

Brown v Manhattan Orthopaedics, P.C.

2011 NY Slip Op 33436(U)

December 22, 2011

Sup Ct, NY County

Docket Number: 109650/08

Judge: Louis B. York

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SCANNED ON 12/27/2011

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

LOUIS B. YORK

PRESENT: _____ **J.S.C.**

PART 2

Justice

Brown, Nancy

INDEX NO. 109650-2008

MOTION DATE _____

- v -

MOTION SEQ. NO. 2

Manhattan Orthopedics

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 granted~~
~~with costs to the moving party~~

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/22/11

Lly

LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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 2

----- x
PETER BROWN as Executor of the Estate of **NANCY O'BRIEN BROWN** a/k/a **NANCY BROWN**,

Plaintiff,

Index No. 109650/08

-against-

MANHATTAN ORTHOPAEDICS, P.C., LENOX HILL HOSPITAL and "**XYZ CORP.**" d/b/a **LENOX HILL HOSPITAL**,

Defendants.

FILED

DEC 27 2011

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COUNTY CLERK'S OFFICE

----- x
LOUIS B. YORK, J.:

This decision addresses the motion by defendant Lenox Hill Hospital, made by notice of motion dated July 22, 2010, seeking an order: (1) restoring this action to the Court's calendar; (2) pursuant to CPLR § 2221 vacating that portion of the order dated October 8, 2009 that dismissed Lenox Hill Hospital's cross-claims against defendant Manhattan Orthopaedics, P.C.; (3) upon such vacation, granting summary judgment pursuant to CPLR § 3212 in favor of defendant Lenox Hill Hospital on its cross-claims against defendant Manhattan Orthopaedics, P.C. with respect to its indemnification claims and allowing this matter to proceed forward on the issue of Lenox Hill Hospital's damages with respect to its cross-claims; and (4) for such other and further relief as this Court deems just and proper, together with the costs of this motion. For the reasons stated *infra*, this motion is granted in part and denied in part.

FACTS

The underlying action was commenced in July, 2008 by plaintiff Nancy Brown against Manhattan Orthopaedics, P.C. (hereafter MOPC) and Lenox Hill Hospital (hereafter LHH). Since the action was commenced, Nancy Brown has died and by an order dated October 19,

2011, Peter Brown as executor of the estate of Nancy Brown has been substituted as the plaintiff in the action. Nancy Brown alleged in her complaint that she fell and sustained injuries while descending from an examination table due to a negligently placed stool in the offices of MOPC. MOPC leased this office space from LHH.

In its answer, LHH alleged three cross-claims against MOPC. The first cross-claim alleges LHH is entitled to common law indemnification or contribution from MOPC in the event of a recovery, including any and all attorneys' fees, costs and disbursements. The second cross-claim alleges LHH is entitled to contractual indemnification from MOPC in the event of a recovery, including all attorneys' fees, costs and disbursements. The third cross-claim alleges that MOPC is in breach of its contract with LHH by reason of its failure to secure policies of liability insurance naming LHH as an additional named insured and that as such, MOPC owes LHH defense, indemnity, insurance coverage and costs and expenses.

In July of 2009, LHH made a motion to dismiss the complaint and any cross-claims made by MOPC based on its failure to comply with discovery orders. MOPC subsequently filed a cross-motion seeking dismissal of all claims and cross-claims based on a settlement agreement between it and the plaintiff. LHH contends that it was never served with the cross-motion and would have opposed the cross-motion to the extent that it dismissed the cross-claims made by LHH against MOPC. This contention is supported by the fact that the affidavit of service attached to the notice of cross-motion only lists service upon the attorneys for the plaintiff. In an order dated October 8, 2009 and signed by the Hon. Richard F. Braun, the cross-motion was granted without opposition, and the complaint and all cross-claims were dismissed.

LHH argues that it is entitled to contractual indemnification from MOPC based on its lease, a written agreement entitled "Medical Practice Offices Use and Services Agreement"

(hereafter the Contract) dated as of May 1, 2005. Section 10 of the Contract outlines the parties' agreement with respect to indemnification. It states, in part, the following:

(a) The Physician hereby agrees to indemnify and save LHH, and its trustees, officers, directors, employees and agents harmless from and against all liabilities, damages and other expenses, including reasonable attorneys' fees, which may be imposed upon, incurred by or asserted against any of them by reason of any of the following: (i) the Physician's use of the Occupied Space or any parts thereof (except an only to the extent same is caused by LHH's negligent acts or omission); or (ii) any negligent acts or omissions on the part of the Physician or on the part of the Physician's agents, contractors, licensees or invitees.

The Contract then elaborates on the indemnification process with the following in pertinent part:

(c) The party seeking indemnification shall promptly notify the other party of any claim asserted against it for which such indemnification is sought and shall promptly deliver to the party from whom indemnification is sought, a true copy of any summons or other process, pleading or notice issued in any lawsuit or other proceeding to assert or enforce such a claim. Where acceptance of its obligation to indemnify is deemed proper by the indemnifying party, the indemnifying party reserves the right to control the investigation, trial and defense of such lawsuit or action (including all negotiation to reflect settlement provided, however, that the indemnifying party shall not effect any settlement that could result in any cost expense, or liability to the party requesting indemnification unless such party consents in writing thereto) and any appeal arising therefrom and to employ or engage attorneys of its own choice. The party seeking indemnification may, at its own costs, participate in such investigation, trial and defense of such lawsuit or action and any appeal arising therefrom.

Additionally, section 8 of the Contract states MOPC is to obtain and maintain commercial general liability insurance with LHH to be named as an additional named insured on the policy.

In addition, LHH offers evidence, in the form of an affidavit by Philip Rosenthal, the Executive Vice President, Chief Administrative Officer at LHH, that it was not negligent as a matter of law and therefore meets the requirements for indemnification under the Contract. The affidavit sets forth that the incident occurred within the space occupied by MOPC and no employee, agent or representative worked in that space at the time the incident occurred. It further sets forth that LHH did not own and was not responsible for any stool or similar device

used in the office and that prior to the incident, LHH had not been provided any notice regarding a dangerous condition that might have caused the incident.

MOPC contends that LHH is not entitled to costs under the Contract as LHH failed to notify MOPC or tender its defense as required by subsection C of the indemnification section. LHH responds that MOPC had notice of the claim by virtue of LHH's answer which cross-claimed for indemnification.

DISCUSSION

In the first portion of the motion, LHH seeks to vacate its default in failing to oppose the cross-motion such that its cross-claims against MOPC are reinstated and the action restored to the Court's calendar. A motion to vacate or modify an order that was granted by default "may be made, on notice, to any judge of the court" (CPLR § 2221 [a] [1]). To vacate an order granted where the moving party defaulted in opposing the motion, the movant must demonstrate both a reasonable excuse for its default and a meritorious claim (*see Montague v Rivera*, 50 AD3d 656, 657 [2d Dept 2008]). LHH's contention that it was not served with the cross-motion and was not aware of its existence until after the cross-motion had been granted is supported by the fact that the affidavit of service attached to the cross-motion only describes service on the plaintiff. It would be impossible to expect LHH to oppose a motion of which it was not aware and thus the Court finds this to be a reasonable excuse for LHH's default. Furthermore, LHH has presented evidence of a meritorious claim by showing its contract with MOPC and through the affidavit of Philip Rosenthal. As such the court grants LHH's motion to the extent that it reinstates LHH's cross-claims against MOPC and restores the action to the calendar.

However, a motion to vacate a default judgment requires a lesser burden of proof than a motion for summary judgment (*see Gamiel v Curtis & Reiss-Curtis, P.C.*, 60 AD3d 473, 474 [1st

Dept 2009]). Under CPLR § 3212(b), a motion for summary judgment "shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." However, such a motion should not be granted where triable issues of fact are raised as "[i]ssue finding, not issue determination, is the appropriate function of summary judgment" (*Epstein v Scally*, 99 AD2d 713, 714 [1st Dept 1984] [citation omitted]). The initial burden lies upon the motion's proponent who "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] [citations omitted]).

As an initial matter, as all claims against LHH have been dismissed, any decision for summary judgment with respect to damages other than the defense costs incurred is moot. With respect to the attorneys' fees and costs, section 10 of the Contract outlines the agreement between LHH and MOPC regarding indemnification. Subsection A of that section states explicitly that MOPC agrees to indemnify LHH for "all liabilities, damages and other expenses, including reasonably attorneys' fees" arising from the use of the leased property except to the extent that they are caused by LHH's negligent acts or omissions. Here, LHH has presented clear and uncontested evidence that it neither had control over the activities at MOPC's offices nor had notice of a dangerous condition prior to the accident. Thus the accident was in no way due to negligence on the part of LHH and LHH has a right to indemnification from MOPC under the terms of the Contract.

However, subsection C of the same section of the Contract establishes further requirements for the party seeking to be indemnified. Here, LHH has failed to establish that it attempted to tender its defense to MOPC or that the decision by LHH to retain its own counsel

was a result of MOPC's breach. Therefore, an issue of fact remains which prohibits granting summary judgment (*see Goll v American Broadcasting Cos., Inc.*, 73 AD3d 694, 697 [2d Dept 2010]).

Therefore, for the reasons stated *supra*, the motion is granted with respect to vacating that portion of the order dated October 8, 2009 that dismissed LHH's cross-claims against MOPC and restoring the action to the Court's calendar but is denied with respect to LHH's request for summary judgment.

Based on the foregoing, it is

ORDERED that the portion of the order dated October 8, 2009, that dismissed defendant Lenox Hill Hospital's cross-claims against defendant Manhattan Orthopaedics, P.C. is recalled and vacated; and it is further

ORDERED that the portion of the motion to restore the action to the Court's active calendar is granted; and it is further

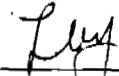
ORDERED that the portion of the motion seeking summary judgment on Lenox Hill Hospital's cross-claims against Manhattan Orthopaedics, P.C. for indemnification is denied.

Dated: 12/22/11

ENTER:

FILED
DEC 27 2011

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