

Schulman v Alliance Energy LLC

2024 NY Slip Op 32006(U)

June 11, 2024

Supreme Court, New York County

Docket Number: Index No. 158415/2019

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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IRA SCHULMAN,

Plaintiff,

- v -

ALLIANCE ENERGY LLC, EXXON MOBIL CORPORATION,
714 WEST 11TH AVENUE ASSOC, LLC, KD 714 INC. D/B/A
THE AMERICAN RETRO BAR AND GRILL, GLOBAL
MONTELLO GROUP CORP., BISMA SERVICE CENTER
INC,

Defendant.

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ALLIANCE ENERGY LLC, EXXON MOBIL CORPORATION,
GLOBAL MONTELLO GROUP CORP.

Plaintiff,

-against-

SERVICE STATION VENDING EQUIPMENT, INC.

Defendant.

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**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595656/2021

The following e-filed documents, listed by NYSCEF document number (Motion 005) 148, 149, 150
were read on this motion to/for REARGUMENT/RECONSIDERATION.

Defendants/Third-Party Plaintiffs, ALLIANCE ENERGY LLC (“Alliance”), GLOBAL
MONTELLO GROUP CORP. (“Global”) and EXXON MOBIL CORPORATION a/k/a MOBIL
 (“Moving Defendants”) move pursuant to CPLR § 2221 to reargue the portion of motion
sequence 004 which sought an Order “granting the Moving Defendants summary judgment on
their cross-claims for contractual indemnification and breach of contract as against BISMA
SERVICE CENTER INC” (“Bisma”). Bisma does not oppose this motion, nor did it offer
opposition to motion sequence 004.

CPLR § 2221(d) provides that:

- (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; and
 3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

Moving Defendants correctly note that the court inadvertently overlooked the portion of motion sequence 004 that sought summary judgment on Moving Defendants' cross-claims for contractual indemnification, and breach of contract for failure to procure insurance and did not address these issues in the Order and Decision dated March 25, 2024 (NYSCEF Doc No 147). Therefore, the motion to reargue will be granted to the extent that the portion of the motion seeking summary judgment on these cross-claims will now be addressed.

Contractual Indemnification

In June 2015, Alliance/Global leased a gas station to Bisma pursuant to a PMPA Franchise Agreement and Lease Provisions ("PMPA" [Petroleum Marketing Practices Act]) (NYSCEF Doc 128 ¶ 5). Section 18.2 of the PMPA states:

Except as provided in Section 18.9, [Bisma] assumes the risk of and sole responsibility for and agrees to defend (with counsel acceptable to Global, unless such defense, but not Global's defense costs, is waived by Global), indemnify, release and hold harmless Global, [Exxon], their Affiliates and each or their officers, employees, agents, managing agents, successors, and assigns (collectively, "Indemnitees"), from and against any and all expenses, costs (including, without limitation, professional fees), penalties, finds (without regard to the amount of such fines), liabilities, claims, demands and cause of action, at law or in equity . . . or injuries, death, loss, or damage of any kind or character to person, property, or natural resources . . . resulting from, related to, or arising out of

the actual or alleges . . . (d) violation or breach by [Bisma] of any warranty, representation or obligation of this Agreement or any related or supplemental agreement . . . (f) use of the Marketing Premises by [Bisma], its agents, licensees, tenants, contractors, and/or employees . . . (i) defective condition of the Marketing Premises whether due to any latent or patent defect . . . (j) failure by [Bisma] to comply with [Bisma's] maintenance obligations under this Agreement, or any related or supplemental agreement . . . (n) failure by [Bisma] to obtain or keep current the amounts and types of insurance required by this Agreement or to comply with the terms and conditions of the insurance obtained.”

(NYSCEF Doc No 124).

Section 11.2 of the PMPA states:

During the time this Agreement is in effect, in addition to any other insurance or surety bonding required by Laws, [Bisma] will carry and maintain in force with companies satisfactory to Global, solely at [Bisma's] expense, insurance satisfactory to Global as follows . . . (a) Comprehensive/Commercial General Liability Insurance or Garage Liability insurance including, but not limited to, coverage for the sale of motor fuel, operation of retail motor fuel stores, premises operations, products, completed operations, contractual liabilities, with a minimum combined single limit of \$2,000,000 providing coverage for injury, death or property damage resulting from each occurrence . . . (i) [e]ach policy of insurance described in this Section 11.1 shall cover Global, and such other parties as Global may designate, as additional insureds . . . and shall be primary as to all other policies which may provide coverage

(*id.*).

When “parties are allocating the risk of liability to third parties between themselves, . . . the courts do not, as a general matter, look unfavorably on [such] agreements (*Castano v Zee-Jay Realty Co.*, 55 AD3d 770, 772 [2d Dept 2008]). “General Obligations Law § 5-321 provides that an agreement to exempt a lessor from its own negligence is void and unenforceable” (*id.*). “However, where, as here, the liability is to a third party, General Obligations Law § 5-321 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm's length between two sophisticated parties when coupled with an insurance procurement requirement” (*id.*). “Lease provisions by which the tenant covenants to procure insurance and

name the landlord as an additional insured are generally valid and enforceable. (*Inchaustegui v. 666 5th Ave, Ltd. P'Ship*, 96 N.Y.2d 111, 114 [2001]).

Here, the PMPA requires Bisma to indemnify the Moving Defendants. The PMPA also requires Bisma to procure a comprehensive general liability policy naming the Moving Defendants as additional insureds to protect against the risk of such liability. Since Bisma does not oppose either motion, it does not dispute that it was required to procure that insurance and does not offer any evidence that it was in fact insured at the time of the accident.

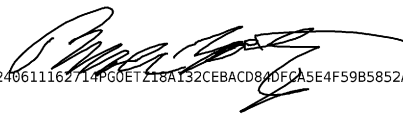
Accordingly, Moving Defendants have established entitlement to summary judgment on their contractual indemnification and breach of contract cross-claims as against Bisma and judgment will be granted in their favor as against Bisma.

Based on the foregoing, it is

ORDERED that Moving Defendant's motion to reargue is granted; and it is further

ORDERED that upon reargument Moving Defendant's motion for summary judgment on their cross-claims for contractual indemnification, and breach of contract as against Bisma is granted; and it is further

ORDERED that, the court otherwise adheres to the Decision and Order, dated March 25, 2024.


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6/11/2024
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE