SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SALIANN SCARPULLA** **PART** **39**
Justice

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ONX-1, LLC,

Plaintiff,

- v -

NEW PROCESS GEAR, INC., MAGNA INTERNATIONAL, INC., MAGNA POWERTRAIN USA, INC., MAGNA POWERTRAIN HOLDINGS USA, INC. F/K/A MAGNA DRIVETRAIN HOLDINGS (AMERICA), INC., MAGNA AUTOMOTIVE HOLDINGS (GERMANY) GMBH F/K/A MAGNA DRIVERTRAIN ERSTE BETEILIGUNGS GMBH, MAGNA DRIVETRAIN ZWEITE BETEILIGUNGS GMBH

Defendant.

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INDEX NO. 152545/2016

MOTION DATE 1/10/2018

MOTION SEQ. NO. 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115

were read on this application to/for REARGUMENT/RECONSIDERATION

Upon the foregoing documents, it is

In this breach of contract action, defendants New Process Gear ("NPG"), Magna International Inc., Magna Powertrain Holdings USA, Inc. f/k/a Magna Drivetrain Holdings (America), Inc., and Magna Automotive Holdings (Germany) GMBH f/k/a Magna Drivetrain Erste Beteiligungs GMBH and Magna Drivetrain Zweite Beteiligungs GMBH (collectively, "Defendants") move, pursuant to CPLR §2221(d), for an Order granting Defendants leave to reargue this Court's decision and order, dated

December 6, 2017 (the "December Order"), to the extent that I denied their motion to dismiss the environmental indemnification and Navigation Law claims in plaintiff ONX-1, LLC's ("ONX-1") amended complaint.

The facts giving rise to this matter are more fully set forth in the December Order and only the facts pertinent to this motion for reargument will now be discussed.

From approximately 1999 until 2004, New Venture Gear, Inc. ("NVGear") occupied and operated manufacturing processes on property in East Syracuse, New York (the "Property"). On May 17, 2004, NVGear entered into an Asset and Stock Purchase Agreement (the "ASPA") with NPG, Magna Drivetrain Erste, and Magna Drivetrain Zweite, pursuant to which the latter parties agreed to acquire certain assets and assume certain environmental liabilities from NVGear.

On September 29, 2004, NVG entered into a Lease with New Process as Lessee and operator of the Property (the "Lease Agreement") and from 2004 through the Lease Agreement expiration, on December 31, 2012, Defendants occupied the Property and conducted manufacturing operations on it.

In September of 2012, ONX-1 purchased the Property and assumed the Lease Agreement. Sections 10.3 (e) and (f) of the ASPA were incorporated in Sections 11 and 18.8 of the Lease Agreement. Pursuant to Sections 10.3 (e) and (f) of the ASPA, NPG agreed to indemnify and defend NVGear from any loss suffered from an incremental increase in environmental liabilities attributable to an "exacerbation" as defined in the agreement.

When Defendants took possession of the Property, the condition of the PBS system and other infrastructure at the Property was investigated by Golder Associates, who then created a report in April 2005 (the "Golder Report"). The Golder Report catalogued the conditions of the Property's infrastructure, including defects and was provided to Defendants affording them "knowledge of the conditions of the Property, along with areas of particular concern which held the potential to create and exacerbate adverse environmental conditions due to the nature of Defendants' manufacturing operations over the course of their eight (8) year tenancy."

The amended complaint alleged that Defendants did not remedy the defects noted in the Golder Report, which exacerbated the adverse environmental conditions at the Property and "increased discharges of petroleum and hazardous wastes." ONX-1 further alleged that during Defendants' tenancy, the New York State Department of Environmental Conservation ("NYSDEC") documented various new chemical or petroleum "spills" at the Property.

About one month prior to the Lease Agreement's expiration, ONX-1 notified NPG, in a November 20, 2012 letter (the "November 2012 letter"), that its "unauthorized removal" of "various articles of property" and the "resulting damage associated therewith, curtails [ONX-1's] ability to use the Premises upon the expiration of the Lease and, as such, constitutes a holdover" to which ONX-1 did not consent.

ONX-1 sent a second letter to Defendants, on May 8, 2014 (the "May 2014 letter"), seeking $11.5 million "to address the conditions and damages caused by [Defendants']" operations on the Property. The May 2014 letter's enumerated

environmental conditions included Defendants' "disposal of petroleum and hazardous wastes into a lower stormwater pond located on the Property, which discharges into Sanders Creek."

Also addressed in the May 2014 letter was the issue of "exacerbation," as set forth in Section 10.3 of the ASPA. ONX-1 stated that it was impossible to determine which adverse environmental conditions were historic and which constituted an exacerbation of those conditions because "at the time it assumed the tenancy of the Property, Magna did not take affirmative action to determine the environmental baseline, therefore rendering it impossible now for the parties to conform with the intentions of Section 10.3 of the ASPA."

In a June 17, 2014 letter, Defendants state that Plaintiff's May 2014 letter requesting damages was too "general" and that the November 2012 letter was "similarly vague." Defendants requested that ONX-1 provide additional information to show that it caused contamination or damage to the Property.

After the parties' negotiations to resolve the issues raised by ONX-1 failed, ONX-1 commenced this action. Its amended complaint alleged that Defendants caused discharges that contaminated the lower stormwater pond with levels of hazardous substances and contaminants exceeding soil cleanup objectives of New York State. It also alleged that Defendants released petroleum and petroleum-related wastes throughout the buildings located on the Property which caused ONX-1 to incur substantial costs to address the environmental and property conditions created and/or exacerbated by Defendants.

ONX-1 contends that when Defendants "abandoned" the Property, they did not remove the petroleum, "estimated to be in excess of 1 million gallons," that was discharged onto the Property and its costs for remediation and removal of hazardous substances were approximately $3,430,200.

Defendants moved to dismiss ONX-1's amended complaint based on documentary evidence and for failure to state a claim. In the December Order, I granted Defendants' motion to dismiss ONX-1's causes of action for common law indemnification, negligence, private nuisance, trespass, holdover tenancy, unjust enrichment and declaratory judgment and denied Defendants' motion as to ONX-1's causes of action under the Navigation Law and for contractual indemnification and breach of contract.

Defendants now move for leave to reargue the December Order with respect to the validity of ONX-1's notice, the amount of damages it seeks for exacerbations, and the navigation law claims. Defendants argue that my decision: 1) "overlooked and/or misapprehended the facts and law that establish that Plaintiff failed to provide the requisite notice to Defendants with respect to its environmental indemnification claim;" 2) "misapprehended the scope of Defendants' Motion to Dismiss the Eighth Cause of Action [for contractual indemnification];" and 3) "overlooked or misapprehended that the Release in Section 18.8 of the Lease released *all* environmental claims." (emphasis added). ONX-1 opposes the motion.

Discussion

The purpose of a motion to reargue is to provide a party with the opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. *See Pro Brokerage, Inc. v. Home Ins. Co.*, 99 A.D.2d 971, 971 (1st Dept. 1984). Motions to reargue "shall not include any matters of fact not offered on the prior motion. *See* CPLR Rule 2221(d)(2). Although the determination of whether to grant a motion for leave to reargue is within the court's discretion, a motion for leave to reargue "is not designed to provide the unsuccessful party successive opportunities to reargue issues previously decided." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22, 27 (1st Dept. 1992) (internal citation omitted); *Setters v. AI Properties and Developments (USA) Corp.*, 139 A.D.3d 492, 492 (1st Dept. 2016).

Here, Defendants argue that I overlooked and/or misapprehended the facts and law that establish that 1) Plaintiff failed to provide the requisite notice to Defendants with respect to its environmental indemnification claim because, among other things, the notice was not reasonably detailed; 2) the Exacerbation Allocation must be enforced and Plaintiff's claim for higher damages for any alleged Exacerbations must be dismissed; and 3) the Release in Section 18.8 of the Lease released all environmental claims of any kind other than ones for contractual indemnity under the ASPA, including Plaintiff's Navigation Law claims.

These arguments simply restate Defendants' original arguments, all of which were considered and rejected in the December Order.[1] Thus, upon review of the papers submitted, Defendants have not demonstrated that I overlooked or misapprehended the law in arriving at the decision in the December Order, and their motion to reargue is denied. *See Opton Handler Gottlieb Feiler Landau & Hirsch v. Patel*, 203 A.D.2d 72, 73-74 (1st Dept. 1994); *Pro Brokerage, Inc.*, 99 A.D.2d at 971 ("As we have repeatedly held," a motion to reargue is solely intended "'to afford a party an opportunity to establish that the court overlooked or misapprehended the *relevant facts*, or misapplied any controlling principle of law'") (citation omitted).

In accordance with the foregoing, it is hereby

ORDERED that the motion of defendants New Process Gear ("NPG"), Magna International Inc., Magna Powertrain Holdings USA, Inc. f/k/a Magna Drivetrain Holdings (America), Inc., and Magna Automotive Holdings (Germany) GMBH f/k/a

[1] Defendants raise a spoliation of evidence argument for the first time in their motion to reargue and state that they intend to file a future spoliation motion. I did not consider the spoliation issue on this motion to reargue. *See Matter of Setters,* 139 A.D.3d at 492 (noting that the purpose of reargument is not to present arguments that differ from the original arguments).

Magna Drivetrain Erste Beteiligungs GMBH and Magna Drivetrain Zweite Beteiligungs GMBH for leave to reargue this Court's decision and order, dated December 6, 2017, is denied.

This constitutes the decision and order of this Court.

4/11/18
~~4/6/2018~~
DATE

SALIANN SCARPULLA, 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:	[ ]	DO NOT POST			[ ]	FIDUCIARY APPOINTMENT	[ ] REFERENCE