

DiMuro v City of New York

2010 NY Slip Op 30458(U)

March 3, 2010

Supreme Court, New York County

Docket Number: 103898/02

Judge: Barbara Jaffe

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

PRESENT: JAFFE BARBARA JAFFE
J.S.C.

PART 5

Index Number : 103898/2002
DI MURO, JACK
VS.
CITY OF NEW YORK
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT
CAL # 42

INDEX NO. _____
MOTION DATE 1/28/10
MOTION SEQ. NO. 003
MOTION CAL. NO. 42

this motion to/for _____

PAPERS NUMBERED

1
2
3

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

Answering Affidavits — Exhibits _____

Replying Affidavits Notice of Cross-motion

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
MAR 08 2010
NEW YORK
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 3/3/10
MAR 03 2010

B
BARBARA JAFFE J.S.C.

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 : PART 5

-----X
JACK DIMURO,

Plaintiff,

-against-

CITY OF NEW YORK,

Defendant.

-----X
THE CITY OF NEW YORK,

Third-Party Plaintiff,

-against-

PDG INC. and PROJECT DEVELOPMENT GROUP, INC.,

Third-Party Defendants.

-----X
PDG INC. and PROJECT DEVELOPMENT GROUP, INC.,

Second Third-Party Plaintiffs,

-against-

ABYSSINIAN DEVELOPMENT CORP.,

Second Third-Party Defendant.

-----X
BARBARA JAFFE, JSC:

Index No. 103898/02
Motion Date: 2/9/10
Motion Seq. No.: 003
Calendar No.: 42

DECISION AND ORDER

Third-Party Index
No. 590754/08

Second Third-Party Index
No. 590107/09

FILED
MAR 08 2010
NEW YORK
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By notice of motion dated November 27, 2009, defendant City of New York (City) moves

[*3]
pursuant to CPLR 3212 for an order granting it summary judgment on its claim for indemnification against third-party defendants PDG Inc. and Project Development Group, Inc. (PDG defendants). Only PDG defendants oppose the motion.

Second-third party defendant Abyssinian Development Corp.'s cross-motion to compel discovery was resolved by a compliance conference order dated March 2, 2010.

I. BACKGROUND

On January 19, 2000, City and Project Development Group, Inc. (Project) entered into an agreement whereby City hired Project to perform lead abatement work. (Affirmation of Gregory Mouton, Esq., dated Nov. 27, 2009 [Mouton Aff.], Exh. G). Section two of Article 17 provides, in pertinent part, as follows:

Indemnification. [Project] shall indemnify and hold [City] harmless against the risk of loss, damage or liability caused by personal injuries, bodily injuries . . . arising out of or in connection with the performance of the [agreement], as a result of the negligence, carelessness, or willful tort of [Project], its agents, employees, contractors, or subcontractors, whether sustained before or after completion thereof. [Project] agrees, in connection therewith, to defend all suits, negotiate all claims, and pay all judgments, costs, expenses, and fees resulting therefrom, including, but not limited to, legal fees.

(*Id.*). As required by the agreement, Project purchased insurance, including coverage for all indemnifications, and named City as an additional insured. (*Id.*, Exhs. G, H).

Plaintiff alleges that on or about May 5, 2001, he fell from a ladder and injured himself while working at 170 West 36th Street, New York, New York, and that his fall was due, in part, to a defective condition on the floor. (*Id.*, Exh. A). On or about August 3, 2001, plaintiff served a notice of claim on City. (*Id.*).

On February 11, 2002, plaintiff's 50-h examination was held. (*Id.*, Exh. D). Plaintiff did not sign the examination transcript, but the reporter certified it. (*Id.*).

4]

On or about February 27, 2003, plaintiff commenced the instant lawsuit for personal injuries, alleging, as pertinent here, that City owns, operates, manages, maintains or controls the premises at 170 West 36th Street, and that he was employed by Project at the time of the accident. (*Id.*, Exh. B).

On or about May 19, 2003, City filed its answer. (*Id.*, Exh. C). On or about August 22, 2008, City commenced a third-party action against PDG defendants. (*Id.*, Exh. D). On or about October 6, 2008, PDG defendants filed their answer (*id.*, Exh. E), and on or about January 13, 2009, they commenced the second third-party action (*id.*, Exh. F).

II. CITY'S MOTION FOR SUMMARY JUDGMENT

A. Contentions

City argues that based on the agreement, and as plaintiff was allegedly injured while working on the project covered by the agreement, there exist no triable issues as to whether PDG defendants are contractually obligated to defend and indemnify it against plaintiff's claim. (Mouton Aff.).

PDG defendants assert that pursuant to Insurance Law § 3420 City's motion is untimely as the claim arose in May 2001 and City did not commence the third-party action until August 2008. They also argue that City's seven-year delay has materially impaired their ability to investigate or defend the claim, that the indemnification provision is barred by General Obligations Law (GOL) § 5-322.1, that to the extent City is seeking common law indemnification, its motion is premature given the evidence of its own negligence, and that City should have instead sought a declaratory judgment as to its alleged entitlement to indemnification. (Affirmation of Neil T. Veilleux, Esq., dated Jan. 19, 2010).

5] Although the parties raised issues at oral argument, having failed to raise them in the motion papers, I decline to address them.

B. Applicable law

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case.” (*Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Friends of Animals, Inc. v Associated Fur Mfrs, Inc.*, 46 NY2d 1065, 1067 [1979]). If this burden is not met, summary judgment must be denied, regardless of the sufficiency of the opposition papers. (*Winegrad*, 64 NY2d 851, 853).

When the moving party has demonstrated entitlement to summary judgment, the burden of proof shifts to the opposing party which must demonstrate by admissible evidence the existence of a factual issue requiring trial. (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman*, 49 NY2d 557, 562). The opposing party must “lay bare” its evidence (*Silbertstein, Awad & Miklos v Carson*, 304 AD2d 817, 818 [1st Dept 2003]); “unsubstantiated allegations or assertions are insufficient” (*Zuckerman*, 49 NY2d 557, 562).

Summary judgment on a contractual indemnification claim may be granted when the parties’ agreement is unambiguous and clearly reflects their intention that one party indemnify the other for the injuries sustained. (*Roddy v Nederlander Prod. Co. of Am., Inc.*, 44 AD3d 556 [1st Dept 2007]). The statute of limitations for an indemnification claim is six years, which commences when the third-party plaintiff actually pays a judgment to the primary plaintiff. (2 NY Prac, Com Litig in New York State Courts § 8:4 [2d ed]).

Pursuant to GOL § 5-322.1(1):

A[n] . . . agreement . . . relative to the construction, alteration, repair or maintenance of a building . . . purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons . . . 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 . . . This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons . . . caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

C. Analysis

Absent any allegation that City has paid a judgment to plaintiff, its cause of action for indemnification has not yet accrued. City's motion is thus timely.

PDG defendants' argument that they have been prejudiced by the delay is conclusory and speculative, and to the extent that they allege that City may also have been negligent, the factual and legal issues common to the main action and the third-party action warrant a joint trial. Moreover, PDG defendants have not alleged that the main action is ready for trial or that they will be unable to obtain disclosure. (*See Neckles v VW Credit, Inc.*, 23 AD3d 191 [1st Dept 2005] [court erred in severing third-party action as two actions involved common factual and legal issues, plaintiff did not claim that further disclosure was required, and claim of prejudice was speculative and unsupported by record]). Consequently, there is no basis for dismissing the third-party claim or severing it.

As the indemnification agreement only requires PDG defendants to indemnify City against claims arising out of Project's negligence or that of its agents, employees, contractors or subcontractors, and does not require them to indemnify City against City's own negligence, it is not barred by GOL § 5-322.1. (*See Brooks v Judlau Contr., Inc.*, 11 NY3d 204 [2008])[provision

did not violate GOL § 5-322.1 as it required subcontractor to indemnify contractor only when damages were caused by subcontractor's negligence]).

Finally, as it appears that City is not seeking common law indemnification, the possibility that City may also be negligent is immaterial. Nor did PDG defendants cite any authority for the proposition that City was obliged to proceed by way of a declaratory judgment action.

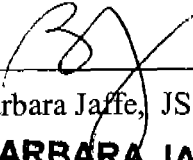
III. CONCLUSION

For all of these reasons, it is

ORDERED that City's motion for summary judgment is granted to the extent that third-party defendants PDG Inc. and Project Development Corp. shall defend and indemnify City against plaintiff's claim in the main action.

This constitutes the decision and order of the court.

DATED: March 3, 2010
New York, New York


Barbara Jaffe, JSC
BARBARA JAFFE
J.S.C.

MAR 03 2010

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