

Martinez v Greenwich St. Prods., Inc.

2010 NY Slip Op 30193(U)

January 26, 2010

Supreme Court, New York County

Docket Number: 150125/08

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
MIGUEL MARTINEZ,

Plaintiff,

-against-

GREENWICH STREET PRODUCTIONS, INC. and
M & M HOLDING CORP.,

Defendants.

-----X
GREENWICH STREET PRODUCTIONS, INC.,

Third-Party Plaintiff,

-against-

NATIONS ROOF OF NEW YORK, LLC,

Third-Party Defendant.

-----X
HON. CAROL R. EDMEAD, J.S.C.

Index No. 150125/08
Sequence 004

Third-Party
Index No. 90352/09

FILED
JAN 28 2010
NEW YORK
COUNTY CLERK'S OFFICE

MEMORANDUM DECISION

In this personal injury action, defendant M&M Holding Corp. ("M&M") moves for summary judgment on its third cross-claim for contractual indemnification against defendant Greenwich Street Productions, Inc. ("Greenwich") and for an order obligating Greenwich to defend and indemnify M&M in this action and pay attorneys fees and costs Greenwich incurred in the defense of this action.

Factual Background

Plaintiff Miguel Martinez ("plaintiff"), alleges that while working as a roof technician for third-party defendant Nations Roof of New York LLC ("Nations Roof"), he fell from a ladder as he was carrying construction materials to the roof.

The subject premises was owned by M&M and leased to The Stop & Shop Supermarket

Company ("Stop & Shop"). Pursuant to a "Licence Agreement," Stop & Shop licensed the premises to Greenwich, who then hired Nations Roof to perform certain roofing work at the premises.

During the course of discovery, Greenwich produced an "Accident Report" of plaintiff's employer Nations Roof, photographs of the accident site, a copy of the License Agreement, and a copy of the paid invoice by which Greenwich retained "Tri-State Roofing and Siding Corp."¹

In support of summary judgment for indemnification, M&M contends that the Licensing Agreement rendered M&M a wholly out-of-possession landlord and expressly obligated Greenwich to defend and indemnify M&M in situations like the one at bar. In addition to the indemnification clause, section 7.4 of the Licensing Agreement contains an insurance procurement clause which obligates Greenwich to name M&M as an additional insured. Section 7.4 demonstrates that full contractual indemnification is clearly implied from the entire License Agreement. Finally, given the broad language of the indemnification clause, counsel fees and costs should also be awarded.

In opposition, Greenwich argues that M&M's motion is premature and should be denied at this time as there have been no depositions taken in the action.

Plaintiffs' Bill of Particulars, paragraph 10, alleges that his accident occurred "in the open section near the ladder leading to the roof access hatch." At paragraph 28 of the Bill of Particulars, plaintiff alleges negligence against the defendants and that the defective ladder and the roof hatch were the cause of the accident. At paragraph 19 of the Bill of Particulars plaintiff alleges that the defendants violated Labor Law §§200, 240(1)& 241(6). Under Labor Law

¹ The aforementioned factual background is taken in large part from M&M's motion.

§§240(1) & 241(6), the class of defendants who are statutorily liable in the first instance upon a finding of a violation of these statutes includes "Owners" of premises, such as M&M.

The ladder at issue is a fixed stationary ladder which was part of the structural premises leased to Greenwich. Additionally, the roof hatch allegedly at issue is also part of the structural premises leased to Greenwich. Photographs of the subject ladder and roof hatch demonstrate that they are both structural components of the leased premises. In Section 5.5 of the License Agreement it is specifically stated that "the Licensee (Greenwich) shall have no obligation to maintain the structural integrity of the licensed premises." Moreover, Section 6.3 of the License Agreement, specifically accords the Licensor/Owner with a "Right of Re-entry" for repairs.

In view of the fact that Greenwich had "no obligation to maintain the structural integrity of the licensed premises," the roof is part of the structure of the licensed premises and the ladder accessing the roof is a permanent portion of the structure, and due to the fact that the owner reserved a right of re-entry to make repairs and alterations, it is clear that at this time, before any depositions have been conducted in this matter, that M&M cannot prevail on its motion.

M&M fails to acknowledge that as per section 8.1, the indemnification clause, the obligation to indemnify is triggered by "any failure on the part of Licensee to perform the obligations imposed on the Licensee by this License Agreement or any breach thereof by Licensee, or due to any actual or alleged negligence . . . of, or any actual or alleged act of commission or omission by, Licensee . . . or contractors." In view of this provision, any claim for contractual indemnification on the part of M&M is premature as there has been no finding as to the negligence of any party at this time, let alone Greenwich.

More importantly, while M&M has highlighted the indemnification clause in section 8.1

of the License Agreement, M&M has neglected to point out that section 8.2 of the License Agreement contains the same broad indemnification clause, which runs to the favor of Greenwich. As such, the License Agreement contains reciprocal "negligence triggered" indemnification provisions going to the favor of both M&M and Greenwich. Thus, the issue as to whom it is that will ultimately be entitled to contractual indemnification in this matter will have to await the determination of whom, if anyone, was responsible for the happening of the alleged occurrence.

Greenwich further argues that where the proposed indemnitee's liability is purely statutory and vicarious, a conditional summary judgment for common law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor was either negligent, or exclusively supervised and controlled plaintiff's work site. M&M failed to demonstrate that Greenwich was negligent, or exclusively, supervised and controlled plaintiff's work site. As such, any motion for indemnification be it contractual or common law by way of summary judgment must be denied.

In light of the reciprocal "negligence triggered" contractual indemnification provisions in the License Agreement, M&M cannot assert that the License Agreement abrogates General Obligations Law §5-321, which mandates that parties cannot indemnify themselves from their own negligence. There have been no stipulations that M&M was not 100% at fault for the happening of plaintiff's alleged accident and there has not been any deposition testimony taken thus far. Thus, it would be premature for M&M to assert that the prohibitions against indemnifying a party for their own negligence recited in GOL §5-321 are inapplicable in this case.

The reciprocal "negligence triggered" indemnification provisions in the License Agreement which run to the favor of M&M (§8.1) and Greenwich (§8.2) evince a clear intent on the part of each party not to indemnify the other for its own negligence.

Greenwich also contends that further evidence that there wasn't an "unmistakable intent" on its part to indemnify M&M can be found in section 7.7, which states that "Licensor shall maintain fire and casualty insurance covering the building and improvements comprised in the Licensed Premises. Such fire and casualty insurance may be maintained as part of a blanket policy covering other properties of Licensor." Given that the License Agreement required that the Licensor maintain its own casualty insurance, M&M cannot possibly claim that Greenwich has evinced an "unmistakable intent" to indemnify M&M for its own negligence. Thus, M&M's motion should be denied in its entirety at this time.

Discussion

"A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003] citing *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777, 521 NYS2d 216). The indemnification clause at issue provides in relevant part as follows:

Section 8.1. Licensee [Greenwich] shall at all times . . . save Licensor [Stop & Shop], Overlandlord [M&M], . . . harmless and indemnified from against all actions, suits, demands, liabilities, losses, damages, costs, charges, counsel fees and all other expenses, *relating to or arising from any claims . . . of every nature or character (including . . . personal injury. . .) based upon or arising out of or from the use of the Licensed Premises by Licensee, or Licensee's tenants, subtenants, sub-licensees, invitees or employees or the conduct of Licensee's business therein, or out of or from any failure*

on the part of Licensee to perform the obligations imposed on Licensee by this License Agreement or any breach thereof by Licensee, or due to any actual or alleged negligence or dishonesty of, or any actual or alleged act of commission or omission by, Licensee or any of its employees, agents, licensees, invitees or contractors; and in the event any action, suit or proceeding shall at any time . . . be brought against Licensor, Overlandlord [M&M] . . . by reason of such claim, Licensee, if Licensor so requests, shall resist and defend such action, suit or proceeding, at the sole expense of Licensee, by counsel selected by Licensee, which selection shall be subject to prior approval by Licensor.

The Court notes that the broad indemnification clause in favor of M&M obligates Greenwich to indemnify M&M for "all actions, suit, . . . , damages, costs, charges, counsel fees and all other expenses, relating to or arising from any claims . . . of every nature or character (including . . . personal injury . . .) based upon or arising out of or from the use of the Licensed Premises by Licensee." Here, it is uncontested that plaintiff's accident occurred during Greenwich's "use of the Licensed Premises" in that Greenwich hired Nations Roof to perform the roofing work at issue (*see Donner v Morewood Realty Corp.*, 136 Misc 2d 42, 518 NYS2d 83 [Sup Ct New York County 1987] (where the Licensee agreed to "indemnify the Licensor against any expense, loss or liability paid, suffered or incurred as the result of any Breach by the licensee . . . of any covenant or condition of this agreement, or as a result of the licensee's use of said property or the carelessness, negligence or improper conduct of the licensee . . ." such "language is quite broad and covers any liability suffered as a result of the licensee's use of property or as a result of failure to comply with any of the terms of the agreement"))).

Contrary to Greenwich's contention, that Greenwich was not obligated to "to maintain the structural integrity of the Licensed Premises" (Section 5.5) does not vitiate Greenwich's general obligation to provide indemnity to M&M for actions and damages against M&M which "arose out of" or "arose from" Greenwich's "use of" the premises. Likewise, that Section 8.1 imposes

an obligation upon Greenwich to indemnify M&M for “any actual or alleged negligence . . . of, or any actual or alleged act of commission or omission by, Licensee . . .,” and there is no proof that Greenwich was either negligent, or exclusively supervised and controlled plaintiff’s work site, is inconsequential. Again, Greenwich’s general obligation to provide indemnity to M&M is triggered where the action, suit or damages against M&M “arises out of” or “arises from” Greenwich’s “use of” the premises.

The Court further notes that contrary to Greenwich’s contention, the indemnification clause in section 8.2, which runs to the favor of Greenwich, also does not vitiate Greenwich’s general and broad obligation to indemnify M&M. Section 8.2 provides, in relevant part, that:

Licensors [Stop & Stop] shall at all times . . . save Licensee [Greenwich] . . . harmless and indemnified from against all actions, suits, . . . , relating to or arising from any claims. . . of every nature or character (including . . . personal injury . . .) based upon or arising out of any actual or alleged negligence . . . of, or any actual or alleged act of commission or omission by Licensors [Stop & Shop] . . . ; and in the event any action, suit or proceeding shall at any time . . . be brought against Licensee . . . by reason of any such claim, Licensors, if Licensee so requests, shall resist and defend such action, suit or proceeding, at the sole expense of Licensors, by counsel selected by Licensors. . . .

Section 8.2 is silent as to M&M, and imposes no obligation upon M&M to indemnify Greenwich under any circumstances.

However, a party seeking contractual indemnification must establish that it is free from any negligence and that its liability is solely vicarious arising from the non-delegable duty imposed by the Labor Law (*Quick v City of New York*, 24 Misc 3d 1210, 890 NYS2d 370 [Sup Ct Kings County 2009] citing *Rey v Ridamaset, LLC*, 19 Misc 3d 1114, *2 [Sup Ct Queens County 2008]; *Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]) (“In contractual indemnification, the one seeking indemnity need only establish that it was

free from any negligence and was held liable solely by virtue of the statutory liability”); *Francavilla v Nagar Const. Co., Inc.*, 151 AD2d 282, 542 NYS2d 557 [1st Dept 1989] (“Since the evidence at trial in this case was insufficient to support a finding that L.H.L. Realty was in any way negligent, and its liability was vicariously predicated solely on its nondelegable duty under the Labor Law, L.H.L. was entitled to be indemnified from its co-defendant, who was the party actually at fault”).

According to the Bill of Particulars, plaintiff’s accident occurred in the open section near a *defective* ladder leading to the roof access hatch, and it is alleged that defendants, including M&M are liable to plaintiff under the Labor Law. Defendants’ submissions indicate that the subject ladder and roof hatch are fixed, and part of the structural premises leased to Greenwich. In this regard, the License Agreement between the lessee and Greenwich states in relevant part:

USE, CONDITION OF PREMISES, AND ALTERATIONS

* * * * *

Section 5.5. Licensee [Greenwich] shall keep and maintain the Licensed Premises and all fixtures and equipment therein in good order, repair and condition, making all repairs and replacements thereto as may be required . . . , provided, however, that *Licensee shall have no obligation to maintain the structural integrity of the Licensed Premises.* (Emphasis added).

Moreover, Section 6.3 of the License Agreement, specifically accords the Licensor/Owner with a “Right of Re-entry” for repairs:

IMPROPER USE: LICENSOR’S RIGHT OF ENTRY

* * * * *

Section 6.3. Licensor . . . shall have the right at reasonable times and upon reasonable prior notice, which may be telephonic or written, to enter upon the Licensed Premises to inspect the same and to make such repairs and alterations as it may be deemed necessary.

Given that plaintiff alleges that the ladder and roof hatch were defective, that defendants' submissions indicate that said ladder and roof hatch were part of the structure of the Licensed premises, and there is no indication, at this juncture, that M&M was *not* responsible for the alleged defective condition of the ladder and roof hatch, M&M failed to establish its freedom from negligence for plaintiff's accident so as to entitle it to contractual indemnification. Notably, depositions of the parties have not been held, and are necessary in order to determine which party was responsible for the maintenance of the subject ladder and roof hatch.

Therefore, M&M failed to establish that it is entitled to contractual indemnification at this juncture.

Conclusion

Based on the above, it is hereby

ORDERED that the motion by M&M for summary judgment on its third cross-claim for contractual indemnification against defendant Greenwich Street Productions, Inc. and for an order obligating Greenwich Street Productions, Inc. to defend and indemnify M&M in this action and pay attorneys fees and costs incurred in the defense of this action, is denied without prejudice, at this juncture; and it is further

ORDERED that outstanding party depositions shall be completed within 30 days of the date of this Order; and it is further

ORDERED that Greenwich Street Productions, Inc. serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

January 26, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

FILED
JAN 28 2010
NEW YORK
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