

Jenks v ISN Corp.
2024 NY Slip Op 35513(U)
October 29, 2024
Supreme Court, Richmond County
Docket Number: Index No. 152887/2018
Judge: Orlando Marrazzo, Jr.
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND
ROBERT JENKS,

DECISION/ORDER

ISA PART 26

HON. ORLANDO MARRAZZO, JR.

Index No.: 152887/2018
Motion No 2

Plaintiff(s),

-against-

ISN CORPORATION.

Defendant(s)

The following numbered 1 to 3 were fully submitted on 24th day of October 2024

Papers
Numbered

Defendant’s Motion Seeking Leave to Reargue the Court’s Denial of Summary
Judgment, with Supporting Papers and Exhibits, Dated, April 15, 2024, 1

Affirmation in Opposition, With Supporting Papers and Exhibits, Dated, July 3,
2024 2

Reply, Dated, September 27, 2024,..... 3

As is set forth below, Defendant’s motion to reargue is denied namely
because Defendant has failed to meet his burden in establishing that reargument is
appropriate. Chief among the court’s concerns is that Defendant has failed to
demonstrate that the Court overlooked or misapprehended any controlling principle
of law.

It is well settled that a motion for reargument is addressed to the sound discretion of the Court and is designed to afford a party the opportunity to establish that the Court overlooked or misapplied any controlling principle of law. The purpose is not to permit the unsuccessful litigant dissatisfied with the result of the prior motion, an opportunity to reargue the very questions previously decided. (*Dugue v. Ortiz*, 154 A.D.2d 333, 545 N.Y.S.2d 810 (2d Dept. 1989). Here, Defendant has failed to establish that this Court misapprehended the relevant facts or misapplied the law. Accordingly, the Court denies Defendant's motion in its entirety.

The Court finds it incredible that while moving to reargue Defendant continues to admit that it had a duty to "ensure" that the property was kept safe. (See affirmation para 6, 7 , NYSCEF #77) This language contained in the Defendant's agreement is as strong as one can expect to find in any agreement. The Court further observes as set forth in plaintiff's opposition papers, that District Court Judge Cogan found that Defendant ISN assumed sole responsibility for many tasks related to the management of this property. (See NYSCEF #44 pg. 3)

Defendant ISN in re-argument now claims that the Property Management duties may only apply to "vacant property". (See Para 7-9 of ISN's motion to reargue). Defendant ISN's argument is simply not supported by the language in the contract. Defendant cherry picks one sentence from within one paragraph entitled

“property management”. (See Page 9 of 44 in the agreement.) The sentence lists one of Defendant’s duties is to inspect vacant property. However, nothing in this contract suggests that the management obligations are limited to be limited solely for vacant property. In fact, the very next paragraph discusses the collection of rent in occupied properties. (see pg. 9 of 44 in contract). Further the term PROPERTY MANAGEMENT is defined again on pg. 16 of 44 NYSCEF #52 pg. 18) In this section, the definition mandates that Defendant ISN “ensure” the safe upkeep of the property and include over a dozen subsections of obligations, none of which even mention vacant property.

There are other examples of Defendant ISN’s contractual obligations for both occupied and vacant properties, as stated in plaintiff’s underlying opposition papers, include:

- “The purpose of the Statement of Work requires the Contractor [Defendants ISN] to provide

property management, maintenance, and repair services” (See page 4 of 44). -

JANITORIAL SERVICES: These services will be required for common areas of some occupied residential and commercial properties. Contractor must ensure that all services are completed in a timely fashion to ensure the health and safety of the tenants.” (See page 7 of 44)

- “The Contractor shall provide property management, maintenance and repairs for residential and commercial properties.” (see page 11 of 44) Clearly the above language establishes an unambiguous duty that Defendant ISN had to ensure that the premises was kept and maintained in a safe condition. In fact, Defendant ISN’s own employee, Sarah Dallas, testified that Defendant ISN did have a duty to ensure that the property was kept safe. (See NYSCEF #54, 42:18-22)

Finally, despite the fact that Defendant had a duty to maintain the property in a safe condition, defendant’s own expert confirms that the property was not properly maintained and that the failure to maintain the property in good condition was a proximate cause of this accident. (See Villano expert report, NYSCEF 50, pg. 3)

In line with the foregoing, this Court did not misapprehend the law or the facts when it denied defendant’s motion for summary judgment, and the within motion to reargue is therefor denied in its entirety. The Court emphasizes that with respect to Defendant ISN’s attempt to apply Espinal to the facts of this case, it is evident that the doctrine does not apply to these facts because Defendant is more than just a contractor, Defendant is a De-Facto owner.

As argued in Plaintiff’s underlying opposition, Defendant ISN was a de-facto owner of the property. This property was originally owned by Anthony Fazio but the USMS took custody of the property. USMS then hired Defendant ISN to provide

property management, maintenance, and repair services as well as to “ensure” the safe upkeep of the property. Unlike a standard contractor or management company, Defendant ISN’s obligations and duties went far beyond those of a contractor. Indeed, the obligation to “ensure” the safety of the property and “ensure” the safety of the tenants is equal to or even greater than the duty put on a typical property owner.

As a de-facto owner, Defendant ISN cannot rely on the holding of Espinal to relieve itself of the duties that require it to maintain this property in a safe condition. The duties and obligations that were agreed to and undertaken by Defendant ISN, in the absence of an actual ‘owner’ serve to make Defendant ISN a de facto owner and therefore, Defendant ISN has a nondelegable duty to Plaintiff which was clearly violated.

Further, even if one were to consider applying the Espinal doctrine to this case, questions of fact exist as it cannot be disputed that Plaintiff reasonably and detrimentally relied on Defendant’s continued performance of the contract which meets an exception to Espinal. Where a Plaintiff can establish that he detrimentally relied on a Defendant’s continued performance, Defendant’s motion must be denied. See Espinal, supra. For example, in (*Kerwin v. Fusco*, 138 A.D.3d 1398 (4th Dept 2016)) the plaintiff was injured when he fell thru a stairway in the house where he resided. Before the accident plaintiff noticed some issues with the stairway and

Defendant Decker (property manager) made repairs. Defendant Decker also hired a sub-contractor to perform mold remediation at the premises. The plaintiff sued both the owner of the house as well as Decker. Decker was responsible for any repairs/inspections on the property. Defendant Decker moved for summary judgment on Espinal grounds. The court denied Decker's motion and held that there were sufficient facts for the plaintiff to argue that he did detrimentally rely on Decker's inspection and performance of repairs to the stairway in accordance with Decker's duties under the agreement with the owner.

Similarly, in (*All Am Moving v. Andrews*, 96 AD3d 674 (1st Dept 2012), plaintiff sued defendant for damages arising out of a warehouse fire. Defendant moved to dismiss the subtenant's claims asserting it did not owe a duty. The Court held that the subtenant detrimentally relied on the Defendant's continued performance of its contractual duties. Specifically, the court noted that Defendant had a duty to inspect the sprinklers, which was at least in part to benefit the subtenant. (See also *MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313, 584 NYS2d 310 [1992] "the intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee".

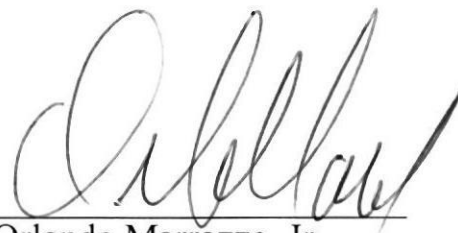
Here, in the case at bar, the undisputed facts are that Defendant ISN entered into a contract with USMS which was at least in part for the benefit of the Plaintiff; Defendant ISN had a duty to inspect the property; Defendant ISN made repairs to

the property; Defendant ISN even made repairs to the deck that led to the stairway where plaintiff fell; Defendant ISN was aware of the poor condition of the outdoor deck boards; Plaintiff complained to ISN about the dangerous boards and steps; Defendant ISN communicated directly with plaintiff regarding maintenance and repairs to the premises. Plaintiff relied on Defendant ISN to repair and maintain the premises where he resided and Defendant ISN's contract with USMS called for ISN to repair and maintain the premises. Clearly plaintiff was justified in relying on Defendant ISN to make repairs that it was hired to make, particularly in light of the fact that Defendant ISN inspected the premises and repaired some, but not all, of the defective conditions.

Accordingly, Defendant's motion for summary judgment was properly denied as, at the very least, questions of fact exist which must be determined by the trier of fact. The court adheres to its March 13, 2024, decision and order and Defendant's motion to reargue is denied in its entirety.

This constitutes the Court's decision and order.

Dated: October 29, 2024



Orlando Marrazzo, Jr.,
Justice, Supreme Court