

835 Ave. of the Americas, L.P. v Breeze Natl., Inc.

2010 NY Slip Op 32149(U)

August 11, 2010

Supreme Court, New York County

Docket Number: 400267/09

Judge: Jane S. Solomon

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

JANE S. BOLTON

PART 55

PRESENT:

Index Number : 400267/2009

835 AVENUE

vs

BREEZE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 2/29/19

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits of Exhibits

Replying Affidavits

PAPERS NUMBERED

1-3

4-13

14-15

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

M.B. -- conference scheduled for 10/4/19 @ 11 AM.

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

FILED

AUG 13 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: _____

JANE S. BOLTON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
835 AVENUE OF THE AMERICAS, L.P.,
CARLISLE 839 LLC, and M.D. CARLISLE
CONSTRUCTION CORP.,

DECISION AND ORDER

Plaintiffs,

Index No.: 400267/09

-against-

BREEZE NATIONAL, INC. and LIBERTY
INSURANCE UNDERWRITERS,

Defendants.

FILED

AUG 13 2010

**NEW YORK
COUNTY CLERK'S OFFICE**

JANE S. SOLOMON, J.:

Plaintiffs 835 Avenue of the Americas, L.P. ("835 Avenue"), Carlisle 839 LLC ("Carlisle") and M.D. Carlisle Construction Corp. ("M.D. Carlisle") move for an order pursuant to CPLR § 3212 granting summary judgment against Defendant Breeze National, Inc. ("Breeze") for contractual indemnification and for breach of contract for failure to provide insurance coverage. Plaintiffs also move for an order pursuant to CPLR § 3025(b) granting leave to serve an amended complaint. Breeze cross-moves for an order granting summary judgment dismissing plaintiffs' causes of action for common law indemnity and contribution, and dismissing the claim for contractual indemnity asserted in the proposed amended complaint. Defendant Liberty Insurance Underwriters ("Liberty") cross-moves for an order pursuant to

CPLR § 3124 compelling plaintiffs to produce documents requested in Liberty's Notice to Produce.

Carlisle was the owner of property located at 835 Avenue of the Americas in Manhattan (the "Property"), which Carlisle sought to develop by demolishing the existing structure and building a new one. M.D. Carlisle served as the construction manager for the Property. Carlisle, as owner, and M.D. Carlisle, as the owner's agent and construction manager, hired Breeze to perform demolition work on the site pursuant to a written contract (Demolition Contract, Notice of Motion, Ex. M). The Demolition Contract contains the following defense and indemnity provision:

Contractor shall and hereby does indemnify and agree to save and hold harmless Owner and Construction Manager from and against all claims, suits, judgments and loss, expense or damage brought against, recovered against or suffered by Owner or Construction Manager for, or on account of, any claim growing out of any injury to or the death of any person or persons by reason or act, omission or negligence of Contractor, its agents, employees, subcontractors, vendors and materialmen, except to the extent it is caused by the sole negligence of Owner or Construction Manager, and Contractor shall and hereby does indemnify and agree to save and hold harmless Owner and Construction Manager from any and all loss, damage or expenses which they may sustain or to which they may be put, by reason of any injury or damage to the property of Owner or Construction Manager, or that of any other person arising out of the performance of this work, or by or on account of any act, omission, or negligence of Contractor, its agents, employees, subcontractors, vendors, materialmen, or any other person having

anything whatsoever to do in connection with the work of Contractor, except to the extent it is caused by the sole negligence of Owner or Construction Manager. (*Id.* at paragraph 2[e]).

The Demolition Contract contains an insurance procurement provision requiring the Contractor to obtain a Commercial General Liability ("CGL") insurance policy with a \$1 million policy limit and excess insurance with a \$5 million policy limit (*id.* at Schedule C). The Demolition Contract also required Breeze to obtain insurance naming Carlisle, M.D. and Carlisle as additional insureds on the policy (*id.*).

Breeze obtained a CGL insurance policy from Liberty with the following Additional Insured endorsement:

WHO IS AN INSURED (Section II) is amended to include as an insured any person or organization with whom you have agreed to add as an additional insured by written contract but only with respect to liability arising out of your operations or premises owned by or rented to you (Liberty Policy, endorsement no. 5, annexed to Affidavit of Jamie Moray as Ex. 1).

The Liberty policy has a self-insured retention endorsement which states "for any liability to which the policy applies, you shall pay the Self-Insured Retention before we have any obligation to pay loss or damages or participate in any investigation or defense" (Liberty Policy, endorsement no. 1, annexed to Affidavit of Jamie Moray as Ex. 1). The schedule lists the self-insured retention as \$500,000 per occurrence.

On March 26, 2007, Thomas Jusinski, a Breeze employee, was injured at the construction site while working within the scope of his employment. Breeze employees were the only workers at the job site at the time of the accident (Examination of Thomas Jusinski, Notice of Motion, Ex. K, 27). Jusinski was ordered by his foreman to stand inside a dump truck and remove certain types of debris from the excavated material that had been deposited there (*id.* at 34-41). While Jusinski was working in the truck, a co-worker operating an excavator dumped more debris into the truck, striking Jusinski and fracturing his hip. Jusinski subsequently underwent total hip replacement surgery.

On March 28, 2007, two days after the accident, Carlisle and 835 Avenue executed an assignment and assumption contract (835 Assignment Agreement) which stated the following:

WHEREAS, Assignor and Assignee are entering into this Assignment to evidence and confirm the transfer and assignment to Assignee, and assumption by Assignee, of all of Assignor's right, title, and interest in and to the Contracts, all from and after the date hereof.

NOW THEREFORE, in consideration of Ten (\$10.00) Dollars in hand paid by Assignee, the receipt and adequacy of which are hereby conclusively acknowledged, Assignor does hereby assign, transfer and set over to Assignee, all of Assignor's right, title, and interest in and to all the Contracts, including, without limitation, the contracts set forth on Exhibit A, attached hereto and incorporated herein (835 Assignment Agreement, annexed to Notice of Motion, Ex. R).

There is no Exhibit A submitted with the motion. The Demolition Contract states at paragraph 13 that it is freely assignable by Carlisle to any entity owned or controlled, directly or indirectly, by Carlisle, provided that the assignee agrees to assume all of Carlisle's rights and obligations under it.

Jusinski commenced a lawsuit against the plaintiffs herein (Supreme Court, New York County, index number 109846/07) (the *Jusinski Action*), who in turn commenced a third-party action against Breeze and Liberty.

By an order dated February 3, 2009, I severed the third-party action from the *Jusinski Action*, and directed that it be re-filed with a new index number (Order, Notice of Motion, Ex. G). This lawsuit is the re-filed third-party action. There are four causes of action: First, Carlisle and M.D. Carlisle seek insurance coverage pursuant to the Demolition Contract; the second and third causes of action, made on behalf of Carlisle and M.D. Carlisle, seek common law indemnity and contribution from Breeze; and the fourth cause of action, made on behalf of Carlisle and M.D. Carlisle, seeks a declaration that Liberty is obligated to defend and indemnify them under the insurance policy it issued to Breeze (Third-Party Complaint, Notice of Motion, Ex. D).

Plaintiffs now seek leave to amend the complaint to add a cause of action on behalf of all plaintiffs against Breeze for contractual indemnification, and to correct what they call "typographical errors" to assert the other claims on behalf of 835 Avenue as well. Plaintiffs seek summary judgment on the proposed amended complaint.

Plaintiffs' Motion

A. Motion to Amend the Complaint

Although that branch of plaintiffs' motion seeking to amend the complaint is framed as one to amend the third-party complaint in the *Jusinski Action*, it is in fact a request for leave to amend the complaint herein. Leave to amend a pleading is freely granted, absent prejudice or surprise resulting from the delay (*Antwerpse Diamantbank N.V. v. Nissel*, 27 A.D.3d 207, 208 [1st Dep't 2006]). Leave to amend should not be granted on request, however, without appropriate substantiation (*Hoppe v Bd. of Directors of the 51-78 Owners Corp.*, 49 AD3d 477 [1st Dept 2008]).

The motion to amend is granted to the extent that Carlisle and M.D. Carlisle assert a claim for contractual indemnification against Breeze.

However, the new claims on behalf of 835 Avenue are not substantiated, and the proposed amendment is denied with respect to them. The basis for the amendment is plaintiffs' contention that 835 Avenue assumed all of Carlisle's rights to all contracts having to do with the Property, including those under the Demolition Contract. The 835 Assignment Agreement states that 835 Avenue will assume the rights and interest of Carlisle in all contracts listed on Exhibit A, but there is no Exhibit A, and specifically, there is nothing to show that Carlisle assigned to 835 Avenue, or that 835 Avenue assumed, any rights and obligations with respect to Breeze or Liberty. Moreover, plaintiffs have not alleged that 835 Avenue is owned or controlled by Carlisle, which is a condition that must be met for the Demolition Contract to be freely assignable by Carlisle (see Demolition Contract, paragraph 13).

B. Summary Judgment on the Contractual Indemnification Claim

The Demolition Contract contains a broad defense and indemnification provision. If enforceable, Breeze is obligated to defend and indemnify Carlisle and M.D. Carlisle from Jusinski's claim. Breeze argues that the defense and indemnification provision is not enforceable because it is over-broad in violation of General Obligations Law ("GOL") § 5-322.1. GOL § 5-322.1 "declares void agreements purporting to indemnify

[owners and] contractors against liability for injuries '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'" (*Brown v Two Exch. Plaza Partners*, 76 N.Y. 2d 172, 178 [1990], quoting GOL § 5-322.1)

On its face, the defense and indemnity provision appears to run afoul of GOL § 5-322.1, because by stating that it only exempts Breeze from indemnifying damages caused by the "sole negligence" of Carlisle and M.D. Carlisle, it implies that Breeze would be responsible for damages caused by their partial negligence, which is forbidden under the statute. However, Breeze has produced no evidence that the negligence of either Carlisle or M.D. Carlisle contributed to the accident in any way. Only Breeze employees were present at the construction site on the day of the accident, and neither Carlisle nor M.D. Carlisle provided Breeze with any of the materials or equipment that Breeze used to perform its work. Plaintiffs' potential liability is limited to that vicariously imposed under the Labor Law.

As the underlying accident was not caused by the negligence of either Carlisle nor M.D. Carlisle, the indemnification clause in the Demolition Contract is enforceable, and does not violate GOL § 5-322.1 (see *Picchione v. Sweet*

Constr. Corp., 60 A.D.3d 510, 513 [1st Dep't 2009]; and *Brown v Two Exch. Plaza Partners*, 76 N.Y.2d at 180).

Breeze's argument, that summary judgment on this issue is premature because discovery is not complete, fails because the Demolition Contract speaks for itself, and Breeze does not deny that it is bound by it. Plaintiffs served on Breeze a notice to admit that the Demolition Contract was the agreement between M.D. Carlisle and Breeze (Notice to Admit, Notice of Motion, Ex. J). Breeze did not respond, so the genuineness of the Demolition Contract is not disputed (see CPLR 3123). Since Carlisle and M.D. Carlisle have made a prima facie showing that they are entitled to contractual indemnification, and no evidence is produced to dispute this, Carlisle and M.D. Carlisle are entitled to summary judgment on this issue (*Zuckerman v City of York*, 49 NY2d 557 [1980]).

C. Breach of Contract to Procure Insurance

The Demolition Contract required Breeze to obtain a CGL insurance policy with a limit of \$1 million. Breeze breached the insurance procurement provision of the contract with Carlisle by obtaining an insurance policy that was substantially different than that which was called for by the contract. The Liberty

policy requires the insured to pay out \$500,000 before the policy pays any benefit.

The insurance procurement provision of the Demolition Contract does not contemplate that insurance coverage would be subject to a \$500,000 self-insured retention imposed on the plaintiffs. A self-insured retention is not "insurance". Insurance generally involves an agreement whereby a party assumes a financial risk of another in return for a premium payment (*Black's Law Dictionary, 7th Ed., 802*); it also implies that the insured party can expect some security knowing that the insurer is subject to public oversight and regulation (see, Insurance Law § 107[27] and § 1101). Breeze's self-insured retention does not meet these criteria, and is not "insurance" within the meaning of the Demolition Contract. Accordingly, Breeze breached its obligation to procure insurance. However, there is no evidence that any plaintiff sustained a loss resulting from said breach, which loss is measured by out-of-pocket costs and any increase in its future premiums due to the liability claim (*Inchaustegui v 666 5th Ave LP, 96 NY2d 111 [2001]*).

Breeze's Cross-Motion

Breeze's cross-motion for summary judgment dismissing plaintiffs' causes of action for common law indemnity and contribution is granted. Pursuant to Worker's Compensation Law

§ 11, an employer's liability for the injury of an employee is limited to the Worker's Compensation Insurance except where the employer does not procure Worker's Compensation Insurance, where a written agreement preserves contractual indemnity or where the employee sustained a "grave injury" as defined in the Worker's Compensation Law. Breeze had a Worker's Compensation and Employer's Liability Insurance policy from Commerce and Industry Insurance Company (Certificate of Liability Insurance, annexed to Affirmation of Stephen J. Molinelli, Ex. E). Jusinski's injury was not a "grave injury" as defined by the Worker's Compensation Law. Therefore, Breeze's liability for common law indemnity and contribution is limited to the Worker's Compensation insurance that Breeze procured.

Defendant Liberty's Cross-Motion

Liberty's cross-motion to compel discovery is granted. Liberty seeks documents concerning communications between plaintiffs and itself prior to this lawsuit (plaintiffs already have agreed to provide this), and concerning the involvement of counsel in the underlying action.

Plaintiffs contend that documents regarding the involvement of counsel, such as retainer agreements, are not relevant to this action. However, these documents may be

relevant to establishing the reasonableness of plaintiffs' damage claims in the event Liberty is compelled to reimburse them for defense costs they incurred.

Accordingly, it hereby is

ORDERED that plaintiffs' motion to amend the complaint is granted to the extent that plaintiffs Carlisle and M.D. Carlisle may assert a claim for contractual indemnification, and the motion otherwise is denied; and it further is

ORDERED that plaintiffs' motion for summary judgment is granted to the extent that Carlisle and M.D. Carlisle are entitled to partial summary judgment as to liability on the breach of contract claim against Breeze for failure to procure insurance, and as to liability on their claim for contractual indemnification against Breeze, and the motion for summary judgment otherwise is denied; and it further is

ORDERED that the cross-motion by defendant Breeze for summary judgment dismissing the second and third causes of action, which allege common law indemnification and contribution, is granted, and those causes of action are dismissed; and it further is

ORDERED that complaint is amended in accordance with the foregoing, and is deemed served in the caption of this action upon service of a copy hereof with notice of entry, and defendants shall serve answers thereto within twenty days of receipt; and it further is

ORDERED that the cross-motion to compel by defendant Liberty is granted, and plaintiffs shall produce copies of retainer agreements within twenty days of service of a copy hereof with notice of entry; and it further is

ORDERED that counsel shall appear in Part 55 for a compliance conference on October 4, 2010 at 11 AM.

Dated: August // , 2010

ENTER:



J.S.C

STATE OF NEW YORK

FILED

AUG 13 2010

**NEW YORK
COUNTY CLERK'S OFFICE**