

Henao v Revman Indus., Inc.

2010 NY Slip Op 33608(U)

December 9, 2010

Supreme Court, New York County

Docket Number: 105202/07

Judge: Marcy S. Friedman

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

MARCY S. FRIEDMAN, J.S.C.

PRESENT:

PART 57

Index Number : 105202/2007

HENAO, ALBA

vs

REVMAN INDUSTRIES, INC.

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for Summary Judgment

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 & cross-motion are decided as per decision/order dated 12-9-10

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

FILED

JAN 04 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 12-9-10

MARCY S. FRIEDMAN, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

ALBA HENAO,
Plaintiff(s),

- against -

REVMAN INDUSTRIES, INC. and J.T. 1211 L.P.,
Defendant(s).

Index No.: 105202/07

DECISION/ORDER

REVMAN INDUSTRIES, INC. and J.T. 1211 L.P.,
Third-Party Plaintiff(s),

- against -

TRIANGLE SERVICES, INC.
Third-Party Defendant(s).

FILED

JAN 04 2011

NEW YORK
COUNTY CLERK'S OFFICE

_____ X
In this action, plaintiff, a janitor at an office building located at 1211 Avenue of the Americas, New York, New York, alleges that she was injured on May 11, 2004, when she tripped and fell on an electrical cord in an office located in the building. Plaintiff's employer, defendant Triangle Services, Inc. (Triangle) moves for summary judgment dismissing the third-party complaint brought by Revman Industries, Inc. (Revman), the tenant of the space where plaintiff fell, and J.T. 1211, L.P. (JT), the owner of the building. Revman and JT cross-move for summary judgment on their contractual indemnification claims against Triangle. Revman and JT do not oppose the branch of Triangle's motion to dismiss their claims for common law indemnification and contribution, and for failure to procure insurance. The court accordingly

* 3] .

turns to their remaining claim for contractual indemnification.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b].” (Zuckerman, 49 NY2d at 562.)

Here, there is a triable issue of fact as to whether the services that plaintiff was performing at the time of her accident fell under a “Special Services Proposal” between Triangle and Revman, which did not provide for indemnification, or under a Building Services Agreement between Triangle and JT, which did contain an indemnification provision. However, even assuming that the Building Services Agreement applies, Triangle demonstrates as a matter of law that Revman and JT are not entitled to indemnification.

Section 8.5 of this Agreement contains two indemnification clauses. Subdivision (a) provides for Triangle to indemnify the Owner and its employees and agents from and against all claims to which the indemnified party “may become subject by reason or arising out of Contractor’s [Triangle’s] negligence or willful malfeasance.” Subdivision (b) provides that “Contractor shall protect the Work and all materials . . . and shall indemnify and hold harmless Owner and Manager and their agents and employees from and against all claims . . . arising from injuries to or death of persons . . . to the extent resulting from the prosecution of the Work.

[* 4]

Contractor shall provide public liability insurance and other insurance as described here in attached, hereto and made a part hereof in amounts satisfactory to Manager and Owner and shall provide certificates of such insurance to Manager prior to commencement of the Work.”

Under neither subdivision is Revman entitled to indemnification. Moreover, Revman submits no evidence in support of its assertion that it was an intended third-party beneficiary of the Agreement.

Nor is JT entitled to indemnification. While JT claims that it is entitled to indemnification from Triangle under subdivision (b), regardless of whether Triangle was negligent, the two subdivisions of section 8.5 must be harmonized, if possible. It is well settled that “[a]ll parts of an agreement are to be reconciled, if possible, in order to avoid inconsistency.” (National Conversion Corp. v Cedar Bldg. Corp., 23 NY2d 621, 625 [1969].) Thus, “where two seemingly conflicting contract provisions reasonably can be reconciled, a court is required to do so and to give both effect.” (HSBC Bank USA v National Equity Corp., 279 AD2d 251, 253 [1st Dept 2001][internal quotation marks and citations omitted].) If subdivision (b) were read not to require a showing of negligence or malfeasance on Triangle’s part as a condition of its obligation to provide indemnification, subdivision (b) would render subdivision (a) superfluous. (See Reiser v JT 1211, L.P., 20 Misc 3d 1122 [A] [Sup Ct, New York county 2008].) Moreover, subdivision (b) appears on its face to provide for indemnification by means of procurement of insurance, rather than contractual indemnification.

The court further holds that Triangle makes a prima facie showing that it was not negligent. In opposition, JT cites plaintiff’s testimony that she complained to Triangle at an unspecified time that Revman’s storage room was “full of stuff.” (P.’s Dep. at 29-30.) This

conclusory testimony is plainly insufficient to raise a triable issue of fact as to Triangle's notice of a defective condition or its negligence.

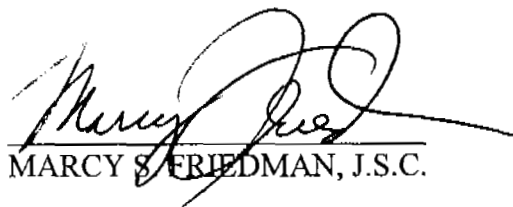
It is hereby ORDERED that Triangle's motion is granted to the extent of awarding Triangle summary judgment dismissing the third-party complaint in its entirety; and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the cross-motion of Revman and JT for summary judgment is denied; and it is further

ORDERED that the main action is severed and shall continue.

This constitutes the decision and order of the court.

Dated: New York, New York
December 9, 2010


MARCY S. FRIEDMAN, J.S.C.

FILED

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