

**Cole v Mraz**

2011 NY Slip Op 34005(U)

October 3, 2011

Sup Ct, New York County

Docket Number: 590359/2010

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN

PART 12

Index Number : 112295/2005

COLE, STEVEN

INDEX NO. 112295/05

vs

MRAZ, JASON

MOTION DATE \_\_\_\_\_

Sequence Number : 013

MOTION SEQ. NO. 013

DISMISS ACTION

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

**MOTION AND CROSS MOTION(S) ARE DECIDED  
IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.**

*pc re 4th party action  
11/2/11 2:15pm*

Dated: 10/3/2011

Paul G. Feinman  
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: CIVIL TERM: PART 12

-----X

STEVEN COLE,  
Plaintiff,

Index Number 112295/2005E  
Mot. Seq. No. 013

-against-

JASON MRAZ, DELICATE PRODUCTIONS, INC.,  
CLEAR CHANNEL ENTERTAINMENT, DELSNER-  
SLATER PRODUCTIONS, LTD and LITTLE BIG  
MAN BOOKING,

**DECISION AND ORDER**

Defendants.

-----X

JASON MRAZ,  
Third-Party Plaintiff,

T.P. Index Number 590743/2006

-against-

DELICATE PRODUCTIONS, INC., CLEAR CHANNEL  
ENTERTAINMENT, DELSNER-SLATER  
PRODUCTIONS, LTD., LITTLE BIG MAN BOOKING,  
THE BEACON THEATRE, and BABYLON  
ENTERPRISES, INC.,

Third-Party Defendants.

-----X

DELICATE PRODUCTIONS, INC.,  
Second Third-Party Plaintiff,

Second T. P. Index 591063/2009

-against-

THE BEACON THEATRE, BEACON THEATRE  
PARTNERS and BABYLON ENTERPRISES, INC.,  
Second Third-Party Defendants.

-----X

DELICATE PRODUCTIONS, INC.,  
Third Third-Party Plaintiff,

Third T.P. Index 590114/2009

-against-

BEACON BROADWAY COMPANY, LLC,  
BEACON CONCESSIONS, INC., BROADWAY  
CONCERTS, INC., BABYLON ENTERPRISES,

INC., and BEACON THEATRE PARTNERS,  
Third Third-Party Defendants.

-----X

BEACON THEATRE PARTNERS,  
Fourth Third-Party Plaintiffs, Fourth T.P. Index 590359/2010

-against-

CLEAR CHANNEL ENTERTAINMENT, INC.,  
CLEAR CHANNEL COMMUNICATIONS, INC.  
and DELSNER-SLATER ENTERPRISES, LTD.,  
Fourth Third-Party Defendants.

-----X

**Appearances on the motion and cross motion:**

**For Beacon Theatre Partners:**  
Gregory Allen, Esq.  
General Attorney, Stae Insurance Fund  
By Trial Counsel: Dillon Horowitz & Goldstein LLP  
Thomas Dillon, Esq.  
11 Hanover Square, 20<sup>th</sup> Fl.  
New York NY 10005

**For Clear Channel and Delsner Slater:**  
Pillinger Miller Tarallo, LLP  
By: Jeffrey T. Miller, Esq.  
Leslie G. Abele, Esq.  
570 Taxter Rd., ste 275  
Elmsford, NY 10523

E-filed papers considered in review of this motion to dismiss and cross-motion for summary judgment:

<b>Papers</b>	<b>E-filing Document Nos.</b>
Notice of Motion, Affirmation, Affidavit, Exhibits	183, 183-1 - 183-15
Affidavit of Service	184
Cross Motion, Exhibits, Affirmation in Support	192, 192-1 - 192-5, 193
Affidavit of Service	192-6
Affirmation in Reply & Opposition	196
Reply Affirmation	198

**PAUL G. FEINMAN, J.:**

Fourth Third-Party defendants Clear Channel Entertainment, Inc., Clear Channel Communication, Inc., and Delsner-Slater Enterprises, Ltd. (hereinafter the Clear Channel defendants), move for an order dismissing the fourth-party summons and complaint based on documentary evidence and failure to state a cause of action (CPLR 3211 [a] [1] and [a] [7]). Fourth third-party plaintiff Beacon Theatre Partners (hereinafter Beacon) cross-moves for an

order granting summary judgment as against the Clear Channel defendants as a matter of law on its contractual indemnification claim. For the reasons set forth below, the motion and cross motion are both denied

In the underlying action, plaintiff, an employee of Beacon, was injured on May 24, 2004, while working as a stagehand in connection with a performance by the musician Jason Mraz (Doc. 183-3 Amended Complaint ¶¶ 1, 23, 24). After extensive motion practice, only Delicate Productions, Inc. remains a direct defendant in this case alleging negligence in the installation and removal of stage lighting equipment, specifically in permitting a leko unit to become loose and strike plaintiff in the head (Amended Complaint ¶¶ 24-25). Beacon is a defendant in the second and third third-party actions brought by Delicate Productions which seeks contribution and common-law indemnification. Beacon has commenced a fourth third-party summons and verified complaint as against the Clear Channel defendants, seeking contractual indemnification and alleging failure to procure liability insurance naming Beacon as an additional insured (Doc. 183-4 Ver. Fourth Third-Party Summ. & Complaint).

#### Motion to Dismiss by Clear Channel defendants

The Clear Channel defendants move to dismiss the fourth third-party complaint on the ground that the April 14, 2004 license agreement clearly provides that they have no duty to Beacon under the particular circumstances of plaintiff's accident, and that the complaint fails to state a cause of action (Doc. 183-12 Beacon Theatre Agreement). They also seek dismissal of the cause of action concerning failure to provide insurance coverage on the ground that they procured the insurance as required, although their insurer subsequently declined coverage.

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as

alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001], citing *Tenuto v Lederle Labs.*, 90 NY2d 606, 609-610 [1997]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). When presented with a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211 (a) (7), it must be determined whether “from the pleadings’ four corners ‘factual allegations are discerned which taken together manifest any cause of action cognizable at law.’” (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 289 [1st Dept 2003], quoting *511 W. 232nd Owners Corp. v Jennifer Realty Corp.*, 98 NY.2d 144, 151-152 [2002]). A motion to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence unequivocally contradicts plaintiff’s factual allegations and utterly establishes a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; see *Ladenburg Thalmann & Co., Inc. v Tim’s Amusements, Inc.*, 275 AD2d 243, 246 [1st Dept. 2000]).

The Clear Channel defendants argue that the license agreement signed by them with Beacon on April 14, 2004, for the use of the theater for the Jason Mraz performance, clearly shows no intention to hold them liable for the injuries sustained by plaintiff based on his employment, the time of the accident, and his location at the time of the accident. In particular, Article 1 of the agreement states in relevant part that Beacon agreed to license to defendants:

“the use of the auditorium and stage platform of Beacon Theatre. . . together with the corridors, foyers and vestibules leading thereto (collectively the ‘Premises’) during the following hours on the following dates and solely for the attraction designated as follows:

“Description of attraction:                      Jason Mraz

“Date(s) . . . . . :	May 24, 2004
“Duration of rental:	8:00 - 11:00 p.m.”

(Doc. 176-2 Agreement § 1). The Clear Channel defendants argue that as plaintiff was injured by a hanging leko light as he stood on a truss suspended above the stage, the accident occurred in an area not considered part of the premises leased to them; in particular, plaintiff was not on the “stage platform.” (Doc. 183-1 Miller Aff. in Supp. pp. 5-6). They argue that plaintiff was injured after the concert, during the “load-out” at about 11:50 p.m., outside the duration of the rental agreement (Doc. 183-1 Miller Aff. in Supp. pp. 5, 10). In addition, plaintiff was Beacon’s employee and under its control and the agreement shows that no Clear Channel defendants were involved. Article 7 of the agreement, pertaining to “Stage Work,” provides that “[a]ll work including, without limitation, the setting up of . . . lighting, upon the stage or elsewhere in or about the Premises in connection with an Engagement . . . shall be done under the supervision of and with the prior express written approval of [Beacon]” (Beacon Theatre Agreement § 7). The Clear Channel defendants were not to provide any additional services, all of which was to be arranged, negotiated, and furnished by Beacon, but only to pay for them (Beacon Theatre Agreement § 18). The Clear Channel defendants as licensee, were “completely responsible solely for its own agents and employees and all of the performers” (*id*).

Defendants also argue that the license agreement’s indemnification provision clearly does not pertain to plaintiff’s injuries. Article 27 states that the Clear Channel defendants agree to indemnify and hold harmless Beacon as to any claims “resulting from or arising out of this Agreement, the use of the Premises, or any Engagement, Performance....” (Beacon Theatre Agreement § 27). Defendants argue that plaintiff’s injuries did not arise “out of” the agreement,

but rather out of the duties and obligations reserved solely to Beacon as owner, that is to say the load-out, work in the area above the stage platform, and work done after the rental hours (Doc. 183-1 Aff. in Supp. p. 14). They cite *Niagara Frontier Transp. Auth. v Tri-Delta Constr. Corp.*, which cautions that the language of an indemnity provision should “not be extended to include damages which are neither expressly within [the agreement] terms nor of such character that it is reasonable to infer that they were intended to be covered under the contract” (107 AD2d 450, 453 [4<sup>th</sup> Dept 1985], *affd* 65 NY2d 1038 [1985]). Indeed, the general rule as to indemnification clauses is that if a party is not under a legal duty to indemnify, the contract assuming the obligation must be strictly construed to avoid reading a duty into it not intended by the parties (*see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

Beacon presents several arguments in opposition and in its cross motion, including that the law provides that where parties enter into a license agreement at arms’ length, a broad indemnity provision will be upheld and will not be violative of either GOL § 5-321 (prohibiting lessors from requiring lessees to indemnify the lessor for the lessor’s negligence) or §322.1 (concerning owners and contractors). It points to *Karp v Federated Dept. Stores, Inc.*, in support of its argument (301 AD2d 574 [2d Dept 2003]). *Karp* states that as to indemnification, a license is not governed by GOL § 5-231 (301 AD2d at 575). Addressing the license agreement at issue therein between the third-party plaintiff department store and the third-party defendant wedding center which licensed space in the store’s premises, the Court held that the store was entitled to rely on the license’s “unambiguous” provision setting forth the parties’ intention that the wedding center would indemnify the store for injuries to representatives, invitees, or customers of the wedding center, unless the injury resulted directly or solely from the store’s “gross

negligence or willful misconduct” (301 AD2d at 575). It also points to *McCleary v City of Glens Falls*, 32 AD3d 605 (3d Dept 2006), involving decedent’s claims following a snowmobiling accident. The County and the local snowmobile club were among the third-party defendants and cross-claimants, and the Court held that even though the County had not been found liable, the club was required to indemnify the County for its defense costs based on the parties’ trail license agreement which provided that “the Club agreed to defend the County against any claims arising from the Club’s ‘activities, conduct, omissions, non[ ]feasance or misfeasance’ in developing and maintaining the trails under license from the City”; the duty to defend was triggered because the third-party complaint alleged that the County failed to properly monitor the trail system (*McCleary* at 610).

Defendants have not established that dismissal of the complaint seeking contractual indemnification is warranted. Their argument that plaintiff’s injuries did not arise out of the agreement does not address the agreement’s provision that the Clear Channel defendants agreed to indemnify Beacon not only as to claims arising out of the agreement, but for “*the use of the Premises, or any Engagement*” (Beacon Theatre Agreement § 27, emphasis added), which would certainly appear to pertain to the Mraz performance. Their argument that plaintiff was injured after the duration of the rental period overlooks Article 2’s provision that they licensed the use of the Premises for “up to 4 hours each for load-in and load-out and 3 ½ hours for the Performance” (Beacon Theatre Agreement § 2 [i]). The further provision that the “exact period of time for load-in, load-out and rehearsal shall be at the sole discretion of the Licensor” does not, contrary to defendants’ additional argument, show that Beacon agreed to be solely responsible for load-out. Their argument that the agreement’s definition of the “Premises” leased by them, namely

the auditorium, stage platform, and the corridors, foyers, and vestibules leading thereto, explicitly excludes the area above the stage, seems at the very least to raise a question of intent by the parties, given that lighting was apparently used in the performance. They offer no case law or statutory authority to support their argument that because the plaintiff is an employee of Beacon, Beacon cannot rely on the broad language of the Article 27 of the lease agreement. Therefore, for all the above reasons, the Clear Channel defendants' motion to dismiss the fourth third-party complaint seeking contractual indemnification is denied.

Turning to the other branch of their motion seeking to dismiss the claim that they did not procure insurance as required under the agreement, the Clear Channel defendants provide an affidavit by a senior claims analyst with Chartis, formerly known as American International Group, Inc., who states that the Clear Channel defendants purchased insurance in accordance with the terms of the agreement (Doc. 183-2 Livesay Aff. ¶¶ 1-6). Defendants provide a copy of what they assert is the policy at issue (Doc. 183-13), as well as a nine-page letter dated August 4, 2010, from Chartis to Beacon's attorney, setting forth the insurer's reasons for declining to provide coverage to Beacon as concerns plaintiff's claim (Doc. 183-14). Defendants contend that as they adhered to the terms of the agreement and procured insurance, Beacon's remedy, given the insurer's declination to cover, is to seek a declaratory judgment action against the insurer (Doc. 183-1 Miller Aff. ¶ 33).

Beacon argues in opposition that the very fact that its claim was declined means that the Clear Channel defendants did not comply with Article 26 of the agreement to "provide and deliver to Licensor a copy of its insurance policy . . . providing broad form public liability coverage for bodily injury, death and property damage in the amount of \$1,000,000 for each Engagement . . . insuring the Licensor as co-insured and naming as additional insured [other

Beacon entities].” (Beacon Theatre Agreement § 26). As the complaint states a cause of action and the Clear Channel defendants have shown only that they procured insurance, but not that it was in accordance with what was contractually required by Beacon, this branch of their motion must also be denied at this juncture, although it may be that at the end of the day Beacon’s remedy is in fact a declaratory action against the insurer.

Cross motion by Beacon for summary judgment and dismissal

Beacon’s cross motion for an order granting summary judgment pursuant to CPLR 3212 as a matter of law on its contractual indemnification claim is procedurally improper, as the defendants have not yet served their answer (CPLR 3212 [a]). Although CPLR 3211 (c) provides that the court may treat a motion to dismiss as a motion for summary judgment, this is only permitted where the court gives “adequate notice” to the parties, which was not done in this case. Accordingly, Beacon’s pre-answer motion is denied without prejudice. Its motion in the alternative, to dismiss pursuant to CPLR 3211 is also improper procedurally, given that there is no cause of action asserted by the Clear Channel defendants to be dismissed.


It is

ORDERED that the motion and cross motion are both denied in their entirety; and the Clear Channel defendants are to serve and upload into the NYSCEF system their fourth third-party answer within 20 days of the date of entry of this order; and it is further

ORDERED that the parties in the fourth third-party action are directed to appear for a preliminary conference in Supreme Court, 60 Centre Street, rm. 212, on November 2, 2011, at 2:15 p.m.

This constitutes the decision and order of the court.

Dated: 10/3/2011  
New York, New York

  
J.S.C.