

Andrezzi v Sprint Spectrum L.P.

2021 NY Slip Op 32246(U)

November 9, 2021

Supreme Court, Kings County

Docket Number: Index No.: 503175/16

Judge: Edgar G. Walker

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At an IAS Term Part 90 of the Supreme Court of the State of New York, held in and for the County of Kings on the 9th day of November, 2021.

P R E S E N T:

HON. EDGAR G. WALKER,
Justice.

-----X

JOHN ANDREZZI,
Plaintiff,

-against-

Index No.: 503175/16
MS24, MS25, MS26

SPRINT SPECTRUM L.P., SPRINT/UNITED
MANAGEMENT COMPANY, 1100 AVENUE
OF THE AMERICAS ASSOCIATES, EUGENE
A. HOFFMAN MANAGEMENT, INC., and
D.H. PACE COMPANY, INC.,

Defendant.

-----X

SPRINT SPECTRUM L.P., SPRINT/UNITED
MANAGEMENT COMPANY, 1100 AVENUE
OF THE AMERICAS ASSOCIATES and EUGENE
A. HOFFMAN MANAGEMENT, INC.

Third-Party Plaintiffs,

- against -

CBRE, INC. CB RICHARD ELLIS, INC., D.H. PACE
COMPANY, INC. and VERSATILE SERVICES, LLC,

Third-Party Defendants.

-----X

D.H. PACE COMPANY, INC.,

Second Third-Party Plaintiff,

-against

VERSATILE SERVICES, LLC,

Second Third-Party Defendant.

-----X

The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	538-558, 565-580, 581-584
Opposing Affidavits (Affirmations) _____	586-588, 590, 591, 592, 593, 594, 595-597, 598-599
Affidavits/ Affirmations in Reply _____	600
Other Papers: _____	_____

Upon the foregoing papers, defendant/third-party defendant/second third-party plaintiff, D.H. Pace Company, Inc., (hereinafter “D.H. Pace”), moves in motion sequence number 24, for an order pursuant to CPLR. 2221 granting reargument of its cross motion for summary judgment dismissing all claims against it by CBRE, Inc., and CB Richard Ellis, Inc., (collectively the CBRE defendants or CBRE), Sprint Spectrum L.P. s/h/a as “Sprint Communications Company L.P.” and Sprint/United Management Company (collectively the Sprint defendants), 1100 Avenue of the Americas Associates (1100 Avenue) and Eugene A. Hoffman Management, Inc., (Hoffman) which resulted in this court’s January 11, 2021 decision and order (the decision) denying this cross motion as moot. In addition, D.H. Pace seeks reargument of its motion seeking summary judgment in its favor on its claims as asserted against Versatile Services, LLC (Versatile) and summary judgment dismissing plaintiff’s claims as asserted against D. H. Pace. Specifically, upon reargument, D.H. Pace seeks: (i) summary judgment dismissing all claims against it by the CBRE defendants, the Sprint defendants, 1110 Avenue and Hoffman; (ii) summary judgment in its favor on its’ claims against Versatile, and (iii) dismissing plaintiff’s claims as against D.H. Pace.

The Sprint defendants move in motion sequence no. 25, for an order pursuant to CPLR 2221 granting reargument of that part of the decision that denied their motion for summary judgment in their favor as against D.H. Pace, the CBRE defendants and Versatile on the contractual indemnification and breach of contract for failure to procure insurance causes of action; and (ii) upon granting reargument, granting the Sprint defendants summary judgment against these defendants on these claims.

1100 Avenue and Hoffman move, in motion sequence no. 26, for an order pursuant to CPLR 2221, granting reargument of that part of the decision that denied their motion for contractual indemnity against Versatile, and upon granting reargument, granting the motion.

On January 11, 2021, this Court issued a decision which, in sum and substance granted those branches of the Sprint defendants and 1100 Avenue and Hoffman's motions seeking dismissal of all of plaintiff John Andrezzi's claims and denied plaintiff's cross motion seeking summary judgment in his favor on his Labor Law § 240 (1) claim. In addition, the court granted that branch of CBRE's motion seeking summary judgment on its claim for contractual indemnification as against D.H. Pace and denied D.H. Pace's cross motions as moot. All other relief sought by the defendants was denied. The factual background and procedural history in this case were discussed at length in said decision and will not be repeated herein.

Discussion

“A motion for leave to reargue ‘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” (*Jaspar Holdings, LLC v Gotham Trading Partners #1, LLC*, 186 AD3d 582, 584 [2d Dept 2020], quoting CPLR 2221[d][2]; see *Degraw Constr. Group, Inc. v McGowan Bldrs., Inc.*, 178 AD3d 772, 773 [2d Dept 2019]). The determination to grant leave to reargue lies within the sound discretion of the court (see *Degraw Constr. Group, Inc.*, 178 AD3d at 773; *Barnett v Smith*, 64 AD3d 669, 670-671[2d Dept 2009]), and a motion for leave to reargue "is not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*Jaspar Holdings, LLC*, 186 AD3d at 584; quoting *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; see *Degraw Constr. Group, Inc.*, 178 AD3d at 773; *Woody's Lbr. Co., Inc. v Jayram Realty Corp.*, 30 AD3d 590, 593 [2d Dept 2006]; *Foley v Roche*, 68 AD2d 558, 567-568 [1st Dept 1979]).

D.H. Pace's Motion

D.H. Pace seeks reargument of its' motions (motion seq. nos. 22 and 23) and, upon reargument, seeks summary judgment in its favor on said motions. D.H. Pace points to this court's decision denying both of its motions as moot. They contend that although this court's decision specifically noted that "[i]nasmuch as the court has dismissed all of plaintiff's claims" it never specifically held that plaintiff's claims against D.H. Pace were dismissed and, thus, incorrectly denied D.H. Pace's cross-motion seeking dismissal of plaintiff's entire complaint against D.H. Pace as moot. In this regard, D.H. Pace contends that the court overlooked the fact that D.H. Pace was added as a direct defendant via

supplemental summons and amended complaint, filed on April 7, 2017 and that is the reason its' motion was denied as moot.

In support of this contention D.H Pace points to the fact that it is not listed as a direct defendant in the case caption. D.H. Pace argues that it is entitled to the same relief as the other direct defendants who moved for summary judgment in the form of dismissal of all of plaintiff's claims.

D.H. Pace further argues that the court made clear in its decision that all claims asserted by CBRE, the Sprint Defendants, 1100 Avenue and Hoffman were dismissed against D.H. Pace because all of plaintiff's claims against those entities were dismissed. Thus, D.H. Pace contends that since it was not negligent and did not have any contractual indemnity obligation to these entities, the Court should have decided D.H. Pace's motion and, upon reargument, should grant summary judgment dismissing the third-party claims and all crossclaims against D.H. Pace. In addition, they contend that D.H. Pace is entitled to dismissal of the contractual indemnity claims asserted by CB Richard Ellis Inc., as it is not an entity included in the definition of indemnified parties in the contract between these two entities.

In opposition, 1100 Avenue and Hoffman argue that D.H. Pace's motion regarding 1100 Avenue and Hoffman must be denied as it seeks relief which has already been granted to D.H. Pace in the January 11, 2021 decision and order. Specifically, they note that the court dismissed all claims against D.H. Pace brought by 1100 Avenue and Hoffman. Moreover, they point to the court's discussion of D.H. Pace's cross motions to dismiss the claims against it at page 32 of the decision, wherein the court clearly states: "Inasmuch as

the court has dismissed all of plaintiff's claims, as well as all claims asserted by CBRE, the Sprint defendants, 1100 Avenue and Hoffman against D.H Pace, for the reasons discussed in detail above, D.H. Pace's cross motions are denied as moot." Accordingly, they argue this motion is unwarranted and improper and should be denied.

The CBRE defendants oppose D.H. Pace's motion to the extent that it seeks to reargue those portions of its summary judgment motion seeking dismissal of CBRE's cross claims for contractual indemnity which the court denied as moot. In this regard, CBRE argues that this branch of the motion should be denied as it lacks merit and the court in its decision correctly held that the indemnification provision in the contract between D.H. Pace and CBRE was triggered, and that D.H. Pace was required to indemnify CBRE.

Versatile opposes that portion of D.H. Pace's motion seeking to reargue its cross motion for summary judgment against Versatile arguing that this Court did not overlook or misapprehend any matters of law or fact with respect to D.H. Pace's underlying motion against Versatile. Versatile notes that in its underlying summary judgment motion, D.H. Pace sought summary judgment on its common law indemnity and contractual indemnity claims against Versatile, but here only advances arguments with regard to its contractual indemnity claim.

Versatile points out that this court dismissed all contractual indemnity claims against Versatile because plaintiff's claims against all of the defendants had been dismissed. Versatile further points to the court's acknowledgement that a claim for costs and attorneys' fee survives the dismissal of the main action. However, Versatile points out that D.H. Pace has already been defended under Versatile's insurance policy and, as such,

D.H. Pace's claim for past costs and attorneys' fees is moot. Thus, Versatile contends that this court did not overlook or misapprehend any matters of fact or law and that D.H. Pace's motion to reargue must be denied. Moreover, they note that the anti-subrogation bar operates here to bar D.H. Pace's contractual indemnity claim against Versatile as both Versatile and D.H. Pace are being defended under the same insurance coverage.

The Sprint defendants oppose that portion of D.H. Pace's motion to reargue pertaining to the Sprint defendants' claims against D.H. Pace for contractual indemnification and breach of contract for failure to procure insurance. They note that D.H. Pace admits that since the court correctly dismissed the Sprint defendants' claims against D.H. Pace, but merely contend that the court likewise should have granted D.H. Pace's motion seeking that relief, rather than determining that D.H. Pace's motion was moot.

Plaintiff also opposes D.H. Pace's motion for the reasons set forth in its Appellate brief in which he appeals that portion of this court's decision dismissing his Labor Law § 240 (1) claim.

Discussion

The court grants D.H. Pace's motion to reargue and upon reargument decides as follows: To the extent this court's decision was not clear in stating that all of plaintiff's claims were dismissed as asserted against all defendants, including D.H. Pace, the court specifically notes that plaintiff's claims as asserted against D. H. Pace are dismissed. In light of the dismissal of the main action, D.H. Pace's motion seeking summary judgment dismissing all claims seeking common law or contractual indemnification asserted against it by CBRE, the Sprint defendants, 1100 Avenue and Hoffman, is granted and all of these

claims are dismissed as academic, except for any claims by these defendants to recover the costs, disbursements, and attorney's fees incurred by them in defending the action (*see McCoy v Medford Landing, L.P.*, 164 AD3d 1436, 1439 [2d Dept 2018]; *Payne v 100 Motor Parkway Assoc., LLC*, 45 A.D.3d 550, 554 [2d Dept 2007]; *Hoover v International Bus. Machs. Corp.*, 35 AD3d 371, 372 [2d Dept 2006]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536, 538-539 [2d Dept 2005]). However, that branch of the motion seeking summary judgment dismissing any claims asserted by these defendants sounding in breach of contract for failure to procure insurance is denied as questions of fact exist regarding whether the requisite insurance was procured (*see Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536, 539 [2d Dept 2005]; *Natarus v Corporate Prop. Invs.*, 13 AD3d 500, 501 [2d Dept 2004] [court held third-party claim that defendant failed to procure contractually mandated insurance coverage was not academic notwithstanding dismissal of the underlying complaint]). Finally, that branch of D.H. Pace's motion seeking to reargue that branch of its motion seeking summary judgment in its favor on its claims as against Versatile is denied.

The Sprint Defendants' Motion

The Sprint defendants seek reargument of that portion of the decision that denied their motion seeking summary judgment in their favor on the causes of action for contractual indemnification and breach of contract for failure to procure insurance against D.H. Pace, CBRE and Versatile, and upon reargument, they seek an order granting this relief. The Sprint defendants argue that the record is unequivocal that the contractual indemnity obligations of D.H. Pace, CBRE and Versatile are triggered by the facts of this

case and that none of these entities procured the requisite insurance coverage pursuant to their respective contracts. They contend that neither the dismissal of the complaint, nor the fact that certain insurance carriers are providing a defense to the Sprint defendants, subject to a reservation of rights, renders the contractual indemnity and breach of contract causes of action moot. The Sprint defendants argue that the fact that there are reservations of rights, no response from excess carriers, and ongoing motion practice, demonstrates that these claims are not moot.

D.H. Pace

Specifically, the Sprint defendants point out that Zurich, the insurance carrier for the first layer of coverage of \$1 million for D.H. Pace, is providing a defense to Sprint defendants, as well as to 1100 Avenue and Hoffman, under a reservation of rights. The reservation of rights conditions full coverage as an additional insured on a finding that D.H. Pace's acts or omissions caused, in whole or in part, the plaintiff's damages and that the damages occurred as a result of their work. Moreover, Zurich declines to indemnify the Sprint defendants if it is determined that the damages did not occur as a result of D.H. Pace's work. Accordingly, the Sprint defendants contend that D.H. Pace breached its contractual obligation to obtain insurance naming the Sprint defendants as additional insureds.

CBRE

With regard to CBRE, the Sprint defendants acknowledge that CBRE's insurance carrier is also providing a defense to the Sprint defendants, 1100 Avenue and Hoffman, subject to a reservation of rights only as to the first \$1 million of coverage. However, the

Sprint defendants contend that this violates the terms of the contract both as to the reservation and as to the amount of insurance required to be procured. They point out that by letter, dated January 11, 2018, Zurich North America, CBRE's insurance carrier, responded to the Sprint defendants' tender to the extent that it agreed to participate on an excess basis to other available insurance, under a full reservation of rights including the position that no coverage will be afforded unless CBRE is found liable in whole or in part. The Sprint defendants further assert that CBRE's umbrella/excess carrier has not responded to the Sprint defendants' tender. Accordingly, the Sprint defendants argue that CBRE failed to procure the requisite insurance.

In opposition, the CBRE defendants argue that the motion should be denied inasmuch as the court held that "there can be no finding that any negligence on the part of CBRE caused or contributed to plaintiff's accident." They argue that since the indemnification clause on which the Sprint defendants rely is contingent on a finding of CBRE's negligent or willful misconduct, the clause was not triggered. In addition, the CBRE defendants argue that the Sprint defendants fail to demonstrate that the requisite insurance was not procured. In this regard they note that although the CBRE defendants were obligated to purchase insurance naming the Sprint defendants as additional insureds, this coverage was contingent on the fact that it would only be primary to the extent that the loss was attributable to CBRE's negligent acts, omissions, or willful misconduct; and would not cover the Sprint defendants' negligence. They contend that the fact that Zurich has afforded a defense with a reservation of rights only serves to support their opposition and undermine the Sprint defendants' argument in this regard.

Versatile

The Sprint defendants acknowledge that United Specialty Insurance Company (USIC), the insurance carrier for Versatile, agreed to defend and indemnify the Sprint defendants as additional insureds, on a primary basis, under a policy of insurance issued by USIC with a \$1 million per occurrence limit. However, they contend that there has been no reimbursement of attorneys' fees following acceptance of the tender and that Versatile's excess/umbrella insurance carrier has not responded to their demand for defense and indemnification.

In opposition, Versatile argues the motion should be denied as the court did not overlook or misapprehend any matters of law or fact with respect to Sprint's underlying motion against Versatile. Therefore, Sprint's motion to reargue must be denied. In this regard, they point to the court's acknowledgement that a claim for costs and attorneys' fees survives the dismissal of the main action, and that the court correctly pointed out, and Sprint does not dispute, that the defense of Sprint has been provided by CBRE and DH Pace's carriers, as well as Versatile's insurance carrier. As such, Sprint's claim for past costs and attorneys' fees is moot. Moreover, Versatile asserts that even if the court were to grant reargument Sprint's motion for summary judgment against Versatile on its contractual indemnity and failure to procure insurance claims should be denied. In this regard they point out that Sprint is not a signatory to the Versatile contract, is not specifically named as an indemnitee, and questions of fact exist as to whether Sprint was an intended third-party beneficiary. In addition, the anti-subrogation bar operates here to

bar Sprint's contractual indemnity claim against Versatile as both Versatile and Sprint are being defended under the same insurance coverage.

Discussion

The court grants the Sprint defendant's motion to reargue that portion of the decision that denied their motion for summary judgment in their favor on their breach of contract for failure to procure insurance claim against D.H. Pace, CBRE and Versatile and dismissed said claims. Upon reargument, the court adheres to its' decision denying the Sprint defendant's summary judgment in its' favor on said claims as triable issues of fact have been raised in opposition to the Sprint defendant's motion with regard to whether the requisite insurance was in fact procured. In addition, the court again notes that it is undisputed that the defense of the Sprint defendants is being provided by CBRE and DH Pace's carriers, as well as Versatile's insurance carrier.

1100 Avenue and Hoffman's Motion

1100 Avenue and Hoffman seek reargument of that part of the decision that denied their motion for contractual indemnity against Versatile, and upon reargument, they seek summary judgment in their favor on this claim. They argue that their motion should be granted as the court overlooked their argument that Versatile is required to indemnify them pursuant to the terms of the applicable contract. In this regard, 1100 Avenue and Hoffman note that the court correctly held that the Master Subcontractor Agreement between D.H. Pace and Versatile required Versatile to defend, indemnify and hold harmless the Contractor's Customers, which the court found included 1100 Avenue and Hoffman as the owner and property manager of the site of the accident. Thus, 1100 Avenue and Hoffman

argue that their reargument motion is meritorious because the court's conclusion in this regard requires that their motion be granted. They contend that the court erred when it denied the motion "for the reasons cited above in relation to the Sprint defendants' motion seeking summary judgment on its claims as against CBRE ..." Specifically, they point out that the Sprint defendants' motion for indemnity was denied because Sprint acknowledged that the insurance carrier for CBRE was already defending the Sprint defendants. Here, however neither Versatile nor its insurance carrier is defending or paying the legal costs of 1100 Avenue or Hoffman.

In opposition, Versatile contends that the court correctly held that since plaintiff's claims against 1100 Avenue and Hoffman have been dismissed, the third-party complaint and all cross claims against Versatile must be dismissed. With regard to any claims 1100 Avenue and Hoffman have seeking costs and attorneys' fees, Versatile argues that they are already being defended by Zurich under an insurance policy issued to D.H. Pace. Moreover, they point out that CBRE's carrier has agreed to serve as excess carrier for 1100 Avenue and Hoffman in this matter. Accordingly, Versatile maintains that any legal fees incurred by 1100 Avenue and Hoffman have been compensated by another carrier and any award of indemnity for past legal fees would constitute a windfall for these entities.

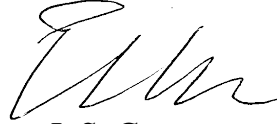
Discussion

1100 Avenue and Hoffman's motion seeking reargument of that portion of the decision that denied their motion for summary judgment in their favor on their contractual indemnity claim against Versatile is denied. These defendants have failed to demonstrate

that the court overlooked or misapprehended any matters of fact or law in rendering its' determination in this regard.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.