

<b>Serrano v Albee Dev. LLC</b>
2020 NY Slip Op 30628(U)
March 3, 2020
Supreme Court, New York County
Docket Number: 159223/2015
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT DAVID KALISH PART IAS MOTION 29EFM

Justice

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INDEX NO. 159223/2015

JUAN SERRANO,

MOTION DATE 2/11/2020

Plaintiff,

MOTION SEQ. NO. 008

-against-

ALBEE DEVELOPMENT LLC, ZDG, LLC, DGC CAPITAL CONTRACTING CORP., CENTURY 21 STORES, LLC, GMA MECHANICAL, CORP.,

DECISION + ORDER ON MOTION

Defendants.

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GMA MECHANICAL, CORP.,

Third-Party Index No. 595694/2016

Third-Party Plaintiff,

-against-

APPLE SHEET METAL, INC.,

Third-Party Defendant.

-----X

DGC CAPITAL CONTRACTING CORP.,

Second Third-Party Index No. 595949/2016

Second Third-Party Plaintiff,

-against-

A&F FIRE PROTECTION CO., INC.,

Second Third-Party Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540

were read on this motion to/for REARGUMENT/RECONSIDERATION

In this Labor Law action, defendant/third-party plaintiff GMA Mechanical Corp. (GMA) moves, by order to show cause, pursuant to CPLR 2221 (d), for leave to reargue the Court's decision and order dated October 4, 2019, which, in relevant part, granted the branch of the

motion for summary judgment by defendant Albee Development LLC (Albee) seeking contractual indemnification against GMA (hereinafter, the prior decision). For the reasons set forth below, the motion is denied.

### **BACKGROUND**

Plaintiff, an employee of third-party defendant Apple Sheet Metal, Inc. (Apple), alleges that he was injured on August 5, 2015 at the premises located at 1 Dekalb Avenue (hereinafter, the premises) when he allegedly fell from a scissor lift due to a greasy condition. Plaintiff brought this action seeking recovery for violations of Labor Law §§ 200, 240 (1), 241 (6), and for common-law negligence.

Albee was the developer of the City Point Project located at both 445 Gold Street and 1 Dekalb Avenue in Brooklyn. Albee owns the structures at the two locations pursuant to ground leases. The City Point Project included the tenant build-out for a Century 21 store. Defendant ZDG, LLC (ZDG) was the construction manager hired by Albee to perform the core and shell work for the project. Defendant Century 21 Fulton, LLC (Century 21) was a tenant at the City Point Project. Century 21 entered into a lease agreement with Albee for the tenant space. Defendant DGC Capital Contracting Corp. (DGC) was the general contractor for the Century 21 build-out. DGC hired GMA as the HVAC subcontractor. GMA subsequently hired Apple as the mechanical sub-subcontractor. Plaintiff alleges, in part, that employees of second third-party defendant A&F Fire Protection Co., Inc. (A&F), left oil or grease on the scissor lift prior to the accident.

As relevant here, Albee moved for contractual indemnification against GMA, based upon the following indemnification provision contained within the access agreement between DGC and GMA:

“To the fullest extent permitted by law, the Sub-Contractor [GMA] shall hold harmless, defend (at Owner’s option), and indemnify the Owner [Albee], Construction Manager (ACRS II LLC) and such other entities as provided in the attached **Exhibit ‘X’** (‘Additional Insured’), and each of their respective agents, officers, directors, managers, partners, officials, members, shareholders, representatives, successors, employees, permitted assigns and trustees from and against *claims, damages, losses and expenses, including but not limited to reasonable attorneys’ fees and costs, arising out of or resulting from performance of Sub-Contractor’s Partial Work, to the extent caused by the acts or omissions of the Sub-Contractor, or anyone directly or indirectly employed by them or anyone for whose acts they may be liable*, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder”

(NY St Cts Elec Filing [NYSCEF] Doc No. 236 [GMA Contract] at 1 [emphasis supplied]).

In moving for contractual indemnification against GMA, Albee argued that the language of the provision was triggered because Apple was hired by GMA, and because Apple’s or A&F’s acts or omissions caused the accident. In addition, Albee maintained that it did not supervise plaintiff’s work, and did not cause or create any of the conditions involved in plaintiff’s accident. In opposition to Albee’s motion, GMA contended that its liability had not yet been established. GMA also asserted that it did not cause or create any dangerous condition, and that it did not have actual or constructive notice that the oil or grease was on the scissor lift.

In the prior decision, as relevant here, the Court granted Albee’s motion for contractual indemnification against GMA (*see Serrano v Albee Dev. LLC*, 2019 NY Slip Op 32953[U], \*13 [Sup Ct, NY County 2019]). In granting Albee’s motion, the Court noted that plaintiff’s accident arose out of GMA’s contracted work (*id.*). Moreover, the Court explained that Albee was free from negligence, since plaintiff’s Labor Law § 200 and common-law negligence claims against Albee had been dismissed (*id.*). However, there is the potential that Albee may be held statutorily liable for the accident pursuant to Labor Law §§ 240 (1) and 241 (6). Accordingly, the Court granted Albee full contractual indemnification, including reasonable attorney’s fees, from GMA (*id.*).

GMA now argues that the indemnification provision requires a showing of negligence on the part of the indemnitor. GMA contends that the Court overlooked the fact that the indemnification provision affords contractual indemnification to Albee where the claim arises out of or results from the performance of GMA's work but only "to the extent *caused by the acts or omissions* of [GMA], or anyone directly or indirectly employed by them or anyone for whose acts they may be liable" (NYSCEF Doc No. 236 at 1 [emphasis added]). GMA further argues, citing *Burlington Ins. Co v NYC Tr. Auth.* (29 NY3d 313 [2017]), that the Court overlooked controlling principles of law pertaining to the use of the phrase "caused by" set forth in the indemnification provision. According to GMA, Albee's motion for summary judgment should have been denied, since there has been no determination regarding GMA's liability or any other party's liability, and whether the claims against Albee were caused by GMA's acts or omissions.

Alternatively, GMA maintains that, even if Albee is entitled to contractual indemnification, Albee is only entitled to conditional indemnification pending a determination as to whether plaintiff's claims were proximately caused by any negligence of GMA or anyone directly or indirectly employed by it. As support, GMA asserts that there is an inconsistency in the prior decision. GMA argues that the indemnification provision contains the same language as the provision in the contract between Century 21 and DGC, but, in deciding Century 21's motion for contractual indemnification against DGC, the Court granted conditional contractual indemnification against DGC since "it has not been established that plaintiff's accident was caused by the negligent acts or omissions of DGC or any of its subcontractors or anyone directly or indirectly employed by them" (*Serrano*, 2019 NY Slip Op 32953[U], \*15).<sup>1</sup>

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<sup>1</sup> GMA withdrew this argument at oral argument on the instant motion to reargue. However, GMA argued that the two provisions should be treated the same.

In opposition, Albee and ZDG argue that the Court did not overlook or misapprehend any fact or law. (See NYSCEF Document No. 541-542.) According to Albee and ZDG, the Court did not overlook the language of the indemnification provision, and the provision does not have a negligence trigger. Moreover, Albee and ZDG assert that Albee was entitled to full, not conditional, indemnification. Albee and ZDG further point out that the language of the indemnification provision does not contain any reference to the word “negligence,” unlike the provision in the contract between Century 21 and DGC.

### DISCUSSION

A motion for leave to reargue is addressed to the sound discretion of the motion court and may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is “not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented” (*McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

Here, GMA has failed to demonstrate that the Court overlooked or misapprehended any relevant facts or law. The Court finds no basis to disturb the prior decision. GMA raises arguments that the Court considered and rejected and/or raises new arguments in opposition to Albee’s motion.

In any event, even if the Court were to reach the merits, the Court would still adhere to its original determination.

“A party’s right to contractual indemnification depends upon the specific language of the relevant contract” (*Hanna v Milazzo*, -- AD3d --, 2020 NY Slip Op 00407, \*2 [2d Dept 2020] [internal quotation marks and citation omitted]). “[T]he ‘intention to indemnify [must] be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances’” (*Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). “In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

The Court finds that plaintiff’s reliance on *Burlington Ins. Co v NYC Tr. Auth.* (29 NY3d 313 [2017]) is misplaced.

First, *Burlington* interpreted the language “caused, in whole or in part,” by the “acts or omissions” of a named insured in liability insurance policies (*see Burlington Ins. Co.*, 29 NY3d at 317), not contractual indemnification provisions.

Second, the indemnification provision requires GMA to indemnify Albee “from and against claims, damages, losses and expenses, including but not limited to reasonable attorneys’ fees and costs, arising out of or resulting from performance of Sub-Contractor’s [GMA’s] Partial Work, to the extent caused by the acts or omissions of the Sub-Contractor [GMA], or anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . .” (NYSCEF Doc No. 236 at 1). As the *Burlington* Court suggested, “‘arising out of’ means

causally connected with, not proximately caused by” (*Burlington Ins. Co.*, 29 NY3d at 324, quoting *Manufacturers Cas. Ins. Co. v Goodville Mut. Cas. Co.*, 403 Pa 603, 607, 170 A2d 571, 573 [1961]). Further, this court finds that the phrase “caused by”—in the context of the surrounding language of the indemnification provision—is not the functional equivalent of the phrase “caused, in whole or in part,” as used in *Burlington*. As used in the indemnification provision, the phrase “caused by” means “but-for causation”—not “proximate causation.”

Thus, contrary to GMA’s contention, the indemnification provision does not require a negligent act or omission to trigger indemnification (*Santos v BRE/Swiss, LLC*, 9 AD3d 303, 303 [1st Dept 2004]; cf. *Podobedov v East Coast Constr. Group, Inc.*, 133 AD3d 733, 737 [2d Dept 2015]). In addition, the indemnification provision does not require a determination of GMA’s liability (or any other party’s liability) or that GMA’s acts or omissions caused plaintiff’s accident. Rather, it only requires that (1) the claim arise out of the performance of GMA’s work, and (2) that the claim be caused by “the acts or omissions” of GMA or anyone directly or indirectly employed by it.

It is undisputed that GMA hired Apple, and that plaintiff was injured in the course of his employment with Apple, when he slipped off a scissor lift owned by Apple. Therefore, Albee has made a prima facie showing of entitlement to judgment as a matter of law by showing that plaintiff’s accident arose out of the performance of GMA’s work and was caused by the acts or omissions of persons or entities directly or indirectly employed by GMA, including Apple (*see Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1019 [2d Dept 2011]; *Giangarra v Pav-Lak Contr., Inc.*, 55 AD3d 869, 871 [2d Dept 2008]; cf. *D’Angelo v Builders Group*, 45 AD3d 522, 525 [2d Dept 2007]). In response, GMA failed to raise an issue of fact. Whether GMA created or had notice of the grease or oil on the scissor lift is irrelevant. The plain language of the

provision does not require that the claim be caused by the acts or omissions of only GMA—it can also be caused by the acts or omissions of “anyone directly or indirectly employed by [GMA] or anyone for whose acts [GMA] may be liable” (GMA Contract at 1). Moreover, “[s]ince the contract did not require as a condition for contractual indemnification that the acts or omissions be negligent or wrongful, whether those acts or omissions constituted negligent conduct was not relevant to [GMA’s] liability for contractual indemnification” (*Simone*, 90 AD3d at 1020). After all, if these commercially sophisticated parties intended the indemnification provision to be contingent on a finding of negligence, they could have so indicated (*Ashwood Capital, Inc. v OTG Mgt., Inc.*, 99 AD3d 1, 8 [1st Dept 2012] [“If these commercially sophisticated and counseled parties had intended their agreement to apply to any JetBlue terminal at JFK, they could easily have expressed this intent in the language of the agreement”]; *see also Arch Ins. Co. v Nationwide Prop. & Cas. Ins. Co.*, 175 AD3d 437, 437 [1st Dept 2019] [where indemnification provision required that the loss be “caused in whole or in part by [sub-contractor’s] negligent acts or omissions” [emphasis added]]).

Moreover, as noted in the prior decision, the Court dismissed plaintiff’s Labor Law § 200 and common-law negligence claims against Albee. In the absence of any negligence on Albee’s part, Albee was, therefore, entitled to full contractual indemnification, including reasonable attorney’s fees, from GMA (*see Jenkins v Related Cos., L.P.*, 114 AD3d 435, 436 [1st Dept 2014] [“given the lack of evidence of active negligence on the part of the construction defendants, they are entitled to full, not conditional, indemnification”]; *accord Santos*, 9 AD3d at 303; *cf. Aramburu v Midtown W. B, LLC*, 126 AD3d 498, 500 [1st Dept 2015]; *Fuger v Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 AD3d 649, 651 [1st Dept 2014]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (Seq. 008) of defendant/third-party plaintiff GMA Mechanical Corp. for leave to reargue the Court's decision and order dated October 4, 2019 is denied; and it is further

ORDERED that, within 10 days of the filing date on the instant decision and order, counsel for Defendants Albee Development LLC and ZDG, LLC are to e-file a copy of said decision and order with notice of entry.

The foregoing constitutes the decision and order of the Court.

3/03/2020  
DATE

CHECK ONE:  CASE DISPOSED  DENIED  NON-FINAL DISPOSITION

APPLICATION:  GRANTED  GRANTED IN PART  OTHER

CHECK IF APPROPRIATE:  SETTLE ORDER  SUBMIT ORDER

INCLUDES TRANSFER/REASSIGN  FIDUCIARY APPOINTMENT  REFERENCE

*Robert D. Kalish*  
HON. ROBERT D. KALISH, J.S.C.