

Borden v Port Auth. of N.Y. & N.J.

2011 NY Slip Op 33579(U)

December 9, 2011

Supreme Court, Queens County

Docket Number: 24092/09

Judge: Janice A. Taylor

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE JANICE A. TAYLOR IAS Part 15
Justice

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SCOTT BORDEN, Index No.:24092/09
Plaintiff(s), Motion Date:10/11/11
- against - Motion Cal. No.: 7
Motion Seq. No: 6

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY and SNOWLIFT LLC,

Defendant(s).

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THE PORT AUTHORITY OF NEW YORK AND NEW Third-Party
JERSEY, Index No.:350288/10
Third-Party Plaintiff(s),

- against -

COVENANT AVIATION SECURITY, LLC, ILLINOIS
NATIONAL INSURANCE COMPANY and NATIONAL
UNION FIRE INSURANCE COMPANY OF
PITTSBURGH,

Third-Party Defendant(s).

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The following papers numbered 1 - 15 read on this motion by the third-party defendants Covenant Aviation Security, LLC and Illinois National Insurance Company for an order granting summary judgment and dismissing the third-party complaint against it; and a cross-motion by the defendant/third-party plaintiff The Port Authority of New York and New Jersey granting summary judgment on the issue of liability on the third-party action.

	<u>Papers</u> <u>Numbered</u>
Notice of Motion-Affirmation-Exhibits-Service.....	1 - 4
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Upon the foregoing papers it is **ORDERED** that the motion and cross-motion are considered together and decided as follows:

This is an action for personal injuries allegedly sustained by plaintiff on December 22, 2008 when he fell on ice located at John F. Kennedy International Airport in the County of Queens, City and State of New York. It is uncontested that, on the date of the accident, plaintiff was an Airport Security Agent employed by third-party defendant Covenant Aviation Security, LLC ("Covenant"), that defendant The Port Authority of New York and New Jersey ("Port Authority") owned the subject property and that defendant Snowlift LLC ("Snowlift") was a snow removal contractor of defendant Port Authority. This action was commenced on September 4, 2009 by the filing of a summons and complaint. On or about June 8, 2010, defendant Port Authority commenced a third-party action against third-party defendants Covenant, Illinois National Insurance Company ("Illinois National") and National Union Fire Insurance Company of Pittsburgh.

By order dated December 2, 2011, this court dismissed the complaint against defendant Snowlift, LLC. This court hereby sua sponte amends the caption to reflect this dismissal.

Third-party defendants Covenant and Illinois National now move, and defendant/third-party plaintiff Port Authority now cross-moves, pursuant to CPLR §3212, for summary judgment. CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, that the cause of action or defense has no merit. The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (see, Grivas v. Grivas, 113 A.D.2d 264, 269 [2d Dept. 1985]; Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp., 76 A.D.2d 68 [4th Dept. 1980]; Parvi v. Kingston, 41 N.Y.2d 553, 557 [1977]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (See, Friends of Animals, Inc., v. Associated Fur Mfrs., 46 N.Y.2d 1065 [1979]; Orwell Bldg. Corp. v. Bessaha, 5 A.D.3d 573 [2d Dept. 2003]).

It is undisputed that, on or about January 25, 2007, defendant/third-party plaintiff Port Authority and third-party defendant Covenant entered into a contract for Covenant to provide security services at John F. Kennedy International Airport. It is also uncontested that third-party defendant Illinois National was Covenant's insurance provider at the time of plaintiff's accident. In support of the instant motion and cross-motion, the moving and cross-moving parties rely on their respective attorney's affirmations, the pleadings, the third-party pleadings and the contract between defendant/third-party plaintiff Port Authority and third-party defendant Covenant.

The third-party complaint seeks an order directing third-party defendants Covenant to indemnify defendant/third-party plaintiff

Port Authority, and third-party defendant Illinois National to provide insurance coverage, in the underlying personal injury action. With the instant motion, the movants assert that Covenant has no obligation to indemnify Port Authority, and Illinois National has no obligation to provide insurance coverage, for plaintiff's claims.

Third-party defendant Covenant's alleged duty to indemnify defendant/third-party plaintiff Port Authority is found in Section 20 of the Part II General Provisions of the contract. Section 20 states, in relevant part:

To the extent permitted by law, the Contractor shall indemnify and hold harmless the Port Authority, its Commissioners, officers, representatives and employees from and against all claims and demands, just or unjust, of third persons (including employees, officers and agents of the Port Authority) arising out of or in any way connected or alleged to arise out of or alleged to be in any way connected with the Contract and all other services and activities of the Contractor under this Contract and for all expenses incurred by it and by them in the defense, settlement or satisfaction thereof, including without limitation thereto, claims and demands for death, for personal injury and for property damage, direct or consequential, whether they arise from the acts or omissions of the Contractor, of the Port Authority, of third persons, or from the acts of God or the public enemy, or otherwise, including claims and demands of any local jurisdiction against the Port Authority in connection with this Contract.

Third-party plaintiff asserts that the contract does not specifically exclude Covenant's employees which means that third-party defendant Covenant must indemnify it in the instant action brought by plaintiff Scott Borden, a Covenant employee. However, it is well-settled that, where a contract is silent as to the obligation to indemnify employees of the Contractor, such an obligation will not be inferred without proof that this was the "unmistakable intent of the parties" (Solomon v. City of New York, 111 AD2d 383, 387 [2d Dept. 1985], affd. 79 NY2d 675 [1987]). See, also, Masi v. Kir Munsey Park 020, LLC, 76 Ad3d 514 [2d Dept. 2010]; Sumba v. Clermont Park Associates, LLC, 45 AD3d 671 [2d Dept. 2007]; Vigiarolo v. Sea Crest Construction Corp., 16 AD2d [2d Dept. 2005]).

In the instant action, the plain language of Section 20 of the Part II General Provisions of the contract does not indicate that it was the express intent of the parties for Covenant to indemnify defendant/third-party plaintiff Port Authority against lawsuits by Covenant's own employees. Thus, this court will not impose such an obligation on the moving third-party defendants. Accordingly, it is,

ORDERED, that third-party defendants Covenant and Illinois National's motion seeking summary judgment and dismissal of the third-party complaint is granted and defendant/third-party plaintiff Port Authority's cross-motion for summary judgment is denied. It is further,

ORDERED, that the third-party complaint is hereby dismissed as against Covenant Aviation Security, LLC and Illinois National Insurance Company. The caption shall be further amended to reflect this dismissal. The amended caption shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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SCOTT BORDEN, Index No.:24092/09
Plaintiff(s),

- against -

THE PORT AUTHORITY OF NEW YORK AND NEW
JERSEY,
Defendant(s).

-----x
THE PORT AUTHORITY OF NEW YORK AND NEW Third-Party
JERSEY, Index No.:350288/10
Third-Party Plaintiff(s),

- against -

NATIONAL UNION FIRE INSURANCE COMPANY OF
PITTSBURGH,
Third-Party Defendant(s).

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Dated: December 9, 2011

JANICE A. TAYLOR, J.S.C.

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