

<b>Garland v JT MH 1250 Owner LP</b>
2017 NY Slip Op 32512(U)
December 1, 2017
Supreme Court, New York County
Docket Number: 159043/2015
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ  
*Justice*

PART 13

QUEEN GARLAND,

INDEX NO. 159043/2015

Plaintiffs,

-against-

MOTION DATE 11/22/2017

MOTION SEQ. NO. 003

MOTION CAL. NO. \_\_\_\_\_

JT MH 1250 OWNER LP, JT MH 1250 OWNER LP, LLC,  
MURRAY HILL PROPERTIES LLC, PMH REALTY, INC., and  
JAMESTOWN REALTY COMPANY, L.P.

Defendants.

JT MH 1250 OWNER LP, JT MH 1250 OWNER LP, LLC,  
MURRAY HILL PROPERTIES LLC, PMH REALTY, INC., and  
JAMESTOWN REALTY COMPANY, L.P.,

Third-Party Plaintiffs,

-against-

VISITING NURSE SERVICES OF NEW YORK,

Third-Party Defendant,

JT MH 1250 OWNER LP, JT MH 1250 OWNER LP, LLC,  
MURRAY HILL PROPERTIES LLC, PMH REALTY, INC., and  
JAMESTOWN REALTY COMPANY, L.P.,

Second Third-Party Plaintiffs,

-against-

STOP PEST CONTROL of NY, INC.,

Second Third-Party Defendant,

The following papers, numbered 1 to 8 were read on this motion to reargue and cross-motion to dismiss.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1 - 3; 4 - 6

Answering Affidavits — Exhibits \_\_\_\_\_

4 - 6 ; 7 - 8

Replying Affidavits \_\_\_\_\_

Cross-Motion:  Yes  No

Upon a reading of the foregoing cited papers, it is Ordered that Third-Party Defendant Visiting Nurse Service of New York's ("VNS") motion for leave to reargue pursuant to CPLR §2221 and upon reargument, grant in its entirety its April 19, 2017 motion to dismiss Third-Party Plaintiffs JT MH 1250 Owner LP, JT MH 1250 Owner LP, LLC, Murray Hill Properties LLC, PMH Realty, Inc. and Jamestown Realty Company, L.P.'s (together the "Owners") Complaint, is granted to the extent that upon reargument, the Owners Third Cause of Action is dismissed along with the previously dismissed

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

**Fourth Cause of Action. The Owners' cross-motion for leave to reargue the same motion pursuant to CPLR §2221, is denied.**

**On September 1, 2015 Plaintiff commenced this action seeking damages for personal injuries suffered in a trip and fall during the course of her employment. Plaintiff, an employee of VNS, brought this action against Defendants/Third-Party Plaintiffs, the Owners, who are the owners, property manager and have other related property interest in the Premises located at 1250 Broadway, New York, New York. The Owners rented the Premises to VNS pursuant to a Lease. The Owners commenced two separate Third-Party Actions, one against VNS and the second against Defendant Stop Pest Control of NY, Inc.**

**On April 19, 2017 VNS moved pursuant to CPLR §3211[a][1] and [7] to dismiss the Third-Party Complaint against it contending Workers' Compensation Statute §11 bars common law contribution and indemnification, the Lease does not include a contractual indemnification provision relevant to this action, and it procured the proper insurance policy. On August 8, 2017 this Court granted VNS' motion to dismiss by dismissing only the Fourth Cause of Action that alleged VNS failed to procure a proper insurance policy. The remainder of VNS' motion was denied.**

**VNS now moves for leave to reargue its April 19, 2017 motion pursuant to CPLR §2221[d] and [e], and upon reargument, for an Order dismissing the Third-Party Complaint against it in its entirety. The Owners oppose the motion and cross-move to reargue the same motion pursuant to CPLR §2221[d], and upon reargument, for an Order reinstating their Fourth Cause of Action.**

**CPLR §2221[d] states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) 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, and (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.**

**The Court has discretion to grant a motion to reargue upon a showing that it "overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law" (Kent v 534 East 11<sup>th</sup> Street, 80 AD3d 106, 912 NYS2d 2 [1<sup>st</sup> Dept. 2010]. Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (Kent, supra and Ul Haque v Daddazio, 84 AD3d 940, 922 NYS2d 548 [2<sup>nd</sup> Dept. 2011]). The movant cannot merely restate previous arguments (*id*).**

**A motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination" (CPLR §2221[e][2]) and the application "shall contain reasonable justification for the failure to present such facts on the prior motion" (CPLR §2221[e][3]). A motion for leave to renew is addressed to the sound discretion of the court (Hamlet At Willow Creek Development Co., LLC v Northeast Land Development Corp., 64 AD3d 85, 878 NYS2d 97 [2<sup>nd</sup> Dept. 2009]), and "is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation" (Renna v Gullo, 19 AD3d 472, 797 NYS2d 115 [2<sup>nd</sup> Dept. 2005] *citing* Rubinstein v Goldman, 225 AD2d 328, 638 NYS2d 469 [1<sup>st</sup> Dept. 1996]). A motion for leave to renew must be based on additional material facts existing at the time the prior motion was made, but the material facts were not known to the party seeking leave**

to renew (*Nassau County v Metropolitan Transp. Authority*, 99 AD3d 617, 953 NYS2d 183 [1<sup>st</sup> Dept. 2012] *citing* *Foley v Roche*, 68 AD2d 558, 418 NYS2d 588 [1<sup>st</sup> Dept. 1979]).

In this motion VNS has annexed: (i) a copy of VNS' Certificate of Self-Insurance for Worker's Compensation; (ii) a copy of a Decision of the Worker's Compensation Board awarding Plaintiff disability wage benefits and medical treatment and care, (iii) a copy of VNS' written request to the Workers Compensation Board to release records of Plaintiff's Workers Compensation case and Plaintiff's incorrect authorization, and (iv) a copy of VNS' insurance Policy with coverage for general liability claims issued by Allied World Surplus Lines Insurance Company.

In the August 8, 2017 Order, this Court held that "[a]lthough Plaintiff did not allege a 'grave injury' in her Verified Bill of Particulars, VNS fail[ed] to present sufficient documentary evidence to prove that the Plaintiff had a Workers' Compensation Policy at the time of the accident." It is well-settled that New York law employers who provide Workers' Compensation coverage are immune from tort liability except in a narrow class of cases where the Plaintiff suffered a "grave injury" (*Rubeis v Aqua Club*, 3 NY3d 408, 788 NYS2d 292, 821 NE2d 530 [2004]). Both parties have noted that Plaintiff did not allege a "grave injury" in her Complaint or Verified Bill of Particulars. VNS has reasonable justification for not including the now-annexed documents in the original motion. When the motion was filed, despite VNS' demands, Plaintiff failed to provide a correct "duly executed authorization to obtain [her] worker's compensation benefits file." Without Plaintiff's permission in the correct form, the Workers Compensation Board would not release copies of documents in her case file. With the Plaintiff not alleging a "grave injury," and VNS' documentary evidence that it had a Workers' Compensation Policy at the time of the accident, all factual issues as a matter of law are resolved (*Fortis Fin. Servs. v Fimat Futures USA, Inc.*, 290 AD2d 383, 737 NYS2d 40 [1<sup>st</sup> Dept. 2002]). VNS is immune from common law contribution/indemnity claims in this action and is entitled to dismissal of the Owners' Third Cause of Action.

Upon a review of the papers in VNS' April 19, 2017 motion, the Court finds it did not overlook any relevant facts or misapply any controlling principle of law. Contractual indemnification or contribution with respect to tort damages can be maintained despite common law contribution/indemnity immunity with employers if, prior to the accident, the employer expressly agreed to provide contribution to, or indemnification of, said Third-Parties, for the loss suffered (*Acosta v S.L. Green Mgmt. Corp.*, 267 AD2d 67, 699 NYS2d 402 [1<sup>st</sup> Dept 1999]). Article 39 of the Lease reference to "any and all third-party claims," sufficiently includes claim's made by VNS' employees, including Plaintiff's, to at the very least, warrant denial of VNS' motion to dismiss pursuant to CPLR 3211[a][1] and [7] (*Sostre v Jaeger*, 38 AD3d 234, 832 NYS2d 150 [1<sup>st</sup> Dept. 2007]).

As to the Owner's cross-motion to reargue the dismissal of their Fourth Cause of Action, the Court finds it did not overlook any relevant facts or misapply any controlling principle of law to warrant reargument. First, as previously held, the

landlord, after acquiring its' own insurance, cannot "look to the tenant for the full amount of the settlement and defense costs in the underlying tort claim" (Inchaustegui v 666 5th Ave. Ltd. P'ship, 96 NY2d 111, 725 NYS2d 627, 749 NE2d 196 [2001]). Second, documentary evidence supports VNS' claim that it procured an appropriate insurance policy. The Lease required VNS to carry a total of \$5 million dollars in coverage. VNS first obtained from Darwin Select Insurance Company a primary policy of \$1 million dollars in general liability and then obtained excess coverage on claims filed between April 30, 2013 to May 1, 2016 in the amount of \$20 million per year from Darwin Select Insurance Company (\$10M) and Torus Specialty Insurance Co. (\$10M).

Accordingly, it is ORDERED, that Third-Party Defendant Visiting Nurse Service of New York's motion for leave to reargue its April 19, 2017 motion to dismiss Third-Party Plaintiffs JT MH 1250 Owner LP, JT MH 1250 Owner LP, LLC, Murray Hill Properties LLC, PMH Realty, Inc. and Jamestown Realty Company, L.P.'s Complaint, pursuant to CPLR §2221 is partially granted, and it is further,

ORDERED, that on reargument, Third-Party Defendant Visiting Nurse Service of New York's April 19, 2017 motion to dismiss the Third-Party Complaint is granted to the extent that the Third Cause of Action is dismissed along with the previously dismissed Fourth Cause of Action, and it is further,

ORDERED, that the Third Cause of Action in the Third-Party Complaint against Third-Party Defendant Visiting Nurse Service of New York is hereby severed and dismissed, and it is further,

ORDERED, that the First and Second Causes of Action in the Third-Party Complaint asserted against Third-Party Defendant Visiting Nurse Services of New York remain in effect, and it is further,

ORDERED, that within twenty (20) days from the date of entry of this Order Third-Party Defendant Visiting Nurse Service of New York shall serve a copy of this Order with Notice of Entry upon Third-Party Plaintiffs, and it is further,

ORDERED, that Third-Party Plaintiffs JT MH 1250 Owner LP, JT MH 1250 Owner LP, LLC, Murray Hill Properties LLC, PMH Realty, Inc. and Jamestown Realty Company, L.P.'s cross-motion to reargue Third-Party Defendant Visiting Nurse Service of New York's April 19, 2017 motion, is denied, and it is further,

ORDERED, that the Clerk enter judgment accordingly, and it is further,

ORDERED, that the parties appear for a Status Conference on April 4, 2018 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER: **MANUEL J. MENDEZ**  
J.S.C.

  
\_\_\_\_\_  
**MANUEL J. MENDEZ**  
J.S.C.

Dated: December 1, 2017

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE