

Live Nation Worldwide, Inc. v Best Buy Stores, L.P.
2022 NY Slip Op 32884(U)
August 24, 2022
Supreme Court, New York County
Docket Number: Index No. 450475/2020
Judge: Dakota D. Ramseur
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 450475/2020

LIVE NATION WORLDWIDE, INC., LIVE NATION
MARKETING, INC.

MOTION DATE 07/12/2021

Plaintiffs,

MOTION SEQ. NO. 003

- v -

BEST BUY STORES, L.P.,

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 71, 72, 73, 74, 75,
76, 77, 78, 80, 81, 84

were read on this motion to/for RENEWAL

Upon the foregoing documents, it is

DECISION MEMORANDUM

This action arises out of Defendant Best Buy Stores, L.P. ("Best Buy")'s motion to sever
Plaintiffs Live Nation Worldwide, Inc and Live Nation Marketing, Inc (collectively, "Live
Nation")'s third-party action from an underlying personal injury/Labor Law action. In this
motion sequence (Mot. Seq. 003), Best Buy now seeks leave pursuant to CPLR 2221 (e) to
renew this Court's July 20, 2020, Decision and Order (the "July 2020 Decision") that granted
Live Nation's motion for summary judgment (and denied Best Buy's motion) on the issue of
whether Best Buy was required, but failed, to purchase additional insured coverage for Live
Nation. Upon renewal, Best Buy seeks (1) an order granting it partial summary judgment on
damages related to expenses Live Nation incurred defending against the underlying Labor Law
action and (2) an order granting summary judgment on Live Nation's additional-insured breach-
of-contract claim. Live Nation opposes the motion in its entirety.

For the following reasons, Best Buy's motion for leave to renew is granted. Upon
renewal, the Court adheres to its July 2020 Decision that denied Best Buy summary judgment on
Live Nation's breach of contract claim. The Court further denies Best Buy's motion to enter an
order preventing Live Nation from seeking damages related to its defense of the underlying
Labor Law action.

BACKGROUND AND PROCEDURAL HISTORY

The Underlying Action

In September 2013, Mark Perez, the plaintiff in the underlying action (NYSCEF Index No. 158373/2013), filed a Summons and Complaint against Live Nation and one of its employees, Michael Brogden, to recover damages for personal injuries he sustained as the result of an approximately 10-foot fall that occurred on June 26, 2013, at a theater managed and operated by Live Nation at Jones Beach in Nassau County. As manager and operator, Live Nation had entered into a Sponsorship Agreement (the “Agreement”) with Best Buy that granted Best Buy certain promotional rights at the theater during its concerts. According to Justice Lebovits’ factual findings, Perez had entered a separate agreement with Best Buy to create artwork to improve the aesthetic design of Best Buy’s vendor booth at the theater and, in that capacity, was assisting Brogden in building the booth’s second level. (*See Perez v Beach Concerts, Inc.*, 2016 WL 3566115 [Sup. Ct. NY County 2016] [Lebovits, J.]) With Perez on the second level, Brogden struck the structure with the forklift he was operating, which caused Perez to fall. (*Id.*)

In January 2016, Live Nation brought Best Buy into the underlying action by filing a third-party Summons and Complaint. Live Nation brought causes of action for (1) common-law indemnification; (2) breach of contract; (3) contribution; (4) breach of contract for failing to procure additional insured coverage; and (5) contractual indemnification. Best Buy then moved for summary judgement as to each. By Decision and Order dated June 30, 2016, Justice Lebovits granted Best Buy summary judgment as to four of Live Nation’s five causes of action, denying it summary judgment only on the cause of action for failure to procure additional insured coverage. (*Id.*) As to this remaining cause of action, Justice Lebovits concluded that the Agreement entitled Live Nation to additional insured coverage from Best Buy but found questions of fact as to whether Best Buy purchased such coverage. (Best Buy only submitted the certificate of insurance as proof, which is insufficient to demonstrate that it procured the requisite coverage.) (*Id.* at 6.) Best Buy moved for leave to renew this branch of the Decision and Order, which Justice Lebovits granted, but ultimately, he adhered to his previous denial of summary judgment.

The Declaratory Judgment Proceeding

Thereafter, on November 2, 2016, Live Nation filed a declaratory judgment action against Greenwich Insurance Company, XL Specialty Insurance Company and XL Catlin (collectively, “XL”), the issuers of the general liability policy Best Buy procured pursuant to the Agreement. (NYSCEF Index No. 655784/2016.) By Decision and Order dated June 12, 2019 (the “June 2020 Decision”), Justice Engoron granted XL summary judgment and dismissed Live Nation’s declaratory judgment action. In so doing, he determined the policy procured by Best Buy would include Live Nation as an additional insured “*if and only if* Best Buy and/or Perez partially or wholly caused the accident [emphasis original],” but that Justice Lebovits’ Decision and Order in the underlying action already determined that there was no evidence that Best Buy’s actions or omissions caused Perez’s injuries. (NYSCEF doc. no. 108; Index No. 655784/2016.) Justice Engoron further determined that granting summary judgment as to the

additional insured issue rendered moot Live Nation's additional arguments with respect to XL's duty to defend. (*Id.*)

The Instant Action

In October 2019, Justice Lebovits granted Best Buy's motion to sever Live Nation's third-party action against it from Perez's underlying action; in January 2020, Live Nation filed a Summons and Complain against Best Buy in the instant action (now severed from the underlying one); and in March 2020, Live Nation moved for summary judgment. Best Buy opposed and cross moved for summary judgment in May 2020. By Decision and Order dated July 20, 2020, Justice Marin granted Live Nation's summary judgment motion and denied Best Buy's motion, holding that the "[A]greement required Best Buy to purchase additional insured coverage for Live Nation." (68 Misc. 3d 1202 [A] [Sup. Ct. NY County 2020] [Marin, J.]) He furthered ordered a conference on damages be scheduled. (*Id.*)

The Instant Motion

Best Buy's motion for leave to renew is based on the First Department's review of the June 2020 Decision in Live Nation's declaratory judgment action against XL. There, it affirmed that Live Nation was not entitled to indemnification from XL as an additional insured because, in the underlying action, neither Best Buy nor those acting on its behalf had caused Perez's injuries. (*Live Nation Market, Inc. v Greenwich Ins. Co.*, 2020 NY Slip Op. 06356 [1st Dept 2020].) However, the court unanimously modified the branch of the June 2020 Decision that found moot those arguments relating to XL's obligation to provide a defense for Live Nation. (*Id.*) The First Department concluded that the general liability policy that Best Buy purchased extended XL's duty to defend to causes of action where there is a reasonable *possibility* that the underlying injury was caused, in whole or in part, by Best Buy's acts or omissions. (*Id.*) The court determined that XL must reimburse Live Nation for its reasonable costs incurred in defending against the underlying action because, irrespective of Justice Lebovits' subsequent determination that Best Buy was not a cause of Perez's injuries, Live Nation had, at the pleading stage, alleged facts suggesting a reasonable possibility that Best Buy was liable. (*Id.*)

Best Buy argues that the First Department's Decision constitutes new factual evidence not before this Court when it granted summary judgment for Live Nation. As such, Best Buy seeks two orders that, it asserts, follow from the First Department's Decision: (1) one dismissing from any damages calculation those that Live Nation seeks as reimbursement for fees it incurred defending the underlying action; and (2) the other dismissing Live Nation's breach-of-contract claim for failure to procure additional insured coverage.¹ (NYSCEF doc. no. 75, Best Buy's memo of law.)

¹ Though Best Buy's notice of motion and certain sections of its memorandum of law seem to suggest it seeks only an order related to the damages Live Nation seeks for fees in defending the action, Best Buy also argues, in Point II of its memo, "Live Nation received the benefit of additional insured coverage from the sponsorship agreement so Best Buy cannot be in breach of contract. Thus, Best Buy's cross-motion for summary judgment should be granted on leave for renewal." (NYSCEF doc. no. 75 at 16.) Live Nation's memorandum in reply is principally focused on this second argument. (NYSCEF doc. no. 77 at ¶19.) Accordingly, the Court includes this argument as part of its request for relief.

In opposition, Live Nation contends that Best Buy confuses the relief it sought in its declaratory judgment action against XL and the relief it seeks now against Best Buy. In its July 2020 Decision, according to Live Nation, this Court granted summary judgment solely as to damages arising from Best Buy's failure to procure additional coverage (which would be limited to, *inter alia*, costs paid to procure its own coverage, substitute insurance, and any remaining liability on Perez's substantive cause of action)—not damages arising from having to defend against Perez's action. Accordingly, it argues that the First Department's Decision did not change any substantive holding from the July 2020 Decision: Best Buy is still liable for not having procured additional insured coverage. With respect to damages from defending the action (and XL's obligation under the insurance coverage Best Buy procured), Live Nation has submitted an affidavit that it does not intend to seek double damages. At the hearing on damages, should XL have reimbursed Live Nation for its reasonable costs, then it will not seek that amount from Best Buy and therefore Best Buy does not have to worry about its double recovery.

DISCUSSION

CPLR 2221 (e) provides a motion to renew must be, "based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." (*See* CPLR 221 [e] [2].) Furthermore, the party seeking renewal must proffer a reasonable excuse for failure to present the pertinent facts on the initial motion. (CPLR 2221 [e] [3]; *Ezzard v One East River Place Reality Co.*, 137 AD3d 648 [1st Dept 2010].) A motion for leave to renew should not be used to provide a second opportunity to argue the original motion to those litigants who have failed to act diligently in making their first factual presentation. (*Henry v Peguero*, 72 AD3d 600, 602 [1st Dept 2010].) Therefore, renewal motions are granted sparingly, in cases, for example, where the existence of a set of factual circumstances are unknown to a party for reasons outside their control. (*Beiny v Wynyard*, 132 Ad2d 190 [1st Dept 1987].)

Best Buy's Motion to Renew

The Court must begin its discussion of Best Buy's arguments by reiterating the First Department's conclusion as to the parties' rights under the insurance policy Best Buy procured from XL. At various points in its memorandum of law, Best Buy seems to suggest that the First Department broadly held that Best Buy procured additional insured coverage naming Live Nation only to backtrack and acknowledge that the First Department's did no such thing: the modification of this Court's Decision applied *only* to XL's obligation to reimburse Live Nation for its defense of the underlying action.² To be clear, as Live Nation contends, this Court found that Best Buy breached Paragraph 5 (a) (v) of the Agreement, which required it to list Live Nation as an "[a]dditional Insured" with respect to any and all claims arising from Sponsor's operations," and the First Department affirmed, writing that under the policy Best Buy purchased from XL, "Live Nation was not entitled to indemnification." (NYSCEF doc. no. 74.) Therefore, to the extent that Best Buy seeks summary judgment as to Live Nation's cause of action for

² "With no basis to be charged with breach of contract, (e.g. the Sponsorship Agreement), Live Nation's fourth cause of action in the complaint cannot be maintained. As such, Best Buy seeks leave to renew its cross motion for summary judgment in light of the November 5, 2020, Decision of the First Department." (NYSCEF doc. No. 75)

breach of contract, the First Department's Decision affirmatively precludes this Court from granting such relief.

As to damages arising from Live Nation's defense of the underlying action, the First Department's holding constitutes new additional facts unknown to anyone, including the Court, when deciding the previous motion sequence. Though the terms of the policy were in existence and known to the parties when arguing their previous summary judgment motions, both parties were under the assumption that the policy did not cover *any* of Live Nation's damages. Neither party realized that portions of Live Nation's damages were in fact covered by the insurance contract underwritten by XL. These facts are precisely the type that can serve as the basis for a motion to renew. (*See Wynyard*, 132 AD2d at 190 [a motion for leave to renew "is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal"]; *Deschaine v Tricon Constr., LLC*, 2022 NY Slip Op 30103 [U] at *8-9 [Sup Ct, NY County 2022] [Edmead, J.] [holding that the findings in a separate declaratory judgment decision, in so far as they conflicted with evidence relied upon in the original motion, constituted new evidence on a renewal motion].) Therefore, Best Buy's motion to renew is granted.

After granting the motion, the only remaining issue is that, in its July 2020 Decision, this Court's orders did not address specifically how damages would be calculated. The pertinent order provided, "It is further ordered that a conference on damages is scheduled for August 19 at 11:30 a.m., or at such other day and time as is mutually agreeable." Irrespective of XL's liability, the language of the Agreement clearly states that Best Buy is required to defend Live Nation in actions arising from the Agreement. (NYSCEF doc. no. 2 at 4.) As such, Best Buy's arguments that it is not liable to Live Nation for expense incurred in the underlying action is inaccurate. Accordingly, the Court concludes that, at the conference on damages, Live Nation is entitled to (1) damages relating to its defense of the underlying action; and (2) damages arising from liability in the underlying action to the degree authorized by *Inchaustegui v 666 5th Ave. Ltd. P'Ship* (96 NY2d 111 [2001]). Should Live Nation recover its expenses from defending the action from XL prior to the conference, it will be precluded from seeking those damages from Best Buy. To the extent Live Nation recovers from Best Buy on damages related to its defense at the damages conference, Best Buy can bring an action seeking reimbursement from XL.

Accordingly, it is hereby

ORDERED that Defendant Best Buy's motion pursuant to CPLR 2221 (e) for leave to renew this Court's Decision and Order dated July 20, 2020, granting summary judgment in favor of Plaintiffs Live Nation Worldwide, Inc. and Live Nation Marketing, Inc., is granted; and it is further

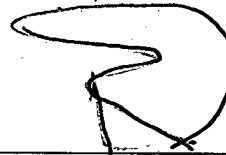
ORDERED that, upon renewal, the Court adheres to its Decision and Order denying Best Buy summary judgment as to Live Nation's cause of action for breach for contract based on Best Buy's failure to purchase additional insured coverage; and it is further

ORDERED that a conference on damages is scheduled for September 8, 2022, at 80 Centre Street Courtroom 328 at 9:30 a.m.; and it is further

ORDERED that, in the event Live Nation recovers under the insurance policy underwritten by XL Specialty Insurance Company prior to the conference, Live Nation shall be precluded from seeking such damages against Best Buy; and it is further

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

ORDERED that counsel of Plaintiffs shall serve a copy of this order, along with notice of entry on all parties within ten (10) days of entry.



8/24/2022

DATE

DAKOTA D. RAMSEUR, 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