

**Port Parties, LTD v Merchandise Mart Props., Inc.**

2011 NY Slip Op 32880(U)

September 30, 2011

Supreme Court, New York County

Docket Number: 113117/2010

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
Justice

PART 7

PORT PARTIES, LTD.,

Plaintiff,

INDEX NO. 113117/2010

-against-

MOTION SEQ. NO. 002

MERCHANDISE MART PROPERTIES, INC. and  
THE UNCONVENTION CENTER,

Defendants.

**FILED**

OCT 31 2011

The following papers numbered were read on this motion by Merchandise Mart and cross-motion by Unconvention Center to dismiss the complaint pursuant to CPLR 3211 and cross-motion by Port Parties for summary judgment pursuant to CPLR 3212.

NEW YORK COUNTY CLERK'S OFFICE

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (Memo) \_\_\_\_\_  
Reply Affidavits — Exhibits (Memo) \_\_\_\_\_

PAPERS NUMBERED


Cross-Motion:  Yes  No

Defendant Merchandise Mart Properties, Inc. ("Merchandise Mart") moves, pursuant to CPLR 3211 (a)(1), (5) and (7), to dismiss the complaint asserted against it in its entirety, with prejudice. Plaintiff Port Parties, Ltd. ("plaintiff") cross-moves, pursuant to CPLR 3212, for summary judgment: (1) declaring that Merchandise Mart defend and indemnify it in an underlying personal injury action; (2) granting it summary judgment on its third cause of action for breach of contract; and (3) ordering an immediate inquest to determine the extent of its damages caused by Merchandise Mart's failure to indemnify it in the underlying personal injury action. The Un-convention Center (Center) cross-moves, pursuant to CPLR 3211(a)(1), (5) and (7), to dismiss the complaint asserted as against it in its entirety, with prejudice.

**BACKGROUND**

In the complaint, plaintiff is seeking a judgment declaring that Merchandise Mart is

obligated to defend and indemnify it in an underlying personal injury action entitled *Helen Bubul v Port Properties, Ltd., The Un-convention Center, Merchandise Mart Properties, Inc., and Vornado Realty Trust, Inc.*, index no.: 103407/07, currently pending in the Supreme Court, New York County, based on contractual indemnification, common-law indemnification, contribution and breach of contract, as well as seeking common-law indemnification and contribution as against Center (Motion exhibit A).

In February of 2004, Merchandise Mart entered into a license agreement with Center to utilize certain sections of Pier 94 at the New York City Passenger Ship Terminal to conduct a consumer/trade show (Motion exhibit B). At the time that the agreement was executed, Center had been granted permission by the City of New York to improve certain sections of Pier 94 for trade and public shows. (*Id.*)

The license agreement provided, in pertinent parts, the following:

"[Center] shall provide during the operating hours of the Event: air conditioning, heating, permanent overhead lighting and clean restroom facilities." "[Merchandise Mart] shall provide, at [Merchandise Mart]'s expense, by direct contract with such providers of services and materials as [Center] shall designate and not otherwise, the following:

\* \* \*

(d) General cleaning and janitorial services with respect to the Authorized Space ... "

The licensing agreement also required Merchandise Mart to procure a general liability insurance policy naming plaintiff, among others, as an additional insured (Motion exhibit B). Certificates of Insurance were issued to Merchandise Mart indicating that plaintiff was an additional insured on the insurance policy (Motion exhibit E). The court notes that no copy of an insurance policy to this effect has been provided with this motion.

The license agreement also contained the following indemnification provision:

"[Merchandise Mart] shall indemnify, defend and hold harmless [Center] and the Additional Insured named in Part A, Paragraph 6 of this Agreement, and their respective officers, employees and representatives (collectively, the 'Indemnities') from and

against all claims, demands, liabilities, damages, costs, losses and expenses (including attorneys' fees) arising from or related to any personal injury or death (whether they be employees of [Center] or [Merchandise Mart] or a third party), and any loss of or damage to property caused by, arising from or in connection with (a) the use or occupancy of the Authorized Space by [Merchandise Mart], or any other person or entity using or occupying the Authorized Space with [Merchandise Mart]'s consent, (b) the use and occupancy of any other portion of the Un-Convention Center of Pier 94 by [Merchandise Mart], or any other person or entity using such portion (s) of the Un-Convention Center of Pier 94 with its consent, or (c) any act or omission of [Merchandise Mart], its officers, members, employees, agents, guests, invitees, representatives, contractors, exhibitors, customers and other persons who are doing business with [Merchandise Mart] or who are at the Pier 94 and/or the Authorized Space, with [Merchandise Mart]'s consent." (Motion, Ex. B.).

On March 13, 2004, Helen Bubul ("Bubul"), the plaintiff in the underlying personal injury action, allegedly slipped and fell on a puddle of water on the floor of the ladies' restroom at Pier 94. Plaintiff failed to answer Bubul's complaint, and a default judgment was entered against it on December 2, 2008 (Motion, Ex. H).

Plaintiff moved to vacate the default judgment, and the matter was sent to a Special Referee to hear and report on the issue of service of process on plaintiff. The Special Referee found that service was proper, and recommended that the default judgment not be vacated. This determination was appealed by plaintiff, but the Special Referee's determination was upheld by the Appellate Division on April 14, 2011 (83 AD3d 517 [1st Dept 2011]). No appeal has been taken from this decision. Plaintiff instituted the present action on October 6, 2010.

Merchandise Mart contends that it does not have a contractual duty to defend or indemnify plaintiff in the underlying personal injury action because the indemnification provision appearing in the licensing agreement is void, as a matter of law, because it attempts to indemnify plaintiff for its own negligence. Further, Merchandise Mart argues that plaintiff is precluded from asserting claims for common-law indemnification and contribution because as a result of the default judgment entered against it, plaintiff is deemed to have admitted 100% liability in the underlying personal injury action. Lastly, Merchandise Mart avers that plaintiff's breach of contract claims must be dismissed because it took all reasonable steps to procure the

\* 4]  
required insurance. The Court notes that Merchandise Mart never claims that it did, in fact, acquire the requisite insurance.

In its cross-motion, Center adopts the arguments posited by Merchandise Mart in the main motion, and further asserts that plaintiff would be unable to establish sufficient notice of a dangerous condition that would render Center or Merchandise Mart liable to Bubul, since plaintiff was the party responsible for maintaining the restrooms and Bubul slipped on a puddle of water.

Richard Troy Durst (Durst), the vice-president and show director for Merchandise Mart for the trade show at which Bubul was allegedly injured, was deposed in this matter and testified that plaintiff provided all maintenance and janitorial personnel for the trade show, including bathroom matrons who were responsible for cleaning the bathrooms (Durst EBT, at 49-51, 68-69, 71-72, 104-106). Plaintiff billed Merchandise Mart for these bathroom matron services (Motion exhibit D).

In its cross-motion, plaintiff maintains that the indemnification provision in the licensing agreement is not void and unenforceable, because it is coupled with an insurance procurement provision. Moreover, according to plaintiff, the type of maintenance that it performed, in cleaning restrooms, is not the type of maintenance contemplated by the General Obligations Law ("GOL"). Plaintiff also contends that its cause of action for breach of contract should not be dismissed because Merchandise Mart has failed to provide evidence that it acquired the general commercial liability insurance mandated by the license agreement that would name plaintiff as an additional insured.

In opposition to plaintiff's cross-motion, Merchandise Mart argues that the type of maintenance services plaintiff provided are included within GOL and, as such, the contractual indemnification provision is void. Merchandise Mart also contends that plaintiff is not entitled to maintain its cause of action for breach of contract because it failed to perform its contractual

obligations, to wit, maintaining a clean bathroom.

In opposition to Center's cross-motion, and in further support of its own motion, plaintiff again argues that the maintenance services it provided are not within the contemplation of GOL, and it further contends that Center's cross-motion should be denied because Center has defaulted in not answering the complaint.

### DISCUSSION

CPLR 3211 (a) states that:

"[a] party may move for judgment dismissing one or more causes of action asserted against him on the ground that: (1) a defense is founded upon documentary evidence; or

(5) the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, res judicata, statute of limitations, or statute of frauds; or

(7) the pleading fails to state a cause of action ..."

As stated in *Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.* (275 AD2d 243, 246 [1st Dept 2000]),

"the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal pursuant to CPLR 3211 (a) (1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (*id.* at 88)."

To defeat a pre-answer motion to dismiss pursuant to CPLR 3211, the opposing party need only assert facts of an evidentiary nature which fit within any cognizable legal theory (*see Bonnie & Co. Fashions, Inc. v Bankers Trust Co.*, 262 AD2d 188 [1st Dept 1999]). Further, if any question of fact exists with respect to the meaning and intent of the contract in question, based on the documentary evidence supplied to the motion court, a dismissal pursuant to CPLR 3211 is precluded (*see Khayyam v Doyle*, 231 AD2d 475 [1st Dept 1996]).

Center's cross-motion to dismiss the complaint as asserted against it is granted. The Court is unpersuaded by plaintiff's argument that Center's motion is untimely because Center has failed to answer the complaint. CPLR 3211(f) extends the time to plead until 10 days after notice of entry of the order determining the pre-answer motion to dismiss made pursuant to CPLR 3211(a). Since Center's motion is a pre-answer motion to dismiss, it could not make that motion had it previously responded.

Further, plaintiff has failed to assert any argument in opposition to Center's motion except to say that discovery has yet to take place. However, as will be discussed below, plaintiff's default constitutes an admission of full liability for Bubul's injuries and, since the only causes of action asserted against Center are for common-law indemnification and contribution, no basis exists to hold Center liable for plaintiff's own negligence. As a consequence of the foregoing, Center's cross-motion to dismiss the complaint asserted as against it is granted.

"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" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006] [internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

That branch of Merchandise Mart's motion seeking to dismiss plaintiff's causes of action asserted as against it for contractual and common-law defense, indemnification and/or contribution is granted.

GOL section 5:323, "Agreements exempting building service or maintenance . . . ."

contractors from liability for negligence void and unenforceable," states:

"Every covenant, agreement or understanding in or in connection with or collateral to any contract or agreement affecting real property made or entered into, whereby or whereunder a contractor exempts himself from liability for injuries to person or property caused by or resulting from the negligence of such contractor, his agent, servants or employees, as a result of work performed or services rendered in connection with the construction, maintenance and repair of real property or its appurtenances, shall be deemed to be void as against public policy and wholly unenforceable."

Although plaintiff argues that the maintenance services that it provided are not covered by GOL, the Court disagrees. Not only have such services been determined to be covered by GOL (see *Hughey v RHM-88, LLC*, 77 AD3d 520 [1st Dept 2010]), but all of the cases cited by plaintiff as presumptive support for its contention (*Colnaghi, U.S.A., Ltd. v Jewelers Protection Services, Ltd.*, 81 NY2d 821 [1993]; *Florence v Merchants Central Alarm Company, Inc.*, 51 NY2d 793 [1980]) concern burglar alarms, not building maintenance.

The main thrust of plaintiff's argument with respect to the indemnification provision lies in its interpretation of the decision in *Santamaria v 1125 Park Avenue Corp.* (238 AD2d 259, 260 [1st Dept 1997]), which stated:

"[I]ndemnification agreements, when coupled with a provision allocating the risk of liability to a third party through the use of insurance, are valid and enforceable and do not violate General Obligations Law [sections], which invalidate agreements exempting the promisee from liability for damages for injuries resulting from the promisee's own negligence."

However, in *Santamaria*, the same provision providing for broad contractual indemnification also included the statement of limitation that the indemnification was to "be in addition to all other required insurance and indemnifications" (*Id.* at 259). In this fashion, that indemnification provision was saved from violating GOL in the same manner that similar provisions that include the phrase "to the fullest extent permitted by law," have been held to pass GOL muster, in that the indemnification is thereby limited to permissible standards (see

*Brooks v Judlau Contracting, Inc.*, 11 NY3d 204 [2008]; *Balladares v Southgate Owners Corp.*, 40 AD3d 667 [2d Dept 2007]).

In the instant case, the contractual indemnification provision did not include a requirement that Merchandise Mart acquire insurance; the insurance requirement appeared elsewhere in the agreement and, therefore, cannot be construed as a limitation on Merchandise Mart's indemnification of plaintiff for plaintiff's own negligence.

As the Court stated in *Cavanaugh v 4518 Associates* (9 AD3d 14 [1st Dept 2004]), which distinguished and criticized the *Santamaria* case, *Santamaria* blurred the clear distinction between insurance procurement provisions and indemnification clauses. "[A] contract to procure insurance is clearly distinct from and treated differently [from] an agreement to indemnify" (*Id.* at 20 [internal quotation marks and citation omitted]).

"[T]he existence of insurance would not save an indemnification clause otherwise unenforceable under [GOL]. The proviso that the section 'shall not affect the validity of any insurance contract . . . merely insures that the contractor will not lose insurance coverage simply because the insurance coverage may extend to liability sought to be imposed under an unenforceable agreement" (*Quevedo v City of New York*, 56 NY2d 150, 156 [1982]).

The Court also notes that plaintiff attempts to bolster its position by citing to an earlier decision of this Court, *Williams v Jeffrey Management Co.*, 29 Misc 3d 1214A, 2010 NY Slip Op 51827[U] [Sup Ct, NY County 2010], which plaintiff characterizes as a situation in which an insurance procurement provision saved a broad indemnification clause. However, as indicated in that decision, the indemnification provision specifically exempted "any loss or damages resulting from or growing out of any act or omission" of the promisee and, hence, falls squarely within the acceptable limitation provisions noted above (*Id.* at \*5). In addition, the Court notes that this case involved a contract to maintain premises free of water, rubbish and so forth, similar to the instant matter wherein plaintiff was to maintain and keep clean the restrooms.

As a consequence of the foregoing, the Court finds that the contractual provision requiring Merchandise Mart to defend and indemnify plaintiff is void and unenforceable, pursuant to the provisions of GOL, and, therefore, plaintiff is not entitled to contractual indemnification or defense costs.

Further, plaintiff is not entitled to common-law defense, indemnification or contribution. In the case at bar, by its own default, which was affirmed by the Appellate Division, plaintiff has admitted to liability for Bubul's injuries and, therefore, would not be entitled to any indemnification or defense from Merchandise Mart.

"[D]efaulters are deemed to have admitted all factual allegations contained in the complaint and all reasonable inferences that flow from them" (*Woodson v Mendon Leasing Corp.*, 100 NY2d 62, 71 [2003]; *see Taylor v Brook Towers LLC*, 73 AD3d 535 [1st Dept 2010]; *Al Fayed v Barak*, 39 AD3d 371 [1st Dept 2007]).

"It is well settled that the 'right of common-law indemnification belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their part.' ... '[W]here a party is held liable at least partially because of its own negligence, contribution against other culpable tortfeasors is the only available remedy'" (*Siegel v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 [4th Dept 2011] [internal citations omitted]; *Glasser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643 [1988]; *Brazell v Wells Fargo Home Mortgage, Inc.*, 42 AD3d 409 [1st Dept 2007]).

Since the default judgment entered against Port Parties acts as a determination of liability with respect to Bubul's injuries, Port Parties has been found at least partially liable and, hence, may not seek indemnification from Merchandise Mart.

In addition, and contrary to Merchandise Mart's and Center's contentions, whereas a default judgment in the underlying personal injury action does not affect Port Parties' ability to seek indemnification or contribution from other responsible parties (*see Brodeur v Hayes*, 18 AD3d 979 [3d Dept 2005]), in order to sustain a third-party cause of action for contribution, "a third-party plaintiff is required to show that the third-party defendant owed it a duty of

reasonable care independent of its contractual obligations, or that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries” (*Siegel v New Plan Excel Realty Trust, Inc.*, 84 AD3d at 1703 [internal quotation marks and citation omitted]).

Viewing the allegations in the complaint in a light most favorable to Port Parties, Port Parties has failed to state a cause of action for contribution. The only allegation appearing in the complaint regarding contribution states:

“If the Plaintiff in the Bubul Action hereby sustained damages at the time and place and in the manner set forth in the Bubul Complaint, which PPL denies, and if such damages were not sustained as a result of Plaintiff in the Bubul Action’s own negligence, then PPL is entitled to contribution pursuant to Article 14 of the CPLR against MMPI for its negligence.”

The exact same allegations are asserted as against Center, and these allegations fail to state a cause of action for contribution.

Based on the foregoing, the portion of Merchandise Mart’s motion seeking to dismiss plaintiff’s causes of action for contractual and common-law indemnification is granted for failing to state a cause of action, and the portion of plaintiff’s motion seeking a declaration that defendants are required to defend and indemnify it is denied.

However, that branch of Merchandise Mart’s motion seeking to dismiss the cause of action for breach of contract for failing to obtain general liability insurance naming plaintiff as an additional insured is denied, and that portion of plaintiff’s motion seeking summary judgment on its first cause of action for a declaration that Merchandise Mart failed to name it as an additional insured is granted.

Merchandise Mart consistently states that it used its best efforts to obtain the mandated insurance, but it never says that it actually acquired such insurance. The only evidence of Merchandise Mart’s alleged compliance with this contractual provision is its inclusion of

Certificates of Insurance as part of its motion papers. However, Certificates of Insurance are not evidence of the acquisition of insurance, but are only evidence of an entity's intent to provide coverage, and, therefore, by implication, Merchandise Mart has admitted its breach in this respect (*see Moleon v Kreisler Borg Florman General Construction Co.*, 304 AD2d 337 [1st Dept 2003]).

**CONCLUSION**

Based on the foregoing, it is hereby

ORDERED that the branch of defendant Merchandise Mart Properties, Inc.'s motion seeking to dismiss the causes of action for common-law and contractual defense and indemnification asserted as against it is granted and those causes of action are dismissed; and it is further,

ORDERED that the branch of defendant Merchandise Mart Properties, Inc.'s motion seeking to dismiss the cause of action for breach of contract and declaratory judgment asserted as against it is denied; and it is further,

ORDERED that Merchandise Mart Properties, Inc. is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further,

ORDERED that defendant The Un-Convention Center, Inc.'s cross-motion to dismiss the complaint asserted as against it is granted and the complaint is dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further,

ORDERED that the action is severed and continued as against the remaining defendant; and it is further,

ORDERED that the branch of plaintiff's cross-motion seeking summary judgment as

against Merchandise Mart Properties, Inc. on its cause of action for breach of contract is granted, but is in all other respects denied; and it is further,

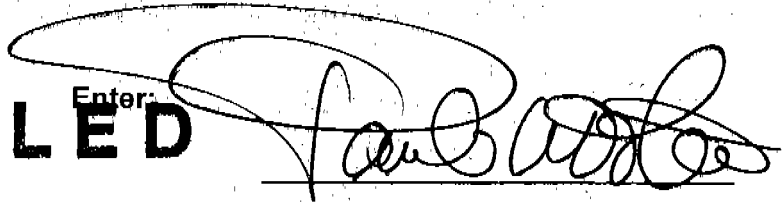
ORDERED that the remaining parties are directed to appear for a status conference in Part 7, 60 Centre Street, Room 341 on December 14, 2011 at 11 A.M.

This constitutes the Decision and Order of the Court.

Dated: 9-30-11

FILED

Enter:



OCT 31 2011

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Paul Wooten J.S.C.

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