[* 1]

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

PRESENT: HON. PAUL WOOTEN PART 7
Justice

340 MADISON OWNER LLC, and McGRAW HUDSON CONSTRUCTION CORPORATION,

INDEX NO. 115000/08

Plaintiffs,

MOTION SEQ. NO. 003

- against -

SAGE ELECTRICAL CONTRACTING, INC., UTICA MUTUAL INSURANCE COMPANY, and UTICA NATIONAL ASSURANCE COMPANY,

Defendants.

The following papers numbered 1 to 2 were read in this motion by plaintiffs to reargue, pursuant to CPLR 2221.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits (Memo)	2
Replying Affidavits (Reply Memo)	

Cross-Motion: ☐ Yes ■ No

In this declaratory judgment action, 340 Madison Owner LLC (340 Madison) and McGraw Hudson Construction Corporation (McGraw Hudson) (collectively, plaintiffs) move, pursuant to CPLR 2221, for leave to reargue this court's Decision and Order, dated March 23, 2012 (Prior Order) which denied plaintiffs' summary judgment motion against defendants Utica Mutual Insurance Company and Utica National Assurance Company (together, Utica), and upon reargument, granting plaintiffs a declaration that (1) Utica owes plaintiffs a duty to indemnify them in the related action, *Contino v 340 Madison Owner LLC* (Index No. 116392/07 before this court [*Contino*]); (2) Utica must assume the defense and all future obligations of plaintiffs in *Contino*; and (3) Utica must reimburse plaintiffs for all monies and defense costs expended by plaintiffs in defending *Contino*.

STANDARD

CPLR 2221(d) provides, in relevant part, that a motion to reargue must be identified as such and "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." A motion for reargument "addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; *see* CPLR 2221[d] [2]). A reargument motion is based solely on the papers submitted in connection with the prior motion. It is not a means by which an unsuccessful party can obtain a second opportunity to argue one or more issues previously decided, nor is it an opportunity to submit new or additional facts not previously submitted as part of the motion (*see McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *15 E. 63 St. Co. v Cook*, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]).

DISCUSSION

The motion to reargue is granted, as the Court made its prior determination based upon incorrect provisions of the McGraw Hudson/Sage Trade Contract.

The Contractual Indemnification Section

The applicable provision of section 7 of the contract states:

> (d) The Contractor [Sage] agrees to indemnify and save harmless the Indemnitees [340 Madison and McGraw Hudson] against loss and expense by reason of the liability imposed by law upon the Indemnitees (such indemnity to include the cost of the defense of an action or claim, including attorneys fees) for damages because of bodily injuries ... sustained by any employee of the Contractor while at the site where work under this contract is conducted, or elsewhere, while engaged in the performance of work under this contract, however such injuries may be caused, including, but not limited to such injuries as are caused by the sole or concurrent negligence of the Indemnitees, whether attributable to a breach of

statutory duty or administrative regulation or otherwise, and such injuries for which liability is imputed to the Indemnitees.

General Obligations Law § 5-322.1 "declares void agreements purporting to indemnify contractors against liability for injuries 'contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part'" (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990], quoting General Obligations Law § 5-322.1). Only if it is found that the indemnitees were not negligent (*see e.g. Naughton v City of New York*, 94 AD3d 1, 12 [1st Dept 2012]), or that the contract provides for partial indemnification through words such as "to the fullest extent permitted by law" (*see e.g. Williams v City of New York*, 74 AD3d 479, 480 [1st Dept 2010]) would enforcement of the above contractual provision not run afoul of the statute.

Here, the indemnification clause would require Sage to indemnify 340 Madison and McGraw Hudson even for "injuries as are caused by the sole or concurrent negligence of the Indemnitees." There is no limiting language, no partial indemnification envisioned. Thus, the provision is void and unenforceable unless 340 Madison and/or McGraw Hudson is found to be without negligence.

The determination of who was responsible for plaintiff's injuries must await the trier of fact. However, in the event that 340 Madison and/or McGraw Hudson is found to be without negligence, Sage will be obliged to indemnify 340 Madison and/or McGraw Hudson in *Contino*.

Defense in *Contino*

As set forth in the prior order, "Since Utica consents to defend 340 Madison and McGraw Hudson in *Contino*, the portion of plaintiffs' motion seeking a declaration that Utica has a duty to defend plaintiffs in *Contino* is granted" (Prior Order, at 3 of 4). Thus, the Court has already issued a declaratory judgment on the issue of Utica's obligation to defend 340 Madison and McGraw Hudson in *Contino*. The relief requested in this motion is in the nature of

indemnification.

The Issue of Late Notice

This issue has been resolved, in that Utica has assumed the defense of 340 Madison and McGraw Hudson in *Contino*, under a "full reserve of rights to disclaim coverage" (Utica 3/21/11 Letter to Plaintiffs) "if [340 Madison and McGraw Hudson] are held liable on some basis other than for the acts or omissions of Sage" (Gold 7/9/12 Affirm. in Opp. to Plaintiffs' Order to Show Cause to Reargue, ¶ 10). Coverage will also be disclaimed if 340 Madison and McGraw Hudson are found liable for their own independent acts or omissions (*id.*).

Whether 340 Madison and/or McGraw Hudson is an Additional Insured

The relevant portions of the additional insured endorsement (8-E-2737[NY] Ed. 11-2000, at page 5-7 of 9) follow:

> 11. ADDITIONAL INSUREDS - BY CONTRACT, AGREEMENT OR PERMIT ... The following is added to SECTION II - WHO IS AN INSURED: a. Additional Insureds - By Contract, Agreement or Permit
>
> (1) Any person or organization with whom you have entered into a written contract, agreement or permit requiring you to provide Insurance such as is afforded by this Commercial General Liability Coverage Form will be an additional Insured, but only:
>
> (a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured; or
>
> (b) With respect to property ... used by ... you.
>
> ***
>
> (c) ... This insurance does not apply to:
>
> (1) The independent acts or omissions of such additional insured.

The McGraw Hudson/Sage contract required Sage to procure a commercial general liability policy which named 340 Madison and McGraw Hudson as additional insureds (McGraw

Hudson/Sage Trade Contract, Insurance Rider No. 1). A certificate of insurance for a Utica commercial general liability policy, dated June 17, 2005, shows Sage as the named insured, and 340 Madison and McGraw Hudson as two of the additional insureds (Wilewicz 2/17/11 Affirm. in prior motion, Exs. D and P).

The policy limits Utica's obligation to indemnify its additional insureds to their liability for Sage's acts and omissions "arising out of and in the course of ongoing operations performed" by Sage for 340 Madison and/or McGraw Hudson. The Court of Appeals has "interpreted the phrase 'arising out of' in an additional insured clause to mean 'originating from, incident to, or having connection with.' It requires 'only that there be some causal relationship between the injury and the risk for which coverage is provided' [internal citations omitted]" (*Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA*, 15 NY3d 34, 38 [2010]; *see also Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404, 408 [1st Dept 2010] ["the focus of an 'arising out of' clause is not on the precise cause of the accident but on the general nature of the operation in the course of which the injury was sustained"]; *and see BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 716 [2007] [additional insured expects protection from lawsuits arising out of the named insured's work -- "litigation insurance"]).

"Where, as here, the loss involves an employee of the named insured, who is injured while performing the named insured's work under the subcontract, there is a sufficient connection to trigger the additional insured 'arising out of' operations' endorsement and fault is immaterial to this determination [citations omitted]" (*Hunter Roberts*, 75 AD3d at 408).

Anthony Contino was a Sage electrician foreman who would make rounds throughout the building to check on his men and the progress of the work (Plaintiff's 2/12/09 Depo., at 67, 69). The accident happened as he was walking to one of the elevators to check on work on another floor (*id.* at 70). Before he reached the elevators, he slipped on a patch of grease/water at the base of a staircase and fell (*id.* at 73-74).

Plaintiff's accident arose out of and was in the course of Sage's ongoing operations for 340 Madison and McGraw Hudson. However, as set forth above, the determination of who was responsible for plaintiff's injuries must await the trier of fact. In addition, 340 Madison and McGraw Hudson have not indicated those acts or omissions of Sage for which they allege that they may be found liable. As such, only some of the prerequisites for coverage have been met, and any determination of whether 340 Madison and/or McGraw Hudson is covered under the additional insured section of the Utica policy is premature. In addition, even if 340 Madison and/or McGraw Hudson were to meet the above prerequisites, coverage would be denied if the accident was the result of the "independent acts or omissions of" 340 Madison and/or McGraw Hudson.

As the issue of who was responsible for the accident, and the concomitant issues of whether the Sage/McGraw Trade Contract is enforceable, and whether the additional insured section of the Utica/Sage policy requires Utica to indemnify 340 Madison and McGraw Hudson in *Contino* must await the trier of fact, the part of 340 Madison and McGraw Hudson's motion which seeks declaratory judgments must be denied.

CONCLUSION

Accordingly, it is

ORDERED that the portion of the motion of 340 Madison Owner LLC and McGraw Hudson Construction Corporation which seeks leave to reargue is granted, and it is further,

ORDERED that upon reargument the prior decision and order of this Court dated March 23, 2012 is vacated and withdrawn and this matter is hereby restored to the active calendar; and it is further,

ORDERED that the portion of 340 Madison Owner LLC and McGraw Hudson Construction Corporation's motion which seeks declaratory judgments is denied; and it is further,

ORDERED that counsel for 340 Madison Owner LLC is directed to serve a copy of this Order with Notice of Entry upon all parties and upon the Clerk of the Motion Support Office who is directed to restore this action to the active calendar.

This constitutes the Decision and Order of the Court.

Dated: 2-21-13

Enter: _____
PAUL WOOTEN J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: : ☐ DO NOT POST ☐ REFERENCE