Hamel v Park Ave. Armory
2021 NY Slip Op 31005(U)
March 29, 2021
Supreme Court, New York County
Docket Number: 450647/2018
Judge: Richard G. Latin

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. RICHARD G. LATIN** **PART** **IAS MOTION 46**

Justice

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VERONICA HAMEL,

Plaintiff,

- v -

PARK AVENUE ARMORY, SEVENTH REGIMENT ARMORY CONSERVANCY, INC.,THE CITY OF NEW YORK, OLD VIC THEATRE, STEWART LAING, MIMI JORDAN SHERIN, MCLAREN ENGINEERING GROUP, ELITE PRODUCTION CONSULT, THE LIGHTING SYNDICATE, LLC,KEVIN BYRNE ARCHITECTS, P.C.,OLD VIC THEATER COMPANY (THE CUT) LIMITED, HUDSON SCENIC STUDIO

Defendant.

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INDEX NO. 450647/2018

MOTION DATE 02/11/2021

MOTION SEQ. NO. 007 008 009 010

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 315, 346, 357, 358, 359, 360, 361, 362, 363, 365, 366, 367, 368, 369, 370, 371, 372, 389

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 390, 391, 394, 395, 400, 402

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 423, 424, 425, 426, 427, 429, 430, 431, 432

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

The following e-filed documents, listed by NYSCEF document number (Motion 010) 417, 418, 419, 420, 421, 422, 428, 433, 434, 435, 436, 437

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

Upon the foregoing documents, it is ordered that defendants Hudson Scenic Studio, Inc. i/s/h/a Hudson Scenic Studio ("Hudson") and McLaren Engineering Group's ("McLaren") motions to, inter alia, dismiss all claims and cross claims, and defendants Elite Production Consult

("Elite") and Lighting Syndicate LLC's ("Lighting Syndicate") motions to, inter alia, reargue the order of Justice Billings dated November 20, 2020, are determined as follows:

Plaintiff Veronica Hamel commenced this action to recover for injuries allegedly sustained on April 14, 2017 at the Park Avenue Armory located at 643 Park Avenue, New York, New York. Plaintiff was attending a performance of the "Hairy Ape" when she fell while descending an inconspicuous staircase connected to a rotating stage in order to reach her seat. Defendant Hudson provided equipment and scenery for the play, defendant McLaren provided consulting services, defendant Elite installed seating, a preparatory stage, and drapes, and defendant Lighting Syndicate provided lighting sound, carpentry, and props.

Defendant Lighting Syndicate previously moved for summary judgment, dismissing the complaint and all cross claims against it. Defendant Elite also previously "cross-moved" for summary judgment, dismissing the complaint and all cross claims against it. By order dated November 20, 2020, the Hon. Lucy Billings granted Elite's cross motion solely to the extent of dismissing Lighting Syndicate's implied indemnification and contribution cross claims against it. Likewise, Lighting Syndicate's motion for summary judgment was granted only to the extent that McLaren's cross claims against Lighting Syndicate were dismissed. Defendants Elite and Lighting Syndicate now move to, inter alia, reargue their prior summary judgment motions and the November 20, 2020 order. Additionally, defendants Hudson and McLaren each move for, inter alia, summary judgment dismissing all claims and cross claims against them.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form, demonstrating the absence of any triable issues of fact, and establishing entitlement to judgment as a matter of law (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). Only when the movant satisfies its prima

facie burden will the burden shift to the opponent "to lay bare his or her proof and demonstrate the existence of triable issues of fact" (*Alvarez*, 68 NY2d at 324; *see also Zuckerman v City of New York*, 49 NY2d 557 [1980]).

With respect to seq. #7, Hudson argues that it acted within the terms of its agreement with Seventh Regiment Conservancy Inc. d/b/a Park Avenue Armory ("the Armory"), plaintiff was not injured due to Hudson, Hudson is entitled to contractual and common law indemnification against the Armory, and that the Armory breached its obligation to procure insurance on its behalf.

In support of the motion, the movant submits, inter alia, its contract with the Armory, the affidavit of Joseph Bellber, finance vice president for Hudson, and the deposition testimony of Roger Bardwell, foreman and chief engineer for Hudson.

Joseph Bellber averred that Hudson built a rotating stage for the Armory for the "Hairy Ape" production based upon a contract the parties entered into on November 16, 2016. The contracted provided that Hudson would build, paint, and furnish materials in accordance with the developed plans of the Armory's designer, Stewart Laing. He stated that Hudson was directed to adhere to the color, elevations, plans, specifications, etc. provided by Laing. Hudson would not be responsible for the actions and omissions of the designer, including decisions as to color and design of the stage. Upon completion of Hudson's work, Paul King of the Armory signed off on the work as required by the contract.

Further, pursuant to the contract the Armory was to insure the project through an all risk insurance policy and was to carry public liability insurance in which Hudson would be named as an additional insured. Additionally, the contract had a reciprocal indemnification clause. It stated in part that Hudson would indemnify and hold the Armory harmless against any and all claims, suits, damages, costs and expenses, associated with Hudson's breach of any of its obligations or

warranties, even actions brought by third parties. It also stated that Hudson would not be liable to the Armory for any acts or omissions of the Armory, and that the Armory shall indemnify and hold Hudson harmless against any and all claims, suits, damages, costs, and expenses arising out of its breach of any of its obligations or warranties, including actions brought by third parties. Additionally, under section 9 of the contract, entitled "Use of Contractor's Judgment," Hudson was to timely and proactively consult with the Armory on any elements of the designs that it found problematic.

Bardwell testified that he is a licensed professional engineer in New York State who has been working for Hudson since the 1980s. He first became involved in the "Hairy Ape" production when he was tasked with creating the large rotating ring for the stage also referred to as a donut. It was his job to come up with a structural system and methodology of construction that would work to meet the constraints of the project. He averred that the initial ground plans for the project were prepared by the Armory and exchanged, however, the plans were revised around a dozen times with around six of the plans or drawings being prepared by Hudson and then returned with requested changes. Bardwell believed, but was not certain, that Stewart Laing may have come up with the original designs. He further recalled that he was responsible for the technical design of the large rotating ring and did the drawings for that, while another Hudson employee was responsible for the mechanical design of the donut. He also did the design and drawing for ancillary elements like some steps, the handrails, ramp, and platform behind the audience.

Bardwell's task was to figure out how to construct the ring and ancillary elements and make them so that they could be assembled at the venue. He alleged that he did not make any changes to the esthetic design of the rotating floor or ancillary elements on his own without direction coming from the Armory, or its agents, through Hudson's project manager. He

remembered that, at what must have been the direction of the Armory, he made changes to the wideness or narrowness of the steps. He stated that while he was not certain, he assumed that Hudson had painted the steps before providing them to the Armory. He also said that the size and shape of the steps, the color of the steps, the location and number of the handrails, and whether the outer handrails were permanent and the inner handrails were removable was all part of the Armory's designer's esthetic design. He claimed he had no role in the placement or number of handrails. Bardwell additionally averred that besides preparing the drawings and editing the design that he also observed the fabrication of the ring and ancillary elements and was available to interpret the drawings and answer questions. In addition to that, he was in attendance for approximately thirty minutes as the floor and ancillary elements were being assembled at the Park Avenue Armory and was consulted with regards to any issues that there were. He alleged that even when he was not there, there would most likely be a layout or department head from Hudson there to supervise the assembly. Additionally, as to any notations on the load-in schedule, there would likely be two people from Hudson at the Park Avenue Armory, one to supervise automation and another who worked on the fabrication of the structure.

Furthermore, Bardwell remembered that in preparing the technical design for the rotating floor and ancillary items that he referred to the New York City Building Code. Specifically, he consulted the section on the pitch of the non-ADA ramp. It was his assumption that the ADA ramp would be used for audience access and he wanted to get the design right so that the item would pass physical inspection on the first try. He further stated that he did not consult the code for anything else as he was not working on the egress plan for this design nor would the code necessarily apply to theatrical set pieces. He stated that while he was familiar with customary step riser heights or tread widths under the New York City Building Code, that he did not make any

recommendation to anybody when going through the different designs concerning the change in the riser heights, tread widths, or anti-slip elements for the steps. Similarly, he did not speak with anyone or recommend that there should be any change in the handrail design or suggest the inclusion of more handrails.

As a general matter, a duty undertaken as a contractual obligation does not normally extend to third parties that are not in privity of contract (*see Eaves Brooks Costume Co. v YBH Realty Corp*., 76 NY2d 220 [1990]). However, an exception to this general rule exists where a party that fails to exercise reasonable care in the performance of its contractual duties and launches a force or instrument of harm may be subject to tort liability to a third party[1] (*see Espinal v Melville Snow Construction*, 98 NY2d 136 [2002]; *Stiver v Good & Fair Carting & Moving, Inc.*, 9 NY3d 253 [2007]; *Church v Callanan Indus.*, 99 NY2d 104 [2002]).

In opposition to the motion, the nonmovants submit, inter alia, the affidavit of Michael Leshner, P.E. Leshner opines to a reasonable degree of engineering certainty that the plaintiff fell as she was descending the stairway to her seat due to a poorly designed and poorly executed theatrical environment. He alleged that the black on black stairway with no handrails was inconspicuous and created optical confusion for the pedestrian leading to her fall. Further, he stated that the lack of handrails or handrail extensions on the subject stairs was a cause of plaintiff's alleged injuries. He concludes that Hudson, as the fabricator and supervisor of the assembly and installation of the rotating stage, handrails, and steps, was negligent as the steps lacked adequate handrails and constituted a hazardous condition that was a substantial factor in causing plaintiff's injuries.

[1] All of the moving defendants' motions are predicated on the same theory that the respective defendant did not owe a duty to plaintiff and that none of the *Espinal* exceptions, particularly that the defendant launched the instrument of harm, apply. With respect to all of the motions, there are no contentions that any party completely displaced the Armory's duty to maintain the premises or that the plaintiff relied on the contracts amongst the parties.

Inasmuch as Hudson owed a contractual duty to proactively consult with the Armory as to any designs that were problematic, triable issues of fact remain as to whether Hudson was negligent in its fabrication and oversight of the installation in creating and allowing for the potentially hazardous condition, and thus launching an instrument of harm. Furthermore, to the extent that this movant may not be free from negligence, summary judgment on its other claims for indemnification and breach of contract to procure insurance coverage are likewise unwarranted (*see Tormey v City of New York*, 302 AD2d 277 [1st Dept 2003]; *compare Astrakan v City of New York*, 184 Ad3d 445 [1st Dept 2020]; *Linhart v Rojas*, 154 Ad3d 440 [1st Dept 2017]). Thus, Hudson's motion is denied in its entirety.

With respect to seq. #8, defendant McLaren seeks summary judgment, dismissing all claims and cross claims inasmuch as it alleges that it did not owe or breach a duty to plaintiff. Specifically, McLaren argues that its contractual duties were limited to provided structural engineering services only and did not have any responsibility concerning architectural or other professional services related to egress, placement of steps, placement of handrails or lighting.

In support of its motion McLaren submits, inter alia, the February 13, 2017 contract between McLaren and the Armory, the affidavit of Earl L. Barnwell, executive vice president at Support Buildings of New York, and the deposition testimony of William Gorlin, P.E., McLaren's structural engineer

Barnwell averred that he has been practicing in the field of expediting in New York City since 2004 and specializes in, among other things, code compliance in New York City based on the New York City Building Code. In coming to an opinion in this matter, Barnwell reviewed, inter alia, plaintiff's bill of particulars and supplemental bill of particulars as to McLaren, Hamel's expert disclosure of Michael Leshner, McLaren's contract with the Armory, the PW-1s, PW-3s,

TR-1s, and the TPA applications filed with the Department of Buildings and the permits issued for the subject theatrical production. Based on his review of the aforementioned documentation and his years of experience as an expediter, he opined that McLaren was only to provide structural engineering services and any code review or code compliance that was exclusively necessary to the structural elements of the project. Further, he believes it is unquestionably clear that Kevin Byrne was the party that furnished architectural services, including code compliance with egress like the placement of handrails and steps for the purpose of obtaining a TPA permit for the production. Such is evident from the forms submitted.

The contract between McLaren and the Armory states that McLaren will evaluate the seating riser system, egress stairs, guardrails, ADA ramps, and stage platform. It continues that McLaren will conduct a structural review of the portions of the donut turntable which are in the audience path of egress. It goes on to state that McLaren will review and redline fabrication and installation drawings and will provide general notes. Furthermore, the contract contained special conditions stating, "the scope does not include review of out of scope elements, architectural services (including egress, occupancy, rise/run geometry, handrail requirements, handrail geometry, fire safety, etc.), mechanical/electrical/control engineering."

William Gorlin, P.E. testified that he has been a professional engineer since 1990, has worked many jobs focusing on structural engineering, and is familiar with the New York City Building Code. Gorlin first joined McLaren as a staff engineer in its entertainment division in January 2000. He averred that McLaren is predominantly an engineering consulting outfit, but that they have several branches that do land surveying and dive inspections. He has been a vicepresident of McLaren and director of the entertainment division for the past 16 or 17 years. In this

role he claimed that he manages the entertainment division and its staff, writes contracts, works with the clients on developing scopes of work, and oversees engineering work.

Gorlin recalled that McLaren had worked on 5 to 10 projects for the Armory prior to the subject production. He alleged that in each case their services pertained to structural engineering. He stated that McLaren would become involved in a project if a permit is required and an independent third-party engineer is required "to review the structural integrity of the systems supporting people." With respect to the subject project, Gorlin made clear that the scope of McLaren's duty was to make sure that what was being designed was structurally sound.

With regards to handrails, he claimed it was the architect's job to determine if they were required, then it was McLaren's job to determine the structural integrity of the handrails. He stated McLaren was not involved in whether the New York City Building Code required handrails, how many different handrails would be used, or where the handrails would be placed. Similarly, Gorlin averred that McLaren was not involved in determining the color of the egress steps, the lighting in the drill hall, or the number of ushers that would assist the audience. Such topics were specifically outside the scope based on the contract. He did corroborate that McLaren was to review and redline the fabrication and installation drawings prepared by the Armory and their agents like Hudson, however, their redlining pertained solely to structural integrity. Similarly, any communications regarding redlining concerning the handrails had pertained to connection details of the handrails to the supporting structure. Likewise, with respect to the treads and egress steps, McLaren evaluated them in regard to their structural integrity. McLaren was tasked with ensuring that the steps and handrail could withstand a load. He averred that McLaren did not communicate with the Armory, King, or any of the Armory's agents with regard to any topic outside of structural integrity. He again clarified that while McLaren submitted plans to the NYC Department of

Buildings and evaluated code compliance for the project, it did so only as it pertained to the structural integrity of items. He claimed that is why they stamped all the sheets as saying that these drawings are submitted for structural integrity.

In opposition to McLaren's motion, the nonmovants rely on, inter alia, the deposition testimony of Paul King, project director for the subject production, and the affidavit of Michael Leshner, P.E., in arguing that McLaren negligently launched a force or instrument of harm by failing to exercise reasonable care in performing its contractual duties. Specifically, they argue that McLaren was hired by the Armory to review the work of Hudson and that they failed to ensure that the rotating stage, steps, and handrail complied with the 2014 New York City Building Code.

King testified that the Armory used McLaren to review Hudson's structural drawings. He stated that McLaren's role was twofold, to prove the concept and to participate in the permitting process. He averred that while it was JAM Consultants task to get the permits approved as abiding by the Building Code, they did so by using McLaren's stamped drawings. King went on to explain that Hudson would provide drawings or modifications of drawings to the Armory and then it was McLaren's task to make sure that the changes were up to code for construction to take place. In fact, the Structural Package of drawings that were reviewed and approved by McLaren note that the plans were prepared in compliance with the 2014 New York City Building Code.

Leshner states, among other things, that it is his expert opinion that McLaren created the hazardous, non-safe theatrical condition that caused plaintiff's accident by approving the fabrication and installation of the rotating platform with inconspicuous stairs with inadequate handrails.

While much of the opposition seems to focus on McLaren's role in reviewing, revising, and approving Hudson's work, it ignores the ample evidence that the scope of this review and

approval was constrained to the structural integrity of what was to be fabricated. The fact that McLaren's review was constrained to issues of structural engineering, structural integrity, and the relevant Building Codes with regard to structural construction is uncontroverted by any of the submitted documentation, including King's deposition transcript. Thus, McLaren met its prima facie burden and the nonmovants failed to raise a triable issue of fact as to whether McLaren breached its contractual duty and launched an instrument of harm that caused plaintiff's injury (*see Espinal*, 98 NY2d 136).

With respect to seq. #9, defendant Elite argues, inter alia, that it should be permitted to renew and reargue the order dated November 20, 2020. Inasmuch as the movant fails to offer any new facts or new law that applies, a motion to renew is unwarranted (CPLR 2221). However, to the extent that the court denied Elite's summary judgment against anyone other than the initial movant, Lighting Syndicate, solely for being an inappropriately labeled cross motion even after none of parties objected to the "cross motion" being treated as a regular motion when asked at conference, the mislabeling should have been disregarded as a mere technical defect (CPLR 2001; *see Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013]). As such, defendant Elite is entitled to reargument of its summary judgment motion against plaintiff and the non-Lighting Syndicate defendants and the court will now address its factual or legal arguments on the merits (CPLR 2221[d]).

As a preliminary matter, the November 20, 2020 decision found that with respect to Lighting Syndicate's cross claims against Elite for implied indemnification and contribution that Elite demonstrated through the testimony of Mark Mina that Elite's actions or omissions did not contribute to plaintiff's injury and warranted dismissal.

In support of its motion, Elite submits, inter alia, the deposition testimony of Mark Mina, Elite's former CEO before it dissolved.

Mina testified that Elite generally assisted other production companies with building their shows by removing items like lights, sound equipment, and staging out of delivery trucks and putting them together. Mina averred that he would always be present to at each jobsite to supervise Elite's work. He stated that in 2017, Elite and the Armory came to an agreement to use Elite's services for the production of the "Hairy Ape."

Mina understood Elite's role to be installing the bleacher seats, building a "prep stage" behind the bleachers, and installing the perimeter drapes. He alleged that Elite was not involved at all in installing the rotating stage or handrails connected to it. Mina recalled that the installation of the rotating stage was all done by the Lighting Syndicate and that all the work that was done was overseen by the Armory's technical directors. Similarly, he claimed Elite had no role in building the risers and treads that made up the steps, changing the color of the hardwood floor, or hiring or placing ushers at the performance. He did state that Elite was responsible for obtaining permits from the NYC Department of Buildings demonstrating that the bleachers and prep stage were up to code. Further, Mina averred that the only involvement Elite had with regard to the rotating stage was disassembling it after the production of the "Hairy Ape" was completed. As such, movant met its prima facie burden in establishing that it was not the proximate cause of plaintiff's alleged injuries.

In opposition to summary judgment, the nonmovants rely primarily on the deposition of Paul King. King testified that Elite helped to haul some of the heavier rotating stage components from the truck and "positioned" them. Further, when asked who installed the rotating platform King clarified his initial response of Lighting Syndicate supervised by Hudson to say, "I believe

there was some time when Elite joined into that process, but it was very limited. It's like Elite carries heavy stuff. So we use them for general labor, and I believe that there were occasions that during that process of that donut, that they were involved in."

However, in his deposition, King continued to clarify to what extent Elite was involved in the process with the donut. He stated that Elite installed the seating, setup the stage behind the seating, and helped haul some of the heavier rotating stage components and positioned them but did not connect them. He recalled that Elite was essentially a labor force and that it became more economical to use them to position heavier pieces of steel for the donut since it was heavier than the normal stagehands were used to. King believed that Elite did not put any of these donut pieces together and would simply place the pieces where they were told to place them and then would go and get the next piece of equipment. He verified that Elite did not have any responsibility in regard to designing the donut stage, assembling or installing the donut stage, supervising the assembly of the donut stage, inspecting the donut stage after it was assembled, repairing the donut stage, installing and testing the automation of the stage, or designing the steps leading and descending to and from the donut stage. He continued to verify that Elite had nothing to do with the steps whether it be supervising their assembly and installation or inspecting them after they were assembled. Similarly, he verified that Elite had no responsibility with regards to the lighting. Thus, it is evident that Elite's only role concerning the subject rotating stage was to carry heavy pieces of the stage to their place for other entities to install and assemble. Therefore, there is no real genuine issue of fact as to whether Elite was involved in or responsible for the designing, fabricating, assembling, installing, repairing, inspecting, supervising, or testing the subject donut, steps, handrails, or flooring to implicate Elite in potentially causing plaintiff's accident (*see generally Espinal*, 98 NY2d 136).

As to seq. #10, defendant Lighting Syndicate's motion pursuant to CPLR 2221 to reargue its summary judgment motion and reverse the order of Justice Billings dated November 20, 2020 is denied. A motion for leave to reargue is addressed to the sound discretion of the trial court and shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion (CPLR 2221[d][2]; *Foley v Roche*, 68 AD2d 558 [1st Dept 1979]). It is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously determined, or to present arguments different from those originally presented to the court (*id.*). Here, the movant failed to demonstrate that the Court overlooked or misapprehended any facts or law. Thus, defendant Lighting Syndicate LLC's motion is denied.

Accordingly, it is ORDERED that defendant Hudson's motion for summary judgment (seq. #7) is denied in its entirety; and it is further

ORDERED, that defendant McLaren's motion for summary judgment (seq. #8) is granted and the complaint and all cross claims are dismissed as to McLaren; and it is further

ORDERED, that defendant Elite is denied renewal (seq. #9); and it is further

ORDERED, that defendant Elite is granted reargument of its summary judgment motion and the November 20, 2020 decision and order (seq. #9); and it is further

ORDERED, that upon reargument defendant Elite's motion for summary judgment (seq. #9) is granted and the complaint and all cross claims are dismissed as to Elite; and it is further

ORDERED, that defendant Lighting Syndicate's motion (seq. #10) seeking leave to reargue its summary judgment motion and the November 20, 2020 decision is denied; and it is further

ORDERED, that defendant Elite shall serve a copy of this order with notice of entry on all parties within 30 days of the date of upload of this order onto NYSCEF.

This constitutes the decision and order of the Court.

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3/29/2021
DATE

RICHARD G. LATIN, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE