Gordon v ENY Hotel, LLC
2021 NY Slip Op 30559(U)
February 19, 2021
Supreme Court, Kings County
Docket Number: 514811/2016
Judge: Edgar G. Walker

At an IAS Term, Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 19th day of February, 2021.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

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TAHITI GORDON,

Plaintiff,

- against -

Index No.514811/2016

ENY HOTEL, LLC, AND GROWN ORG.,LLC.,

Defendants.

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ENY HOTEL, LLC ,

Third-Party Plaintiff,

- against -

MC SUPERSTRUCTURE, INC., H & F PLUMBING, INC., ORION PLUMBING & HTG CORP.,

Third-Party Defendants.

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The following e-filed papers read herein:	NYSCEF Doc. No.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	158-171
Opposing Affidavits (Affirmations)	174-175, 177-178
Reply Affidavits (Affirmations)	176
Affidavit (Affirmation)	
Other Papers	

Upon the foregoing papers, third-party defendant MC Superstructure, Inc., (MC) moves, in motion (mot.) sequence (seq.) four, seeking an order pursuant to CPLR § 2221(d), for leave to reargue the Decision and Order of this court dated September 1, 2020, and upon

said reargument, an order: 1) reversing the court's ruling that MC is in breach of contract for failing to procure insurance on behalf of defendant/third-party plaintiff ENY Hotel, LLC (ENY); 2) modifying the court's ruling as to the nature of recoverable damages for the breach of insurance procurement provision to the extent that MC is found to be in breach of contract; or, alternatively, 3) modifying the court's ruling that the subsequent agreement between ENY and MC did not supersede the first, notwithstanding the plain reading of the subsequent agreement.

Background and Procedural History

ENY is the owner of property located at 1691 East New York Avenue in Brooklyn. ENY contracted with MC to perform work related to the construction of a hotel at the location and MC subcontracted with another entity to install scaffold covering the sidewalk outside of the project. On April 20, 2016, plaintiff Tahiti Gordon was walking on the sidewalk under the scaffold when she was caused to trip and fall due to what she described as a raised piece of rock. Plaintiff claims to have sustained various injuries as a result of this fall.

ENY moved in mot. seq two for an order, pursuant to CPLR 3212, granting it:1) summary judgment dismissing plaintiff's complaint and 2) summary judgment on its claims for contractual indemnification and failure to procure insurance asserted against MC. MC moved in mot. seq. three for an order granting it summary judgment dismissing the third-party complaint as well as any cross claims, and/or counterclaims. As relevant to the instant motion, this court, in its September 1, 2020 Decision and Order, granted that branch of ENY's motion seeking summary judgment on its claim for breach of contract for failure to procure insurance and denied MC's motion in the entirety.

"Motions for reargument are addressed to the sound discretion of the court which decided the original motion and may be granted upon a showing that the court overlooked or misapprehended the facts or law or for some reason mistakenly arrived at its earlier decision" (*Tardif v Hauppauge Off. Park Assoc., LLC*, 184 AD3d 887, 888-889 [2d Dept 2020], quoting *Bueno v Allam*, 170 AD3d 939, 940 [2019]; *Fuessel v Chin*, 179 AD3d 899, 900-901 [2d Dept 2020]; *MAD Constr., Inc. v Cavallino Risk Mgt. Inc.*, 178 AD3d 816,819 [2d Dept 2019]; *see* CPLR 2221[d][2]).

MC contends that the court misapprehended several points of fact and law. Specifically, MC asserts that this court should have denied that branch of ENY's motion seeking summary judgment on its breach of contract claim. In this regard, MC contends that the record establishes that, prior to plaintiff's accident, MC procured general liability insurance which covered ENY as an additional insured. Alternatively, MC argues that the court's ruling that the subsequent agreement between ENY and MC did not supersede the first should be modified.

After careful consideration, the motion to reargue is granted. Upon reargument, that branch of MC's motion seeking an order reversing the Court's ruling that MC is in breach of contract for failing to procure insurance on behalf of ENY is granted. In so holding the Court finds that it overlooked and misapprehended certain facts demonstrating that MC had procured insurance which included a blanket additional insured endorsement that states "who is an insured is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named as an additional insured..." Specifically, MC had submitted a copy of the Blanket Additional Insured Endorsement related to policy # AGL0012449-01, issued by Arch Specialty Insurance Company to MC,

with a policy period of April 26, 2015 through April 26, 2016, which provides in pertinent part that:

> This endorsement modifies insurance provided under the following: COMMERCIAL GENERAL LIABILITY COVERAGE PART SECTION II – WHO IS AN INSURED is amended to include as an additional insured those persons or organizations who are required under a written contract with you to be named as an additional insured, but only with respect to liability for "bodily injury", "property damage", or "personal and advertising injury" caused, in whole or in part, by your acts or omissions or the acts or omissions of your subcontractors: a. In the performance of your ongoing operations or "your work", including "your work" that has been completed; or . . . (NYSCEF doc. no. 108).

The court notes that it is bound by the Second Department's holding in *77 Water St., Inc. v JTC Painting & Decorating Corp.*, (148 AD3d 1092,1097[2d Dept 2017]). In *77 Water St., Inc.*, the Appellate Division held that a subcontractor was entitled to summary judgment declaring that it fulfilled its contractual obligation to procure insurance by providing evidence that its commercial general liability insurance policy contained an endorsement, which stated that coverage as an additional insured was provided to any entity that the subcontractor was required by contract to have covered as an additional insured. Similarly, in *Arner v RREEF Am., L.L.C.*, (121 AD3d 450, 451 [2014]), the First Department held that a subcontractor was entitled to summary judgment dismissing a claim for breach of contract for failure to procure insurance, as it demonstrated that it had satisfied its obligation by procuring "insurance in the specified amounts, and the additional insured endorsement provides coverage for organizations '[a]s required by written contract signed by both parties prior to loss,'" notwithstanding the fact that the subcontractor's carrier had denied the owner's tender. Accordingly, in the instant case, the court should have denied that branch of ENY's motion seeking summary judgment on its breach of contract claim, and upon

reargument, this branch of ENY's motion is denied. In light of the foregoing and the court's determination that MC satisfied its' contractual obligation to procure insurance naming ENY as an addition insured, the alternative relief requested in MC's motion to reargue is denied. To the extent not specifically addressed herein, MC's remaining contentions and arguments were considered and found to be without merit and/or moot.

The foregoing constitutes the decision and order of the court.

E N T E R,

J. S. C.