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

PRESENT: EMILY JANE GOODMAN Justice

PART 17

Index Number : 120978/2002
FERNANDEZ, MARIA T.
VS
ORB MANAGEMENT LTD
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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 and Cross Motion are decided per attached

FILED
MAR 09 2007
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 3/2/07

EMILY JANE GOODMAN

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

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MARIA T. FERNANDEZ,

Plaintiff,

-against-

Index No.: 120978/02

ORB MANAGEMENT LTD., PRINTING HOUSE CONDOMINIUM, and STERLING ELEVATOR CORP.,

Defendants,

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ORB MANAGEMENT LTD., PRINTING HOUSE CONDOMINIUM,

Third-Party Plaintiffs,

Third-Party
Index No.: 590893/03

-against-

PRINTING HOUSE FITNESS CENTER, LTD.,

Third-Party Defendants.

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MARIA T. FERNANDEZ,

Plaintiff,

Action No. 2
Index No.: 101155/04

-against-

PRINTING HOUSE FITNESS CENTER, LTD. and MOUNTBATTEN EQUITIES, L.P.,

Defendants.

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EMILY GOODMAN, J.:

Plaintiff Maria T. Fernandez allegedly sustained injuries when the elevator in which she was riding dropped. The elevator was located in the building at 421 Hudson Street, New York, New York (Premises). The Premises was allegedly owned and/or managed

by defendant Orb Management Ltd. (Orb).

Fernandez was an employee of third-party defendant Printing House Fitness Center, Ltd. (Fitness), which was located on the mezzanine, ninth, and tenth floors of the Premises. On January 11, 2000, Fernandez was in the elevator at the Premises when the elevator dropped, injuring Fernandez. Defendant Sterling Elevator Corp. (Sterling) allegedly maintained the elevator, while the Premises as a whole was allegedly leased by defendant Printing House Condominium (Condo).

On or about May 28, 2003, Orb and Condo (herein, Third-Party Plaintiffs) initiated a third-party action against Fitness to apportion responsibility for the incident, and for contractual indemnification (Third-Party Complaint).

On or about December 30, 2003, Fernandez brought a separate, direct, action against Fitness and Mountbatten Equities, L.P. (Mountbatten) (hereinafter, Action No. 2). Action No. 2 alleges that Mountbatten is owner and/or manager of parts of the Premises. By order filed February 28, 2005, Action No. 2 was consolidated with this action.

By stipulation dated April 15, 2005, Fernandez discontinued Action No. 2 as against Fitness. Thus, the sole remaining action against Fitness is one for contribution and contractual/common-law indemnification under the Third-Party Action, and the sole remaining action involving Mountbatten is Action No. 2.

The instant motion is by Fitness to dismiss the Third-Party Complaint, and any other cross claims, pursuant to CPLR 3212(b), and for sanctions against Third-Party Plaintiffs for filing, and refusing to withdraw, the Third-Party Complaint.

Approximately six months after Plaintiff filed the Note of Issue and three years after commencement of the third party action, Third-Party Plaintiffs and Mountbatten cross-move, pursuant to CPLR 3025, to amend the Third-Party Complaint. The movants seek to add Mountbatten as a Third-Party Plaintiff based upon a contractual indemnification provision contained in a lease for the Premises, originally dated June 1, 1983, which is allegedly still in effect, between Fitness and Mountbatten (the Lease, see Notice of Cross Motion, Exhibit C, ¶8).

Leave to amend a pleading is freely granted absent prejudice or surprise resulting from the delay. CPLR 3025(b); Thomas Crimmins Contr. Co. v City of New York, 74 NY2d 166 (1989). However, if the proposed claim patently lacks merit, amendment of a pleading to assert that claim would serve no purpose but needlessly to complicate discovery and trial. Id., 74 NY2d at 170. Thus, in order "to conserve judicial resources, an examination of the proposed amendment is warranted, and leave to amend should be denied when the proposed pleading is palpably insufficient as a matter of law." Ancrum v St. Barnabas Hosp., 301 AD2d 474, 475 (1st Dept 2003) (citations omitted).

Mountbatten seeks to enforce a right of contractual indemnification contained in the Lease, against Fitness, via amendment to the Third-Party Complaint. Fitness seeks to dismiss the Third-Party Complaint in its entirety. Thus, both the cross motion for leave to amend, and the motion to dismiss the Third-Party Complaint pose, in effect, one question: whether there is a viable cause of action for contractual and/or common-law indemnification against Fitness.

As a preliminary matter, the indemnification provision of the Lease states that

> [i]n case any action or proceeding is brought against [Mountbatten] by reason of any such claim, [Fitness], upon written notice from [Mountbatten], will, at [Fitness'] expense, resist or defend such action or proceeding by Counsel approved by [Mountbattten] in writing, such approval not to be unreasonably withheld.

Lease, ¶8.

Fitness argues that Mountbatten cannot enforce paragraph 8 of the Lease, as Mountbatten has failed to give written notice. Mountbatten has failed to address this argument whatsoever. A fundamental, neutral precept of contract interpretation is that agreements are to be construed as they are written. Slamow v Del Col, 79 NY2d 1016, 1018 (1992). Here, the Lease requires that Mountbatten give notice and until such time as Mountbatten demonstrates that such notice has been given, Fitness' duty to defend the action cannot be enforced by Mountbatten. However, as this procedural defect is easily remedied, the court will address

the remaining arguments of the motion to dismiss.

Fitness argues that: (i) there is no privity of contract between Fitness and Third-Party Plaintiffs, and that Third-Party Plaintiffs have no standing to rely on a contract between Fitness and Mountbatten; (ii) the action, as against Fitness, is proscribed by operation of New York State Workers' Compensation Law (WCL) §11; (iii) in any event, Fitness has no contractual obligation to indemnify Mountbatten or any other party; (iv) Fitness has no common-law duty of indemnification to Third-Party Plaintiffs; (v) Third-Party Plaintiffs have failed to demonstrate a connection between Fitness' actions or inactions and Fernandez' alleged injuries; and (vi) Third-Party Plaintiffs have waived their right to sue Fitness, as Fitness and those parties are listed as additional insured for the applicable elevator service contract.

Fitness' argument that Third-Party Plaintiffs have waived their right to sue Fitness, as Fitness and those parties are listed as additional insured for the applicable elevator service contract, is based upon the public policy that "would bar a common-law claim for indemnification by the vicariously liable party (or its insurer) to the extent that the wrongdoer, pursuant to contractual obligation, has insured that party against the loss." North Star Reinsurance Corp. v Continental Ins. Co., 82 NY2d 281, 291 (1993).

This 'pre-indemnification rule' was espoused by Michalak v Consolidated Edison Co. of New York, 166 AD2d 213, 214-215 (1st Dept 1990) which prevents insurance carriers from obtaining a right of subrogation against their insured. However, since Michalak, the Court of Appeals has adopted a narrower rule, designed to reflect the expectations of the parties, which would require a specific acknowledgment of intended waiver. North Star Reinsurance Corp., 82 NY2d at 291-294; see also Travelers Indem. Co. v LLJV Dev. Corp., 227 AD2d 151, 157-158 (1st Dept 1996); 23 NY Jur 2d, Contribution, etc. §104 (Court of Appeals has rejected a blanket pre-indemnification rule).

However, the pre-indemnification rule applies only, as corroborated in all the cases upon which Fitness relies, where a party requires that indemnification insurance naming that party as an additional insured be purchased. Under such circumstances, a party making such a requirement may be deemed to have waived their right to common-law indemnity up to the aggregate limits of the policy. North Star Reinsurance Corp., 82 NY2d at 291.

Here, Fitness has presented no evidence, indeed, made no allegation, that the Third-Party Plaintiffs required that they, or Fitness, be listed as additional insured on the insurance policy for the applicable elevator service contract. Moreover, none of the cases upon which Fitness relies suggest that by merely being listed on an insurance policy, without having made

such an election, a party may be barred from making a claim, or waive its right to make a claim, in indemnity against another party so listed.

Moreover, common-law indemnification is only unavailable under the pre-indemnification rule below the aggregate limits of the policies. Id. at 291, 294-295; see also Pennsylvania Gen. Ins. Co. v Austin Powder Co., 68 NY2d 465 (1986). Here, Fernandez brings an action to recover $5 million, and the limit of the elevator service policy is $1 million. The pre-indemnification rule would not, in principle, bar partial recovery by Third-Party Plaintiffs for any losses in excess of the policy limit.

Nonetheless, the court concurs with regard to Fitness' arguments that the movants have not established that the Lease provides for the contractual indemnification of Mountbatten in this action. The Lease states that Fitness shall indemnify Mountbatten for injuries to persons "as a result of any breach by [Fitness], [Fitness' agents], contractors, employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence or improper conduct of [Fitness], [Fitness' agents], contractors, employees, invitees, or licensees" Lease, ¶8.[1] The only arguments movants make as to

[1]Action No. 2 is entirely based upon allegations of Mountbatten's negligence.

why this indemnification provision applies is that (1) the elevator in question was exclusively used by Fitness, (2) that based on that fact, movants speculate that any notice of defects in the elevator would have been known by Fitness and (3) Fitness assumed a duty to report any problems with the elevator to Orb. However, as noted by Fitness, movants fail to point to any Lease obligation which Fitness breached, such as an obligation to maintain the elevator, nor is there evidence that Fitness owns or services the elevator. The fact that Fitness might have exclusively used the elevator does not establish that it had a duty which would support a claim of negligence, nor establish that any Lease provision was violated. Further, assuming Fitness did make complaints about the elevator to Orb (which would be logical given that it needed to use the elevator), movants have not demonstrated why a failure to make a complaint would translate into liability under the Lease or pursuant to law.

Fitness also correctly argues that the action, as against Fitness, is proscribed by operation of WCL §11, and that Fitness has no common-law duty of indemnification to Third-Party Plaintiffs. In this regard, CPLR 1401 provides that the availability of claims for contribution and indemnification are delimited by WCL §11. WCL §11 provides, in turn, that with the exception of claims pursuant to a written contract entered into prior to the alleged accident

> [a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury"....

Here, Fernandez has not claimed any "grave injury."[2] See Verified Bill of Particulars, Motion to Dismiss, Exhibit G, at ¶7. Moreover, CPLR 1601 bars a common-law determination as to Fitness' equitable share in liability because Fernandez has not sustained a "grave injury" as defined in WCL §11. The action against Fitness must be dismissed.

With respect to Fitness' request for sanctions, it is well-established that under 22 NYCRR §130-1.1, the court, in its discretion, may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct. Sanders v Copley, 194 AD2d 85, 87 (1st Dept 1993).

A review of the documentation provided shows that Third-Party Plaintiffs failed to address Fitness' repeated requests

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[2]A "grave injury", under WCL §11, means "only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." None such injuries are alleged in Fernandez' Verified Bill of Particulars.

'that' the matter be discontinued against Fitness. However, Fitness has not demonstrated why movants arguments, though lacking in merit, are frivolous within the meaning of 22 NYCRR §130-1.1. See e.g. Intercontinental Credit Corp. Div. of Pan Am. Trade Dev. Corp. v Roth, 78 NY2d 306, 308 (1991); Jason v Chusid, 78 NY2d 1099 (1991); Bell v New York Higher Educ. Assistance Corp., 76 NY2d 930 (1990). The motion for sanctions is denied.

Accordingly, it is hereby

ORDERED that the motion of defendant Printing House Fitness Center, Ltd. to dismiss the Third-Party Complaint, and any other cross claims, pursuant to CPLR 3212(b), is granted, and the complaint is hereby severed and dismissed against Printing House Fitness Center, Ltd., with costs and disbursements to that defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that the motion of defendant Printing House Fitness Center, Ltd. for sanctions is denied; and it is further

ORDERED that the cross motion of defendants Orb Management Ltd., Printing House Condominium, and Mountbatten Equities, L.P., pursuant to CPLR 3025, for leave to amend the complaint is granted to the extent that the complaint, which has been consolidated upon prior motion, shall bear the following caption:

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MARIA T. FERNANDEZ,

Plaintiff, -

-against-

ORB MANAGEMENT LTD., PRINTING HOUSE CONDOMINIUM, STERLING ELEVATOR CORP., and MOUNTBATTEN EQUITIES, L.P.,

Index No.: 120978/02

Defendants.

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and it is otherwise denied; and it is further

ORDERED that the action shall otherwise continue.

This Constitutes the Decision and Order of the Court.

Dated: March 2, 2007

ENTER:

JSC

EMILY JANE GOODMAN