Deluise v 333 E. 46th St. Apt. Corp.
2026 NY Slip Op 31341(U)
April 2, 2026
Supreme Court, New York County
Docket Number: Index No. 151481/2022
Judge: Hasa A. Kingo
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. HASA A. KINGO** **PART** **65**

Justice

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ROBERT DELUISE,

Plaintiff,

- v -

333 EAST 46TH ST. APARTMENT CORP., ORSID REALTY CORP.,

Defendant.

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INDEX NO. 151481/2022

MOTION DATE 02/17/2026

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

333 EAST 46TH ST. APARTMENT CORP., ORSID REALTY CORP.

Plaintiff,

-against-

333 EAST 46TH ST. PARKING CORP.

Defendant.

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Third-Party
Index No. 595836/2023

The following e-filed documents, listed by NYSCEF document number (Motion 004) 111, 112, 113, 114, 115, 117, 118

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER.

Third-Party Defendant 333 East 46th Street Parking Corp. moves, pursuant to CPLR § 2221(d), for leave to reargue the portion of its prior summary judgment motion (Motion Seq. No. 003) that was denied, and upon such reargument to grant summary judgment dismissing Defendants/Third-Party Plaintiffs' contractual indemnification claims against it (and awarding Parking Corp. its attorneys' fees, costs and disbursements). In essence, Parking Corp. seeks a "second bite" at its summary judgment motion, in light of disputed evidence on where Plaintiff's accident occurred.

BACKGROUND AND PROCEDURAL HISTORY

Plaintiff Robert Deluise ("Plaintiff," an employee of Parking Corp.) was injured on July 23, 2021 when he tripped and fell on a sidewalk abutting the premises at 333 East 46th Street. The building is owned by 333 East 46th Street Apartment Corp. ("Apartment Corp.") and managed by Orsid Realty Corp. Parking Corp. leases and operates the ground-floor garage under a written lease. In this personal injury action, Plaintiff sued Apartment Corp. and Orsid (the

"Defendants/Third-Party Plaintiffs") for negligence in failing to maintain the sidewalk. Pursuant to Workers' Compensation Law §11, Plaintiff made no direct claim against his employer (Parking Corp.). Defendants/Third-Party Plaintiffs answered and asserted a third-party complaint against Parking Corp. seeking common-law contribution and indemnification, contractual indemnification under the lease, and damages for breach of the lease (including failure to procure insurance and attorneys' fees).

In November 2025, Parking Corp. moved for summary judgment dismissing all third-party claims against it and for attorneys' fees under the lease. On January 12, 2026, this court issued a decision and order (Kingo, J.) granting summary judgment to Parking Corp. on the common-law contribution and indemnity claims and on the insurance-procurement claim (recognizing these were barred or moot under WCL §11), but denying the motion as to the contractual indemnification claim. The court explained that there was conflicting evidence on where the accident occurred – whether "in front of the garage" (as a Workers' Comp report suggested) or off to the side – and that this factual dispute was outcome-determinative for the indemnity clause. The court expressly held that the motion "is otherwise denied, in particular, the branch of the motion seeking dismissal of the contractual indemnification claim is denied, in view of the outstanding issues of fact as to the location of Plaintiff's accident and the applicability of the lease's indemnification provision." Parking Corp.'s fee application was denied as premature since it was not then a "prevailing party."

Parking Corp. now moves (Motion Seq. No. 004) for leave to reargue that portion of its denied motion and to grant summary judgment dismissing the contractual indemnity claim. Defendants/Third-Party Plaintiffs oppose, arguing that no new facts or law justify reargument and that genuine issues (particularly the accident's location) remain for trial. The motion has been fully briefed.

ARGUMENTS

Third-Party Defendant (Parking Corp.) argues that the court's prior decision overlooked critical evidence and misapprehended controlling law. It maintains that the accident occurred outside its leased premises (on the public sidewalk away from the garage entrance), so the lease's indemnity clause was never triggered. Parking Corp. points to deposition testimony of Plaintiff and a building superintendent, plus photographs taken during depositions, which show that the defect was on the sidewalk in front of the residential portion of the building, not the garage entrance. It asserts that the Workers' Compensation "First Report of Injury" (saying Plaintiff "tripped on [a] broken sidewalk in front of the garage") is inadmissible hearsay that cannot be the sole basis for denying summary judgment. In reply, Parking Corp. emphasizes that Plaintiff denied making that report and that the only admissible evidence of location is his own deposition, in which he placed the fall away from the garage entrance. It also notes that it owed no maintenance duty for the public sidewalk beyond a limited snow/ice obligation. Parking Corp. further contends that any common-law indemnity or contribution claim is barred by WCL §11 (since Plaintiff is its employee)[3], and that it fulfilled its insurance obligation under the lease. In sum, Parking Corp. contends it is entitled to summary judgment because the factual dispute is manufactured by inadmissible hearsay and is resolved in its favor by the admissible evidence.

Defendants/Third-Party Plaintiffs argue that Parking Corp. has failed to show the necessary grounds for reargument and that in any event genuine factual issues remain. They emphasize that the exact location of Plaintiff's fall is squarely disputed. In support, they rely on the "First Report of Injury" prepared for Plaintiff's workers' compensation claim, which explicitly states that Plaintiff "tripped on [a] broken sidewalk in front of the garage." If credited, this report shows the accident occurred adjacent to Parking Corp.'s leased premises, potentially triggering the indemnity clause. They argue that, at a minimum, the conflict between that contemporaneous report and the depositions (which suggest a fall away from the garage) raises a triable issue of fact as to the accident's location. Third-Party Plaintiffs also assert that summary judgment is premature in light of discovery issues: Parking Corp. refused to make any witness available for deposition, and the identity of whoever prepared the "First Report" (and the basis for its statements) is unknown. They cite CPLR § 3212(f) and Appellate Division, First Department, authority to the effect that summary judgment should be denied or deferred when essential facts remain undisclosed due to the movant's own discovery failures.

On the indemnity clause itself, Third-Party Plaintiffs observe that WCL §11 does not bar their claim because the lease contains a written indemnity agreement, which §11 expressly permits. They contend that if Plaintiff's fall was indeed "in front of the garage," then it was sufficiently connected to Parking Corp.'s use of the garage (e.g. an employee exiting the garage) to invoke the clause, and a jury should decide that issue. Finally, Plaintiffs oppose any fees award: Parking Corp. is not a prevailing party so far, and requesting fees at this stage is baseless. In sum, they urge denial of the reargument motion and a refusal to disturb the earlier order.

DISCUSSION

Parking Corp.'s motion for leave to reargue is addressed to this court's sound discretion under CPLR § 2221(d). By statute, a motion to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended" by the court. Appellate Division, First Department, precedent repeatedly cautions that reargument is not a license for an unsuccessful party to reargue the same issues or to raise arguments not previously asserted. For example, the First Department has held that a "motion for leave to reargue is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided . . . or to present arguments different from those originally asserted" (*Matter of Setters v AI Props. & Devs. (USA) Corp.*, 139 AD3d 492 [1st Dept 2016] *quoting Pahl v. Kassis*, 182 AD2d 22, 27 [1st Dept 1992]). Here, Parking Corp. identifies no new evidence or binding authority that was overlooked. Instead, it simply rehashes the location dispute and reorders its trial arguments about hearsay and contract language – issues already fully considered. Contrary to movant's characterization, the court did not "ignore" the Workers' Compensation report; it explicitly compared that report to Plaintiff's deposition testimony when denying the motion. Whether the report is hearsay or not, the Court weighed the conflicting evidence and found a factual issue. Parking Corp. has pointed to nothing that the Court actually failed to consider: the depositions, photographs and lease language were all before the court. Giving reargument simply to revisit weight-of-evidence issues would contravene the principle that the application for leave to reargue should not be employed as a substitute for an appeal, or to raise new legal theories or new facts (*Matter of Setters*, 139 AD3d 492). In short, Parking Corp.'s motion is essentially a second attempt to obtain relief already denied, and it makes

no showing of any "overlooked or misapprehended" issue of law or fact. Under controlling precedent, the motion to reargue must be denied.

Even if one were to consider the merits on the indemnity claim, summary judgment remains unwarranted. Parking Corp. bears the heavy burden of eliminating all material factual issues to show its entitlement to judgment as a matter of law. The admissible evidence leaves open a genuine dispute about where Plaintiff fell. Third-Party Plaintiffs have highlighted a contemporaneous report indicating the fall was "in front of the garage." While Parking Corp. labels that report hearsay, the deposition testimony of Plaintiff and the building superintendent constitutes direct evidence of location. At this stage, the court must view that record in the light most favorable to the non-moving party (Defendants/Third-Party Plaintiffs). As this court previously found, a jury could reasonably conclude from the conflicting testimony and photographs that the accident occurred adjacent to Parking Corp.'s garage entrance. Nothing in Parking Corp.'s reargument papers eliminates that conflict. The assertion that the "First Report" is unsworn is legally correct (hearsay alone cannot defeat summary judgment), but here there is also sworn testimony to be resolved. If the deposition evidence is believed, the fall was away from the garage; if the (prior) report is credited, it was directly in front. These are classic credibility issues for trial. It is settled law that such a factual dispute precludes summary judgment. Parking Corp. identifies no controlling case to the contrary – indeed, the applicable authorities reinforce that indemnity clauses are interpreted in light of the location and causation.

On the contract indemnity clause itself, the lease obligates Parking Corp. to indemnify Apartment Corp. only for claims "arising from any accident, injury or damage to any person or property in the Premises or any adjacent walkway during the Term," except for losses "to the extent caused by negligence of Landlord." Courts interpret the phrase "arising out of" broadly to require only some nexus to the premises or the tenant's activities. For example, in *O'Brien v. Prestige Bay Dev. Corp*., 103 AD3d 428 (1st Dept 2013), the indemnity clause did not cover an unrelated sidewalk defect outside the tenant's area. Similarly, here the court correctly held that if the fall was wholly unrelated to the leased garage (e.g. on a sidewalk segment the tenant did not maintain), the indemnity clause would not apply. But if the fall was in front of the garage entrance, where tenant's employees regularly walked, a sufficient connection might exist to trigger the clause[16][21]. In fact, Third-Party Plaintiffs persuasively argue that an injury to Parking Corp.'s employee "while walking out of the garage (even on the adjacent sidewalk)" could be connected enough to require indemnification. Because the outcome depends on the undisputed facts of where the accident occurred and what caused it, resolution of the indemnity question must await trial. The court's prior ruling – that factual issues prevent dismissal of the indemnity claim – was correct and remains so. No new law was overlooked: in fact, recent Appellate Division, First Department decisions (e.g. *Shamilova v. Berkowitz*, 192 AD3d 491, 492 [1st Dept 2021]) reinforce the principle that a tenant has no duty for unmaintained sidewalks absent special arrangements. Here the lease carved out landlord negligence from indemnity (satisfying NY GOL § 5-322.1) but did not unambiguously shift every public sidewalk defect to the tenant. The motion papers simply disagree with the court's analysis; they do not establish a purely legal error.

For all these reasons, the motion for reargument and for summary judgment on the contractual indemnity claim must be denied. The court's January 12, 2026 decision and order is adhered to in all respects, and the contractual indemnification cause of action continues to pend.

Parking Corp. is not a prevailing party at this time; its request for attorneys' fees and costs is denied as premature.

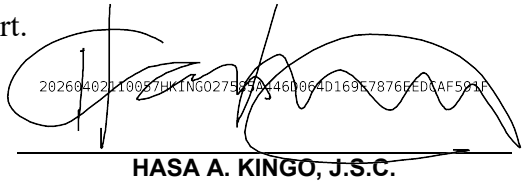
Accordingly, it is hereby

ORDERED that the motion of Third-Party Defendant (Motion Seq. No. 4) is denied; and it is further

ORDERED that the prior order of January 12, 2026, stands, and the contractual indemnification claim remains for trial; and it is further

ORDERED that Third-Party Defendant's request for fees or costs is denied as premature at this juncture.

This constitutes the decision and order of the court.



4/2/2026
DATE

HASA A. KINGO, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE