

Greenbaum v Duane Reade

2009 NY Slip Op 32007(U)

August 31, 2009

Supreme Court, New York County

Docket Number: 101652/07

Judge: Doris Ling-Cohan

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.

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 101652/2007
GREENBAUM, THEODORA
VS.
DUANE READE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

1-4

PAPERS NUMBERED

1, 2

3

4

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

by defendant / third-party defendant Cintas for summary judgment is granted in accordance with the attached memorandum decision.

FILED

SEP - 3 2009

COUNTY CLERK'S OFFICE
NEW YORK

HON. DORIS LING-COHAN

Dated: 8/3/09

[Signature]

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
THEODORA GREENBAUM,

Motion Seq. No.: 001

Plaintiff,

Index No. 101652/07

-against-

FILED

DUANE READE and CINTAS CORPORATION,

SEP - 3 2009

Defendants.

-----X
DUANE READE,

**COUNTY CLERK'S OFFICE
NEW YORK**

Third-Party Plaintiff,

Index No. 590254/08

-against-

CINTAS CORPORATION,

Third-Party Defendant.

-----X
Ling-Cohan, J.:

In motion sequence 001, defendant/third-party defendant Cintas Corporation (Cintas) moves, pursuant to CPLR 3212, for summary judgment against defendant/third-party plaintiff Duane Reade on its cross claim, on the grounds that, pursuant to a contract between the parties, Duane Reade is obligated to indemnify and hold harmless Cintas from any claims arising out of that contract.

Background

On August 31, 2005, Cintas and Duane Read entered into a

Facility Services Rental Service Agreement, whereby Cintas agreed to provide mats to certain Duane Reade store locations and clean and maintain those mats on a weekly basis (the Agreement). The Agreement also provided that Duane Reade would "defend, indemnify, and hold harmless [Cintas] from any claims and damages arising out of or associated with [the] agreement, including claims arising from defective products." Cintas' Notice of Motion for Summary Judgment, Exhibit M.

On June 29, 2006, Benjamin Sosa, an employee of Cintas, arrived at the Duane Reade store located at 49 East 52nd Street, New York, New York (the Store) around 9:30 A.M. to change the mats, as per the Agreement. Affirmation in Opposition, Exhibit B, Deposition of Benjamin Sosa, p. 21. Mr. Sosa admitted that he rolled up the dirty mats and placed them on the floor, next to a wall by the door. *Id.* at 41-50. At approximately 9:45 A.M., plaintiff Theodora Greenbaum entered the Store and allegedly tripped and fell over a roll of mats left around the entranceway of the Store, causing her injury.

On January 30, 2007, plaintiff brought suit against Duane Reade. On March 31, 2008, Duane Reade commenced a third-party action against Cintas. With Cintas in the case, plaintiff amended her complaint to reflect Cintas as a direct defendant. As stated above, Cintas now moves for summary judgment against Duane Reade on the grounds that Duane Reade is obligated to

indemnify and hold Cintas harmless from any claims arising out of the Agreement.

Analysis

Duane Reade argues that Cintas' motion must be denied because the indemnification provision in the Agreement violates New York's General Obligations Law §§ 5-323, 5-322.1, and 5-321, making it void, as it is against public policy. This court disagrees.

General Obligations Law § 5-323 states,

Every covenant, agreement or understanding in or in connection with or collateral to any contract or agreement affecting real property made or entered into, whereby or whereunder a contractor exempts himself from liability for injuries to person or property caused by or resulting from the negligence of such contractor, his agent, servants or employees, as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances, shall be deemed to be void as against public policy and wholly unenforceable.

The plain language of this statute clearly places its obligation on "contractors" who perform services or work in connection with "construction, maintenance, and repair of real property or its appurtenances." Here, the Agreement involves a service provider who contracted to "swap out" dirty removable floor mats for clean ones on a weekly basis. It is clear that this service does not involve the construction, maintenance, or repair of real property or its appurtenances.

Therefore, it would be a stretch for this court to extend

the obligations of § 5-323 to a service provider such as Cintas. See *Florence v Merchants Cent. Alarm Co., Inc.*, 51 NY2d 793 (1980) (installation and maintenance of an alarm system not covered by § 5-323); see also *St. Vincent's Medical Center of Richmond v Vincent E. Iorio, Inc.*, 78 Misc 2d 968 (Sup Ct, Richmond County 1974) (discussing legislative history of General Obligations Law § 5-323).

For similar reasons, General Obligations Law § 5-322.1 does not apply. General Obligations Law § 5-322.1 states, in part,

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

Again, the Agreement clearly is not one relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances or appliances.

Duane Reade also makes mention of General Obligations Law § 5-321, but this statute is also inapplicable, as it applies to agreements exempting lessors from liability.

The court notes that where damages are caused by grossly negligent conduct, public policy does forbid a party's attempt to

escape liability through a contractual clause. *Colnaghi, USA., Ltd. v Jewelers Protection Servs., Ltd.*, 81 NY2d 821, 823-824 (1st Dept 1993). However, "gross negligence" differs from claims of ordinary negligence, as it is conduct that evinces a "reckless disregard for the rights of others" or "intentional wrongdoing." *Id.* at 824. The allegations in this action do not meet the standard of gross negligence. Therefore, since there appear to be no applicable statutes which would forbid the escape of liability through contract and there are no allegations meeting the standard for gross negligence, the indemnification provision in the Agreement is applicable and not voidable.

Accordingly, it is

ORDERED that Cintas Corporation's motion for summary judgment on its cross claim against Duane Reade for contractual indemnity is granted; and it is further

ORDERED that within 30 days of entry of this order, Cintas shall serve a copy upon all parties with notice of entry.

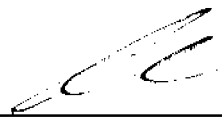
Dated: August 31, 2009

FILED

SEP - 3 2009

**COUNTY CLERK'S OFFICE
NEW YORK**

HON. DORIS LING-COHAN



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Greenbaum.duane reade.wpd