Cruz v Park Lbr. Yard Corp.
2022 NY Slip Op 34851(U)
November 23, 2022
Supreme Court, Kings County
Docket Number: Index No. 523465/2018
Judge: Mark I. Partnow
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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 23rd day of November, 2022.

PRESENT:

HON. MARK PARTNOW,
Justice.

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JOSEPH CRUZ,

Plaintiff,

- against -

PARK LUMBER YARD CORP. et al.,

Defendants.

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Motion Sequence 5 & 6

Index No. 523465/2018

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	116-129, 130-138
Opposing Affidavits (Affirmations)	139-140, 141-142
Reply Affidavits (Affirmations)	143

Upon the foregoing papers, defendant Prestige Construction LLC (Prestige) moves for an order, pursuant to CPLR 2221 (d), granting it leave to reargue the prior motion of defendant 60-80 Myrtle LLC (Myrtle), which sought, among other things, partial summary judgment on the issues of defense and indemnification against Prestige, and, upon the granting of such leave, denying partial summary judgment in favor of Myrtle on the issues of defense and indemnification against Prestige. Defendants Park Lumber Yard Corp. and

Richard A. Goss (Goss, and collectively, Park Lumber) also move for leave to reargue the underlying motion.

Background

Plaintiff commenced the instant action by electronically filing a summons and verified complaint with this court on November 20, 2018. The pleadings assert that on April 3, 2017, plaintiff suffered injuries as a consequence of a motor vehicle collision on Myrtle Avenue in Queens. Plaintiff seeks damages as a result. More specifically, the record indicates that on that date, plaintiff was operating his motor vehicle and traveling east bound on Myrtle Avenue near the premises known as 60-87 Myrtle Avenue, owned by Myrtle. The premises were used as a construction site at all relevant times. Myrtle had hired Prestige as the general contractor for the project. In connection therewith, Prestige had ordered a delivery of sheetrock and lumber from Park Lumber.[1]

On the date of the accident, Goss, a Park Lumber driver, was operating a forklift[2] to deliver sheetrock to the construction site. While he was doing so, other workers (described as flaggers or flagmen) would direct traffic in the roadway, which included directing motorists to stop while the forklift was moving across the street. According to the record, what precipitated the collision is disputed. Plaintiff claims that a flagman directed him to drive his vehicle forward, whereupon the forklift then drove into plaintiff's

[1] The court's electronic file indicates that defendant US Demco of Brooklyn, Inc., has never appeared in this action.

[2] The record at times refers to this vehicle as a piggyback. Also, at times, the record indicates that the forklift/piggyback was attached to another vehicle operated by Goss. The court will refer to the vehicle simply as a forklift.

vehicle. Goss, on the other hand, testified that the flagmen directed plaintiff to stop, but plaintiff drove forward anyway, and Goss, expecting the roadway to be clear, operated his forklift which then collided with plaintiff.

Plaintiff alleges that defendants' operation of the forklift and maintenance of the premises resulted in the hazard that precipitated the accident. Plaintiff argues that defendants' acts and omissions constituted negligence, and that their negligence proximately caused his injuries.

On January 22, 2021, plaintiff filed a note of issue and certificate of readiness, indicating that all discovery is complete and that the action is ready for trial. Myrtle subsequently moved for summary judgment arguing that it was not liable to plaintiff and that its written agreement with Prestige required Prestige to defend and indemnify Myrtle in the instant action.

In support of summary judgment dismissing the direct claims, Myrtle argued that since the accident was largely precipitated by the actions of Myrtle's independent contractors, Myrtle breached no duty of care to plaintiff, even though it is the relevant landowner. This court rejected that argument, noting that Myrtle's duty to keep the premises in safe condition is nondelegable. This court also pointed out that, although a party who retains an independent contractor is generally not liable for the independent contractor's negligent acts, an exception exists when a landowner hires a contractor "where there was danger to others inherent in the work and the hirer reasonably should have anticipated, from the nature of the work, that it would be dangerous to others" (*Kojic v City of New York*, 76 AD2d 828, 830 [1980]). This court found that the trier of fact must

determine whether sheetrock and lumber deliveries adjacent to the roadway constitutes an inherent hazard that Myrtle should have anticipated would be dangerous to drivers on said roadway, and, as such, denied the motion insofar as it sought summary judgment dismissing plaintiff's direct claims against Myrtle.

However, this court granted that branch of Myrtle's motion seeking partial summary judgment on the issues of defense and indemnity against Prestige. Myrtle argued that it was entitled to such relief because the subject written agreement between it and Prestige contains a broad indemnity provision by which Prestige agreed to defend and indemnify Myrtle against all claims arising from the contracted-for work. Myrtle asserted that Prestige, as the general contractor, was ultimately responsible for all site safety and the acts and omissions of all subcontractors. Myrtle reasoned that since plaintiff's instant claims arose from the manner in which the flagmen in the street directed cars, and Prestige was responsible for site safety and acts of workers on site, there is thus no serious debate that the claims arose from the work on the site, thereby triggering the subject defense and indemnity clause. Myrtle concluded that since the defense and indemnity provisions are unambiguous, enforceable, applicable and was in effect at all relevant times, it was entitled to partial summary judgment on the issues of defense and indemnity against Prestige.

In opposition to the underlying motion, Prestige acknowledged the existence of an enforceable indemnity provision in the written agreement between it and Myrtle. Prestige argued, however, that an issue of fact exists as to whether plaintiff's claims triggered the subject provision. More specifically, Prestige asserted that the subject indemnification provision applied only to claims resulting from the contracted work if there was any

negligence or omission on the part of Prestige or any contractors. Prestige alleged that based solely on the record, no such finding was possible. Prestige pointed out that at his deposition, Goss testified that he heard the flagmen say that plaintiff disregarded their instructions and nevertheless drove into the path of the moving forklift. Additionally, Prestige claimed that, given the vastly different sworn accounts of the accident, Myrtle could not demonstrate, as a matter of law, that it is free from negligence and not seeking indemnification for its own negligent acts or omissions. Prestige concluded that since only a trier of fact may determine which account of the accident is credible, summary judgment with respect to contribution and indemnity was premature.

This court disagreed with Prestige and found that the written defense and indemnity provision is not predicated on a finding of contractor or subcontractor negligence; instead, the provision applies "regardless of whether or not such claim, damages, loss or expense is caused in part by a party indemnified hereunder." This court also found that since Myrtle agents were not involved in the accident (i.e. the flagmen, delivery personnel and forklift operator were not Myrtle employees), any liability on Myrtle's part would be purely vicarious. Lastly, this court found that the agreement was both enforceable and in effect at the relevant time, and that the record belied any suggestion that Myrtle was attempting to have Prestige indemnify Myrtle for Myrtle's own negligence. Accordingly, this court granted the motion insofar as it sought partial summary judgment in favor of Myrtle on the issues of defense and indemnity against Prestige.

The instant motions for leave to reargue ensued.

Leave to Reargue

In support of its motion for leave to reargue, Prestige first asserts that this court should not have awarded Myrtle summary judgment on the issues of defense and indemnity. Specifically, Prestige claims that this court misread the defense and indemnity provision, and the correct reading of the subject provision in the contract establishes that a finding of negligence on the part of Prestige is a prerequisite to triggering defense and indemnification in favor of Myrtle. Prestige acknowledges that the provision applies to claims, damages, losses and expenses related to the subject projects, but emphasizes the language in the provision specifying that defense and indemnity is triggered only when "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 therefrom, cause[d] in whole or in part by negligent acts or omissions of [Prestige and its subcontractors.]" Prestige claims that the subject language was omitted from Myrtle's argument, and, as such, this court mistakenly concluded that the requirement to defend and indemnify is not predicated on a finding of contractor or subcontractor negligence.

In sum, Prestige claims that a correct reading of the defense and indemnity provision indicates that Prestige is not contractually required to defend or indemnify Myrtle absent a determination that Prestige or its subcontractors is liable for a negligent act or omission. Prestige notes that this court made no such determination in its underlying decision, and, accordingly, the defense and indemnity provision in the written agreement between

Prestige and Myrtle was not triggered. Therefore, urges Prestige, this court's prior determination was erroneous. For these reasons, Prestige concludes that this court should grant leave to reargue Myrtle's prior motion, and, upon the granting of leave, deny the motion in its entirety.

In support of its motion, Park Lumber seeks leave to reargue "and/or clarification of their opposition" to Myrtle's underlying motion. Specifically, Park Lumber seeks "an order clarifying the Court's decision as follows: a. That Park Lumber cross-claims for contribution and indemnification were not dismissed and survived the motion; and b. That Park Lumber may argue at trial that 60-80 Myrtle's negligence caused or contributed to the accident and/or that 60-80 Myrtle can be found vicariously liable for the acts or omissions of Prestige." Park Lumber notes that in the underlying motion, Myrtle sought an order granting it summary judgment dismissing all claims and cross claims asserted against it. Park Lumber also points out that the underlying order granted Myrtle's motion solely to the extent that Prestige is required to defend and indemnify Myrtle. Lastly, Park Lumber states that this court granted the underlying motion only to the extent that Myrtle was awarded partial summary judgment on the issues of defense and indemnity against Prestige, and otherwise denied the motion.

Park Lumber suggests that this court's reasoning in the underlying decision and order supports other conclusions as well, and thus seeks leave to reargue and/or "clarification" of the underlying order. For these reasons, Park Lumber concludes that this court should grant "an Order clarifying and confirming that the moving defendant's

cross-claims against 60-80 Myrtle LLC survive and that the movants may argue at trial that 60-80 Myrtle was actively negligent and/or vicariously responsible for the acts or omissions of Prestige Construction NYC LLC."

In opposition, Myrtle first argues that the Court did not misread the indemnification provision in determining the underlying motion. Myrtle contends that this court correctly applied the rule that a party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. Myrtle argues that, here, the subject provision is broad, is applicable to plaintiff's claims herein and was in effect at relevant times. Indeed, continues Myrtle, the clause requires Prestige to hold Myrtle harmless against claims, damages, losses and expenses, including attorneys' fees, arising out of or resulting from performance of either Prestige's work or the work performed by subcontractors. Myrtle claims that the above statements are uncontroverted.

However, Myrtle rejects Prestige's contentions with respect to whether a finding of fault or negligence is a prerequisite for defense and indemnity. Myrtle therefore contends that it was not premature for this court to award partial summary judgment on the issue of defense and indemnity in its favor against Prestige. For these reasons, Myrtle concludes that the court did not err when it issued the underlying decision and order, and, therefore, Prestige's instant motion for leave to reargue should be denied.

Next, Myrtle claims that Park Lumber's motion for leave to reargue and/or "clarification" should be denied as meritless. Myrtle points out that in the underlying

decision and order, this court ordered "that the motion of defendant 60-80 Myrtle LLC is granted solely to the extent that 60-80 Myrtle LLC is awarded partial summary judgment on the issues of defense and indemnity against defendant Prestige Construction LLC, and is otherwise denied." Myrtle maintains that this court, by explicitly stating that the motion was "otherwise denied" but for defense and indemnity, clearly determined in the underlying decision and order that the cross claims between Myrtle and Park Lumber were unaffected. No ambiguity requiring further clarification exists, states Myrtle. Additionally, Myrtle presses, Park Lumber's request for an order specifying that Park Lumber "may argue at trial that [Myrtle's] negligence caused or contributed to the accident and/or that [Myrtle] can be found vicariously liable for the acts or omissions of Prestige[]" is improper and should not be addressed.

Discussion

The court exercises its discretion and grants Prestige's motion. CPLR 2221 states, in applicable part:

> "(d) A motion for leave to reargue:
> 1. shall be identified specifically as such;
> 2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion...."

A motion for leave to reargue, pursuant to CPLR 2221, is addressed to the sound discretion of the court (*see e.g. Mansueto v Worster*, 1 AD3d 412, 413 [2003]; *Matter of Hoey–Kennedy v Kennedy*, 294 AD2d 573, 573 [2002]; *South Liberty Realty Corp. v Mercury*, 292 AD2d 516, 517 [2002]) and may be granted only upon a showing that the

court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision (*William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 26 [1992], *lv denied in part and dismissed in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]). Reargument is not designed to allow an unsuccessful party "successive opportunities to reargue issues previously decided" (*Id.* at 27 [internal citations omitted]). However, reargument is properly granted where the court misapprehended facts in the underlying disposition (*see e.g. Ito v 324 East 9th Street Corp.*, 49 AD3d 816 [2008]).

Here, leave to reargue is granted because this court misapprehended the defense and indemnity provision at issue. The written agreement between Myrtle and Prestige was offered as Exhibits P and Q (NYSCEF Doc Nos. 87 and 88). Article 1 ("INDEMNIFICATION") of Exhibit Q ("STANDARD FORM OF AGREEMENT BETWEEN CONTRACTOR AND OWNER" dated September 14, 2016) contains the relevant language:

> "1.1 To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner and their agents from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Contractor's Work or work of the Subcontractors hired by the Contractor, *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 therefrom, cause* [*sic*] *in whole or in part by negligent acts or omissions of the Contractor, Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable*, regardless of whether or not such claim, damage, loss

or expense is caused in part by a party indemnified hereunder."
(emphasis added)

Since this document was offered by the prior movant in the underlying motion, this court properly considers it in connection with the instant motions for leave to reargue (*cf. HSBC Bank, USA v Infinity Auto Glass Distributors, Inc.*, 27 AD3d 1094 [2006], *clarification denied* 28 AD3d 1258 [2006] [motion for leave to reargue could not be based on document not offered on prior motion for contribution or indemnity]). This court failed to consider the emphasized language above, which limits Prestige's responsibility to defend and indemnify Myrtle only for losses caused at least in part by Prestige, its agents and/or subcontractors. As Prestige correctly points out, the prior decision and order (as well as the instant one) made no findings of fault or causation. Accordingly, the subject defense and indemnification provision is not yet triggered by plaintiff's claims. Myrtle has thus failed to demonstrate prima facie entitlement to judgment as a matter of law with respect to the issues of defense and indemnity, and, therefore, the underlying motion for summary judgment must be denied.

Myrtle's protestation that the subject "indemnity provision requires defense and indemnity regardless of fault" is belied by the plain text of the provision which limits defense or indemnification to losses caused at least in part by Prestige, its agents and/or subcontractors. This court's misapprehension of the subject provision suffices reargument of the underlying motion for summary judgment (*see e.g. N450JE LLC v Priority 1 Aviation, Inc.*, 102 AD2d 631 [2013] [reargument of summary judgment was properly granted as to trial court's misapprehension of a section of contract]). For these reasons,

Prestige's motion for leave to reargue Myrtle's underlying motion for summary judgment is granted, and upon the granting of such leave, Myrtle's motion for summary judgment is denied in its entirety.

As to Park Lumber, the court denies its motion. First, the court notes that it seeks no leave to reargue but instead seeks "clarification" of the underlying decision and order. This court finds that clarification is unnecessary, since the prior order specified that "the motion of defendant 60-80 Myrtle LLC is granted solely to the extent that 60-80 Myrtle LLC is awarded partial summary judgment on the issues of defense and indemnity against defendant Prestige Construction LLC, and is otherwise denied." This court finds no ambiguity in the underlying order (and there is even less ambiguity in the current order, whereby Myrtle's motion is denied in its entirety).

Lastly, the court rejects Park Lumber's request for an order specifying what Park Lumber may argue at trial. At best, the relief sought is tantamount to a premature and unnecessary ruling that should be reserved for the trial judge; at worst, an order directing what Park Lumber may argue at trial sounds suspiciously similar to an impermissible advisory opinion (*see e.g. Simon v Nortrax N.E., LLC*, 44 AD3d 1027 [2007]; *see also Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988] ["The courts of New York do not issue advisory opinions for the fundamental reason that in this State '[t]he giving of such opinions is not the exercise of the judicial function'"], quoting *Self-Insurer's Assn. v State Indus. Commn.*, 224 NY 13, 16 [1918]). For these reasons, the motion of Park Lumber is denied.

Accordingly, it is hereby

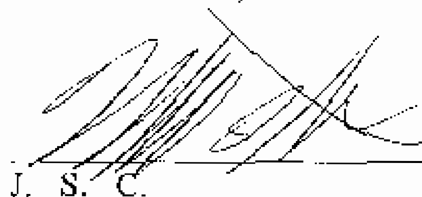
ORDERED that the motion of defendant Prestige Construction LLC for an order granting leave to reargue the underlying motion of defendant 60-80 Myrtle LLC which sought summary judgment is granted; and upon the granting of such leave, it is

ORDERED that the underlying motion of defendant 60-80 Myrtle LLC for an order granting summary judgment is denied in its entirety; and it is further

ORDERED that the motion of defendants Park Lumber Yard Corp. and Richard A. Goss for an order granting leave to reargue the underlying motion and/or "clarifying" the underlying decision and order is denied in its entirety.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I PARTNOW
SUPREME COURT JUSTICE

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