

Choephel v A/R Retail, LLC

2019 NY Slip Op 32236(U)

July 26, 2019

Supreme Court, New York County

Docket Number: 156398/2015

Judge: Manuel J. Mendez

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

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

TENZIN CHOEPHEL,
Plaintiff,
-against-

INDEX NO. 156398/2015
MOTION DATE 07/10/19
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

A/R RETAIL, LLC and THYSSENKRUPP ELEVATOR CORPORATION,
Defendants.

A/R RETAIL, LLC,
Third-Party Plaintiff,
-against-

Index No. 595405/2016

WHOLE FOODS MARKET GROUP, INC.,
Third-Party Defendant.

The following papers, numbered 1 to 11 were read on this motion and cross-motion to reargue:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 3</u>
Answering Affidavits — Exhibits _____	<u>4 - 6, 7 - 8</u>
Replying Affidavits _____	<u>9, 10 - 11</u>

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that that Defendant A/R Retail, LLC's (hereinafter A/R) motion pursuant to CPLR §2221 to reargue the February 15, 2019 Decision and Order of this Court and upon reargument granting full and unconditional contractual and common law indemnification in favor of A/R and to hold that Thyssenkrupp Elevator Corporation's duty to defend is unconditional and currently enforceable, is granted only to the extent of permitting reargument. Upon reargument the motion is denied. Defendant Thyssenkrupp Elevator Corporation's (hereinafter "TKE") cross-motion pursuant to CPLR §2221, to reargue the February 15, 2019 Decision and Order of this Court on its prior cross-motion for summary judgment and upon reargument granting summary judgment against plaintiff and its cross-claims asserted against A/R, is denied.

Plaintiff alleges that on September 25, 2014, during the course of his employment as a Whole Foods Market Group Inc. (hereinafter "Whole Foods") employee, he fell into an empty elevator passenger shaft (S56) while using a battery operated pallet jack, sustaining substantial injuries. A/R is the owner of the building and leased the space occupied by Whole Foods. A/R had a contract with TKE for elevator repair and maintenance. The instant action was commenced on June 25, 2015. Plaintiff asserted causes of action for negligence against defendants A/R and TKE (Mot. Exh. E). A/R and TKE asserted cross-claims against each other seeking indemnification and contribution (Mot. Exh. F, Cross-Mot. Exh. B). A/R commenced a third-party action against plaintiff's employer Whole Foods for contribution, common law indemnification, contractual indemnification and breach of contract (Cross-Mot. Exh. C).

A/R, pursuant to CPLR §3212, sought summary judgment dismissing all claims and cross-claims asserted against it (Motion Sequence 003). A/R sought summary judgment: (1) arguing A/R was not liable to plaintiff for negligence because it had no constructive or actual notice of any elevator malfunction or defect that contributed to plaintiff's injuries; (2) on the cross-claims for indemnification asserted against TKE arguing A/R had no actual or constructive notice of the alleged elevator defect, and that TKE, as A/R's exclusive elevator maintenance company, had assumed the full duty to maintain the elevator at issue; and (3) on its third-party claims asserted against Whole Foods.

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

TKE opposed A/R's motion and cross-moved pursuant to CPLR §3212 for summary judgment on its cross-claims for indemnification against A/R (Motion Sequence 003). TKE asserted that: (1) A/R as owner of the premises had a daily presence and had both actual and constructive notice of the elevator defects and the tenants' activity; (2) A/R had promulgated specific rules to prevent its tenant, Whole Foods, from using pallet jacks on the elevator but allowed continued violation of the rules, (3) A/R had misrepresented to Whole Foods that the S56 elevator was a freight elevator when in fact it was a passenger elevator; and (4) the elevator doors and gib did not function properly and the evidentiary record - including investigations by the Department of Buildings (DOB), OSHA and the consultant for the building's managing agent - found no negligence by TKE.

This Court's February 15, 2019 Decision and Order (filed under Mot. Seq. 003), granted A/R conditional contractual indemnification on the cross-claims against TKE. A/R was denied full contractual indemnification because it was determined that there remained issues of fact on A/R's non-delegable duty to maintain the premises and make the elevators safe. The remainder of the relief sought in A/R's motion was denied. TKE's cross-motion for summary judgment was denied in its entirety (Mot. Exh. A).

A/R, pursuant to CPLR §2221, seeks to reargue the February 15, 2019 Decision and Order of this Court only as to that part of its motion seeking summary judgment against TKE. Upon reargument A/R seeks full and unconditional contractual and common law indemnification in its favor. A/R also seeks an Order that TKE's duty to defend is unconditional and currently enforceable.

TKE opposes the motion and cross-moves pursuant to CPLR §2221 to reargue the February 15, 2019 Decision and Order of this Court denying its prior cross-motion for summary judgment and upon reargument seeks an Order granting summary judgment against plaintiff and against A/R on its cross-claims.

A/R states that the February 15, 2019 Decision and Order misinterpreted and misapplied the law in only granting A/R conditional contractual indemnification because of liability resulting from the non-delegable duty to keep the elevator safe. A/R argues: (A) that the statutory non-delegable duty to maintain the elevator in safe condition under Multiple Dwelling Law §78, does not raise an issue of fact on the cross-claims for indemnification asserted against TKE, the elevator maintenance contractor; (B) that the February 15, 2019 Decision and Order should have granted summary judgment on the cross-claims for common law negligence asserted against TKE, because there was no finding that A/R was negligent; and (C) that the February 15, 2019 Decision and Order did not address A/R's arguments that TKE has a duty to defend A/R as required under the express provisions of the maintenance contract, and should have rendered a decision that TKE's duty to provide a defense is unconditional and currently enforceable. A/R states that the favorable determination on the cross-claims for contractual indemnification asserted against TKE, after A/R tendered the defense of the claim on June 12, 2015 (Mot. Exh. U), entitles A/R to reimbursement of attorney fees and the costs of the defense against claims under the elevator maintenance contract.

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" (Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [1st Dept., 1979] and Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010]). Reargument is not intended to afford an unsuccessful party successive opportunities to argue issues previously decided, or to present arguments different from those originally asserted. The movant cannot use a motion to reargue as a successive opportunity to merely restate previously unsuccessful arguments (DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D. 3d 715, 800 N.Y.S. 2d 679 [1st Dept., 2005] citing to William P. Pahl Equip. Corp. v. Kassis, 182 A.D. 2d 22, 588 N.Y.S. 2d 8 [1st Dept., 1992]).

A/R has stated a basis for reargument. The February 15, 2019 Decision and Order partially misstated or misapplied the law and the facts on A/R's summary judgment motion to dismiss the cross-claims for indemnification asserted against TKE.

A/R is correct that the February 15, 2019 Decision and Order misconstrued the standard for liability resulting from a non-delegable duty to the plaintiff. A/R's non-delegable duty to the plaintiff, to maintain and repair the elevator, does not bar contractual indemnification against TKE as an elevator repair company with an exclusive maintenance and repair contract (*Mas v. Two Bridges Associates by Nat. Kinney Corp.*, 75 N.Y. 2d 680, 554 N.E. 2d 1257, 555 N.Y.S. 2d 669 [1990]).

The February 15, 2019 Decision and Order misstated A/R's potential negligence. Issues of fact exist of the extent of A/R's constructive notice of the defective S56 elevator, and whether A/R's actions contributed to, or caused the S56 elevator door defect and malfunction. A/R's potential negligence outside of the statutory non-delegable duty to the plaintiff requires a jury determination before A/R is entitled to full contractual indemnification from TKE. Whether a door malfunction could have occurred absent the negligence of A/R, or TKE, in the maintenance and inspection of the elevator, is a question of fact for the jury (*Rogers v. Dorchester Associates*, 32 N.Y. 2d 553, 300 N.E. 2d 403, 347 N.Y.S. 2d 22 [1973]).

A/R as the property owner has a nondelegable duty to maintain the elevator in a reasonably safe condition. A property owner may be found liable for elevator malfunctions or defects, despite having an exclusive elevator maintenance and repair contract with an elevator company (TKE), if the property owner fails to notify the elevator company of a known defect, had actual or constructive notice of the defect, or created the defect and failed to have it corrected (*Issac v. Macombs, LLC*, 84 A.D. 3d 457, 922 N.Y.S. 2d 354 [1st Dept. 2011] and *Nunez v. Chase Manhattan Bank*, 155 A.D. 3d 641, 63 N.Y.S. 3d 481 [2nd Dept. 2017]).

The February 15, 2019 Decision and Order determined that there remained issues of fact as to A/R's negligence but failed to properly address evidence presented by TKE. A/R claims it had no notice of the elevator defect. TKE, in opposition, provided evidence that A/R's agents had notice of potential defects with the S56 doors, sills and gibs (through signed work order agreements) and provided deposition testimony of A/R's representative, to raise issues of fact. The evidence produced by TKE is sufficient to raise an issue of fact as to whether A/R had constructive notice of the S56 elevator's defective doors (*Cole v. Homes for the Homeless Institute, Inc.*, 93 A.D. 3d 593, 940 N.Y.S. 2d 642 [1st Dept. 2012]).

TKE provided approved work order contracts on replacement elevator doors in 2012 and 2013 signed by Paul Berkowitz, A/R's chief engineer. About a month before the plaintiff's accident on August 8, 2014, Mr. Berkowitz was given three proposals from TKE for elevator repairs - including new door gibs and the doors that allegedly failed on the S56 elevator which caused plaintiff's injury (See NYSCEF Doc. # 164 and Cross-Mot. Exhs. I, J, K and L). Tom Wilson, A/R's agent and representative, stated at his deposition that the "command center," run by another agent of A/R, took complaints and directed them to TKE, and that A/R's "Merchant Manual" (See NYSCEF Doc. # 184 - Excerpts of Merchant Manual) prohibited third-party defendant Whole Foods' employees from using battery operated pallet jacks in the elevators, and ramming them into the elevators, which damaged the elevator's doors - including the door gibs, and the door frames (NYSCEF Doc. # 178, pgs. 37-38, 46-47, 51-52, 62-63). TKE also raises issue of facts of A/R's potential liability based on the mislabeled S56 elevator as a freight elevator when it is actually a passenger elevator, and excusing Whole Food's violations of the "Merchant Manual," which it is alleged resulted in further damage to the S56 elevator.

The conflicting evidence and testimony presented under the prior motion (Mot. Seq. 003) raises credibility issues and issues of fact (*Almonte v. 638 West 160 LLC*, 139 A.D. 3d 439, 29 N.Y.S. 3d 178 [1st Dept., 2016] and *Doumbia v. Moonlight Towing, Inc.*, 160 A.D. 3d 554, 71 N.Y.S. 3d 884 [1st Dept., 2018]). A/R was properly denied summary judgment on contractual indemnification in the February 15, 2019 Decision and Order of this Court even though the basis for that determination was misstated.

A/R has not established as a matter of law that it is entirely free from negligence; however because of TKE's contractual duty to ensure the S56 elevator was properly maintained and because the indemnity provision in the elevator service contract with TKE was triggered by plaintiff's accident, A/R is still entitled to conditional contractual indemnification (*Antoniak v. P.S. Marcato Elevator Co.*, 144 A.D. 3d 407 [1st Dept. 2016]).

A/R is not entitled to summary judgment on its common law indemnification claims against TKE because there remain issues of fact as to A/R's negligence (*Bellefleur v. Newark Beth Isreal Medical Center*, 66 A.D. 3d 807, 888 N.Y.S. 2d 81 [2nd Dept. 2009]).

A/R is not entitled to a defense until there has been a determination of its negligence or a determination that TKE was negligent. The defense attorneys fees and costs sought on this motion to reargue is premature (*Ezzard v. One East River Place Realty Co., LLC*, 80 A.D. 3d 515, 914 N.Y.S. 2d 635 [1st Dept. 2011]).

TKE in opposition to A/R's motion correctly stated that the February 15, 2019 Decision and Order failed to address that there were multiple indemnity provisions in the elevator service contract and cited only to Section III on page 11. The general provisions had a separately identified indemnification subsection (Mot. Exh. D, section 11, pg. 2), and the addendum to the elevator service contract also had an Indemnity subsection (Mot. Exh. D, addendum, pg. 2, subsection 2). The indemnification provisions in the elevator service contract consistently hold TKE liable for its own negligence. Section III by including language "to the fullest extent under the law" limits TKE's indemnification liability to its own negligence, and renders the indemnification provision valid under General Obligations Law §5-322.1 (*Frank v. 1100 Avenue of the Americas Associates*, 159 A.D. 3d 537, 74 N.Y.S. 3d 8 [1st Dept. 2018]).

TKE cross-moves pursuant to CPLR §2221 to reargue the February 15, 2019 Decision and Order of this Court on its prior cross-motion for summary judgment and the cross-claims for indemnification and contribution asserted against A/R.

A/R seeks to have TKE's cross-motion denied as untimely. TKE argues that the cross-motion seeks the same reargument relief as the motion, and should be heard without the need to show good cause.

An untimely cross-motion may be considered as to issues that are the same as those stated in the motion, without the need to show good cause (*Filannino v. Triborough Bridge and Tunnel Authority*, 34 A.D. 3d 280, 824 N.Y.S. 2d 244 [1st Dept. 2006] and *Palomo v. 175th Street Realty Corp.*, 101 A.D. 3d 579, 957 N.Y.S. 2d 49 [1st Dept., 2012]). A "correctly labeled cross-motion" is made against the party that made the original motion returnable at the same time, it cannot seek relief against a non-moving party. To the extent an untimely cross-motion is mislabeled, good cause is required (*Kershaw v. Hospital for Special Surgery*, 114 A.D. 3d 75, 978 N.Y.S. 2d 13 [1st Dept. 2013]).

A/R's motion only seeks to reargue denial of summary judgment of the cross-claims asserted against TKE. The cross-motion seeks summary judgment on all claims asserted against TKE, although this relief addresses the cross-claims asserted by and against A/R, it also seeks to dismiss plaintiff's claims asserted in the complaint. TKE has not filed a "correctly labeled cross-motion," and there has been no showing of good cause for the delay.

A technically untimely motion to reargue a prior order may be heard in the Court's discretion and in the interests of justice (*Onlingswan v. Chase Home Finance, LLC*, 104 A.D. 3d 543, 961 N.Y.S. 2d 149 [1st Dept., 2013]). Every court retains continuing jurisdiction to reconsider its own orders during the pendency of the

action, and may do so regardless of the statutory time limits concerning motions to reargue (Kleinser v. Astarita, 61 A.D. 3d 597, 878 N.Y.S. 2d 28 [1st Dept., 2009]).

TKE has not established that the cross-motion should be addressed in the interests of justice.

However, TKE’s motion would be denied even if this Court were to address the merits of TKE’s arguments raised in support of the cross-motion. TKE argues that: (1) this Court misunderstood that there were separate work order contracts that were entered into with A/R because of issues with damage to the elevator doors by Whole Foods and that the separate indemnity provisions in the work order contracts take them outside the provisions of the maintenance contract, eliminating TKE’s liability to A/R for indemnification; and (2) TKE is entitled to summary judgment on the cross-claims against A/R, which never obtained insurance coverage for TKE as required on the work order contracts.

The February 18, 2019 Decision of this Court properly addressed the work order contracts and determined that the last one was entered into on May 6, 2013 (Cross-Mot. Exh. K) at least a year before the September 25, 2014 accident and was no longer applicable (Mot. Exh. A and Cross-Mot. Exh. L). The three August 8, 2014 proposals were only signed by a representative of TKE and unenforceable as contracts with their own indemnification clauses. TKE identifies them as the “Three proposals dated 8/8/14” in the NYSCEF exhibits (NYSCEF Doc. # 299). The work order contracts and proposals were proper to show notice and negligence on the part of A/R, but are not proper to enforce their indemnification provisions on behalf of TKE. TKE is merely restating previously unsuccessful arguments and has not stated a basis for reargument.

Accordingly, it is ORDERED, that Defendant A/R Retail, LLC’s motion pursuant to CPLR §2221 to reargue the February 15, 2019 Decision and Order of this Court and upon reargument granting full and unconditional contractual and common law indemnification in favor of A/R Retail, LLC and to hold that Thyssenkrupp Elevator Corporation’s duty to defend is unconditional and currently enforceable, is granted only to the extent of permitting reargument, and it is further,


ORDERED, that upon reargument, A/R Retail, LLC is granted conditional contractual indemnification as stated in the February 15, 2019 Decision and Order of this Court, for the reasons stated in this decision, and it is further,

ORDERED, that the remainder of the relief sought in A/R Retail, LLC’s motion is denied, and it is further,

ORDERED, that Defendant Thyssenkrupp Elevator Corporation’s cross-motion pursuant to CPLR §2221 to reargue the February 15, 2019 Decision and Order of this Court on its prior cross-motion for summary judgment and upon reargument granting summary judgment against plaintiff and its cross-claims asserted against A/R Retail, LLC, is denied, and it is further,

ORDERED, that the action shall continue to trial as to all of the named defendants and the third-party action.

ENTER:



MANUEL J. MENDEZ
J.S.C. MANUEL J. MENDEZ
J.S.C.

Dated: July 26, 2019

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE