Lugo v Sunbyrd Realty Corp.
2012 NY Slip Op 33225(U)
September 6, 2012
Sup Ct, Bronx County
Docket Number: 84022/10
Judge: Mark Friedlander

NEW YORK SUPREME COURT - COUNTY OF BRONX
PART IA-25

JOSEPH LUGO,

Plaintiff,

-against-

SUNBYRD REALTY CORP.,

Defendant.

MEMORANDUM DECISION/ORDER
Index No.: 301111/10

SUNBYRD REALTY CORP.,

Third-Party Plaintiff,

-against-

RICHMOND ELEVATOR CO. INC.,

Third-Party Defendant.

Third-Party Index No.: 84022/10

HON. MARK FRIEDLANDER

Third-party defendant, Richmond Elevator Co. Inc. ("Richmond") moves for an order: (1) pursuant to CPLR§3211(a), dismissing the third-party complaint; and (2) pursuant to CPLR§3212, for summary judgment. The motion is decided as hereinafter indicated.

This is an action by plaintiff, Joseph Lugo ("Lugo"), to recover monetary damages for personal injuries allegedly sustained as a result of the negligence of defendant, Sunbyrd Realty Corp. ("Sunbyrd"). More specifically, Lugo alleges that he was an elevator mechanic employed by Richmond. On July 6, 2009, while in the course of his employment with Richmond, he fell off a ladder while trying to open a door (which had no doorknob) to the motor room in the premises at 3150 Rochambeau Avenue, Bronx, New York (the "premises"), owned by Sunbyrd.

Sunbyrd commenced a third-party action against Richmond. The third-party complaint

contains three causes of action. The first cause of action seeks contractual indemnification from Richmond. The second cause of action seeks common law contribution and/or indemnification. The third cause of action asserts: that Richmond was contractually obligated to obtain general liability insurance naming Sunbyrd as an additional insured for all injuries and damages arising out of Richmond's work at the premises; that Richmond failed to procure said insurance; and that Richmond is liable to Sunbyrd for all costs and expenses of this litigation, including attorneys' fees, expenses, disbursements and costs, and for any amount for which Sunbyrd may be liable to Lugo as a result of Richmond's contractual breach.

Richmond contends that Sunbyrd's third-party complaint must be dismissed on the grounds that: (1) there is no provision in any contract between Richmond and Sunbyrd that provides for contractual indemnification; (2) Lugo did not sustain a "grave injury," and common law contribution or indemnification is barred pursuant to the Workers' Compensation Law; and (3) there is no provision in any contract between Richmond and Sunbyrd that provides for Richmond to obtain general liability insurance naming Sunbyrd as an additional insured.

Richmond and Sunbyrd entered into an Elevator Maintenance Agreement ("Agreement"), dated July 28, 1997. This was the only agreement between them. The Agreement, by it terms, was effective for one year, commencing August 1, 1997, through July 31, 1998. Notwithstanding the Agreement's one year term and the lack of any formal written renewal, Richmond and Sunbyrd continued the Agreement from year to year, with the only modification thereto being an adjustment of payments. Page 3 of the Agreement, provides, in relevant part, as follows:

> RICHMOND ELEVATOR CO. is insured at all locations where it undertakes business operations for the types of insurance and limits of liability as follows:
>
> WORKMEN'S COMPENSATION AND EMPLOYER'S LIABILITY: Equal to or in excess of limits of Workmen's Compensation Laws in New York and New Jersey.

> COMPREHENSIVE LIABILITY: Up to one million dollars ($1,000,000) combined single limit per occurrence.
>
> Coverage's (*sic*) Include: Bodily Injury liability and Property Damage liability.
>
> It is agreed that we do not assume possession or control of any part of the equipment but such remains yours exclusively as the owner or lessee thereof. We shall not be liable for any loss, damage, delay nor be required to repair or replace equipment due to any cause beyond our reasonable control including, but not limited to, acts of government, strikes, lockouts, fire, explosion, theft, water, riot, civil commotion, war, malicious mischief, act of God, or non operation of equipment. Under no circumstances shall we be liable for consequential damages.
>
> This agreement shall constitute the entire agreement between the parties, and all prior representations or agreements, whether written or oral are superceded.

Sunbyrd asserts that, during the course of negotiations with Richmond, the subject of indemnification came up and that Walter Wilfinger, Sunbyrd's principal, believed they were going to have an insurance policy indemnifying Sunbyrd. Sunbyrd further contends that the Agreement is ambiguous.

The court has reviewed the entire Agreement, including the provisions quoted above, and finds that there is nothing in the Agreement which provides for Richmond to either contractually indemnify Sunbyrd or procure general liability insurance showing Sunbyrd as a named insured. Contrary to Sunbyrd's contention, the Court does not find any ambiguity in the Agreement, and, while parol evidence can be used to establish or rebut asserted facts, it may not be used to vary unambiguous terms of a contract. *Schron v. Troutman Saunders LLP*, 97 A.D.3d 87 (1st Dept. 2012). Furthermore, the Agreement specifically states that "all prior representations or agreements, whether written or oral are superceded."

It is undisputed that the injuries allegedly sustained by Lugo as a result of the accident, as stated in Lugo's bill of particulars, do not constitute a "grave injury" as defined by Section 11 of the Workers' Compensation Law. A lawsuit seeking common law contribution or

indemnification may not be maintained against an employer who maintains Workers' Compensation Insurance, absence a "grave injury" or a written contract of indemnification. *Rodriques v. N & S Bldg. Contrs., Inc.*, 5 N.Y.3d 427 (2005).

Based upon the foregoing, Sunbyrd's third-party complaint against Richmond is dismissed in its entirety.

The foregoing constitutes the Decision and Order of the Court.

Dated: 9/6/12

MARK FRIEDLANDER, J.S.C.