

Figaro v Walter & Samuels, Inc.

2008 NY Slip Op 33209(U)

November 25, 2008

Supreme Court, New York County

Docket Number: 114779/05

Judge: Jane S. Solomon

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 12/2/2008
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON Justice

PART 55

Index Number : 114779/2005

FIGARO, RALPH

vs
WALTER & SAMUELS INC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 9/22/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3
~~4-6~~
7-8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the memorandum decision and order annexed hereto.

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

FILED

DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/25/08

JANE S. SOLOMON Justice

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 : IAS PART 55

-----X

RALPH FIGARO,

Plaintiff,

-against-

INDEX NO. 114779/05

WALTER & SAMUELS, INC., FORTUSA
REALTY CORP., NY PARK N. SALEM, INC.,
MAGE ELECTRICAL CONTAINERS, INC.,
and P&H ELECTRICAL CORP.,

DECISION AND ORDER

Defendants.

-----X

WALTER & SAMUELS, INC., FORTUSA
REALTY CORP. and NY PARK N. SALEM, INC.,

Third-party Plaintiffs,

-against-

DEVRIES PUBLIC RELATIONS, LTD.,

Third-party Defendant.

FILED
DEC 02 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X

JANE S. SOLOMON, J.

In this lawsuit arising from personal injuries allegedly sustained by plaintiff Ralph Figaro (Figaro), defendants Mage Electrical Contractors, Inc., s/h/a Mage Electrical Containers, Inc., and P&H Electrical Corp. (together referred to as the Electricians) move for summary judgment dismissing the complaint and cross-claims against them. By a separate motion, defendants Fortusa Realty Corp. (the out of possession landlord), Walter & Samuels, Inc. (the managing

agent), and NY Park N. Salem, Inc. (an entity apparently related to the landlord and managing agent, but not otherwise described in the motion papers) (together, the Landlord Defendants) move for summary judgment dismissing the complaint and all cross-claims as against them, and for summary judgment on their claim for contractual indemnification against third-party defendant Devries Public Relations, Ltd. (Devries PR). Devries PR moves for summary judgment dismissing the third-party complaint. The motions are decided as follows.

Figaro was employed by Devries PR to work in the mail room. His supervisor directed him to change a fluorescent light bulb in the office; he had done so without incident on previous occasions. Figaro stood on a small step ladder to change the bulb when he suffered an electric shock, fell to the floor and sustained a torn rotator cuff. After the accident, the building owner called the Electricians to inspect the fixture. The Electricians changed the ballast out of caution, and reported that the fixture was broken, apparently as a result of plaintiff's accident.

Figaro sued the the Landlord Defendants and the Electricians. The complaint alleges that Figaro was injured in the course of his work on a construction site, suggesting defendants may be liable under Labor Law sections 240(1), 241(6) and 200, in addition to his negligence claim. The Landlord

Defendants commenced a third-party action against Devries PR. It alleges three causes of action: common law contribution and indemnification, breach of contract arising from a failure by Devries PR to procure insurance, and contractual indemnification.

The Electricians contend that they did no work on the subject light fixture before the accident, and there is no basis for any liability on their part. In opposing these motions, Figaro concedes that he has no claim under the Labor Law (Aff. In Opposition of Clifford D. Gabel, Esq., paragraph 4). He argues that the Electricians had been called into the building to do repairs on prior occasions, and therefore there is a question of fact as to whether they either created a defective condition or should have noticed it before the accident. Figaro's argument is entirely speculative and unsupported by the evidence, and accordingly the Electricians' motion for summary judgment dismissing the complaint is granted.

The Landlord Defendants contend that the facts as alleged by plaintiff do not make out a cause of action against them. There is no evidence that the Landlord Defendants had notice of an alleged defect, or that they caused or created the defect. Figaro alleges that the Landlord Defendants are liable for violations of the Administrative Code of the City of New York sections 27-127 and 27-128. However, an allegation of the general duty of maintenance and repair set forth in these code

sections are an insufficient basis for liability (Dixon v Nur-Hom Realty Corp., 254 AD2d 66 [1st Dept 1998]).

The Landlord Defendants further allege that Fortusa Realty was an out of possession landlord, and the obligation of the Landlord Defendants to make repairs is limited to structural defects (see, Lease, annexed to Landlord Defendants' Notice of Motion at Ex. H). The Lease provides that Devries PR will furnish and install all lighting fixtures and ballasts in the demised premises (Lease, rider paragraph 49[c]), and is responsible for their maintenance (id., paragraph 4). Although Fortusa Realty had no obligation under the Lease to repair light fixtures, there is evidence that the managing agent, Walter & Samuels, would change light bulbs "as a courtesy" (see EBT Trans. Of Fernando Dominquez, Landlord Defendants' Notice of Motion, Ex J, 22). However, there is no evidence that the Landlord Defendants had notice of a defect in a light fixture that may have caused Figaro's accident, nor is their evidence that the Landlord Defendants were obligated to repair such a defect even if they knew of it. Accordingly, that part of the Landlord Defendants' motion seeking dismissal of Figaro's complaint as against them is granted.

That part of the Landlord Defendants' motion seeking summary judgment against Devries PR on the third-party complaint is denied. Figaro did not sustain a "grave injury," so the

common law claims are barred under Workers Compensation Law section 11. Landlord Defendants admit that Devries PR procured insurance as required under the Lease (Reply Aff. of Michael J. White, Esq., paragraph 6), so the third cause of action in the third-party complaint also is dismissed.

Landlord Defendants rely upon a contractual indemnification provision, which states that Devries PR shall indemnify Fortusa Realty against "all liabilities, obligations, damages, claims, costs, and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys fees, paid, suffered or incurred as a result of any breach by Tenant . . . or the carelessness, negligence, or improper conduct by the Tenant [or its employees]" (Lease, paragraph 8).

There is no dispute that the injury which is the basis for this lawsuit arises from the conduct of a Devries PR employee, although whether it was carelessness, negligence, improper conduct, or none of the above, remains a question of fact. As a result of dismissal of Figaro's claim against the Landlord Defendants, their claim in the third-party action is limited to attorneys fees and defense costs. Paragraph 8 of the Lease provides that the landlord can recover only such damages, including costs and expenses, for which it is not reimbursed by insurance. New York courts have held that where the lease has this provision limiting the landlord's right to indemnification,

the tenant is not obligated to pay the landlord damages covered by the landlord's insurance policy (see, Wilson v Haagen Daz Company, Inc., 201 AD2d 361 [1st Dept 1994] [where tenant failed to procure insurance as required under the lease, landlord's damages limited to amount it paid in premiums for policy that covered its loss). "Indemnity agreements should be strictly construed, and a promise to indemnify should not be found unless clearly implied in the language of the Agreement" (Taussig v Clipper Group, LLC, 13 AD3d 166, 167 [1st Dept 2004], leave to appeal denied, 4 NY3d 707 [2005]). Here, Paragraph 8 limits indemnification to damages for which the landlord will not be reimbursed by insurance, and an intention to extend indemnification further is not implied. Also, there is no evidence that the Landlord Defendants incurred any expense in this litigation that was not reimbursed by insurance.

Accordingly, it hereby is

ORDERED that the motion for summary judgment by defendants Magee Electrical Contractors, Inc. and P&H Electrical Corp. (Motion Sequence 02) is granted, and the complaint is dismissed as against them, and all cross-claims against and by these defendants are dismissed; and it further is

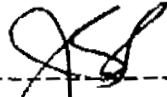
ORDERED that the motion for summary judgment by defendant Devries PR (Motion Sequence 03) is granted, and the third-party complaint is dismissed; and it further is

ORDERED that the motion for summary judgment by defendants Fortusa Realty Corp., Walter & Samuels, Inc. and NY Park N. Salem, Inc. (Motion Sequence 04) is granted in part to the extent that the complaint and all cross-claims by and against them are dismissed, and the motion otherwise is denied; and it further is

ORDERED that the Clerk of the Court is directed to enter judgment accordingly, with costs and disbursements to defendants and third-party defendant as taxed.

Dated: November 25, 2008

ENTER:



J. S. C.
JANE S. SOLOMON

FILED

DEC 02 2008

**COUNTY CLERK'S OFFICE
NEW YORK**