SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

MARLOW PALLEJA and DONALD MEADE

INDEX NO. 151678/16

MOT. DATE

- v -

MOT. SEQ. NO. 003, 004 and 005

EAST RIVER HOUSING CORPORATION et al.

The following papers were read on this motion to/for DJ (003)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 75-87
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 98-104
Replying Affidavits NYSCEF DOC No(s). 130-131

The following papers were read on this motion to/for quash (004)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 88-97
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 127-129
Replying Affidavits NYSCEF DOC No(s). 132

The following papers were read on this motion to/for reargue and x-mot to reargue (005)

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 108-116
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 118-124, 137, 138
Replying Affidavits NYSCEF DOC No(s). 141-143, 144

This is a personal injury action. By way of background, the court previously granted defendant GSK Restoration Corp. ("GSK")'s motion for summary judgment dismissing plaintiffs' claims and any cross-claims against it in a decision/order dated December 8, 2017. In motion sequence number 005, plaintiffs move and defendant/third-party plaintiff Hillman Housing Corporation ("Hillman") cross-moves to reargue the 12/8/17 decision. GSK opposes both the motion and cross-motion.

In motion sequence number 003, Hillman moves for a default judgment against third-party defendants Boshudha US LLC ("Boshudha") and Allstar Ready Mix Corp. ("Allstar"). Plaintiffs oppose that motion. Finally, in motion sequence number 004, plaintiffs move to quash the subpoena served by Hillman upon non-party Reshma Sapre. The motion to quash is opposed by Hillman.

Because they are interrelated, these motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court will first address the motion to reargue.

Reargument

A motion to reargue is addressed to the court's discretion, and permission to reargue will only be

Dated: 3/28/18

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED (005) ☒ DENIED (003) ☒ GRANTED IN PART (004) ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

granted if the court believes some error has been made (see CPLR § 2221[d][2]). In order to succeed on a motion for reargument, the movant must demonstrate that the Court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to relitigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; see also *DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 [1st Dept 2005]).

As Hillman points out, the court incorrectly stated in the 12/8/17 decision that Hillman did not oppose GSK's motion. Since the court overlooked Hillman's opposition to the motion for summary judgment, the court will grant the motion and cross-motion to reargue. Upon reargument, the court vacates the 12/8/17 decision.

The facts as stated in the 12/8/17 decision are hereby incorporated by reference. Briefly, plaintiff Marlow Palleja seeks to recover for personal injuries she sustained when she slipped and fell due to a puddle of waste cement mixed with water at the intersection of Broome Street and Columbia Street in Manhattan. Plaintiff's accident occurred on August 8, 2014 at approximately 12:20am. Hillman owned the building adjacent to the subject sidewalk where plaintiff fell. Hillman hired Boshudha to demolish and install sidewalks at the buildings. Boshudha's principal, Babalu, in turn, hired GSK to perform the sidewalk demolition and replacement work.

Although Hillman's supervisor, Edwin Velazquez, testified that only Boshudha performed the subject sidewalk replacement work, the NYC Department of Transportation ("DOT") issued permits to GSK to open the sidewalk on Columbia Street from Broome to Grand Streets for the purpose of sidewalk repair and to patch the curb. The permits are dated July 18, 2014 to August 15, 2014 and August 16, 2014 to September 14, 2014, and were issued July 18, 2014 and August 8, 2014, respectively. DOT further issued permits to GSK to perform sidewalk repairs at another location for the same time period, to wit, on Grand Street from Columbia Street to Henry Street.

GSK's president, Gurdev Singh, testified that GSK was paid by Babalu, and when asked "[w]ho gave GSK more direction, Babalu, or Mr. Velazquez", Singh answered Babalu. Singh testified that there was no written agreement between GSK and Boshudha. Singh further testified that GSK only began the subject sidewalk repairs on August 11, 2014. Singh however also testified that GSK began the subject work "15, 20 days after obtaining the permits."

Plaintiff and Hillman nonetheless claim that there was a triable issue of fact as to whether GSK was the only contractor performing the sidewalk repairs at the time of plaintiff's accident. The court did not reach this issue in the prior decision because it found that even if GSK was the only contractor, GSK established that it did not cause or create the subject puddle. The court further found that plaintiff was unable to raise a factual dispute as to whether GSK's employees caused or created the puddle upon which plaintiff slipped.

Plaintiffs and Hillman argue that the court incorrectly found that the material facts are not in dispute. The court agrees. Plaintiffs and Hillman first contend that the court overlooked the fact that Singh admitted that GSK's employees "cleaned off cement-covered masonry tools with water on Broome Street, the location of [plaintiff's] fall."

Movants cite the following deposition testimony given by Singh:

> Q. Did you clean these tools at the end of each day of work during that job?
>
> A. You are asking for the tools, cleaning?

Q. Cleaning of the tools, correct.

A. With the brush in the wheelbarrow.

Q. Did you ever use any water to clean off those tools?

A. We take clean water, a bucket or two.

Q. Where would this cleaning take place?

A. Where we work.

Q. So if you were doing work on, say, Columbia, you would just clean in the wheelbarrow on Columbia Street? Or would it be on the sidewalk? Or would it be somewhere else?

A. Since Broome Street is kind of private street, so there is no traffic, so we found it appropriate to do that work there.

In the 12/8/17 decision, with regard to Singh's testimony, the court stated: "Singh denied that any of his workers used water to wash off any tools at the site." The court incorrectly summarized Singh's testimony. Initially, Singh repeatedly testified that GSK's employees did not use water to clean up at the end of the work day (Singh Deposition, p. 40-41, see also p. 75). However, Singh eventually admitted was that his employees would use a bucket or two of water in a wheelbarrow to wash tools at the end of the work day.

Meanwhile, according to plaintiffs' bill of particulars, Palleja "was caused to slip and fall while walking when she stepped on a patch of "wash out", waste cement and water, that had come from construction activities, including pouring of cement and related clean up and/or washing out of equipment containing or used to mix cement." The court stated in the 12/8/17 decision: "Palleja... testified that she observed workers 'hosing down' in the middle of Grand and Bloom Streets. Palleja did not personally observe the puddle when she saw workers 'hosing' or any time prior to her accident."

At her deposition, Palleja testified about how she believed GSK caused the subject dangerous condition:

Q. You noticed there was hosing down on Columbia in the days before the accident; who was doing the hosing down –

A. The workers.

Q. The hosing down, was the hosing down of the sidewalk on Columbia or hosing down the street on Columbia?

...

A. I saw hoses and equipment and that's – I wasn't sitting paying attention. I walked by and I saw hoses and equipment and concrete and I kept going. I mean, it wasn't like I was going to sit there.

...

A. That's what I saw, hoses and equipment and men.

Q. Were the hoses spraying water when –

A. Yes.

Q. -- you saw them at any point before the accident?

A. Yes.

Q. I'm going to ask again because I don't think it was answered. Was the hosing down of the sidewalk, the street or something else?

A. I saw a hose. I saw equipment. I don't' know what they were hosing. I walked past.

Q. Was the hosing work being done –

A. I walked past.

...

Q. Was the hosing on Columbia being done at Columbia's intersection with Broome Street?

A. It was, I believe, towards the middle. And like I said, I was – it was a half of a second of walking by. There was men and hoses and stuff they use – I don't know, I'm not a – it was in the middle of Grand to Broome.

...

Q. When you saw these workers hosing down on Columbia in the days before the accident, did you notice a puddle there?

A. No.

Q. Did you ever notice a puddle there before the accident?

A. No. Not on Columbia, no.

Q. Did you notice any puddles in the days or weeks before the accident on Broome Street?

A. No.

...

Q. You also testified before that you had seen trucks and people with hoses, what were they doing with the hoses?

A. Washing construction stuff. I'm not – I mean –

...

A. Washing construction sludge off, like, equipment or I don't know what that technical term would be. Hosing equipment and sidewalks with a hose. I don't know what to –

Q. So you saw them using a hose, correct?

A. Mm-hmm.

Q. That's a yes?

A. Yes.

Whether a defendant owes a duty of care to a plaintiff is a question of law to be determined by the court (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Generally, contractual obligations do not give rise to a duty of care in favor of third-parties. However, where a defendant, in failing to exercise reasonable care in the performance of his or her duties, "launches a force or instrument of harm", the defendant assumes a duty of care to third parties and may be held liable (*id.* [internal citations omitted]). Here, there is a triable issue of fact as to whether GSK's acts or omissions caused the cement waste puddle which precludes summary judgment.

Plaintiffs and Hillman argue that Singh's admission to the use of a bucket or two of water by GSK employees requires denial of the motion. While Singh denied that GSK's employees dumped the water and cement waste from the wheelbarrow into the street which then pooled at the location of plaintiff's accident, this self-serving denial does not eliminate all triable issues of fact.

The court also stated in the 12/8/17 decision that Velazquez "testified that Boshuda's workers would hose wet cement off their tools into a wheel barrel from a hose connected to Hillman's property and would then dump the water in a garden area in the back of 530 Grand Street. Velazquez testified that he did not personally observe any workers washing their tools in the street or dumping the water from the wheel barrel into the street." Velazquez further stated that he saw the workers dispose of the waste water from the wheelbarrow in the garden area every day. He further said that if he had seen such acts, "[he] would have stopped it right there and then [he] would have made them clean up."

While both Velazquez and Singh deny that GSK's employees generally used water during the sidewalk construction other than to clean tools, this self-serving testimony that GSK's employees did not use a hose and did not dump any cement waste into the street does not, standing alone, establish GSK's entitlement to summary judgment, in light of plaintiffs' testimony as well as the testimony of her husband, Donald Meade.

The court stated in the 12/8/17 decision, Meade testified that "he observed workers 'who [he] assume[d] were from GSK, hosing down the area and naturally flowed down in the depression on Bloom Street.' Meade further admitted that he didn't witness these acts personally and he didn't ask the workers who they worked for." Plaintiffs argue that the court misapprehended Meade's testimony. The court agrees.

Meade's testimony is sufficient to raise a triable issue of fact, when coupled with the evidence in this case. About the workers he observed prior to plaintiff's accident, Meade testified:

Q. Did you notice these workers having uniforms or identifying clothing?

A. Well, here. Yes, they all worked for a crew that was a hundred percent religious Sikh because they wore the long beards and turbans associated with that religion. So as there is not a great number of Sikhs on the ground on Grand Street, it was easy to conclude these fellas were all working together.

Q. Besides them wearing typical Sikh garb, were they wearing anything that identified any construction company or any employer that they worked for?

A. On their clothing, not that I recall. But I wasn't paying a great deal of attention to it.

Q. Did you notice any construction truck in the area –

A. Yes.

Q. -- of Broome and Columbia?

A. Trucks there, no. I saw trucks along Grand Street at the top of the hill. You know, it goes up to Grand Street at that point. So they were working along Grand Street and along Columbia Street as well as in front of our building on Lewis Street.

...

Q. On August 7, 2014, do you recall being in the area of Broome Street and Columbia Street?

A. Yes.

Q. When were you there that day?

A. Probably 5:30.

...

Q. Did you notice any puddles or any construction sludge in the area of Broome Street and Columbia Street when you walked home at 5:30 or 5:45?

A. I can't recall. At that point I was seeing guys spray down the sidewalk up the hill along Columbia.

Q. So at that time you were seeing people up the hill of Columbia spraying down a sidewalk?

A. Yeah, it's not very far. ...

Q. So these men that you saw hosing down the sidewalk of the hill at Columbia, were these the Sikh men who were doing the construction earlier?

A. Yes. It was not the Hillman maintenance crew.

Q. How do you know it's not them, do you know all the people in the Hillman Housing crew?

A. There are no Sikhs who are employed by Hillman who do this kind of work, all right?

Q. The Hillman Housing people, do they wear any sort of identifying clothes?

A. They have uniforms, yes.

Q. And you didn't see anybody from Hillman at that time when you were walking past Broome and Columbia?

A. No.

...

Q. But as you said before, you don't know for sure whether that puddle was a result of construction work, that your assumption; is that correct?

A. It's an assumption based on me seeing the workers, who I assume were from GSK, hosing down the area and naturally flowed down into the depression on Broome Street. You're right, I didn't witness it personally and I didn't go out and question the workers on who they work for."

It is true that Meade did not affirmatively testify that the workers he observed hosing down the sidewalk worked for GSK. However, his testimony raised a triable issue of fact, since GSK indisputably performed the sidewalk repairs and Singh admitted during his deposition that all but one of GSK's workers wore turbans. Velazquez confirmed that all of the individuals who worked for GSK on the subject project wore turbans. Singh also stated that Babalu did not have any Boshudha employees working at the project.

The court notes that both Singh and Velazquez testified that GSK's employees finished working at 4, and Meade testified he observed the workers in turbans hosing the street at approximately 5:30. While none of the parties argue about whether GSK's workers could have been working at the accident location at the time Meade claims to have observed them, this issue standing alone does not warrant summary judgment in GSK's favor. The court finds as such given the relatively small difference of an hour and a half and the fact that the parties were generally estimating and approximating while relying on their memory. Otherwise GSK has not come forward with evidence in admissible form which eliminates the possibility that GSK's employees were present at the worksite when Palleja and Meade observed them.

Therefore, the court needs to reach the further issue of whether GSK established that it did not perform the subject sidewalk repair prior to plaintiff's accident. As previously noted, Singh testified that GSK began its work on August 11, 2014. However, Singh also testified that GSK began its work 15-20 days after it obtained the permits. Fifteen days from the date the first set of permits were issued would put GSK working at the site before plaintiff's accident. In any event, on this record, there is insufficient evidence which would eliminate all triable issues of fact as to when GSK started the subject work.

There is also an issue of fact as to whether the puddle which caused plaintiff's accident was the result of GSK's construction activities and/or clean-up, or was just water with sand and/or mud. The court cannot resolve this fact issue on the record before it.

Hillman next argues that "there is certainly a question of fact regarding whether GSK's dumping of waste water created or exacerbated a dangerous condition at the location of plaintiff Marlow Palleja's alleged accident, thus launching a force or instrument of harm." This argument which was originally raised in its opposition papers to the motion for summary judgment, is based upon the claims that the garden area where Singh admitted they dumped water from the tool cleaning "was only about 25 feet away from the corner of Grand Street and Columbia Street" and Columbia Street is sloped downhill so that this waste water could have traveled to that area. This argument is too speculative to raise a triable issue of fact and is rejected.

Based upon the foregoing, the court vacates the 12/8/17 decision. Upon vacatur, the court denies GSK's motion for summary judgment.

Motion for a default judgment

Hillman moves for a default judgment against Boshudha and Allstar Ready Mix Corp. ("Allstar"), the company that Singh testified supplied the cement for the sidewalk construction project. In its third-party

complaint, Hillman asserts claims for common law and contractual indemnification, contribution and failure to procure insurance. Plaintiffs oppose the motion.[1]

At the outset, Hillman has established that it served its third-party complaint upon both Boshudha and Allstar. Since there time to answer the third-party compliant has expired and has not been extended by the court, they have defaulted in appearing in this action.

While a default in answering the complaint constitutes an admission of the factual allegations therein, and the reasonable inferences which may be made therefrom (*Rokina Optical Co., Inc. v. Camera King, Inc.*, 63 NY2d 728 [1984]), plaintiff is entitled to default judgment in its favor, provided it otherwise demonstrates that it has a prima facie cause of action (*Gagen v. Kipany Productions Ltd.*, 289 AD2d 844 [3d Dept 2001]). An application for a default judgment must be supported by either an affidavit of facts made by one with personal knowledge of the facts surrounding the claim (*Zelnick v. Biderman Industries U.S.A., Inc.*, 242 AD2d 227 [1st Dept 1997]; and CPLR § 3215[f]) or a complaint verified by a person with actual knowledge of the facts surrounding the claim (*Hazim v. Winter*, 234 AD2d 422 [2d Dept1996]; and CPLR § 105 [u]).

Hillman has provided the barebones affidavit of Velazquez, who states in conclusory fashion that Boshudha and Allstar were retained by Hillman to perform sidewalk demolition and repair and deliver concrete, respectively. Velazquez states that both third-party defendants had certain duties which they breached. For the reasons that follow, the motion is granted only to the extent that Boshudha and Allstar's default in appearing is noted. All issues regarding Boshudha and Allstar's liability and Hillman's damages remain to be determined at trial.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see also Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). Here, Hillman has failed to provide a copy of the contract which allegedly triggered Boshudha and Allstar's obligation to indemnify it. Therefore, Hillman has not demonstrated a *prima facie* cause of action against either entity.

Similarly, Hillman's cause of action for failure to procure insurance is a breach of contract action, and without the contract, Hillman has not established every element of that claim as well.

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.,* 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.,* 259 AD2d 60, 65 [1st Dept 1999]). At this stage of the litigation, Hillman has not established its freedom from liability or that Boshudha or Allstar were also negligent.

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citations omitted]). Again, Hillman has wholly failed to demonstrate a *prima facie* cause of action.

Accordingly, the motion for a default judgment is granted only to the extent that Boshudha and Allstar's default in appearing is noted. All issues regarding Boshudha and Allstar's liability and Hillman's damages remain to be determined at trial.

Motion to quash

[1] The court notes that plaintiff filed a surreply without leave of court, which was procedurally improper and therefore not considered by the court.

Finally, plaintiffs move to quash the subpoena served upon a non-party named Reshma Sapre. Hillman opposes the motion, arguing that Sapre's testimony will not be relevant because she did not witness plaintiff's accident and discovery is concluded. Hillman explains, in opposition to the motion, that the nonparty deposition is material and relevant because Sapre was with Palleja at a bar where plaintiff was consuming alcoholic beverages just before the accident. Indeed, the court previously resolved a prior motion to vacate note of issue, by so-ordering a stipulation which directed, *inter alia*, plaintiff to provide Sapre's address to the defendants.

The court finds that the target deponent may offer material and necessary testimony in connection with the claims and defenses in this action (*cf. Smith v. Moore,* 31 AD3d 628 [2d Dept 2006]). Nor is the court persuaded by plaintiff's arguments concerning the fact that note of issue has already been filed. Accordingly, the motion to quash is denied in its entirety.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that both the motion and cross-motion in motion sequence number 005 is granted to the extent that the court grants reargument, the court vacates the 12/8/17 decision and GSK's prior motion for summary judgment is denied for the reasons stated herein; and it is further

ORDERED that the motion for a default judgment (motion sequence number 003) is granted only to the extent that Boshudha and Allstar's default in appearing is noted. All issues regarding Boshudha and Allstar's liability and Hillman's damages remain to be determined at trial; and it is further

ORDERED that the motion to quash (motion sequence number 004) is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 3/28/18
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.