

Dubinskiy v Davis Realty

2011 NY Slip Op 30206(U)

January 27, 2011

Sup Ct, New York County

Docket Number: 112469/2006

Judge: Saliann Scarpulla

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

PRESENT. **SALIANN SCARPULLA**

PART 19

Index Number : 112469/2006

DUBINSKIY, YAKOV

vs

DAVIS REALTY

Sequence Number : 003

REARGUMENT/ RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

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 — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion ~~is~~

^{is} motion and ~~order~~ ^{is} decided in accordance with accompanying memorandum decision.

This constitutes the decision and order of the Court.

FILED

JAN 28 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/27/11

Saliann Scarpulla
SALIANN SCARPULLA J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
YAKOV DUBINSKIY and ZINA DUBINSKIY,

Plaintiffs,
-against-

Index No.: 112469/2006
Subm. Date Nov. 3, 2011
Seq. No.003

DAVIS REALTY, SARAH STERNKLAR and
BAUMLIT CONSTRUCTION CORP.,

Defendants.

-----X
DAVIS REALTY and SARAH STERNKLAR,

Third-Party Plaintiffs,
-against-

T.P. Index No.: 590106/2007

BAUMLIT CONSTRUCTION CORP.,

Third-Party Defendant.

-----X
BAUMLIT CONSTRUCTION CORP.,,

Second Third-Party Plaintiff,

-against-

OLYMPIC ELECTRIC WIRING CORP.,

Second Third-Party Defendant.

-----X

Appearances: **For Plaintiff :**
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2625 East 14th Street-Suite 209
Brooklyn, New York 11235

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350 Fifth Avenue-Suite 5101
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For Defendant Davis Realty:
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By Harvey Gladstein, Esq.
110 Wall Street
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For Defendant Olympic:
Robin, Harris, King & Fodera
One Battery Park Plaza-30th Floor
New York, New York 10004

NEW YORK COUNTY CLERK'S OFFICE
JAN 3 1 2011
FILED

Papers considered in review of this motion for summary judgment:

Papers	Numbered
Notice of Mot. and Motion with Annexed. Ex.....	<u>1</u>
Affirm in Opp. with Annexed Ex.....	<u>2</u>
Memo. of Law by Davis Realty.....	<u>3</u>
Reply Affirm.....	<u>4</u>

SALIANN SCARPULLA, J.:

Third-Party plaintiffs Davis Realty and Sarah Sternklar (Davis Realty and Sternklar) move, pursuant to CPLR 2221 (a) and (d), for leave to reargue the portion of their motion on their cross claim with respect to the indemnification and attorneys' fees allegedly owed to them from third-party defendant Baumblit Construction Corp. (Baumblit). Upon reargument, Davis Realty and Sternklar seek summary judgment granting this portion of their cross motion.

BACKGROUND AND FACTUAL ALLEGATIONS

This action stems from a personal injury claim in which plaintiff Yakov Dubinskiy (plaintiff)¹ alleges that he suffered injuries while working at the premises located at 605 West End Avenue in New York, New York. Plaintiff states that, on July 12, 2006, he fell off of a ladder while replacing a lightbulb on a sidewalk construction bridge. Sternklar and her husband, Marvin Davis (Davis) are the owners of the property. Davis is a principal of Davis Realty, which was the managing agent for the property.

¹Zina Dubinskiy, plaintiff's wife, is also a plaintiff in this action.

Pursuant to a written contract, Sternklar had hired Baumblit to act as a general contractor to perform renovations to the premises, which was being converted from a multiple dwelling to a one-family dwelling for the Sternklar/Davis family. The contract was signed by Sternklar and Davis, as owners of the property. Baumblit had a subcontract with second third-party defendant Olympic Electric Wiring Corp. (Olympic), regarding certain renovations. Apparently, Olympic had a subcontract with Evergreen Electrical Corporation (Evergreen). At the time of the accident, plaintiff was an employee of Evergreen. Plaintiff had been sent to the accident site, to perform work for Olympic, pursuant to the written contract between Olympic and Baumblit.

Plaintiff testified that, on the date of the accident, he was in the process of changing a lightbulb on a sidewalk bridge which had been erected by another subcontractor, outside of the premises. Plaintiff's co-worker, who had been holding the ladder, went to get a new lightbulb for plaintiff. Plaintiff testified that he knew that the co-worker had gone to get the lightbulb. However, plaintiff also then testified that he did not realize that no one was holding the ladder. Baumblit's Exhibit A, Plaintiff's TR, at 60-62. At any rate, plaintiff testified that, as he unscrewed the old light bulb, the ladder began to slide from underneath him and he fell to the ground with the ladder. *Id.* at 66.

Plaintiff moved for partial summary judgment against Baumblit and Davis Realty and Sternklar. Davis Realty and Sternklar cross-moved for summary judgment dismissing plaintiff's complaint and any cross claims as against them. Davis Realty and Sternklar also

sought indemnification and attorneys' fees from Baumblit pursuant to the written contract between the parties.

Section 3.3.2 of the contract provides the following:

The Contractor shall be responsible to the Owner for acts and omissions of the Contractor's employees, Subcontractors and their agents and employees, and other persons or entities performing portions of the Work for or on behalf of the Contractor or any of its Subcontractors.

Davis Realty and Sternklar's Exhibit K, at 13.

Section 3.18.1 of the contract states:

To the fullest extent permitted by law and to the extent claims, damages, losses or expenses are not covered by Project Manager Protective Liability insurance purchased by the Contractor in accordance with Section 11.3, the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work, provided that such claim, damages, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, Sub-contractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damages, loss or expense is caused in part by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in Section 3.18.

Id. at 17.

In January 2010, plaintiff and Baumblit mediated and agreed to a settlement. Davis Realty and Sternklar declined to participate in the mediation and did not participate in the settlement. When Davis Realty and Sternklar were advised that the action had settled between plaintiff and Baumblit, they did not sign the stipulation of settlement.

According to Davis Realty and Sternklar, the cross claim against Baumblit for indemnification and attorneys' fees is still pending, regardless of whether the underlying personal injury action had settled as to Baumblit. Davis Realty and Sternklar are seeking approximately \$39,000 in attorneys' fees that have accumulated as a result of defending themselves in this action. Apparently, plaintiff is no longer pursuing claims against Davis Realty and Sternklar.

Davis Realty and Sternklar advised this court that the cross claim against Baumblit was still pending. On March 17, 2010, an oral argument was held on the issue of whether Davis Realty and Sternklar were owed indemnification and attorneys' fees pursuant to the contract between Sternklar and Baumblit. Also, on March 17, 2010, this Court signed a stipulation which stated, "[t]he only issue remaining in case is defendant Davis Realty/Sarah Sternklar's cross-motion for Indemnification and defense costs; which was argued and fully submitted on 3-17-10." Davis Realty and Sternklar's Exhibit I.

On May 21, 2010, this court issued an order stating that Davis Realty and Sternklar's cross motion was "denied as moot as the action has settled." Davis Realty and Sternklar's Exhibit A.

Davis Realty and Sternklar now move, pursuant to CPLR 2221 (a) and (d), to reargue the portion of the decision with respect to the cross claim for indemnification and attorneys' fees allegedly owed by Baumblit. Upon reargument, Davis Realty and Sternklar seek summary judgment granting this cross claim.

Davis Realty and Sternklar argue that this court should not have denied their cross motion as moot, as this claim is separate from plaintiff and Baumblit's settlement. Davis Realty and Sternklar contend that the indemnification provision is triggered whenever Baumblit "may be" liable, and no actual finding of negligence on Baumblit's part is required. Davis Realty and Sternklar also argue that, pursuant to the language of the contract, Baumblit is responsible for any negligent acts committed not only by Baumblit, but by any contractor or subcontractor, or their employees, which allegedly includes plaintiff as an employee of Evergreen. That is, if plaintiff's injuries were caused by his own negligence, Baumblit would still be liable to Davis Realty and Sternklar for indemnification.

Baumblit argues that, pursuant to the contract between Baumblit and Sternklar, only a finding of negligence on Baumblit's part would create an obligation to indemnify. Baumblit continues that Baumblit was never found liable for plaintiff's accident, since, allegedly, plaintiff was the sole proximate cause of his own injuries. Without this finding of liability as against Baumblit, Baumblit argues that Davis Realty and Sternklar are not owed any indemnification or attorneys' fees. Baumblit also argues that Davis Realty was not

a named party in the contract between Baumblit and Sternklar and, as such, neither party is entitled to indemnification.

DISCUSSION

I. Motion to Reargue:

Davis Realty and Sternklar move, pursuant to CPLR 2221, for an order granting them leave to renew and reargue their cross motion for summary judgment for indemnification pursuant to the written contract with Baumblit. “A motion for reargument ... is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law.” *Mangine v Keller*, 182 A.D.2d 476, 477 (1st Dep’t 1992).

As counsel for Davis Realty and Sternklar properly argues, the “right to indemnification ... is not impaired by the fact that the personal injury action was resolved by settlement rather than judgment.” *American Ref-Fuel Co. of Hempstead v Resource Recycling*, 307 A.D.2d 939, 942 (2d Dep’t 2003). Contrary to Baumblit’s assertions, plaintiff’s worker’s compensation benefits, or any other contracts with Baumblit and other parties, are irrelevant to the contract between Baumblit and Sternklar.

Accordingly Davis Realty and Sternklar’s motion for reargument is granted with respect to the portion of their cross motion seeking indemnification, in the form of attorneys’ fees in defending against the action.

II. Cross Motion for Summary Judgment:

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 A.D.3d 303, 306 (1st Dep't 2007), citing *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon proffer of evidence establishing a prima face case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 A.D.3d 535, 545 (1st Dep't 2008), quoting *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). In considering a summary judgment motion, evidence should be viewed in the "light most favorable to the opponent of the motion." *Id.* at 544, citing *Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 A.D.2d 610 (2d Dep't 1990).

Davis Realty and Sternklar cross-move for summary judgment, seeking contractual and/or common-law indemnification from Baumblit, including attorneys' fees. Davis Realty and Sternklar argue that the language of the contract creates an obligation to indemnify. They contend that Baumblit is liable to indemnify Davis Realty and Sternklar for negligence by any contractor, subcontractor, or by a contractor's employees. Plaintiff, an employee of a subcontractor, injured himself. So, according to Davis Realty and Sternklar, even if plaintiff was liable for his own injuries, Baumblit would still be liable for its subcontractor's employee's negligence.

However, Davis Realty and Sternklar's argument is premature. The contract between Baumblyt and Sternklar states that Baumblyt is obligated to indemnify Sternklar and Davis if the loss was caused by the "negligent acts or omissions of Baumblyt" or if the loss was caused by any of the subcontractors or their employees for whose acts Baumblyt "may be liable." Contrary to Davis Realty and Sternklar's contention, a determination of negligence must be made before the indemnification claim can be activated. *See e.g., Yacovacci v Shoprite Supermarket, Inc.*, 24 A.D.3d 539, 541 (2d Dep't 2005) (holding that the contractor's "right to contractual and common-law indemnification ... rests on a finding of [subcontractor's] negligence and such negligence being a proximate cause of the plaintiff's injuries and [contractor's] freedom from such negligence").

Since there was a settlement, there was no judicial determination as to liability for plaintiff's accident. Baumblyt has not been determined to be either negligent or without fault. Similarly, there has been no finding that plaintiff was the sole proximate cause of his own injury. However, as per the language of the contract between Baumblyt and Sternklar and Davis, Baumblyt is responsible for the acts of its contractors, subcontractors and their employees. The contract protects Sternklar and specifically allows indemnification upon a finding of negligence. As the Court states in *Torres v Morse Diesel Intl.*, "[a] party is entitled to full contractual indemnification 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.” *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 (1st Dep’t 2005) (internal quotations omitted).

Baumblit and Olympic had a written contract by which Olympic performed work at the accident site. Because Evergreen was hired to perform work for Olympic, plaintiff is an employee of a subcontractor of Baumblit. Evergreen is encompassed in Baumblit’s obligations under the indemnification provision. Therefore, upon a finding of negligence by Baumblit or any of its subcontractors or their employees, the indemnification provision will be triggered.

As such, issues of fact remain with respect to the parties’ negligence which require a judicial determination. Accordingly, upon reargument, the cross motion for summary judgment by Davis Realty and Sternklar for indemnification from Baumblit is conditionally granted conditioned on a finding of negligence by Baumblit, its subcontractors or their employees. *See e.g., Rivera v Urban Health Plan, Inc.*, 9 A.D.3d 322, 323 (1st Dep’t 2004)(holding that the owner was “entitled to summary judgment on the issue of contractual indemnification, conditioned on a finding of negligence on the part of [contractor].”

Additionally, although Davis Realty and Sternklar potentially may recover indemnification as a result of defending against the main action, this indemnification is solely limited to attorneys’ fees, costs and disbursements, as there has been no finding that would make them liable for plaintiff’s injuries. Therefore, their only damages will be for attorneys’ fees.

III. -Davis Realty Not a Signatory on the Contract:

Only Davis and Sternklar, as owners of the property, are the signatories on the contract with Baumblit. Davis Realty is not a signatory to the contract, and Davis, as owner, is not a listed party in this action. Since common-law indemnification is not an issue at this time, only Sternklar, as owner, will be potentially indemnified by Baumblit as a result of this action.

CONCLUSION

Accordingly, it is

ORDERED that the motion of third-party plaintiffs Davis Realty and Sarah Sternklar for leave to reargue its cross motion for summary judgment is granted; and it is further

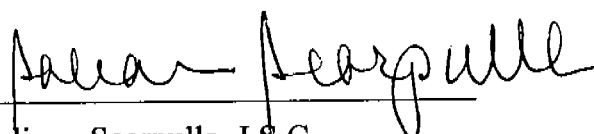
ORDERED that, upon reargument, third-party plaintiffs Davis Realty and Sarah Sternklar's cross motion for summary judgment enforcing the indemnification provision in Sarah Sternklar's favor as against third-party Baumblit Construction Corp. for attorneys' fees is conditionally granted conditioned on a finding of negligence on the part of any party listed in the indemnification provision; and it is further

ORDERED that defendant Sarah Sternklar, within sixty (60) days of the date of this decision and order, shall file a notice of issue, scheduling a trial solely on the issue of negligence on the part of any party listed in the indemnification provision

This constitutes the decision and order of the Court.

Dated: New York, New York
January 27, 2011

ENTER:


Saliann Scarpulla, J.S.C.

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JAN 31 2011
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