

Vasquez v City of New York

2021 NY Slip Op 30450(U)

February 17, 2021

Supreme Court, New York County

Docket Number: 159903/2015

Judge: Carol R. Edmead

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

PRESENT: HON. CAROL R. EDMEAD PART IAS MOTION 35EFM

Justice

-----X

DAVID VASQUEZ, ERICA VASQUEZ,
Plaintiff,

- v -

THE CITY OF NEW YORK, LINCOLN CENTER FOR THE
PERFORMING ARTS, INC., NEW YORK CITY BALLET,
INC., NEW YORK CITY OPERA, INC., CITY CENTER OF
MUSIC & DRAMA, INC., RC DOLNER, INC., ALL-SAFE
LLC, LINCOLN CENTER DEVELOPMENT PROJECT,
INC., RCDOLNER LLC,

Defendant.

-----X

RC DOLNER, INC.

Plaintiff,

-against-

DONALDSON INTERIORS, INC.

Defendant.

-----X

RC DOLNER, INC.

Plaintiff,

-against-

ALL-SAFE LLC

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 339, 340, 341, 342, 343, 344, 346, 350, 351, 352, 353, 354, 355, 357

were read on this motion to/for REARGUMENT/RECONSIDERATION.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 336, 337, 338, 345, 347, 348, 356, 358

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

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595223/2016

Second Third-Party
Index No. 595507/2016

Upon the foregoing documents, it is

ORDERED that Second Third-party defendant ALL-Safe LLC's ("All Safe") motion seeking reargument is granted and, upon reargument, this Court modifies the December 2019 Decision to the extent that All Safe's contractual indemnification claim against Donaldson is granted; and it is further

ORDERED that Third-Party Plaintiff RC Dolner, Inc.'s ("RC Dolner") motion seeking reargument is granted and, upon reargument, this Court vacates the portion of December 2019 Decision dismissing RC Dolner's claim for contractual indemnification as against Donaldson; and it is further

ORDERED that RC Dolner's claim for contractual indemnification as against Donaldson is restored and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for RC Dolner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.

MEMORANDUM DECISION

In this Labor Law action, the following motions are consolidated for disposition.

In Motion Seq. 006, Second Third-Party Defendant ALL-Safe LLC ("All Safe") moves, pursuant to CPLR §§ 2221(a), (d) and (f), for leave to reargue portions of this Court's Decision and Order dated December 27, 2019 ("December 2019 Decision") and, upon reargument, granting All Safe relief by: (i) dismissing Third-Party Plaintiff RC Dolner, Inc.'s ("RC Dolner") claim for contractual indemnification; and (ii) granting All Safe's claims for contractual indemnification and breach of contract against Third-Party Defendant Donaldson Interiors, Inc. ("Donaldson").

In Motion Seq. 007, RC Dolner moves, pursuant to CPLR 2221 (d), for leave to reargue the December 2019 Decision and, upon granting reargument, vacating the portion thereof which dismissed RC Dolner's contractual indemnification claim as against Donaldson.

BACKGROUND FACTS

While employed by Donaldson as a carpenter for the renovation of the Koch Theater at Lincoln Center in New York City (the “Project”), Plaintiff David Vasquez tripped and fell when he stepped off a platform (the “Platform”) unto the adjoining ground. Plaintiff alleged that the adjoining ground was “uneven” as the hallway floor tiles that used to be there were previously demolished by a nonparty subcontractor.

RC Dolner, acting as the prime contractor for the Project, hired All Safe to perform site logistics work and Donaldson to perform the drywall and carpentry work. All Safe’s tasks included, among others, the installation of the Platform. There is a question of fact as to whether the Platform was installed before or after the adjoining hallway floor was demolished.

The December 2019 Decision

As relevant here, this Court found in the December 2019 Decision that All-Safe was not negligent in Plaintiff’s accident as All Safe constructed the Platform conforming to the design and following the schedule provided by RC Dolner. The Court further found that any steps that should have been taken to remedy the uneven adjoining ground fell squarely within RC Dolner’s purview as the general contractor responsible for overall safety on the Project site.

This Court therefore dismissed all claims against All Safe, except RC Dolner’s contractual indemnification claim against it. This Court reasoned that the indemnification provision in the contract between All Safe and RC Dolner does not require a showing of negligence. Thus, it is for the jury to determine whether Plaintiff’s accident arose from All Safe’s work:

“Here, there is expert testimony that All-Safe's work caused Plaintiff's accident. While that testimony was insufficient to raise a question of fact as to negligence, the subject indemnification clause does not require a showing of negligence. Under the broad "arising under" language in the indemnification provision, it is question of fact for the jury as to whether Plaintiff's accident arose from All-Safe's work.”

This Court did not particularly rule on the branch of All Safe's motion seeking summary judgment on its cross-claim for contractual indemnification and breach of contract against Donaldson.

Separately, this Court granted Donaldson's motion seeking dismissal of RC Dolner's contractual indemnification claim. This Court reasoned that the cause of Plaintiff's accident had nothing to do with Donaldson's work, thus:

“As to indemnification, RC Dolner holds the same broad "arising under" indemnification provision against Donaldson that it has against All-Safe. Here, as discussed exhaustively above, the accident did not arise out of Plaintiff's work, but work that occurred prior to the subject work. That is, Plaintiff alleges that his accident arose from a temporary defect caused by other contractors, the scheduling of the work, and RC Dolner's failure to remedy the defect. In these circumstances, the accident cannot be said to have arisen from Donaldson's work. Accordingly, the branch of Donaldson's motion that seeks dismissal of the RC Dolner's indemnification claim against it is granted.”

The Motions to Reargue

All Safe is now seeking reargument of the portion of the December 2019 Decision quoted above denying dismissal of RC Dolner's contractual indemnification claim against it (Motion Seq. 006). In support, All Safe argues that there was “no particular act or omission in the performance of All Safe's work that is causally related to Plaintiff's accident.” RC Dolner does not oppose. In the same motion, All Safe requests that this Court particularly rule on All Safe's motion seeking judgment granting its cross claims for contractual indemnification and breach of contract against Donaldson.

RC Dolner separately seeks reargument of the portion of the December 2019 Decision quoted above dismissing RC Dolner's contractual indemnification claim against Donaldson (Motion Seq. 007). RC Dolner submits that this Court erred in interpreting the “arising out of” language in the indemnification provision in Donaldson's contract. Specifically, RC Dolner

maintains that this Court “too narrowly focused on the specific mechanics of the accident as opposed to, more generally, determining whether the accident has a "connection with" the overall nature of the "Work" assigned to Plaintiff's employer under the contract.”

Donaldson opposes both motions. It maintains that the indemnity provision in its contract does not cover Plaintiff's accident as the cause thereof had nothing to do with Donaldson's work.

DISCUSSION

Pursuant to CPLR 2221, a motion for leave to reargue 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. Kassiss*, 182 AD2d 22, 27 [1st Dept 1992], quoting *Schneider v. Solowey* (141 AD2d 813 [2d Dept 1988]). "Reargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." (*Id.* at 27, citing *Pro Brokerage v. Home Ins. Co.* (99 AD2d 971 [1st Dept 1984]). Nor does a reargument motion provide a party "an opportunity to advance arguments different from those tendered on the original application." (*Rubinstein v. Goldman*, 225 AD2d 328, 328 [1st Dept 1996], quoting *Foley v. Roche* (68 AD2d 558, 568 [1st Dept 1979]).

This Court finds movants' application for reargument partly meritorious. Movants put forth cases that were not previously considered by this Court in the December 2019 Decision. On the basis of these cases, this Court modifies the December 2019 Decision, as set forth below.

I. Contractual Indemnification Claims against Donaldson

Both All Safe and RC Dolner seek contractual indemnification from Donaldson on the basis of the indemnification provision found in Donaldson's contract with RC Dolner (NYSCEF doc No. 158). The provision, in pertinent part, provides as follows:

“To the fullest extent permitted by law, [Donaldson] agrees to indemnify, defend and hold harmless Owner, RC Dolner LLC, Owner's agents and/or consultants, the

Owner's Representative, the Architect, the Engineer, the Site Logistics Subcontractor (to the extent the Subcontractor or sub-subcontractor utilizes the hoist, scaffolding or bridging equipment of the Site Logistics Subcontractor), and their respective officers, trustees, members, directors, agents, employees and partners (collectively "Indemnitees" and each an "Indemnatee"), from and against any and all losses, claims, suits, damages, liabilities, attorneys' fees... **directly or indirectly arising out of, alleged to arise out of or in connection with or as a consequence of the performance or non-performance of the Work**, excluding only Damages specifically attributable to and only to the extent caused by the negligence of the party seeking indemnification." (emphasis added)

Donaldson maintains that Plaintiff's accident could not have arisen out of Donaldson's work as the installation of the Platform and demolition of the floor underneath were performed by contractors over which Donaldson had no supervisory responsibility (NYSCEF doc No. 350 and 356).

This Court adopted Donaldson's position in the December 2019 Decision, holding that the temporary dangerous condition caused by the Platform being next to a demolished floor was not caused by Donaldson's work.

This Court revisits the issue and finds cases standing for the proposition that when analyzing a broad "arising out of" indemnification language, a court's inquiry should not focus on the "precise cause" of the accident, but should simply determine whether the accident has a "connection" with the risk for which the insurance coverage was provided.

This Court starts its analysis with the case of *Regal Construction v National Union Fire Ins. Co. of Pittsburgh, PA* (15 NY3d 34 [2010]). In *Regal*, the plaintiff was injured when he stepped and slipped on a joist painted by an employee of URS. URS was the construction manager for the project while Plaintiff's employer, Regal, was hired by URS to do demolition and renovation work. Plaintiff commenced an action against URS prompting URS to demand indemnification from Regal under an additional insured endorsement which provided coverage "only with respect to liability arising out of [Regal's] ongoing operations." Regal put forth the same argument Donaldson

is making now before this Court, *i.e.*, that Plaintiff's injury did not arise from the indemnitor's work as it was caused by work of another contractor/trade. The *Regal* court rejected the argument, holding that "the focus of the inquiry "is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained."" As the plaintiff in *Regal* was performing Regal's work when he slipped, the *Regal* court held that "the injury "ar[ose] out of" Regal's operations notwithstanding URS's alleged negligence, and fell within the scope of the additional insured clause of the insurance policy." The *Regal* court further elaborated that "there was a connection between the accident and Regal's work, **as the injury was sustained by Regal's own employee while he supervised and gave instructions to a subcontractor regarding work to be performed.** That the underlying complaint alleges negligence on the part of URS and not Regal is of no consequence, as URS's potential liability for [plaintiff's] injury 'ar[ose] out of' Regal's operation and, thus, URS is entitled to a defense and indemnification according to the terms of the CGL policy." (emphasis added)

After *Regal* was issued by the Court of Appeals, the First Department followed *Regal*'s holding in *Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408, 904 NYS2d 52 [2010]). In *Hunter*, an employee of subcontractor Petrocelli was injured on the job. The employee sued Hunter who acted as the construction manager. Hunter, in turn, sought defense and indemnification from Petrocelli. Hunter insisted that "since [plaintiff] "was an employee of Petrocelli, who was allegedly injured in the course of work for Hunter, the loss plainly arises out of Petrocelli's work." The First Department upheld Hunter's position. Following the case of *Regal*, the *Hunter* court held that "[w]here [] the loss **involves an employee of the named insured, who is injured while performing the named insured's work** under the subcontract, there is a

sufficient connection to trigger the additional insured "arising out of" operations' endorsement and fault is immaterial to this determination." (emphasis added)

In *Admiral Ins. Co. v American Empire Surplus Lines Ins. Co.* (96 Ad3d 585 [1st Dept 2012]), plaintiff, an employee of subcontractor B&R, was injured while performing B&R work. B&R was hired by general contractor Cross Country. The underlying action resulted in a jury verdict holding Cross Country solely liable. During the damages phase of the trial, the insurers settled the case. Admiral, one of the insurers, later filed a declaratory relief and equitable contribution against defendant-insurers, raising the issue of "whether Cross Country's liability for the injuries at issue in the underlying action constitutes "liability arising out of [B&R's] operations" under the B&R policies." The First Department, following *Regal* and *Hunter*, rejected defendant-insurers' argument that "Cross Country's liability did not "aris[e] out of [B&R's] operations" because B&R [] was not found to be responsible for those injuries in any way, and because there is no evidence that those injuries resulted from any fault on B&R's part." The *Admiral* court found that Cross Country's coverage as additional insured under the policies issued to B&R was established as plaintiff in the underlying action was injured while performing his duties as an employee of B&R in the course of the work for which B&R was hired by Cross Country.

Guided by the above cases, this Court finds that there was a connection between the accident and Donaldson's work, as the injury was sustained by Donaldson's employee while performing Donaldson's work under its subcontract with RC Dolner. Therefore, the Court grants All Safe's motion seeking judgment on its contractual indemnification claims against Donaldson. However, as RC Dolner did not move for summary judgment granting its contractual indemnification claim against Donaldson, such claim is simply restored and shall continue.

II. Contractual Indemnification Claim against RC Dolner

In the original motion, All Safe sought dismissal of RC Dolner's contractual indemnification claim based on the following indemnification provision in All Safe's contract (see "Purchase Order", NYSCEF doc No. 2014):

"To the fullest extent permitted by law, [All-Safe] agrees to indemnify, defend and hold harmless Owner, RC Dolner ... from and against any and all losses, claims suits, damages ... **directly or indirectly arising out of, alleged to arise out of, or in connection with or as a consequence of the performance or nonperformance of the Work**, excluding only Damages specifically attributable to and only to the extent caused by the negligence of the party seeking indemnification" (emphasis added)

As mentioned, this Court denied this branch of All Safe's motion as the broad "arising out of" language does not require a showing of negligence on the part of All Safe.

In seeking reargument All Safe submits that this Court "misapplied the legal precedent set forth in *Brown v Two Exchange Plaza Partners*, [] 76 NY2d 172 [1990])." All Safe argues that the Court in *Brown* required a showing of a "particular act or omission" that is "causally related" to Plaintiff's accident before an indemnity provision with a "arising out of" language can be triggered. All Safe maintains that the facts of this case failed to meet such requirement as "the [P]latform was properly built and installed, did not fail in any way at the work site, and plaintiff confirmed in his testimony that it was the uneven floor next to the platform that caused his ankle injuries."

This Court disagrees and finds that it did not overlook or misapprehend legal precedent on this issue. As All Safe relies on *Brown*, this Court finds it proper to revisit its facts.

In *Brown*, the plaintiff was injured when the scaffold on which he was standing collapsed. The scaffold was erected by Heydt pursuant to a subcontract with the general contractor, Fuller, and was designed to be used in common by all trades, including subcontractor A&M who was

hired by Fuller to erect the walls and ceilings. A & M in turn hired Plaintiff's employer to install the suspension system for the ceiling. The evidence at trial failed to establish why the scaffold collapsed. Liability was nevertheless imposed on Fuller because of its absolute liability under Labor Law 240 (1) so Fuller sought contractual indemnification against Heydt and A&M. Fuller's claim was denied by the lower court on procedural ground, but the Appellate Division modified by awarding Fuller judgment over against A&M, but not as to Heydt. The Appellate Division held that "to say [] that plaintiff's accident arose out of, in connection with or as a consequence of Heydt's erection or straightening of the scaffold, without any showing of a particular act or omission in the performance of such work causally related to the accident, would be to make Heydt a virtual insurer of the scaffold." On further appeal, the Court of Appeals affirmed.

As relevant here, the indemnification provision in Heydt's contract covered claims "arising out of, in connection with or as a consequence of the performance of the Work and/or any acts or omission of the Subcontractor or any of its ... subcontractors." The Court of Appeals noted that the provision was triggered in two instances: (1) where a claim arose out of, in connection with or as a consequence of the performance" of the subject work and "(2) where a claim arose out of the acts or omissions" of the putative indemnitor (*Id.*). "It provides," the Court held, "for indemnification when the claim arises out of the subcontractor's work even though the subcontractor has not been negligent" (*Id.*).

All Safe acknowledges that the indemnity provision in its contract "does not require RC Dolner to establish that All Safe was negligent." However, All Safe insists that "it does require a showing that plaintiff's ankle injury arose from a particular action or inaction in the performance of All Safe's contractual obligations..." (NYSCEF doc No. 340, ¶ 28). According to All Safe, "RC Dolner cannot establish [that] a particular act or omission in the performance of All Safe's work

caused the accident because the evidence in this case convincingly establishes that it was the uneven floor adjacent to the platform that caused plaintiff's injuries." (*Id.*)

The Court finds that All Safe's argument is based on a faulty premise, *i.e.*, that Plaintiff's accident was caused solely by the uneven floor next to the Platform, and that the Platform has completely nothing to do with it. However, Plaintiff alleges that his accident arose from a temporary condition resulting from a series of events, *i.e.*, the demolition of the floor followed by the installation of the Platform over it. Thus, both the uneven floor and the installation of the Platform over it form part of the alleged dangerous condition causing Plaintiff's accident. For the sake of clarity, it is the installation of the Platform over a demolished floor - assuming that the jury finds that the Platform was indeed installed post demolition state - was the "particular act" that has a "causal relation" to Plaintiff's accident.

All Safe's circumstances are distinguishable from Heydt in the case of *Brown*. There was no allegation in *Brown* that the installation of the Platform by Heydt created a dangerous condition at the Project site as it was the Platform itself that failed, albeit for reasons unknown, causing plaintiff's accident therein.

For the sake of completeness, this Court will address the other cases discussed by All Safe in its motion.

All Safe cites to the case of *Urbina v 26 Ct Assoc LLC* (46 AD3d 268 [1st Dept 2007]) as also lending support to its position. All Safe argues that the subcontractor who erected the scaffold in *Urbina* was found to be contractually obliged to indemnify because the subcontractor assumed the responsibility to maintain the scaffold. All Safe contends that, unlike the subcontractor in *Urbina*, All Safe was not tasked to maintain the Platform after it was delivered and installed at the Project site. This Court finds that All Safe's reliance on *Urbina* is misplaced. While All Safe was

not responsible for maintaining the Platform here, Plaintiff does not allege that his accident arose from the negligent maintenance of the Platform as in the case of *Urbina*, but from the alleged dangerous condition it created after the Platform was installed over a demolished floor.

All Safe next argues that this Court erred in relying on *Regal* (*supra*, at p. 6) and *Britez v Madison Park Owner, LLC* (106 AD 531 [1st Dept 201]).

It is however plain in the December 2019 Decision that *Regal* and *Britez* were cases cited to by RC Dolner to support its opposition to All Safe's original motion. In any event, this Court rejects All Safe's reading of these cases in its favor.

All Safe maintains that since it did not employ Plaintiff, the Court's holding in *Regal* is inapplicable. While All Safe is correct that *Regal's* specific pronouncement relating to employment as sufficient trigger to indemnification responsibility does not apply, the general holding that the phrase "arising out of" "requires "only that there be some causal relationship between the injury and the risk for which coverage is provided"" does. In fact, *Regal* stands for the proposition that the duty to indemnify under an "arising out of" indemnity clause is "exceedingly broad". Adopting All Safe's argument that it has no duty to indemnify just because it was not the employer of Plaintiff defeats the broad interpretation given by the courts to "arising out of" clauses.

As to *Britez*, All Safe reads this case as requiring supervisory responsibility over Plaintiff's work to trigger indemnification responsibility. This reading is erroneous as the indemnification clause in All Safe's contract is triggered when a claim arises out of All Safe's work, not Plaintiff's work. Here, as discussed in the December 2019 Decision, there is expert testimony that All Safe's work caused Plaintiff's accident.

On the basis of the foregoing, this Court adheres to its prior decision to deny All Safe's motion seeking dismissal of RC Dolner's contractual indemnification claims as against it.

III. Breach of Contract Claim by All Safe against Donaldson

As to All Safe's claim for breach of contract against Donaldson, this Court finds that All Safe failed to make a prima facie showing that Donaldson failed to name All Safe as an additional insured. While All Safe previously submitted portions of Donaldson's insurance policy with Travelers Insurance Company (NYSCEF doc No. 163), the pages submitted merely listed down the "forms, endorsements and schedule numbers" forming part of the policy. In fact, among the forms listed were "Additional Insured" (CG T8 00-01) and "Blanket Add'l Insured (Contractor NY)" (CG F2 76 06 03). The copies of these relevant forms, however, were not submitted to the Court. Thus, there is no way for this Court to confirm whether All Safe was named under these forms or not.

Therefore, the branch of All Safe's motion seeking summary judgment granting its breach of contract claims against Donaldson is denied. Accordingly, All Safe's claim to recover out of pocket expenses arising from Donaldson's breach of contract is likewise denied.

CONCLUSION

Based on the foregoing, it is hereby

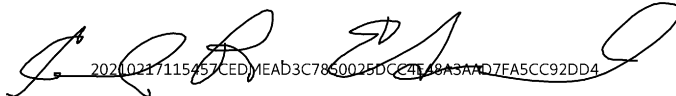
ORDERED that Second Third-Party Defendant ALL-Safe LLC's ("All Safe") motion seeking reargument is granted and, upon reargument, this Court modifies the December 2019 Decision to the extent that All Safe's contractual indemnification claim against Donaldson is granted; and it is further

ORDERED that Third-Party Plaintiff RC Dolner, Inc.'s ("RC Dolner") motion seeking reargument is granted and, upon reargument, this Court vacates the portion of December 2019 Decision dismissing RC Dolner's claim for contractual indemnification as against Donaldson; and it is further

ORDERED that RC Dolner's claim for contractual indemnification as against Donaldson is restored and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the counsel for RC Dolner shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on all parties.


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2/17/2021

DATE

CAROL R. EDMED, 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