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

**PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29**

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MICHAEL YOCUM and BOBBIE YOCUM,

**INDEX NO.: 156636/2016**

Plaintiff(s),

-against-

**DECISION & ORDER ON MOTION**

UNITED STATES TENNIS ASSOCIATION INCORPORATED, USTA NATIONAL TENNIS CENTER INCORPORATED, and HUNT CONSTRUCTION GROUP, INC.,

Defendant(s).

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UNITED STATES TENNIS ASSOCIATION INCORPORATED, USTA NATIONAL TENNIS CENTER INCORPORATED, and HUNT CONSTRUCTION GROUP, INC.,

Third-Party Plaintiffs,

-against-

BIRDAIR, INC. AND HY-SAFE TECHNOLOGY,

Third-Party Defendant(s).

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**Introduction**

By way of background, on July 31, 2016, plaintiff Michael Yocum (plaintiff) was employed by third-party defendant Birdair, Inc. (Birdair) to perform certain work at the Arthur Ashe Tennis Stadium (Stadium) in Flushing, Queens. On that day, plaintiff was assisting with the installation of a banner on the roof of the Stadium and, at some point, allegedly fell and sustained various personal injuries. Plaintiffs commenced this action with the filing of a summons and complaint, which was later amended. The amended complaint alleges, among other things, that defendant United States Tennis Association Incorporated (USTA) and defendant USTA National Tennis Center Incorporation (National Tennis Center) are the owners of the Stadium, who hired defendant Hunt Construction Group, Inc. (Hunt) as a general contractor and hired Birdair to perform certain work at the Stadium. Plaintiffs commenced this action, setting forth claims for violations

of Labor Law §§ 200, 240, and 241 (1) as well as a claim for loss of consortium. Thereafter, defendants commenced a third-party action against third-party defendant Hy-Safe Technology (Hy-Safe), setting forth claims for contractual indemnification, breach of contract, common law indemnification, and contribution (that is, the third, fourth, fifth, and sixth causes of action). Subsequently, plaintiffs moved (Motion #3) for partial summary judgment on their claims under Labor Law §§ 240 and 241 (6); Hy-Safe moved (Motion #4) for summary judgment; and defendants moved (Motion #5) for summary judgment. On July 9, 2021, the Court denied plaintiff's motion (Motion #3); granted Hy-Safe's motion (Motion #4) as to the claims for contractual indemnification, common law indemnification, and contribution and denied it as to the claim for breach of contract; and granted defendants' motion (Motion #5) as to any claims against USTA and otherwise denied the motion. On July 13, 2021, counsel for Hy-Safe filed a copy of this order with notice of entry.

Now, Hy-Safe moves to reargue and/or renew (Motion #6) its prior motion as to the claim for breach of contract and plaintiffs cross-move to reargue their motion as to the claim under Labor Law § 241 and third-party plaintiffs move (Motion #7) to reargue Hy-Safe's motion on the issue of liability as to contractual indemnification. The Court addresses the motions in order.

**Hy-Safe's Motion to Reargue and/or Renew (Motion #6)**

In support of the motion to reargue Motion #4 as to the claim for breach of contract, Hy-Safe asserts that the Court overlooked the fact that the third-party plaintiffs were not parties to the contract (Subcontract) between Hy-Safe and Birdair, which required Hy-Safe to obtain certain insurance. Hy-Safe asserts that the Subcontract did not require Hy-Safe to name the third-party plaintiffs as additional insured on the insurance beyond the commercial general liability policy.

In support of the motion to renew Motion #4 as to the claim for breach of contract, Hy-Safe presents a certificate of insurance. Hy-Safe asserts that this certificate evinces that Hy-Safe obtained all of the required insurance policies.

CPLR 2221 provides that a motion 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" (*see* CPLR 2221 [d] [2]). In Motion #4, Hy-Safe asserted that the claim for breach of contract should be dismissed because Hy-Safe obtained a commercial general liability policy. In opposition, third-party plaintiffs noted that, under the Subcontract, Hy-Safe was required to obtain more than simply commercial general liability. In reply, Hy-Safe merely reiterated that it has obtained the required insurance.

Initially, the Court notes that the Subcontract proffered by Hy-Safe is 11 pages in length and the one proffered by the third-party plaintiffs is 26 pages in length and neither

is authenticated by anyone with personal knowledge of the Subcontract. The relevant portion of the Subcontract, which Hy-Safe asserts the Court overlooked, does not appear in Hy-Safe's exhibit, but does appear in the third-party plaintiff's exhibit. Although empowered to search the record on a motion for summary judgment (*see, e.g., New Hampshire Ins. Co. v MF Glob., Inc.*, 108 AD3d 463, 467 [1st Dept 2013]), it is not required and the Court declines to do so here.[1]

CPLR 2221 provides that a motion to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination; and [] shall contain reasonable justification for the failure to present such facts on the prior motion" (*see* CPLR 2221 [e] [2] & [3]). Here, the "new fact" presented by Hy-Safe is a document entitled "certificate of liability insurance." The document purportedly shows that Hy-Safe had certain types of insurance on the date of the subject accident. This document is not authenticated by anyone with personal knowledge. No one with personal knowledge swears that this insurance policy was in effect on the date of the accident or explains how to read the document. Overlooking all of this, Hy-Safe does not present any justification for its failure to present this document on the prior motion.

**Plaintiff's Cross-Motion to Re-argue**

On August 18, 2021, plaintiffs filed the instant cross-motion to reargue. In support of the motion to reargue Motion #3 on their claims under Labor Law § 241 (6), plaintiffs contend that there is no evidence that Industrial Code (12 NYCRR) § 23-1.7 (d) was not violated. As such, plaintiffs contend, the Court should grant reargument and, upon reargument, award summary judgment to plaintiffs on the claim under Labor Law § 241 (6).

In opposition, defendants make several arguments. First, defendants assert that plaintiffs' motion is untimely, as it was not made within 30 days of the filing of the subject order with notice of entry. Second, defendants assert that they previously proffered sufficient evidence that, among other things, plaintiff was provided with a fall protection system that permitted plaintiff to safely access all points on the relevant roof. As a result, defendants contend, even if a violation of the Industrial Code is found, a jury could still find that plaintiff's employer acted in a reasonable manner to prevent the hazard.

CPLR 2221 (d) (3) provides that a motion to reargue shall be made within 30 days after service of the order determining the prior motion and written notice of its entry. As noted above, the order with notice of entry was filed on July 13, 2021 and plaintiff did not file the instant motion until August 18, 2021, after the lapse of more than 30 days. Thus,

[1] Indeed, where, as here, there are numerous, related, and varying contracts, it would be an improvident use of discretion for the Court to search the imperfect record and fix the rights of the parties therefrom.

the motion is untimely and plaintiffs have presented nothing in the moving papers to address this failure.

Although the Court may reconsider its prior interlocutory orders even when presented with an untimely motion under CPLR 2221 (d) (3) (*see Profita v Diaz*, 100 AD3d 481, 481 [1st Dept 2012]), the Court is not required to do so. Here, viewing the evidence in the light most favorable to the non-moving party (*see Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]), the Court found that defendants had submitted sufficient evidence in opposition to Motion #3 to raise a material issue of fact and plaintiffs have presented nothing in the instant cross-motion to persuade the Court that it overlooked or misapprehended any matter of law or fact in reaching that decision.

**Third-Party Plaintiffs' Motion to Reargue (Motion #7)**

In support of the motion to reargue Motion #4 as to claim for contractual indemnification, the third-party plaintiffs contend that the Court improperly granted summary judgment to Hy-Safe on their claim for contractual indemnification. The third-party plaintiffs assert that the contract (Subcontract) between Hy-Safe and Birdair provides, among other things, that Hy-Safe will indemnify third-party plaintiffs for the negligence of Birdair.

In granting Motion #4 as to third-party plaintiffs' claim for contractual indemnification, the Court noted that Hy-Safe had made a *prima facie* showing that it did not cause or contribute to the happening of plaintiff's accident and that third-party plaintiffs had failed to proffer any evidence to raise a material issue of fact. The Subcontract provides in relevant part:

> "To the fullest extent permitted by law, [Hy-Safe] agrees to indemnify, defend and hold harmless . . . Owner, General Contractor and Architect, . . . for, from, and against any and all claims, demands, causes of action, damages . . . including, without limitation, reasonable attorney's fees, which Indemnitees may at any time suffer or sustain or become liable for by reason of:
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> Any damages or injury either to person (including death) or property, including without limitation the Project or adjoining property, in any manner **arising out of or relating to the acts or omissions of [Hy-Safe]**, its sub-subcontractors, suppliers, and materialmen, or anyone employed by any of them or anyone for whose acts they may be liable, even though such damages or injury may have resulted from the joint, concurring, or contributory act, omission, or negligence, whether passive or active, of Birdair, Inc., another Indemnitee,

> or any other person or entity, unless such damages or injury are caused solely by the negligence or willful misconduct of an Indemnitee . . . ." (NYSCEF Doc. No. 112 [emphasis added]).

As the language of the Subcontract makes plain, Hy-Safe's obligation to indemnify is triggered by the acts or omissions of Hy-Safe and this obligation is not altered if some other party (including Birdair) contributes to the damages or injury. As Hy-Safe proffered sufficient evidence to demonstrate, *prima facie*, that it did not cause or contribute to the happening of plaintiff's accident and third-party plaintiffs did not and have not proffered any evidence to raise a material issue of fact on this account, the Court properly granted Motion #4 as to third-party plaintiffs' claim for contractual indemnification.

**Conclusion**

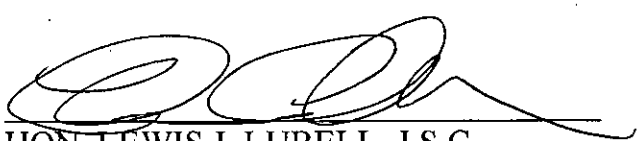
To the extent not specifically addressed herein, the Court finds the remaining arguments to be without merit. Based on the foregoing, it is hereby

ORDERED that Hy-Safe's motion (Motion #6) to reargue is granted and, upon re-argument, the Court adheres to its original decision and Hy-Safe's motion to renew is DENIED; and it is further

ORDERED that plaintiffs' cross-motion is DENIED; and it is further

ORDERED that third-party plaintiffs' motion (Motion #7) to reargue is granted and, upon re-argument, the Court adheres to its original decision.

Dated: New York, New York
December 9, 2021



HON. LEWIS J. LUBELL, J.S.C.