

Huerta v 658 W. 188th St. LLC
2022 NY Slip Op 30453(U)
January 25, 2022
Supreme Court, Kings County
Docket Number: Index No. 505570/2017
Judge: Devin P. Cohen
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**Supreme Court of the State of New York
County of Kings**

Index Number 505570/2017

Part 91

DECISION/ORDER

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

ARTURO HUERTA,

Plaintiff,

against

658 WEST 188TH STREET LLC AND BOROUGH
CONSTRUCTION GROUP LLC,

Defendants.

Papers	Numbered
Notice of Motion and Affidavits Annexed	<u>1</u>
Order to Show Cause and Affidavits Annexed	<u>2</u>
Answering Affidavits	<u>3</u>
Replying Affidavits	<u> </u>
Exhibits	<u> </u>
Other	<u> </u>

BOROUGH CONSTRUCTION GROUP LLC,

Third-Party Plaintiff,

against

BUILDING SOLUTIONS NYC CORP.,

Third-Party Defendants.

658 WEST 188TH STREET LLC ,

Second Third-Party Plaintiff,

against

BUILDING SOLUTIONS NYC CORP., SAFETX
CONTRACTING CORP., AND JOSE GONZALEZ,

Second Third-Party Defendants.

Upon the foregoing papers, defendant 658 West 188th Street LLC's motion to reargue (Mot. Seq. 011) is decided as follows:

Introduction and Procedural Background

Plaintiff commenced this action against defendants 658 West 188th Street and Borough

Construction Group LLC (“Borough Construction”) for injuries he claims to have sustained as a result of defendants’ negligence and violations of New York Labor Law §§ 200, 240(1) and 241(6). 658 West 188th Street and Borough Construction each asserts cross-claims against the other for common-law and contractual indemnification, and contribution. Borough Construction commenced a third-party action against Building Solutions NYC Corp. (“Building Solutions”) for common-law and contractual indemnification, contribution, and breach of contract. 658 West 188th Street commenced a second third-party action against Building Solutions, Safetx, and Jose Gonzalez for contractual indemnification, contribution, and breach of contract.

Many of the parties moved for summary judgment, either in part or on all of their claims. This court issued a decision on these motions on January 15, 2021. One of these movants was 658 West 188th Street, who sought summary judgment on its cross-claims for indemnification against Borough Construction (Seq. 005). Upon review of the contract between 658 West 188th Street and Borough Construction, this court found that the contract provided that Borough Construction must indemnify 658 West 188th Street for, among other things, the negligent actions of Borough Construction's subcontractors. However, this court held that 658 West 188th Street was not entitled to summary judgment on its contractual indemnification claim because the record did not sufficiently show whether Borough Construction's subcontractors—Building Solutions and Mr. Gonzalez—were negligent.

Analysis

To successfully modify a decision on reargument, 658 West 188th Street must show that this court overlooked or misapprehended a point of law or fact in its prior decision, without resorting to arguments different from those originally stated (*NYCTL 1998 1 Tr. v Rodriguez*, 154

AD3d 865, 865 [2d Dept 2017]; *Rodriguez v Gutierrez*, 138 AD3d 964, 966 67 [2d Dept 2016]).

658 West 188th Street argues that this court overlooked that defendant Borough Construction was required to indemnify 658 West 188th Street as a result of the negligence of second third-party defendant Safetx Contracting Corp. (“Safetx”). As this court found in its prior order, 658 West 188th Street’s contract with Borough Construction states:

To the fullest extent permitted by law, the contractor shall indemnify and hold harmless the owner, including their agents and employees, from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the work, provided that such claim damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the work itself) including loss of use resulting there from, caused in whole or in part by negligent acts or omissions of the contractor, their agents, servants, employees or subcontractors.

Thus, pursuant to its contract with Borough Construction, Borough Construction was required to indemnify 658 West 188th Street for claims caused by Borough Construction’s fault, or the fault of Borough Construction’s subcontractors.

Assuming that Safetx is a subcontractor of Borough Construction, 658 West 188th Street did not prove that Safetx was negligent in its underlying motion, and this court did not previously determine that Safetx was negligent.¹ Indeed, 658 West 188th Street did not specifically argue in its underlying motion that Safetx was negligent. 658 West 188th Street cannot raise new arguments in this motion that it did not previously make in its underlying motion (*Degraw Constr. Group, Inc. v McGowan Builders, Inc.*, 178 AD3d 772, 773 [2d Dept 2019]).

658 West 188th Street next argues that this court overlooked that Borough Construction

¹ Rather, this court found that Safetx owed a common-law duty to indemnify 658 West 188th Street because Safetx supervised plaintiff’s work, but not because Safetx was negligent.

was required to indemnify 658 West 188th Street as a result of the negligence of Building Solutions. 658 West 188th Street contends that Building Solutions was negligent because it purportedly supplied the burnt plank that broke under plaintiff's weight and led to his fall. Again, 658 West 188th Street made no such argument in its underlying motion papers and did not establish Building Solutions' negligence in this regard.

Conclusion

For the foregoing reasons, 658 West 188th Street's motion to reargue is denied.

This constitutes the decision and order of the court.

January 25, 2022
DATE



DEVIN P. COHEN
Justice of the Supreme Court

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