

Travelers Prop. & Cas. Ins. Co. v 23rd Street Prop.
2010 NY Slip Op 33995(U)
January 14, 2010
Sup Ct, New York County
Docket Number: 102312/05
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

THE TRAVELERS PROPERTY & CASUALTY INSURANCE
COMPANY a/s/o INTERPUBLIC GROUP COMPANIES,
Plaintiff,

Index No.: 102312/05

Motion Date: 8/25/09

- v -

Motion Seq. No.: 11

23RD STREET PROPERTIES, WILLIAMS REAL
ESTATE CO., INC., IBEX CONSTRUCTION,
L.L.C., and HOME DEPOT U.S.A., INC.,
Defendants.

Motion Cal. No.: 124

23RD STREET PROPERTIES, WILLIAMS REAL
ESTATE CO.,
Third-party Plaintiffs,

Third-Party
Index No.: 102312/05

- v -

ENVIRONMENTAL SERVICE OF NEW YORK, INC.,
Third-party Defendant.

The following papers, numbered 1 to 2 were read on this motion to reargue.

Notice of Motion/Notice of Cross Motion -Affidavits -Exhibits
Answering Affidavits - Exhibits
Replying Affidavits - Exhibits

PAPERS NUMBERED

1

2

FILED

JAN 20 2010

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers,

The court shall grant the motion of defendant Home Depot seeking to reargue pursuant to CPLR 2221 (d) this court's decision on Motion Sequence No. 7 dated April 6, 2009, which granted the motion of Ibex and the cross-motion of defendant Home

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

Depot for summary judgment dismissing the action against them and dismissing all cross-claims.

Home Depot argues that this court should not have granted summary judgement dismissing its cross-claim for contractual indemnification from co-defendant IBEX based upon the indemnification provision in the contract between the parties. IBEX argues that Home Depot failed to oppose IBEX's motion for summary judgment and that in any event the fact that the court found that neither IBEX or Home Depot was liable to the plaintiff supports the court's dismissal of Home Depot's indemnification claim.

The court, upon reargument, agrees with Home Depot that based upon the contractual language it is entitled to be indemnified for its costs and attorney's fees expended in defense of plaintiff's claims.

The indemnification clause in Section 4.17 of the parties' contract provides that IBEX will "indemnify and defend" Home Depot against "all claims, loss, damages, costs and expenses of any type arising from all claims . . . occurring wholly or in part, as a result of the work done or omitted to be done" by IBEX. "The indemnification provision is enforceable inasmuch as it does not require that the triggering act or omission constitute negligence. . . Notwithstanding [defendant's] argument to the contrary, the indemnification provision would apply with

respect to litigation costs and counsel fees incurred, even in the event of a dismissal of plaintiff's claims." Quinonez v Manhattan Ford, Lincoln-Mercury, Inc., 62 AD3d 495, 497 (1st Dept 2009); see Di Perna v American Broadcasting Companies, Inc., 200 AD2d 267, 270 (1st Dept 1994) ("nothing in its broad language conditions [owner]'s right to indemnification on a finding of fault"). As stated by the Court, "[w]here, as here, there is a broad indemnity agreement providing for indemnification 'against all claims, actions, damages and costs,' the indemnitee is entitled to costs, including counsel fees, incurred in the defense of the primary action even though that action was dismissed." Perchinsky v State, 232 AD2d 34, 39 (3d Dept 1997).

"[T]he general rule limit[s] an award of counsel fees to the defense of the claim indemnified against and not extending such award to legal services rendered in establishing the right to indemnification." Id.

The indemnification clause at issue here is the type of broad indemnification clause that the aforementioned Court's have determined is triggered by the types of claims raised by plaintiff in this action. Therefore, Home Depot is entitled to contractual indemnification from IBEX in the amount of the counsel fees and costs incurred by Home Depot in defense of plaintiff's claims, but not including any amounts expended to pursue its cross-claims for indemnification.

Accordingly, it is

ORDERED that the motion of HOME DEPOT U.S.A., INC., for reargument pursuant to CPLR 2221 (d) is GRANTED; and it is further

ORDERED that upon reargument the court GRANTS summary judgment to HOME DEPOT U.S.A., INC., on its cross-claim for contractual indemnification against IBEX CONSTRUCTION, L.L.C., to the extent indicated above and denies summary judgment to IBEX CONSTRUCTION, L.L.C., to the extent that dismissal of the cross-claim for contractual indemnification by HOME DEPOT U.S.A., INC., was sought; and it is further

ORDERED that if the parties are unable to agree on the amount of the contractual indemnification the parties shall request the court refer the matter to a Special Referee to here and determine.

This is the decision and order of the court.

Dated: January 14, 2010

ENTER:

~~Debra A. James~~
DEBRA A. JAMES J.S.C.

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