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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A. Madden **PART** 11
Justice

Index Number : 602377/2009
VIRGINIA SURETY CO., INC.
vs.
TRAVELERS PROPERTY CAS. CO.
SEQUENCE NUMBER : 005
RENEWAL

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, **were read on this motion to/for** renew/reargue

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision + Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: December 12, 2012

_____, **J.S.C.**

1. **CHECK ONE:** ..... ☐ **CASE DISPOSED** ☒ **NON-FINAL DISPOSITION**
2. **CHECK AS APPROPRIATE:** .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**
3. **CHECK IF APPROPRIATE:** ..... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**
☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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VIRGINIA SURETY COMPANY, INC. a/s/o
BOVIS LEND LEASE LMB, INC.

Index No.: 602377/09

Plaintiffs,

-against -

TRAVELERS PROPERTY CASUALTY COMPANY
OF AMERICA and FUJITEC AMERICA, INC.,

Defendants.

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JOAN A. MADDEN, J.

Plaintiff Virginia Surety Company, Inc. a/s/o Bovis Lend Lease LMB ("Virginia Surety") moves for an order granting renewal and/or reargument of the court's decision and order dated January 12, 2012 ("the original decision") to the extent it denied that part of Virginia's Surety's motion for summary judgment on its claim to be indemnified by defendants for 50 % of the $703,000 paid by Virginia Surety on behalf of Bovis Lend Lease LMB, Inc. ("Bovis"). Defendants Travelers Property Casualty Company of America ("Travelers") and Fujitec America, Inc. ("Fujitec") oppose the motion.

Background

This dispute arises out of an elevator accident that occurred on December 1, 2005, during work on a construction project at 9 West 31st Street, New York, NY. Bovis was the construction manager on the project. The claimants in the underlying personal injury action were passengers in the elevator at the time of the accident. With the exception of Nelly Rodriguez ("Rodriguez"), the claimants were employees of one of the subcontractors on the project, GM Crocetti Flooring ("Crocetti").

Under Crocetti's contract with Bovis ("the Crocetti/Bovis Contract"), Crocetti was

required to procure a "Commercial General Liability Insurance policy with a combined single limit for bodily injury, personal injury and property damage of at least $5,000,000 per occurrence and aggregate...naming [Bovis] as an additional insured....the Policy [is to be] primary as respects coverage afforded the additional insureds [i.e. Bovis] " In accordance with this requirement, Crocetti obtained such insurance from Virginia Surety that named Bovis as an additional insured. Under the policy, Bovis qualified for an additional insured for liability "arising out of 'your work' [i.e. Crocetti's work]..."

The construction elevator at issue was furnished, installed and maintained by Fujitec pursuant to a contract with Bovis ("the Bovis-Fujitec Contract"). Like the Bovis-Crocetti Contract, the Bovis-Fujitec Contract obligated Fujitec to procure a Commercial General Liability Insurance policy with a combined single limit for bodily injury, personal injury and property damage of at least $5,000,000 and named Bovis as an additional insured under such policy. In accordance with such obligation, Fujitec obtained a general liability insurance policy from Travelers which provided coverage to Bovis as an additional insured for liability "caused by your [i.e. Fujitec's] work."

Under Article of 11.1 of their respective contracts with Bovis, Crocetti and Fujitec each agreed:

> [t]o the fullest extent permitted by law... to defend, indemnify and hold [Bovis] harmless ...from any claim, cost, expense, or liability (including attorneys' fees, and including costs and attorneys' fees incurred in enforcing this indemnity attributable to bodily injury ...caused by or arising out of, resulting from, or occurring in connection with performance of the Work by contractor, its subcontractors, suppliers of any tier, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder,

> provided, however Contractor's duty hereunder shall not arise if such injury, sickness, disease, death, damage, or destruction is caused by the sole negligence of a party indemnified hereunder....

Additionally, under Article of 11.2 of their respective contracts, Crocetti and Fujitec each agreed:

> Should Owner or any other person or entity assert a claim or institute a suit, action, or proceeding against Construction Manager (i.e. Bovis) involving the manner or sufficiency of the performance of the Work, Contractor shall upon the request of the Construction Manager promptly assume the defense of such claim, suit, action, or proceeding, at Contractor's expense. To the fullest extent permitted by law, Contractor shall indemnify and hold harmless Construction Manager and Owner...from and against any liability, loss, damage or expense (including attorneys' fees incurred in enforcing this indemnity) arising out of or related to such claim, suit, action or proceeding.

After the initiation of the underlying claims against Bovis and the other defendants, Bovis' general liability carrier, Zurich American Insurance Company ("Zurich") tendered the defense and indemnity of its insured to Virginia Surety and Crocetti's excess carrier, RSUI Indemnity Co. ("RSUI"). Virginia Surety agreed, without reservation, to accept Zurich's tender of the defense and indemnity of Bovis with respect to the claims by Crocetti employees.[1] By letter dated March 23, 2007 to Zurich, Travelers agreed to defend and indemnify Bovis under a reservation of rights as to Bovis' sole negligence, independent acts and omissions of Bovis, and

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[1]However, Virginia Surety refused to defend and indemnify Bovis with respect to a claim by Rodriguez, who was not a Crocetti employee. Bovis and Zurich subsequently brought an action against Virginia Surety and RSUI seeking a determination of the rights and obligations of the parties under the insurance policy issued by Virginia Surety. By decision, order and judgment dated October 22, 2008, the court held that Virginia Surety was obligated to defend Bovis including with respect to the claims by Rodriguez, and to provide Bovis with counsel of its own choosing.

noted that Bovis is only an additional insured for acts caused by Fujitec's "work" for Bovis.

In 2008 and 2009, Virginia Surety settled five underlying claims/actions by certain Crocetti employees for a total of $703,000. Subsequently, Virginia Surety sought to have Travelers indemnify it for half of the settlement amounts and half of its defense and legal costs. When Travelers refused, Virginia Surety commenced this action.

After certain discovery was conducted, Virginia Surety moved for summary judgment, arguing that based on the defense and indemnity provisions in the Fujitec/Bovis Contract and Travelers' acceptance of Zurich's tender, Fujitec and Travelers owe and continue to owe a duty to defend and indemnify Bovis with respect to the claims of Crocetti employees and Rodriguez. Fujitec opposed the motion, asserting, *inter alia*, that the record raises triable issues of fact as to whether the accident was caused by Bovis' sole negligence in overloading the elevator and adding protective material reducing the elevator's capacity, and absent a determination of negligence, it is premature to grant summary judgment. Travelers separately cross moved for partial summary judgment, arguing that Virginia Surety is not entitled to recover half of its defense costs from it as a matter of law.

In the original decision, the court found that Travelers and Virginia Surety were co-insurers National Union Fire Ins. Co. of Pittsburgh, P.A. v. Hartford Ins. Co. of the Midwest, 248 AD2d 78, 84 [1st Dept 1998]), and that in accordance with the broad duty to defend (Regal Constr. Corp. v. National Union Fire Ins. Co., 15 NY3d 34, 37 [2010]), Travelers was liable to Virginia Surety for one-half the defense costs incurred during the mediation and settlement of the underlying claims of the five Crocetti employees.

In contrast, the original decision held that there were triable issues of fact as to Virginia

Surety's entitlement to half of the amounts it paid to settle the claims on behalf of the five Crocetti employees, relying on precedent holding that "[t]he duty to indemnify is...distinctly different from the [duty to defend]." Servidone Const. Corp. v. Security Ins. Co. of Hartford, 64 NY2d 419, 424 (1985). Moreover, the court noted that as a subrogee of Bovis, Virginia Surety's rights against any third-party are derivative and limited to the rights the insured, i.e. Bovis, would have against such third party. Federal Ins. Co. v. Andersen & Co., 75 NY2d 366, 372 (1990).

Thus, Virginia's Surety's right to be indemnified depended on whether Bovis was entitled to recover as an additional insured under Traveler's policy with Fujitec. To recover under that policy, Virginia Surety must showed that Fujitec's work "caused" the elevator accident, and that the accident was not result of the independent acts and omissions of Bovis. Although Fujitec's work included installing and maintaining the elevator, the court found that there were factual issues as to whether the accident was caused by Fujitec's work, and/or whether the accident was the result of an independent act by Bovis.

The Instant Motion

Virginia Surety now moves for renewal and reargument, asserting that certain discovery obtained after the issuance of the original decision, demonstrates that the accident was caused by Fujitec's work and not an independent act of Bovis and it is therefore entitled to summary judgment on its claim seeking indemnification from Travelers for one-half of the amounts it paid to settle the claims on behalf of the five Crocetti employees settlement amounts.

In support of the motion, Virginia Surety relies on the deposition testimony of Fujitec's witness, James Marlowe, who inspected the elevator at issue, and testified that the elevator was

installed, maintained and repaired by Fujitec. Virginia Surety relies on Mr. Marlowe's testimony to argue that there is no issue of fact as to whether Bovis loaded the elevator beyond its capacity based on evidence that there were 15 people in the elevator who weighed no more than 165 to 215 pounds each. In particular, Virginia Surety points to Marlowe's testimony that the elevator had a capacity of 3,000 pounds, and that tests performed on the elevator showed that it could hold at least 125 % of its capacity or 3,750 pounds. Based on this testimony Virginia Surety argues that the elevator could hold the 15 people weighing 200 pounds each and the 500 pounds of plywood lining the elevator included during construction activities at the time of the accident.

Virginia Surety also relies on Marlowe's testimony regarding Fujitect's maintenance and repair records, including records indicating that a "hoist rope shortening" was performed in January 2006. According to Marlowe, hoist rope shortening is performed due to the stretching of the elevator ropes over time and when elongated the elevator ropes or cable could come off the sheave and caused slipping, and the elevator to drop. Virginia Surety notes that Marlowe testified that there were no records showing that hoist rope shortening was performed between August 2005 and the December 2005, when the accident occurred. Thus, Virginia Surety argues that it can be inferred from the evidence that at the time of the accident the ropes were elongated and slipped off the sheave and that Fujitect was responsible for the accident.

In further support of this theory, Virginia Surety relies on an analysis performed by its expert, Robert Schloss, who opines that Fujitect did not properly inspect or maintain the elevator during its first 6 months of operation to check for elongation and elasticity of cables, resulting in the slippage of the elevator and the accident.

A motion for reargument is addressed to the discretion of the court, and is intended to

give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992).

"A motion for leave to renew is intended to bring to the court's attention new facts or additional evidence which, although in existence at the time the original motion was made, were unknown to the movant and were, therefore not brought to the court's attention." Tishman Constr. Corp. of New York v. City of New York, 280 AD2d 374, 376 (1st Dept 2001)(citations omitted). At the same time, however, a court, in its discretion, may grant renewal "in the interest of justice," even when the facts on which the renewal motion is based were known to the party at the time of the original motion. Id.

Here, as the motion is intended to bring new facts before the court, it is more properly characterized as a motion to renew, as opposed to a motion to reargue. However, even assuming *arguendo* that the court were to grant renewal, it would adhere to its original decision.

As a threshold matter, Virginia Surety mischaracterizes the original decision as suggesting that the term "caused by" mandates a finding of 100% liability on the part of Fujitect in order for Travelers' indemnification obligation to be triggered under the endorsement. The court made no such determination nor does Virginia Surety's argument that the decision in W&W Glass Systems, Inc. v. Admiral Insurance Co., 91 AD3d 530 (1st Dept 2012) holding that there is no material difference between the terms "caused by" and "arising out of" require a different result. The original decision denying Virginia Surety summary judgment was not

based on whether the accident arose out of or was caused by Fujitect's work. In any event, for the reasons discussed below, issues of fact exist as to whether the elevator dropped due to Fujitect's negligence in performing its work and whether Bovis' negligence caused or contributed to the drop.

Although the additional evidence submitted by Virginia Surety tends to support its position that the accident was caused by Fujitec and not by an independent act of negligence of Bovis in allegedly overloading the elevator, such evidence is insufficient to eliminate all issues of fact in this regard. Indeed, in opposition to the motion, defendants submit evidence sufficient to raise an issue of fact as to the cause of the accident. Thus, for example, defendants submit evidence that in September 2005, after the elevator passed inspection, (including a test involving the descent of the elevator at top speed at 125% capacity, or 3,750 pounds), an inspection certificate was issued by the Department of Buildings warning that the elevator should not be overloaded. Defendants also submit evidence that following the inspection, the elevator was "turned over" to Bovis, which added the 500 pound plywood layering to prevent damage to the car. Defendants also submit an excerpt from the deposition testimony of Rodriguez, the non-Crocetti employee in the elevator at the time of the accident, to support their theory that the accident was caused by the overloading of elevator. Rodriguez testified that the elevator functioned normally until it became overloaded with fifteen people and various tools, including a toolbox and heavy canvass bags filled with carpentry tools, and saws, including a power saw. Defendants also point out that an accident report completed by Bovis mentioned that the elevator "was allegedly over capacity" at the time of the accident.

Finally, Virginia Surety's argument that it is entitled to summary judgment based on the

doctrine of *res ipsa loquitur* was properly rejected in the original decision, and there is no ground for granting reargument or renewal with respect to this issue. To rely on the doctrine of *res ipsa loquitur*, a plaintiff must show that "'it is more likely than not' that the injury was caused by defendant's negligence." Kambat v. St. Francis Hosp., 89 NY2d 489, 494 (1997) citing from Restatement [Second] of Torts §§328 D, comment e. Here, even putting aside the question of whether Fujitect's control of the elevator was sufficiently exclusive, the doctrine does not apply as there are factual issues as to the cause of the accident.

Accordingly, as the evidence submitted by Virginia Surety on renewal is insufficient to establish Virginia's Surety's right to indemnity as a matter of law, the motion to renew must be denied.

In view of the above, it is

ORDERED that Virginia Surety's motion for reargument and renewal is granted only to the extent of granting renewal and, upon renewal, the motion for summary judgment seeking indemnification for one-half of the amounts it paid to settle the claims on behalf of the five Crocetti employees is denied; and it is further

ORDERED that a status conference will be held January 24, 2013 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: December 12, 2012

J.S.C.