

Tepper v New York Convention Ctr. Operating Corp.
2008 NY Slip Op 33676(U)
April 25, 2008
Sup Ct, NY County
Docket Number: 100109/07
Judge: Judith J. Gische
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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LINDA TEPPER,

Plaintiff,

-against-

NEW YORK CONVENTION CENTER OPERATING
CORPORATION d/b/a JACOB JAVITS CONVENTION
CENTER OF NEW YORK, GEORGE LITTLE
MANAGEMENT, LLC and FREEMAN DECORATING
SERVICES, INC.,

Defendants.

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Decision/Order

Index No.: 100109/07
Seq. No. : 001

Present:
Hon. Judith J. Gische

FILED
MAY 01 2008
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

Dfd's motion [amend] w/AAL affirm in support, exhs 1

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

In the underlying action, plaintiff, an exhibitor at a trade show, claims to have sustained a personal injury when a piece of display fell and struck her. Defendant George Little Management, LLC, ("GLM") now moves to amend its answer to add cross-claims for contribution and common law and contractual indemnification against defendant Freeman Decorating Services, Inc. ("Freeman"), pursuant to CPLR § 3025(b). Freeman opposes the motion on the grounds that the proposed affirmative defenses are improperly asserted and not viable. Plaintiff and defendant New York Convention Center Operating Corporation d/b/a Jacob Javits Convention Center of New York ("NYCCOC") take no position on this motion.

Although the parties vigorously argue the issue of a purported conflict of interest with respect to the prior joint representation of GLM and Freeman by the firm of Forchelli, Curto, Schwartz, Mineo, Carlino & Cohn, LLP, the court does not reach this issue. As more fully set

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forth below, the amendment to GLM's answer should be allowed, regardless of whether its prior counsel was conflicted. The court's conclusion, however, is without prejudice to the parties' respective rights to address the conflict issue in any appropriate forum.

Leave to amend a pleading shall be freely given at any time by leave of court upon such terms as may be just, including the granting of costs and continuances. CPLR § 3025 (b); see also Gjokaj v. Fox, 25 AD3d 759 (2d Dept. 2006). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it. Murray v. City of New York, 43 NY2d 400 (1977); Adams Drug Co. v. Knobel, 129 AD2d 401 (1st Dept 1987).

However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. "[T]he sufficiency or meritoriousness of a proposed pleading or matter" should be considered at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982). If the claim asserted is colorable, then the amendment should be permitted. Jordan v. Kentshire Galleries, Ltd., 282 AD2d 319 (1st Dept. 2001).

On January 26, 2006, plaintiff allegedly sustained injuries at the International Gift Show (the "show"), which was sponsored by GLM. NYCCOC operates the Javits Center for the State of New York and licensed use of exhibition space for thst Show to GLM pursuant to a written license agreement (the "NYCCOC/GLM Contract"). Pertinent to this action, the NYCCOC/GLM Contract obligates GLM to "indemnify, hold harmless, and defend" NYCCOC for all losses, claims, liability, damage actions, and judgments recovered from or asserted against NYCCOC, except for claims arising form the sole negligence or willful misconduct of NYCCOC.

GLM thereafter entered into a written contract with Freeman (the "GLM/Freeman Contract"), wherein GLM retained Freeman to act as the Official Service Contractor and

facilitate the set-up and physical production fo the show. The GLM/Freeman Contract contained a contractual indemnification provision which required:

Freeman [to] indemnify, defend and hold harmless [GLM] and its respective officers, directors, and employees from and against any bodily injuries, property damage liability claims, judgments, damages, costs or expense, including reasonable attorneys' fees, arising out of or occasioned by the operations performed by Freeman, its employees, agents, servants or sub-contractors for [GLM] except for occurrences or accidents caused by the sole negligence of [GLM] and its respective officers, directors, and employees, or for that portion of any occurrence or accident caused by any other party.

Upon commencement of this action, GLM tendered its defense and requested indemnification from Freeman. Freeman accepted the tender, and on February 7, 2007, on behalf of both Freemand and GLM, attorney Russel G. Tisman, Esq. interposed an answer denying the material allegations of the complaint. No cross-claims were asserted on behalf of GLM and against Freeman, or *vice versa*.

In its reply papers, movant has provided an affidavit of merit by Sean R. McMahon ("McMahon"), a Senior Litigation Examiner in the Claim Department of Chubb & Son, GLM's insurer. McMahon claims that there because "Jacob Javits laborers caused a pipe to fall on plaintiff, there is an open question as to whether [GLM] owes any indemnification to [NYCCOC]."

The court finds that plaintiff has met its burden on this motion. The proposed claims for contribution and common law and contractual indemnification have a basis in law and are not devoid of merit. Freeman has not demonstrated any prejudice or surprise resulting from GLM's failure to assert its claims earlier. Accordingly, GLM's motion is granted to the extent of granting GLM leave to serve the amended answer, in the form annexed to the moving papers, on appearing counsel within 20 days.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion by GLM to amend its answer to assert cross-claims against Freeman for contribution and common law and contractual indemnification is hereby granted; and it is further

ORDERED that GLM shall file and serve the proposed answer (Exhibit "E" to its motion papers) on appearing counsel within 20 days.

Any requested relief not expressly addressed has nonetheless been considered and is hereby denied.

This shall constitute the decision and order of the Court.

Dated: New York, New York
April 25, 2008

So Ordered:



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

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NEW YORK