

Chaitman v Moezinia

2024 NY Slip Op 32710(U)

July 29, 2024

Supreme Court, New York County

Docket Number: Index No. 653037/2012

Judge: Dakota D. Ramseur

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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. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 653037/2012

JENNIFER CHAITMAN, VETERINARY INTERNAL
MEDICINE & ALLERGY SPECIALISTS LLC,

MOTION DATE 04/24/2024

Plaintiffs,

MOTION SEQ. NO. 016

- v -

FRANCIS MOEZINIA, DAVID MOUSSAZADEH, SAMY
MAHFAR, FSM HOLDINGS II, LLC, DMZ III, LLC, SM 84TH
TIC, LLC, THE CITY OF NEW YORK DEPARTMENT OF
BUILDINGS,

**DECISION + ORDER ON
MOTION**

Defendants.

-----X

FRANCIS MOEZINIA, DAVID MOUSSAZADEH, SAMY
MAHFAR, FSM HOLDINGS II, LLC, DMZ III, LLC, SM 84TH
TIC, LLC

Third-Party Plaintiffs,

-against-

NEW YORK UNIVERSITY, EASTMAN COOKE &
ASSOCIATES

Third-Party Defendants.

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Third-Party
Index No. 590278/2013

EASTMAN COOKE & ASSOCIATES,

Second Third-Party Plaintiff,

-against-

KABACK ENTERPRISES, INC, GLENDALE CONTRACTING,
PLUMING HEATING & AIR CONDITIONING INC, ADMIRAL
AIR CONDITIONING CORP.,

Second Third-Party Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 016) 661, 662, 663, 664, 665, 666, 667, 670, 673, 674, 675, 676, 677, 678

were read on this motion to/for

REARGUMENT/RECONSIDERATION

In August 2012, plaintiffs Jennifer Chaitman and Veterinary Internal Medicine & Allergy Specialists LLC commenced this breach of contract and rent abatement action against defendants Francis Moezinia, David Moussazadeh, Sammy Mahfar, FSM Holdings II, LLC, DMZ III, LLC, and SM 84th TIC, LLC (collectively, the “defendants”). Alleging various interferences with the use and enjoyment of their leased ground-floor premises at 207 East 84th Street over at least two years, plaintiffs sought (1) a full rent abatement from August 2010 to August 2012, (2) a partial, 6.9% rent abatement from August 2010 to October 2020, and (3) compensatory damages for their veterinary clinic’s IDEXX machines. Thereafter, defendants (as landlords of the premises) commenced third-party actions against New York University (“NYU”) and Eastman Cooke & Associates (“Eastman Cooke”) for indemnification and contribution related to various renovations that allegedly caused the interference with plaintiffs’ real property. Eastman Cooke then commenced its own third-party action against Kaback Enterprises, Inc. (“Kaback”) and Admiral Air Condition Corp. (“Admiral”).

After conducting a bench trial over six days in May and August 2023, the Court issued its Decision After Trial on February 29, 2024. (NYSCEF doc. no. 647, Decision After Trial.) In it, the Court found in favor of defendants on each of plaintiffs’ three direct claims. Among other things, the Court held that plaintiffs were estopped from seeking a partial rent abatement after August 2012 (*id.* at 3); they failed to establish both ownership of the IDEXX machine and their approximate value (and thus could not recover for damage to them) (*id.* at 3-4); plaintiffs executed an unambiguous “Tenant Estoppel Certificate” and thus were estopped from seeking damages between August 2010 to November 2010 (*id.* at 7); and plaintiffs had not established either that (1) 6.9% of their premises was unusable during the two years (*id.* at 8) or (2) the premises was unusable when the clinic was affected by a lack heating and a sewage fly infestation given their revenue and profits from their veterinary clinic remained relatively stable throughout the relevant time period (*id.* at 9-10).

As to the third-party claims, the Court wrote:

“While the issue is moot considering the above factual findings and conclusions of law, the Court notes that defendants did not put on any witnesses of their own to show that, if they were liable to plaintiffs, NYU or Eastman were responsible for the renovations at the project that contributed to plaintiffs’ injuries. Nor did Chaitman and Moussazadeh testify reliably as to which parties were engaged in which aspects of the renovation work. As such, even if defendants were liable, third-party defendants NYU and Eastman, and second third-party defendants Kaback and Admiral cannot be liable.” (*Id.* at 11.)

By Letter to the Court dated March 5, 2024, counsel for NYU informed the Court that its Decision After Trial did not address NYU’s crossclaim against Eastman regarding its alleged

contractual duty to defend NYU. Accordingly, the Court entered an Amended Decision After Trial dated March 12, 2024 (“Amended Decision”) (NYSCEF doc. no. 653), in which it found NYU was entitled to attorneys’ fees and costs incurred in defending the action from Eastman—the renovation project’s general contractor—pursuant to two construction contracts. (*See* NYSCEF doc. nos. 638 and 639.) It reasoned that, even though neither plaintiffs nor defendants had proffered specific evidence of NYU or Eastman’s negligence, Eastman—as the project’s construction manager—had assumed an obligation to defend NYU for injuries “arising out of the performance of the [renovation] work” and said work was what plaintiffs alleged caused the damage to their clinic. (NYSCEF doc. no. 653 at 2.)

In this motion sequence (016), Eastman moves under CPLR 2221 for leave to reargue the Court’s Amended Decision, specifically whether Eastman is obligated to defend NYU. (NYSCEF doc. no. 661, notice of motion 016.) Alternatively, should the Court adhere to its previous decision, it seeks an order declaring that subcontractors Kaback and Admiral have a duty to defend it arising from their contracts with Eastman. The motion is opposed by NYU, Kaback, and Admiral.

DISCUSSION

CPLR 2221 (d) provides that a party may seek leave to reargue a prior motion based upon matters of fact or law the Court overlooked or misapprehended. A motion to reargue is not intended to provide the unsuccessful party a second opportunity to reargue issues previously decided. (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22, 28 [1st Dept 1992].) Nor is a motion to reargue designed to afford unsuccessful parties the opportunity to present alternative positions, new theories of the case, or arguments different from those originally asserted. (*Foley v Roche*, 68 AD2d 558, 547 [1st Dept 1979], *Matter of Settlers v AI Props & Devs (USA) Corp*, 139 Ad3d 492, 492 [1st Dept 2016].) At its sound discretion, the court that decided the prior motion retains the authority to grant or deny reargument motions, and the moving party bears the burden of demonstrating that it misapprehended or overlooked matters of fact or law. (*Loland v City of New York*, 212 AD2d 674, 674 [2d Dept 1995].) The Court finds that Eastman has not met its burden here.

For this motion, Eastman contends that the Court’s Amended Decision, in finding NYU entitled to attorneys’ fees and costs, overlooked Justice Melissa Crane’s denial of NYU’s summary judgment motion (mot. seq. 014) from 2018. According to Eastman, Justice Crane not only denied summary judgment but held that NYU would be entitled to a defense *if and only if* the plaintiff prevailed against defendants *and* defendants prevailed against NYU on their third-party claims. (NYSCEF doc. no. 662, memo of law in support.) The Court reads Justice Crane’s on-the-record Decision differently. On page 47, she first addresses NYU’s motion for summary judgment against both defendants and Eastman, and asked counsel for NYU, “But if the landlord is liable to the plaintiff and it is your contractor’s fault, how are you out of the case?” To which NYU’s counsel responded: “The landlord brought us in and ... my position was with respect to that aspect of the motion was simply that the issue should have been resolved and then the landlord could come after us after that.” (NYSCEF doc. no. 665 at 47-48, decision transcript for mot. seq. 014.) The question and response make it clear that Justice Crane, at this juncture, was

addressing the branch of the motion for summary judgment against defendants, not the branch seeking indemnification and a defense against Eastman.¹

Further, on page 63, Justice Crane stated: “So that means I am denying the landlord’s motion and NYU’s motion to the same extent that if the landlord is liable for what the plaintiff did not recover from insurance... then to the extent that it is NYU’s fault or [Eastman’s] fault, you [NYU] will have to indemnify the landlord. So I can’t let you out of the case either at this point.” (*Id.* at 64.) Even here, Justice Crane does not hold that Eastman owes a defense to NYU only after plaintiffs demonstrated liability against defendants and defendants had established that the damage resulted from NYU and Eastman’s renovation project. Again, the extent of her holding is limited to whether NYU was entitled to summary judgment against defendants. There is nothing in Justice Crane’s decision that can be read as holding Eastman would only have to provide NYU a defense should plaintiff recover from defendants.² As this Court found in its Amended Decision, to hold as such would undermine the parties’ indemnity agreement. Accordingly, Justice Crane’s decision merely denied summary judgment to NYU and cannot be viewed, as Eastman does, as establishing a “law of the case.” (*See 37 E 50th St. Corp. v Restaurant Group Mgt. Servs., LLC*, 195 AD3d 535, 535 [1st Dept. 2021] [“The prior order denying defendant’s summary judgment motion does not establish [the] law of the case... The denial of defendant’s motion for summary judgment established no more than the existence of triable issues of fact.”] [internal citations omitted].)

In light of the Court’s holding above, Eastman’s next argument—that there was no direct evidence linking its acts and omissions to the renovation work that caused damage to plaintiffs’ premises—has already been addressed in the Court’s Amended Decision. As discussed there, it is immaterial that plaintiffs failed to prove damages at trial: Chaitman testified at length as to how her claim for a rent abatement and other damages arose out of or were caused by the allegedly negligent renovation work. Since Eastman assumed (1) the duty to “indemnify and hold harmless” NYU “from and against all *claims*, damages, losses, and expenses, including... attorneys’ fees,” and (2) agreed to provide the “defense of any action at law” upon *claims* for “any and all damages or injury... caused by, resulting from, or arising out of” the performance of the renovation project (NYSCEF doc. no. 638, NYSCEF doc. no. 639 at § 4.19.2 and § 11.12), Eastman remains obligated to indemnify NYU for costs incurred in defending the action. (*See Ezzard v One E Riv. Place Realty Co., LLC*, 137 AD3d 648, 649 [1st Dept 2016] [“The indemnity clause does not require a finding of negligence on [third-party defendant’s] part”]; *Rucinski v More Restoration Co., Inc.*, 210 AD3d 604, 605 [1st Dept 2022].)

Eastman’s related argument that there were no “claims” against it since there was no evidence “to suggest Eastman ever even step foot on the premises” is likewise unavailing. Not only does it strain credulity that Eastman—as the project’s general contractor—did *not* perform

¹ It is unclear whether Justice Crane was aware of a second branch of NYU’s motion for summary judgment. On page 56, she states, “Motion 013 is plaintiff’s motion for partial summary judgment on the rent and Motion 014 is NYU’s motion for summary judgment vis-à-vis the landlord.” There is no mention of summary judgment against Eastman. Nor is there any discussion of the terms of the contractual indemnification clauses anywhere in the transcript.

² In its memorandum of law, Eastman asserts that “[Justice Crane] held (in no uncertain terms) that no party would be entitled to defense costs from another unless the Landlord (direct defendants) was liable to plaintiff.” The Court does not know from where Eastman derives this conclusion as it is unaccompanied by a citation to the hearing.

construction work at the premises during the relevant period, but, as NYU points out, a portion of Erica Benjamin’s deposition testimony was read into the record in which she confirmed that Eastman started the renovation work pursuant to the two construction contracts on May 1, 2012. (NYSCEF doc. no. 645 at 27-28, [day six trial transcript](#).) Defendant Moussazadeh also confirmed that Eastman was on the premises “doing NYU’s work” at this time. (*Id.* at 30.) And Eastman’s owner—Peter Morandi—testified during his deposition that he was unaware of any complaints regarding Eastman’s work at the site. (*Id.* at 31.)

In the alternative, since the Court adheres to its prior Amended Decision After Trial, Eastman contends that the Court must follow that same holding and require Kaback and Admiral to defend it, even as there is no evidence of their negligence. However, the type of damages that Kaback and Admiral subcontracts indemnify against is materially different from those in the NYU/Eastman general contract. Under their respective subcontract, Kaback and Admiral agreed to “defend, indemnify, and hold harmless Contractor . . . from and against all claims, actions, suits, liabilities losses, damages, costs and expenses. . . *resulting from injury or alleged injury to persons including death resulting therefrom*, that may arise or be alleged to have arisen, out of the performance of this Agreement by Subcontractor.” (NYSCEF doc. no. 666 at ¶ 9 [a], [Kaback and Admiral Subcontracts](#).) In this action, plaintiffs did not assert a cause of action related to injury to Chaitman’s person. Rather, they sought property-related compensatory damages over defendants’ alleged interference with her use and enjoyment of her veterinary clinic. As such, Eastman is not entitled to indemnification from Kaback or Admiral.


Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of third-party defendant Eastman Cooke & Associates’ motion pursuant to CPLR 2221 for leave to reargue the Court’s Amended Decision After Trial dated March 12, 2024 is granted; and upon renewal, the Court adheres to its prior Amended Decision; and it is further

ORDERED that the branch of Eastman Cooke’s motion pursuant to CPLR 2221 for an order requiring second third-party defendants Kaback Enterprises, Inc. and Admiral Air Condition Corp. to reimburse it for attorneys’ fees and costs in defending this action is denied; and it is

ORDERED that the matter of calculating NYU’s award of attorneys’ fees and costs is hereby referred to the Special Referee Clerk (Room 119, 646-386-3028 or spref@nycourts.gov) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of that Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the “References” link), shall assign this matter at the initial appearance to an available JHO/Special Referee; and it is further

ORDERED that counsel for NYU shall serve a copy of this order, along with notice of entry, on all parties within twenty (20) days of entry.


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DAKOTA D. RAMSEUR, J.S.C.

7/29/2024

DATE

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