Rivera v JP Morgan Chase & Co.
2022 NY Slip Op 32047(U)
June 28, 2022
Supreme Court, New York County
Docket Number: Index No. 156677/2016
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. CAROL EDMEAD** **PART** **35**

Justice

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YAMIL RIVERA,

Plaintiff,

- v -

JP MORGAN CHASE &CO., JP MORGAN CHASE BANK, ROGERS ELECTRICAL CONTRACTORS, INC.,JONES LANG LASALLE AMERICAS, INC.,J.P. MORGAN CHASE,

Defendants.

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INDEX NO. 156677/2016

MOTION DATE 03/07/2022

MOTION SEQ. NO. 015

DECISION + ORDER ON MOTION

JONES LANG LASALLE AMERICAS, INC.,

Third-Party Plaintiff,

-against-

ROGERS ELECTRIC CONTRACTORS, INC.,

Third-Party Defendant.

Third-Party
Index No. 595917/2019

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JP MORGAN CHASE &CO., JP MORGAN CHASE BANK, J.P. MORGAN CHASE,

Second Third-Party Plaintiff,

-against-

FOREST ELECTRIC CORP.,

Second Third-Party Defendant.

Second Third-Party
Index No. 595466/2020

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JP MORGAN CHASE &CO., JP MORGAN CHASE BANK, J.P. MORGAN CHASE,

Third Third-Party Plaintiff,

-against-

JAMES F. VOLPE ELECTRICAL CONTRACTING CORP.,

Third Third-Party Defendant.

Third Third-Party
Index No. 595332/2021

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JONES LANG LASALLE AMERICAS, INC.,

Fourth Third-Party Plaintiff,

-against-

JAMES F. VOLPE ELECTRICAL CONTRACTING CORP.,

Fourth Third-Party Defendant.

Fourth Third-Party
Index No. 595329/2022

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The following e-filed documents, listed by NYSCEF document number (Motion 015) 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 488, 489, 490, 512

were read on this motion for REARGUMENT/RECONSIDERATION.

Upon the foregoing, it is hereby

ORDERED AND ADJUDGED that the motion (sequence number 015) of defendant/second third-party plaintiff JP Morgan Chase Bank, N.A. for leave to reargue the court's decision and order dated December 6, 2021 is denied; and it is further

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

ORDERED that counsel for second third-party defendant Forest Electric Corp. shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

MEMORANDUM DECISION

In this personal injury action asserting violations of the Labor Law, defendant/second third-party plaintiff JPMorgan Chase Bank, N.A. (JP Morgan) moves, pursuant to CPLR 2221, for leave to reargue the court's decision and order dated December 6, 2021 (the prior decision), which dismissed JP Morgan's contractual indemnification claim against second third-party defendant Forest Electric Corp. (Forest).

BACKGROUND

Plaintiff Yamil Rivera (plaintiff), an electrician, was injured on July 13, 2016 while working in the parking lot of a Chase bank branch located at 10-51 Jackson Avenue, Long Island City, New York. Plaintiff alleges that he fell from a ladder after receiving an electric shock. It is undisputed that JP Morgan owned the premises. Pursuant to Master Agreement # CW534285 dated May 1, 2013, JP Morgan hired Rogers Electric Service Corporation[1] to replace fluorescent lights with LED lights at the premises (NY St Cts Elec Filing [NYSCEF] Doc No. 333 at 2). By Master Subcontract Agreement dated May 1, 2016, Rogers Electric Lighting Corp. (RELC) retained Forest Electric Corp. (Forest) to perform the electrical work (NYSCEF Doc No. 326 at 2). Plaintiff was an employee of Forest on the date of the accident.

As relevant here, JP Morgan moved for contractual indemnification against Forest, pursuant to the indemnification provision contained within the Master Subcontract Agreement, which provides as follows:

> "**Article 3: Indemnification and Hold Harmless Master Agreement**
>
> "The Subcontractor [Forest] hereby agrees to fully indemnify, defend and hold harmless RELC [Rogers Electric Lighting Corp.], its Subcontractors, officers, directors, affiliates, *Clients, contractees, upstream contractors in privity with*

[1] Plaintiff commenced this action against defendant/third-party defendant Lin R. Rogers Electrical Contractors, Inc. i/s/h/a Rogers Electrical Contractors, Inc. d/b/a Rogers Electric.

> *RELC, owners*, agents and authorized representatives ('Indemnitees') from and against any and all losses, suits, actions, legal and administrative proceedings, claims, demands, damages, liabilities, interest, legal fees, costs, and expenses of whatsoever kind or nature whether arising before, during or after completion of any work by Subcontractor [Forest] hereunder and in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, by reason of any negligent act or omission, whether active or passive, of Subcontractor [Forest], its Subcontractors or anyone else for whom Subcontractor [Forest] is legally responsible in connection with or incident to the performance of its duties and responsibilities hereunder notwithstanding the partial fault or negligence of any Indemnitee. The provisions of this Article 3 are expressly agreed to survive the completion, or termination of Subcontractor's [Forest's] services and/or this Master Agreement"

(NYSCEF Doc No. 326 at 2–3 [emphasis added]).

JP Morgan argued that it qualified as a third-party beneficiary of the indemnification provision, and that it was a "Client[], contractee[], upstream contractor[] in privity with [Rogers] and the owner." As argued by JP Morgan, it did not supervise, direct or control the work that caused plaintiff's injury and was, therefore, entitled to full contractual indemnification from Forest.

In opposition to JP Morgan's motion, and in support of its own motion, Forest argued that it was not negligent. Forest asserted that it did not have any responsibility to ensure that the fence or fence poles were properly grounded, and that it provided plaintiff with proper equipment to perform his work. Additionally, Forest maintained that there were questions of fact as to JP Morgan's negligence in failing to inspect the bank's electrical system.

In the prior decision, the court, among other things, denied the branch of JP Morgan's motion seeking contractual indemnification against Forest (*Rivera v JP Morgan Chase & Co.*, 2021 NY Slip Op 32571[U], *16 [Sup Ct, NY County 2021]). The court also dismissed JP Morgan's contractual indemnification claim, explaining that it was not a signatory to the Master Subcontract Agreement and was not included in the indemnification provision (*id.*).

JP Morgan now argues that its contractual indemnification claim against Forest should not have been dismissed, and that it was entitled to summary judgment on this claim against Forest. According to JP Morgan, the court overlooked the fact that it was a third-party beneficiary of the indemnification provision, and that the Master Subcontract Agreement incorporated by reference the Master Agreement between JP Morgan and Rogers. In addition, JP Morgan argues, Forest conceded that JP Morgan was a third-party beneficiary of the Master Subcontract Agreement.

In response, Forest contends that: (1) JP Morgan's motion must be denied for failure to submit a statement of material facts; (2) JP Morgan's motion does not include a certification of the word count of its moving papers; and (3) the court did not overlook any facts or law in deciding the prior motions. Specifically, Forest maintains that JP Morgan was not an intended third-party beneficiary of its subcontract, and the contract does not include the term "owner" nor does it incorporate the contract between JP Morgan and Rogers. In addition, Forest contends that it was not negligent, since it gave plaintiff proper equipment, and it did not have any responsibility to inspect or maintain the electrified fence. Further, Forest did not concede that JP Morgan was a third-party beneficiary of the Master Subcontract Agreement.

DISCUSSION

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221 [d] [2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept 1992], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is "not designed to

provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Peretz v Zhenjun Xu*, 205 AD3d 746, 747 [2d Dept 2022] [internal quotation marks and citation omitted]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

As a preliminary matter, JP Morgan's motion includes certifications of compliance with the court rule concerning the word count of its moving papers (*see* 22 NYCRR 202.8-b [a]). Read together, they certify that the affirmation and memorandum of law in support of reargument are below the 7,000 word limit (NYSCEF Doc No. 458 at 7; NYSCEF Doc No. 473 at 14).

Moreover, contrary to Forest's argument, JP Morgan was not required to submit a statement of material facts on its motion for leave to reargue. 22 NYCRR 202.8-g, entitled "Motions for Summary Judgment; Statements of Material Facts," expressly states that "*Upon any motion for summary judgment*, other than a motion made pursuant to CPLR 3213, there shall be annexed to the notice of motion a separate, short and concise statement, in numbered paragraphs, of the material facts as to which the moving party contends there is no genuine issue to be tried" (22 NYCRR 202.8-g [a] [emphasis added]). In addition, JP Morgan's underlying motion for summary judgment was made on December 4, 2020 (NYSCEF Doc No. 311), prior to the effective date of the court rule.[2]

In any event, JP Morgan's motion for leave to reargue the prior decision is denied. The court finds no basis to disturb the prior decision. The court considered and rejected JP Morgan's arguments on its motion for summary judgment. The court did not overlook JP Morgan's third-party beneficiary argument; rather, it implicitly held that JP Morgan was not a third-party

[2] 22 NYCRR 202.8-g became effective on February 1, 2021 (22 NYCRR 202.8-g).

beneficiary of the indemnification provision. In support of this argument, JP Morgan only argued that it was a client, contractee, upstream contractor in privity with Rogers, and the owner.

Even if the court were to reach the merits, it would adhere to its prior determination. Contrary to JP Morgan's contention, Forest did not concede that JP Morgan was a third-party beneficiary of the indemnification provision (*see* NYSCEF Doc No. 388 ¶¶ 21-22).

JP Morgan did not make any arguments about incorporation by reference, and may not do so now for the first time on reargument (*see Peretz*, 205 AD3d at 747). Even considering this argument, the language employed by the parties is not clear enough to impose an indemnification obligation on Forest to defend and indemnify JP Morgan.

> "Words in a contract are to be construed to achieve the apparent purpose of the parties. . . This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances"

(*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491–492 [1989] [citations omitted]; *accord Mejia v Trustees of Net Realty Holding Trust,* 304 AD2d 627, 628 [2d Dept 2003] ["Indemnification provisions of a contract must be strictly construed and any ambiguity construed against the drafter"]).

In this case, JP Morgan is not identified in the Master Subcontract Agreement or included in the indemnification provision, which must be "strictly construed" (*Hooper*, 74 NY2d at 491; *see also Tonking v Port Auth. of N.Y. & N.J.,* 3 NY3d 486, 490 [2004]; *Tavarez v LIC Dev. Owner, L.P.*, 205 AD3d 565, 567 [1st Dept 2022]; *Nazario v 222 Broadway, LLC*, 135 AD3d 506, 510 [1st Dept 2016], *mod on other grounds* 28 NY3d 1054 [2016]; *Sicilia v City of New York*, 127 AD3d 628, 628 [1st Dept 2015]). Stated differently, the intent to benefit JP Morgan is

not apparent from the face of the Master Subcontract Agreement (*see LaSalle Natl. Bank v Ernst & Young*, 285 AD2d 101, 108 [1st Dept 2001] [to recover as a third-party beneficiary, "the parties' intent to benefit the third party must be apparent from the face of the contract"]). Although the Master Subcontract Agreement purports to incorporate by reference "all the terms of the contract between Client and RELC," defined therein as Rogers Electric Lighting Corporation (NYSCEF Doc No. 326 at 2, art 1), JP Morgan's contract was with Rogers Electric Service Corporation (NYSCEF Doc No. 333 at 2), not Rogers Electric Lighting Corporation (*cf. Vargas v New York City Tr. Auth.*, 60 AD3d 438, 441 [1st Dept 2009]). If the parties intended for JP Morgan to qualify as an indemnitee, they could have said so unambiguously (*see Tonking*, 3 NY3d at 490).[3]

To be sure, "Workers' Compensation Law § 11 generally precludes third-party claims for indemnification against an employer unless, as relevant here, there is an express written agreement for indemnification" (*Chong Fu Huang v 57-63 Greene Realty, LLC*, 174 AD3d 777, 777–778 [2d Dept 2019]). "Requiring the indemnification contract to be clear and express furthers the spirit of the legislation" (*Tonking*, 3 NY3d at 490).

Furthermore, the court has the authority to search the record and grant summary judgment to a nonmoving party (*see* CPLR 3212 [b]; *Merritt Hill Vineyards v Windy Hgts. Vineyard*, 61 NY2d 106, 111–112 [1984]). This authority "only [applies] to a cause of action or issue that is the subject of the motions before the court" (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 430 [1996]). JP Morgan's motion expressly argued that it was a client, contractee, upstream contractor in privity with RELC, and the owner under the indemnification provision. Thus, the

[3] The cases of *Newin Corp. v Hartford Acc. & Indem. Co.* (37 NY2d 211, 219 [1975]) and *Key Intl. Mfg. v Morse/Diesel, Inc.* (142 AD2d 448, 457 [2d Dept 1988]), cited by JP Morgan, did not involve contractual indemnification.

court had the power to dismiss JP Morgan's contractual indemnification claim on the ground that it did not qualify as an indemnitee under article 3 of the Master Subcontract Agreement.

In sum, JP Morgan is not entitled to contractual indemnification from Forest, and Forest was entitled to summary judgment dismissing this claim.

CONCLUSION

Accordingly, it is

ORDERED AND ADJUDGED that the motion (sequence number 015) of defendant/second third-party plaintiff JP Morgan Chase Bank, N.A. for leave to reargue the court's decision and order dated December 6, 2021 is denied; and it is further

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

ORDERED that counsel for second third-party defendant Forest Electric Corp. shall serve a copy of this order, along with notice of entry, on all parties within ten (10) days.

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6/28/2022
DATE

CAROL EDMEAD, J.S.C.

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