

**Inter-Continental Realty Corp. v Whing Shing
Constr., Inc.**

2009 NY Slip Op 31618(U)

July 17, 2009

Supreme Court, New York County

Docket Number: 100069/09

Judge: Louis B. York

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

PRESENT: LOUIS B. YORK
J.S.C. Justice

PART 2

Index Number : 100069/2009

INTER-CONTINENTAL REALTY CORP.,

vs.

WHING SHING CONSTRUCTION, INC.,

SEQUENCE NUMBER : # 001

SUMMARY JUDGMENT

INDEX NO. 100069-09

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ 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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

JUL 22 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 7/16/09

Lly

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:

DO NOT POST

LOUIS B. YORK
J.S.C.

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

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

-----X
INTER-CONTINENTAL REALTY CORP. and BRIDGE VIEW
TOWER, LLC,

Plaintiffs,

DECISION AND ORDER
Index no.100069/09

-against-

WHING SHING CONSTRUCTION, IN Index#: 100069/09

FILED
JUL 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

-----X
Defendant.

LOUIS B. YORK, J.:

In this action for contractual indemnification, Plaintiff Intercontinental Realty Corp. ("ICRC") moves and Plaintiff, Bridge View Tower, LLC ("Bridge Tower") cross-moves for summary judgment against Whing Shing Construction, Inc. ("Whing Shing") based on an Indemnification Agreement executed on October 15, 2004.

Defendant opposes the motions, contending that there are genuine issues of material fact. Defendant also contends that the motions are premature and that there has been insufficient opportunity for substantive discovery.

For the reasons stated infra, the motions are granted.

Background

This cause of action originated as a Fourth-Party action to Alberto Yanez v. Inter-Continental Realty Corp. and Bridge View Tower LLC, which is currently pending in the Supreme Court, New York County. This Court severed this action from the main one in a November 10, 2008 Order.

In this underlying action, the plaintiff, Alberto Yanez, alleges that he suffered personal injuries while employed by Whing Shing while working at a construction site

located at 193 Bridge Street, Brooklyn, New York. Alberto Yanez was performing demolition work one story above ground level when a fellow Whing Shing employee, on the level below, knocked walls down. The walls failed to support the load of the floor above and Mr. Yanez fell eight (8) to nine (9) feet to the ground below. Yanez alleged that ICRC, as the owner of the building, is liable to him pursuant to Labor Law § 200, § 240(1) and § 241(6) as well as for common law negligence.

Plaintiff claims that the indemnification agreement provides unequivocally for full or partial indemnification by Whing Shing, as the accident was a scenario contemplated by the parties to the agreement.

Defendant claims that the motion for summary judgment must fail, because there has not been ample opportunity for discovery or depositions in order to determine the intent of the parties. Additionally, defendant asserts that the indemnification agreement is not sufficiently specific in identifying the particular job or job site covered under the terms of the agreement, and that it should not be applied retroactively, as work on the site in question commenced in June of 2004.

Decision

Resolution of a dispute by summary judgment is particularly appropriate when no genuine issues of facts exist. Ugarriza v. Schmieder, 46 N.Y.2d 471, 414 N.Y.S.2d 304, 386 N.E.2d 1324 (1979); Sillman v. Twentieth Century Fox Film Corp., 3 N.Y.2d 395, 165 N.Y.S.2d 498, 144 N.E.2d 387 (1957). A motion for summary judgment should be granted if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” CPLR 3212(b).

Here, there are no issues of material fact that would defeat a motion for summary judgment. The Indemnification Agreement clearly requires Whing Shing to indemnify ICRC for any lawsuit arising out of Whing Shing's work and caused by any act or omission of Whing Shing.

A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. Drzewski v. Atlantic Scaffold & Ladder Co., 70 N.Y.2d 774, 521 N.Y.S.2d 216 (1987) quoting from Margolin v. New York Life Ins. Co., 32 N.Y.2d 149, 344 N.Y.S.2d 336 (1973).

The Indemnification Agreement provides that Whing Shing is to indemnify ICRC "to the fullest extent of the law" against "claims, damages, losses and expenses...arising out of or resulting from performance of the Contractor's Work" where such claim for bodily injury is caused "in whole or in part by negligent acts or omissions of the Contractor." Here, it is undisputed that Mr. Yanez's injuries were sustained while in the scope of his employment at Whing Shing, specifically the demolition work contracted to by the parties on August 1, 2004. This is exactly the kind of scenario that was contemplated by the parties in ¶ 1.1 of the Indemnification Agreement.

Defendants contend that the motion should be defeated as premature because discovery has not yet been conducted. However, CPLR § 3212(f) only permits a summary judgment motion to be denied on those grounds when the facts, documents or other information needed to defeat the motion is in the exclusive possession of the moving party. ICRC is not in the exclusive possession of any such documentation.

Defendant also asserts that depositions must be held in order to obtain the intent of the parties. However, the parol evidence rule bars such evidence, as extrinsic and parol evidence is not admissible to create an ambiguity in a written agreement which is complete and clear and unambiguous on its face. Madison Ave. Leasehold, LLC v. Madison Bentley Assoc. LLC, 8 N.Y.3d 59, 828 N.Y.S.2d 254 (2006); South Road Assoc., LLC v. International Bus. Machines Corp., 4 N.Y.3d 272, 793 N.Y.S.2d 835 (2005). The Indemnification Agreement clearly, and unambiguously expresses the intent of the parties as to the issue of indemnification. The agreement could not possibly refer to any other work site or activities other than those contracted by the parties on August 1, 2004 and August 15, 2004. Defendant also asserts, citing Burke v. Fisher Sixth Ave. Co., 287 A.D.2d 410, 731 N.Y.S.2d 724 (1st Dept. 2001) that the Indemnification Agreement should not be applied retroactively, as work at the site in question began five (5) months prior to the execution of the Indemnification Agreement. However, this contention fails, because unlike Burke, in this action the Indemnification Agreement was executed twenty (20) days before the occurrence of Mr. Yanez's accident. In Burke, the issue of retroactivity was presented in the context of an indemnification agreement executed after the occurrence of a worker's accident.

Additionally, the Defendant's argument regarding the insurance coverage has no bearing on the issue at hand, which are about Whing Shing's contractual duties to ICRC and Bridge Tower.

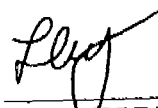
Therefore, the Indemnification Agreement is binding, and Whing Shing shall indemnify plaintiffs at the conclusion of the underlying action.

Order

Based on the above, therefore, it is

ORDERED that the motion for summary judgment by plaintiffs is granted; and the defendants shall indemnify the plaintiffs for their costs and out of pocket expenses at the conclusion of Yanez v. Intercontinental Realty Corps. et al.

Dated: July 17, 2009



LOUIS B. YORK, J.S.C.

LOUIS B. YORK
J.S.C.

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