

Bullock v 1585 Realty Co. LLC
2021 NY Slip Op 30073(U)
January 12, 2021
Supreme Court, New York County
Docket Number: 150073/2017
Judge: David Benjamin Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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INDEX NO. 150073/2017

JACQUELINE BULLOCK,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 002

- v -

1585 REALTY COMPANY LLC., and 1582 FIRST AVENUE
WINE & LIQUOR INC.,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 45, 46, 47, 48, 49, 50, 51, 53, 55, 56, 57, 58, 59

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

In this trip and fall action, defendant 1582 First Avenue Wine & Liquor Inc. (“W&L”) moves, pursuant to CPLR 2221, for leave to reargue its prior motion for summary judgment (Seq. 001) seeking dismissal of all cross claims as asserted against it and, upon reargument, pursuant to CPLR 3212, for summary judgment dismissing all cross claims as asserted against it (Doc. 003 [Cross Claims]). Defendant 1585 Realty Company, LLC (“1585 Realty”), opposes the motion. For the reasons set forth herein, W&L’s motion is granted in full.

BACKGROUND

This case arises out of an alleged slip and fall by plaintiff Jacqueline Bullock (“Plaintiff”) in the vicinity of the sidewalk vault/cellar doors in front of tenant W&L’s premises located at 1585 First Avenue, which is owned by 1585 Realty. The facts of this case are set forth in detail in this Court’s order filed on July 1, 2020 (Doc. 43). In that order, this Court granted W&L’s motion for summary judgment dismissing the complaint (*Id.*). However, this Court denied the branch of the motion seeking a dismissal of 1585 Realty’s cross claims for indemnification (*Id.*).

1. The Lease & Lease Rider

Paragraph 4 of the lease entitled, “Repairs,” provides, in relevant part, that:

Tenant shall ... take good care of the demised premises including, without limitation, the storefront... and the sidewalks adjacent to [the demised premises], and at its sole cost and expense, make all non-structural repairs thereto as and when needed to preserve them in good working order and condition[.]

(Lease ¶ 4, Doc. 35 at 3.)

Paragraph 8 of the lease provides, in relevant part, that:

Tenant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs, and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorney’s fees, paid, suffered or incurred as a result of any breach by Tenant[.]

(Lease ¶ 8, Doc. 35 at 4.)

Paragraph 14 of the lease provides, in relevant part, that:

No vaults, vault space or area, whether or not enclosed or covered, not within the property line of the building, is leased hereunder... All vaults and vault space and all such areas not within the property line of the building... is to be used and/or occupied under a revocable license[.]

(Lease ¶ 14, Doc. 35 at 5.)

Paragraph 50 of the lease rider, entitled “Tenant’s Indemnification,” provides, in relevant part, that:

Tenant covenants and agrees that Tenant will and shall indemnify, defend and save Owner harmless from all claims, losses, actions, costs and expenses, including without limitation, reasonable attorney’s fees, by reason of any loss, damage, liability or injury which may happen to any person or persons ... in or about the demises premises in any way connected with, related to, or arising out of the use, condition, or occupation of the demised premises.

(Lease Rider ¶ 50, Doc. 35 at 16.)

Paragraph 55 of the lease rider, entitled “Maintenance & Store Front,” provides, in relevant part, that:

Tenant covenants and agrees to clean and maintain the store front portion of the demised premises, including, but not limited to, all glass and metal portions thereof in a condition at least comparable to the building front or the other store fronts of said building, whichever is in better condition[.]

(Lease rider ¶ 55, Doc. 35 at 17.)

Paragraph 66(A) of the lease rider, entitled “Tenant’s Maintenance,” provides, in relevant part, that:

Tenant shall ... be responsible for the maintenance and cleanliness of all interior walls, floors, ceilings, glass windows, doors, windows [sic] sashes and frames, door frames and street entrance and stairways and passageways leading to or from the demised premises.

(*Id.* ¶ 66, Doc. 35 at 19-20.)

Paragraph 87 of the lease rider, entitled “Repairs,” provides, in relevant part, that:

Tenant agrees to maintain in good order and condition and repair the exterior of the demised premises including the store front, windows, doors, fittings, signs, awnings and or [sic] other equipment as well as the interior of the demised premises in a manner reasonably satisfactory to the Owner.

(*Id.* ¶ 87, Doc. 35 at 25.)

2. The Parties’ Contentions

This Court’s denial of the branch of W&L’s motion seeking dismissal of the indemnification claim is the subject of the instant motion. W&L argues that this Court “misapprehend[ed] the fact, inherent in the lease, that defendant [W&L] was not responsible for repair of the sidewalk at all” (Affirm in Supp. ¶ 16, Doc. 46). W&L further argues that “[a] determination of where, specifically, plaintiff fell will make no difference in a determination of

whether [W&L] owes indemnification to [1585 Realty], as neither of the possible locations would trigger the indemnification clause” (Affirm in Reply ¶ 3, Doc. 59).

In opposition, 1585 Realty argues that, based on the terms of the lease, W&L “clearly assumed responsibility for maintenance of the store front ... and was required to maintain in good order and condition and repair the exterior of the demised premises” (Affirm in Opp ¶ 14, *see also id.* ¶ 16, Doc. 56). 1585 Realty further argues that “[s]ince there has been no finding ... that [it] was actively negligent or caused or created the condition where plaintiff fell, this Court rightly denied [W&L’s prior motion]” (*Id.*).

In reply, W&L argues that a determination of actual negligence on the part of 1585 Realty is not necessary (Affirm in Reply ¶ 4, Doc. 49). W&L further argues that “the language of the [lease] provisions clearly only makes [W&L] responsible to clean and maintain areas of the demised premises and the abutting sidewalk” (*Id.* ¶ 9). W&L further argues that “the lease agreement only obligates [W&L] to make non-structural repairs to the abutting sidewalk” (*Id.*). W&L additionally argues that “the lease agreement clearly obligated [1585 Realty], exclusively, to perform all structural repairs to the sidewalk and vault doors” (*Id.* ¶ 10).

LEGAL CONCLUSIONS

A motion for leave to reargue, pursuant to CPLR 2221 (d), “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” (CPLR § 2221 (d) [2]). A motion for leave to reargue “is addressed to 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 Equip. Corp. v*

Kassis, 182 AD2d 22, 27 [1st Dept 1992] [internal quotation marks and citations omitted], *Iv denied in part, dismissed in part*, 80 NY2d 1005 [1992], *rearg. denied*, 81 NY2d 782 [1993]).

“Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted” (*Setters v AI Properties and Developments (USA) Corp.*, 139 AD3d 492, 492 [1st Dept 2016] [internal quotation marks and citations omitted]; *see also Foley v Roche*, 68 AD2d 558, 567-68 [1st Dept 1979]). “On reargument the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked” (*Macklowe v Browning School*, 80 AD2d 790, 791 [1st Dept 1981]). Where it is demonstrated that the court mistakenly arrived at its earlier determination, the granting of reargument is a provident exercise of such discretion (*Grimm v. Bailey*, 105 AD3d 703, 704 [2d Dept 2013]).

At issue here is whether W&L is required to indemnify 1585 Realty pursuant to the lease between these entities. The Administrative Code of the City of New York § 7-210 imposes a nondelegable duty on the owner of a building to maintain and repair the sidewalk abutting the premises (*See Xiang Fu He v Troon Mgt., Inc.*, 34 NY3d 167, 175 [2019]). “Unless a lease specifically obligates a commercial tenant to be responsible for structural repairs, and identifies what structural repairs are covered, such an obligation will not be implied nor imposed by the courts” (*Firtell v 173-175 E. 91 Realty Corp.*, 2014 N.Y. Slip Op. 31799[U] *7 [N.Y. Sup Ct, New York County 2014], citing *Cucinotta v. City of New York*, 68 AD3d 682, 683 [1st Dept 2009]).

Upon a further review of the lease, this Court finds that W&L did not have any responsibility under the lease for making structural repairs or for repairing or replacing the sidewalk or the cellar doors (*See Cucinotta*, 68 AD3d at 683). It is irrelevant whether the alleged

incident occurred on the sidewalk or on the cellar doors (Plaintiff's Cont'd EBT at 48:09-14, Doc. 48). The lease merely required W&L to make non-structural repairs on the sidewalk (Lease ¶ 4, Doc. 35 at 3). Paragraph 4 of the lease is not in conflict with the other paragraphs of the lease or the lease rider. Indeed, Lewis Trencher ("Trencher"), the managing agent of 1585 Realty, testified at his EBT that repairs of the sidewalk in front of W&L's premises were "the responsibility of the super and the managing agent...on behalf of the landlord [1585 Realty]" (Trencher EBT, Doc. 34 at 13:16-25). Trencher further testified that "[i]f repairs were needed, they would either be made by the super or a contractor that would be hired by the managing agent...on behalf of the landlord" (*Id.* at 14:16-25). Moreover, there is no indication that W&L created or had any actual or constructive notice of the alleged dangerous condition of the cellar doors prior to the date of Plaintiff's accident (*Compare Cucinotta*, 68 AD3d at 684 [tenant entitled to summary judgment dismissing cross claims based on the rider] and *Berkowitz v Dayton Const., Inc.*, 2 AD3d 764, 765 [2d Dept 2003] [tenant entitled to summary judgment dismissing cross claims based on the lease] with *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 154 [1973] [holding that there was an agreement to indemnify for the alleged incident based on the lease]). Accordingly, this Court grants W&L's motion for reargument and, upon reargument, grants its motion for summary judgment dismissing all cross claims for contractual indemnification.

Moreover, as to any common-law indemnification claim, under New York law, "one who is liable for an injury vicariously or by imputation of law may seek common-law indemnification from a person primarily liable for the injury" (*Bd. of Managers of Bay Club Condominium v Bay Club of Long Beach, Inc.*, 15 Misc 3d 282, 288 [Sup Ct, Nassau County, 2007]; *see also* 23 N.Y. Jur.2d *Contribution, Indemnity and Subrogation* § 90). "One whose liability is premised upon

active negligence cannot obtain common law or implied indemnity” (*Bd. of Managers of Bay Club Condominium*, 15 Misc 3d at 289, citing *D'Ambrosio v City of New York*, 55 NY2d 454, 461 [1982]). Because 1585 Realty would be actively negligent for failing to maintain the sidewalk in accordance with the Administrative Code, it would not be entitled to common-law indemnification and its cross claim for common-law indemnification against W&L is also dismissed.

CONCLUSION

Accordingly, it is hereby:

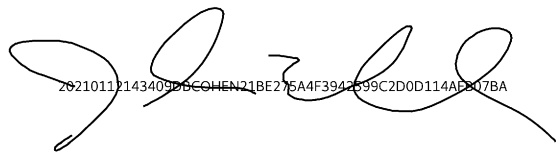
ORDERED that the branch of the motion by Defendant 1582 First Avenue Wine & Liquor Inc., pursuant to CPLR 2221, for leave to reargue its prior motion pursuant to CPLR 3212 for summary judgment (Seq. 001) seeking dismissal of all cross claims as asserted against it is GRANTED; and it is further

ORDERED that, upon reargument, the motion by Defendant 1582 First Avenue Wine & Liquor Inc. for summary judgment dismissing all cross claims against it is GRANTED, and the Clerk shall enter judgment accordingly; and it is further,

ORDERED that within 20 days of the filing date of the instant decision and order, counsel for Defendant 1582 First Avenue Wine & Liquor Inc. shall e-file a copy of said decision and order with notice of entry.

1/12/2021

DATE



DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE	<input checked="" type="checkbox"/> NON-FINAL
APPLICATION:	<input checked="" type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN <input type="checkbox"/> OTHER
CHECK IF	<input type="checkbox"/> SETTLE	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES	<input type="checkbox"/> FIDUCIARY <input type="checkbox"/> REFERENCE