

Live Nation Mktg., Inc. v Greenwich Ins. Co.
2019 NY Slip Op 31776(U)
June 12, 2019
Supreme Court, New York County
Docket Number: 655784/2016
Judge: Arthur F. Engoron
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARTHUR F. ENGORON PART IAS MOTION 37EFM

Justice

-----X

LIVE NATION MARKETING, INC., LIVE NATION WORLDWIDE,
INC., AND WESTCHESTER FIRE INSURANCE COMPANY,

Plaintiffs,

- v -

GREENWICH INSURANCE COMPANY, XL SPECIALTY
INSURANCE COMPANY, XL CATLIN,

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 106, 107

were read on these motions to

RENEW / REARGUE

Upon the foregoing papers, defendants' motion for renewal is granted, and upon renewal, the Court grants summary judgment for defendants. The cross-motion by plaintiffs to reargue is granted, and upon re-argument, the Court denies plaintiffs' motion as moot, as the Court is granting defendants summary judgment for the reasons set forth herein.

Background

The instant insurance declaratory judgment action arises out of an underlying personal injury action, *Perez v. Beach Concerts, Inc.*, Index No. 158373/2013 (the "Underlying Action"), wherein the plaintiff, Mark Perez ("Perez"), alleges he was injured on June 26, 2013 while assembling, "on behalf of [non-party] Best Buy," an advertising structure for Best Buy, at the Jones Beach Theatre ("the venue"). Perez claims that Michael Brogden ("Brogden"), an employee of one of the instant "Live Nation" plaintiffs ("Live Nation"), negligently drove a fork-lift into the metal trussing on which Perez was standing, causing Perez to fall and sustain serious injuries.

In the instant action Live Nation asks this Court to declare that defendants Greenwich Insurance Company ("Greenwich") and XL Specialty Insurance Company ("XL Specialty") (collectively "defendants") are obligated to defend and indemnify Live Nation in the Underlying Action. Live Nation is named as an Additional Insured under a policy ("the Subject Policy") procured by Best Buy, with whom Live Nation has a Sponsorship Agreement. The Sponsorship Agreement required Best Buy to have liability insurance naming Live Nation as an additional insured.

By Decision and Order dated June 30, 2016 in the Underlying Action, Judge Gerald Lebovits

granted Perez summary judgment solely on the limited issue of Live Nation's liability under New York Labor Law § 240(1). In so doing, Judge Lebovits held that the "[l]ack of a safety device... was the proximate cause of plaintiff's injury," and that Live Nation, as a licensee of the venue, was thus strictly liable under Labor Law § 240(1). However, Judge Lebovits specifically found that "[a] jury will decide whether [Perez's] negligence may have contributed to [his] fall and subsequent injuries." By Decision and Order dated October 26, 2017, the Appellate Division, 1st Department, affirmed the trial court's decision.

The Subject Policy

The Subject Policy contains the following Additional Insured endorsement, which this Court specifically found, and now reaffirms, to be the only relevant endorsement:

Additional Insured – Designated Person or Organization:

Section II – Who is An Insured is amended to include as an additional insured the person(s) or organization(s) shown in the Schedule, but only with respect to liability for "bodily injury", "property damage" or "personal and advertising injury" **caused, in whole or in part, by [Best Buy's] acts or omissions or the acts or omissions of those acting on [Best Buy's] behalf:**

- A. In the performance of your ongoing operations; or
- B. In connection with your premises owned by or rented to you

NYSCEF Doc No. 36 (emphasis added). Thus, Live Nation is an Additional Insured under the Subject Policy *if and only if* Best Buy and/or Perez partially or wholly caused the accident. This Court previously denied plaintiffs' prior motion and defendants' prior cross-motion for summary judgment based on the fact that whether or not Perez and/or Best Buy were negligent had not yet been determined.

New Facts

In a Decision and Order dated November 29, 2018 in the Underlying Action, Judge Lebovits determined that Best Buy is **not** liable for plaintiff's injuries and explicitly stated that "[n]o evidence exists that Best Buy's 'acts or omissions' caused plaintiff's injury."

Defendants now move, pursuant to CPLR 2221(e), for leave to renew their previous motion for summary judgment in light of the new decision and order by Judge Lebovits. Plaintiffs now also cross-move, pursuant to CPLR 2221(d), to reargue their motion for summary judgment.

Discussion

Pursuant to CPLR 2221(e), a motion for leave to renew:

1. shall be identified specifically as such;
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.

As the Underlying Action has now determined that Best Buy was not negligent, which was

unknown at the time of defendants' prior motion before this Court, defendants have satisfied their burden under CPLR 2221(e) to offer a new fact that would change this Court's prior determination. Accordingly, defendants' motion to renew is granted. The Court additionally grants plaintiffs' cross-motion solely to the extent of permitting re-argument.

Defendants' Renewed Motion for Summary Judgment

Defendants assert that Judge Lebovits's decision and order dated November 5, 2018 necessarily should result in summary judgment in their favor in the instant case. This Court agrees. As Perez was working for Best Buy, and any negligence by him would have been attributable to Best Buy under the theory of respondeat superior, it logically follows that if Best Buy was not negligent, Perez was not negligent.

Thus, upon renewal, this Court grants summary judgment in favor of defendants. As the Subject Policy unambiguously states that the additional insured provision is only triggered upon a finding of negligence against Best Buy or those acting on its behalf, the new ruling from Judge Lebovits in the Underlying Action clearly demonstrates that this policy provision is not applicable. Worth Const. Co. v Admiral Ins. Co., 10 NY3d 411 (2008).

Plaintiffs' Motion for Re-argument

Although this Court grants plaintiffs' application for re-argument, it finds plaintiffs' contention that Brogden was working on behalf of Best Buy unpersuasive. The court in the Underlying Action found "that Live Nation had its own employees who would set up and construct the trussing." (NYSCEF Doc. No. 97.) Live Nation sent one laborer, Brogden, to build the trussing system...Brogden ...worked for Live Nation; he received checks from Live Nation. Id. Live Nation's contractor "caused," or contributed, to plaintiff's fall." Id. Plaintiffs' argument that Brogden's employment status at the time of the accident is irrelevant to Live Nation's Additional Insurance status is unconvincing. In constructing the metal truss Brogden was acting on behalf of Live Nation, in compliance with Live Nation's sponsorship agreement with Best Buy to provide the metal trussing and set up the activation area. (NYSCEF Doc. No. 30.)

Additionally, Plaintiffs' arguments that Live Nation is afforded coverage as an Additional Insured under the four other endorsements, remain unavailing. The "OWNER, LANDLORD, or PROPERTY MANAGER" endorsement is inapplicable as Best Buy did not enter the premises "for the purpose of delivering to and/or serving and/or installing a product for [Best Buy's] customer...". (NYSCEF Doc No. 36.) The installation of the metal trussing was pursuant to Live Nation's contractual obligation to provide so.

The "MANAGERS OR LESSORS OF PREMISES" endorsement is inapplicable as Live Nation is a licensee of the venue, not a lessor, and plaintiffs have failed to produce any evidence demonstrating otherwise.

The "LESSOR OF LEASED EQUIPMENT" endorsement is inapplicable because Best Buy did not lease equipment from Live Nation.

The "OWNERS, LESSEES OR CONTRACTORS – SCHEDULED PERSON OR ORGANIZATION" endorsement does not apply for the same reasons discussed *supra* under the

“Additional Insured – DESIGNATED PERSON OR ORGANIZATON” endorsement, and accordingly would only trigger coverage if the acts or omissions of Perez and/or Best Buy caused or contributed to Perez’s accident.

Plaintiffs additionally argue that the Court failed to determine “whether defendants breached their duty to defend; a duty that was triggered by the filing of the Complaint in the Underlying Action.” However, as discussed herein, summary judgment is granted for defendants, rendering this argument moot.

The Court has considered plaintiffs’ remaining arguments, including those of the intent of the parties, and finds them unavailing.

Conclusion

Accordingly, plaintiffs’ cross-motion to reargue is granted, and upon re-argument, the Court denies plaintiffs’ motion as moot, as the Court is granting defendants summary judgment for the reasons set forth herein; and defendants’ motion for renewal is granted, and upon renewal, the Court grants summary judgment for defendants, and the Clerk is hereby directed to dismiss the complaint.

6/12/2019
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE