; (3) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order denying the Plaza defendants' motion (motion sequence number 006) for summary judgment in their favor on the third-party claims for contractual indemnification as against third-party defendants Hatzel & Buehler, Inc. (Hatzel) and E-J Electric, and upon reargument, for an order granting that branch of the Plaza defendants' motion; and (4) pursuant to CPLR 2221 (d), for leave to reargue that part of the Order denying the Plaza defendants' motion (motion sequence number 006) for summary judgment in their favor for breach of contract for failure to procure insurance against Hatzel, and upon reargument, for an order granting that branch of defendants' motion, is denied.

Dated: June 17, 2019

ENTER:


HON. KELLY O'NEILL LEVY, J.S.C.

KELLY O'NEILL LEVY
JSC