Berg v Au Café, Inc.
2009 NY Slip Op 31085(U)
May 1, 2009
Supreme Court, New York County
Docket Number: 108437/05
Judge: Judith J. Gische
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

SCANNED ON 5/5/2009

[* 1]

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

PRESENT: JUDITH J. GISCHE, J.S.C. PART _____

Index Number : 108437/2005

BERG, MARION

vs.

AU CAFE

SEQUENCE NUMBER : 012

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 5/1/09

JUDITH J. GISCHE, J.S.C. J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York: Part 10

Marion Berg,

Plaintiff,

-against-

Au Café, Inc., The Shubert Foundation, Inc., 1700 Broadway Co., 1700 Broadway LLC, 53-54 Partners, LP and Brighton Line Corp., and Schlosserei J. Meissl GMBH.,

Defendants.

Decision/Order

Index# 108437/05
Mot. Seq. # 012

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR §2219(a), of the papers considered in the review of this (these) motion(s):

PAPERS	NUMBERED
Notice of Motion, JES affirm., exhibits	1
CMR affirm., exhibits	2

Hon. Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

Defendant Schlosserei Meissl GMBH ("Meissl") moves for summary judgment against co-defendant Au Café, Inc. ("Au Café") on its cross-claim for indemnification. Meissl brought an earlier motion for summary judgment based, in part, upon its claim of contractual indemnification, which motion the court denied as premature. Gische, J. Order April 10, 2008. Since the Court's prior order denying summary judgment, the case in chief has been settled. Meissl paid plaintiff the amount of $150,000 in settlement. It now re-seeks summary judgment on its claim of contractual indemnification in order to recover the amount that it paid plaintiff in settlement, plus the attorneys fees it incurred in connection with its defense of the underlying personal injury

action.

Certain "facts," set forth in the Court's prior decision remain the same. It is undisputed that Meissl manufactures specialized outdoor seating areas, referred to as "umbrella bars." Au Café owns a restaurant called "Maison," located at 1700 Broadway, New York, New York ("restaurant"). On October 12, 2002, Au Café contracted with Meissl for the purchase and installation of an umbrella bar for use in the outdoor area adjacent to the indoor portion of the restaurant. This purchase was pursuant to a "Confirmation of Order" expressly incorporating a document entitled the "General Terms and Conditions of Business and Delivery of the Machine Shop Company J. Meissl GmbH" (collectively herein referred to as the "contract").

In the amended verified complaint, plaintiff alleges that while she was a patron of the restaurant, she tripped and fell "due to a dangerous and hazardous condition at the [restaurant], including, but not limited to a dangerous step and sudden change or drop in the elevation of the floor, without proper warnings or railings." Plaintiff suffered serious injuries, including a broken left hip and two hip replacement surgeries. She had a long convalescence and claimed permanent limitations.

The case never went to trial because all of the defendants settled their claims with the plaintiff. Meissl's attorney, Jordan E. Stern, affirms that as early as June 2008 counsel for Au Café was informed that the other defendants and Meissl jointly were in settlement discussions with the plaintiff, and that the settlement could exceed $110,000. Corey Reichart, attorney for Au Café, denies that his client (or its counsel) was ever notified of Meissl's settlement efforts and/or that Miessl consulted with Au Café before agreeing to settle the matter. Au Café separately settled its direct liability

with plaintiff for an additional sum of $62,000. This settlement occurred approximately one month after Meissl had settled with the plaintiff.

Paragraph 8.11 of the contract between Meissl and Au Café provides, as follows:

> ... NEITHER THE WARRANTY NOR ANY OTHER PROVISION STATED HEREIN ENTITLES BUYER OR ANY THIRD PARTY TO DAMAGES, DIRECT, INDIRECT, CONSEQUENTIAL OR PUNITIVE, FOR PERSONAL INJURY OR PROPERTY DAMAGE ARISING FROM THE INSTALLATION, OPERATION, SERVICING, USE, MISUSE OR INABILITY TO USE THE GOODS, AND BUYER AGREES TO INDEMNIFY, DEFEND AND HOLD SELLER HARMLESS FROM AND AGAINST ANY SUCH DAMAGES, OR ANY CLAIMS IN RESPECT THEREOF.

In its prior decision, the court held that "Meissl's claim for indemnification is not ripe because the issue of negligence has not yet been tried and decided in this case. Not only has plaintiff not yet proved either of these defendants were negligent, neither Au Café nor Meissl has proven its freedom from negligence."

Meissl now argues that since the case has been settled the issue of indemnification is ripe for the Court's consideration. It further argues that the Court was incorrect when it previously states that Meissl needed to prove its own freedom from negligence in order to enforce the indemnification provision. Meissl argues that since it informed Au Café about the claim, it is entitled to recoup any reasonable settlement it made of the underlying action, including legal fees incurred in defending the action.

Au Café argues that the Court was correct in originally concluding that there must first be a finding of defendants' negligence and that Meissl must be free from negligence in order to recover under the indemnification. Au Café argues that we simply do not know whether any of the defendants were negligent, since the case never went to trial. It also argues that Meissl has not shown in its motion that it was legally

obligated to pay plaintiff any settlement and that it has not and cannot prove any actionable facts on which liability depends. It claims that Meissl never consulted with Au Café before settling and that it has not shown that the settlement reached was reasonable.

DISCUSSION

Meissl's motion is one for summary judgment on its cross-claim for indemnification.[1] Meissl, therefore, bears the initial burden of setting forth evidentiary facts to prove its *prima facie* case that would entitle it to judgment, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Only if it meets this burden, will it then shift to Au Café, who must then establish the existence of material issues of fact, through evidentiary proof, in admissible form, that would require a trial of this action. Zuckerman v. City of New York, *supra*. If the Meissl fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers. Alvarez v. Prospect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. Hindes v. Weisz, 303 AD2d 459 (2nd dept. 2003).

---

[1]No party raises the issue of timeliness under Brill v. City of New York, 2 NY3d 648 (2004). Certainly "good cause" to consider the motion is established by the fact that until the case in chief was resolved, the issues of indemnification were premature, and the court has so held in this case. Thus, the court is free to reach the merits of the parties' arguments on summary judgment.

Preliminarily the court addresses the issue of whether Meissl is required to prove its own freedom from negligence in order to recover on the indemnification provision in the contract. Au Café relies on General Obligations Law ("GOL") §5-322.1 which voids as against public policy contracts "relative to the construction, alteration, repair or someone against liability arising out their one negligence. " In *obiter dicta* in its prior decision the court stated that Meissl had not proven its own freedom from negligence. Now, upon direct consideration of the issue, the court concludes that Meissl need not prove its own freedom from negligence in order to proceed against Au Café for contractual indemnification. The essence of the agreement between Meissl and Au Café was for the sale of an umbrella bar. The fact that there was installation incidental to the sale did not convert the contract into a "construction" contract that otherwise falls within the ambit of GOL §5-322.1. Pierre v. Crown Fire Protection Corp., 240 AD2d 386 (2nd dept. 1997); Auburn Steel Company, Inc. v. Westinghouse Electric Corp., 158 AD2d 938 (4th dept. 1990). In th absence of the application of GOL §5-322.1, there is no prohibition against contractual indemnification for one's own acts of negligence.

The court concludes that the parties have a valid binding identification agreement that covers the accident alleged by plaintiff to have occurred in the underlying personal injury action. The further issue to consider is whether Meissl is entitled to identification for the settlement it made in such action.

Where an indemnitor is given notice of a claim or proceeding against the indmnitee and declines to defend, then the indenitor is bound by any reasonable good faith settlement the indenitee may make. Shihab v. Bank of New York, 211 AD2d 430 (1st dept. 1995). Where, however, an idemnitee fails to notify an idemnitor of a

settlement with a claimant, indemnification is conditioned upon a stronger showing by the indemnitee. The indemnitee must demonstrate under such circumstances that it would have been liable to the claimant, that there was no good defense and that the settlement was in a reasonable amount. National Union Fire Ins. Co. Of Pittsburgh, PA v. Red Apple Group, Inc., 309 AD2d 657 (1st dept 2003). Recovery may be based on potential rather than actual liability. See: ELRAC, Inc. v. Cruz, 182 Misc2d 523 (Civ. Ct. Queens Co. 1999).

At bar, although the parties dispute whether Au Café was notified about Meissl's settlement discussions with plaintiff, there is no dispute that it had notice that plaintiff was asserting a direct claim against Meissl, long before the settlement was actually reached. Au Café was a party to this same action and Meissl had a pending cross claim against it before the subject settlement. The notice requirement has been fulfilled since the notification given in this cases served the goal of providing the indemnitor an opportunity to step in and control the defense of this matter. Shihab v. Bank of New York, *supra*. Consequently, Meissl is entitled to indemnification if it makes the lesser showing that the settlement was reasonable, based upon potential liability, and made in good faith.

In terms of potential liability, an underpinning of plaintiff's claim concerned whether a ramp should have been installed, rather than a step, between the edge of the umbrella bar platform and the hallway leading into the indoor portion of the restaurant. Although all of the defendants denied this was the cause of plaintiff's fall, it remained a viable theory of liability through the time of settlement. Moreover, the court's decision on the prior summary judgment motion left open the possibility that Meissl was responsible

for the construction of a permanent ramp as part of the installation. The amounts paid in settlement were consistent with amounts paid by other co-defendants and the claims of injuries made. The landlord defendant also paid $150,000 in settlement to the plaintiff. Au Café has not raised any issue of fact to contradict Meissl's showing that the settlement was reasonable and made in good faith, such that would warrant a testimonial hearing on such issue. See: Cigna Corporation v. Lincoln National Corp., 6 AD3d 298 (1st dept. 2004). Summary judgment on the cross-claim is, therefore, warranted. Goldmark Industries. Ltd., v. Tessoriere, 256 AD2d 306 (2nd dept. 1998); Coleman v. J.R.'s Tavern, Inc. , 212 AD2d 568 (2nd dept. 1995).

The right of indemnification includes not only the amount paid in settlement by Meissl, but also its reasonable attorney's fees incurred in order to defend the personal injury action. DiPerna v. American Broadcasting Companies, Inc., 200 AD2d 267, 270 (1st dept. 1994). The issue of the reasonableness of the attorneys fees is referred to a Special Referee to hear and make recommendations to the Court isn a written report.

CONCLUSION

In accordance with this decision is hereby:

ORDERED that Meissl's motion for summary judgment on its second cross-claim for indemnifications against Au Café is granted, and it further

ORDERED that Meissl is entitled to a money judgment in its favor against Au Café in the amount of $150,000 with costs, disbursements and pre-judgment interest from September 11, 2008, and it is further

ORDERED that Meissl is entitled to a further sum of money representing its reasonable attorneys fees in defending the underlying action by Plaintiff Marion Berg

against it and it is further

ORDERED that the amount of such fees shall be referred to a Special Referee for hearing and such Referee shall report his of her findings with recommendations to the Court ins a written report, and it is further

ORDERED that Meissl shall serve a copy of this decision on the office of the Special Referee (room 119 at 60 Centre Street) within the next 60 days so that the matter may be placed on the Special Referee calendar and it is further

ORDERED that entry of judgment in accordance with this order shall be held in abeyance pending resolution of the issue of attorney's fees and it is further

ORDERED that any issue raised but not expressly granted herein is denied and that this constitutes the decision and order of the Court.

Dated: New York, NY
May 1, 2009

SO ORDERED:

J.G./J.S.C.

FILED
MAY 05 2009
COUNTY CLERK'S OFFICE
NEW YORK