McCarthy v Great Jones Current Project, Inc.
2013 NY Slip Op 30169(U)
January 14, 2013
Supreme Court, New York County
Docket Number: 112910/2007
Judge: Joan A. Madden
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SCANNED ON 1/30/2013

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon Joan A Madden

Justice

PART 11

Index Number : 112910/2007
MCCARTHY, CAROLE
vs.
GREAT JONES CURRENT
SEQUENCE NUMBER : 006
SUMMARY JUDGMENT

INDEX NO. ____________
MOTION DATE ____________
MOTION SEQ. NO. ____________

The following papers, numbered 1 to _____, were read on this motion to/for ____________

Notice of Motion/Order to Show Cause — Affidavits — Exhibits ____________ | **No(s).** ____________

Answering Affidavits — Exhibits ____________ | **No(s).** ____________

Replying Affidavits ____________ | **No(s).** ____________

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed Memorandum Decision and Order.

FILED
JAN 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: January 14, 2013

____________, **J.S.C.**

1. CHECK ONE: .... ☐ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. CHECK AS APPROPRIATE: ....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. CHECK IF APPROPRIATE: .... ☐ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11
---X
Carole McCarthy,

Plaintiff,

-against-

Index No. 112910/2007

Great Jones Current Project, Inc., Michael Connors, and
Carole Ferrara Associates, Inc. d/b/a CFA Management,

Defendants.
---X

FILED
JAN 30 2013
NEW YORK
COUNTY CLERK'S OFFICE

Joan Madden, J.:

Defendants Great Jones Current Project, Inc. (Great Jones) and Carole Ferrara Associates, Inc. d/b/a CFA Management (CFA) move for an order, pursuant to CPLR 3124, compelling defendant Michael Connors to comply with certain discovery demands (motion seq. 005).Great Jones and CFA move for an order, pursuant to CPLR 3212, granting summary judgment on their cross claim for contractual indemnification against Connors, and an order directing that, as a matter of law, their settlement with McCarthy was reasonable, and directing Connors to indemnify them for the amount of the settlement and the attorneys' fees and expenses that they incurred in defense of this lawsuit (motion seq. 006).[1] Connors cross-moves for an order, pursuant to CPLR 3212, granting summary judgment in his favor, and dismissing the contribution and indemnification cross claims asserted against him by Great Jones and CFA.

The underlying facts and procedural history of this action are fully set forth in this court's prior decision and order dated October 15, 2010 (the prior order), and will not be repeated herein, except as is necessary for clarification.

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[1]Motion sequence numbers 005 and 006 are consolidated herein for disposition.

[* 3]

Plaintiff Carole McCarthy alleges that she sustained serious personal injury on June 16, 2007, at approximately 1:00 a.m., while visiting Connors at his art gallery, located in a co-op unit in a building owned by Great Jones and managed by CFA. McCarthy alleges that the accident occurred while she was on the mezzanine storage loft, which had been converted by Connors into a sleeping loft approximately 11 years earlier, and which overlooked the main floor of the unit. She alleges that the loft was dimly lit, and that she was kneeling next to a bed abutting an interior knee wall, 21 inches in height. Connors had previously installed louvered shutters on the top of the knee wall. McCarthy alleges that, believing the wall behind her to be solid to the ceiling, she leaned back, and then fell backwards, over the knee wall and through the shutters, down 10 feet to the main floor. She further alleges that, at the time of the accident, the shutters were closed, but not latched, and offered no protection from a fall.

McCarthy alleges that Connors, Great Jones, and CFA negligently created, or permitted to continue to exist, a defective, dangerous, trap-like condition, and failed to provide a guardrail, handrail, or legal parapet wall that would have protected her from a fall. McCarthy also alleges the defendants' conduct constitutes violations of the statutes, ordinances, rules, and regulations applicable to New York City buildings and multiple dwellings.

In the prior order, this court denied the summary judgment motions made by Great Jones and CFA and by Connors, holding that there exist numerous triable issues of fact, including whether the knee wall and shutters constituted inherently dangerous and defective conditions, and whether Great Jones, an out-of-possession landlord with a right of reentry, and CFA, the building managing agent, had actual or constructive notice of any dangerous condition.

Subsequently, Great Jones and CFA moved for leave to renew, and Connors cross-moved

for reargument and/or renewal. By order dated November 21, 2011, this court permitted Great Jones and CFA to withdraw their motion. This court also granted Connors' cross motion, and upon reargument and/or renewal, adhered to its original decision.

On November 11, 2011, McCarthy settled her claims against Great Jones and CFA for the sum of $220,000.

Great Jones and CFA now seek an order granting summary judgment on their contractual indemnification cross claim asserted against Connors, holding that, as a matter of law, their settlement with McCarthy was reasonable, and directing Connors to indemnify Great Jones and CFA for the settlement and for the attorneys' fees and expenses that they incurred in defense of this action.

In opposition, Connors cross-moves for an order granting summary judgment in his favor, and dismissing the cross claims asserted by Great Jones and CFA for common-law contribution and indemnification and contractual indemnification.

As a threshold matter, the court finds that, by timely opposing Connors' cross motion on the merits, and replying to Connors' opposition to the main motion, Great Jones and CFA have effectively waived any right that they otherwise may have had to object to Connors' late service of his motion papers (*see Piquette v City of New York*, 4 AD3d 402, 403 [2d Dept 2004]; *Adler v Gordon*, 243 AD2d 365, 365 [1st Dept 1997]). The court notes that Great Jones and CFA do not allege that they have suffered any prejudice as a result of Connors' admittedly late service (*Vento v City of New York*, 247 AD2d 535, 535 [2d Dept 1998]).

The parties next dispute whether the indemnification clause set forth in the 1996 proprietary lease between Great Jones and Connors (the lease) is enforceable under General

Obligations Law (GOL) § 5-321. Great Jones contends that the clause is enforceable, while Connors contends that the clause is so broadly worded as to shift the responsibility for Great Jones' liability to Connors, in violation of the GOL.

Section 5-321 of the GOL provides as follows:

> Every covenant, agreement or understanding in or in connection with or collateral to any lease of real property exempting the lessor from liability for damages for injuries to person or property caused by or resulting from the negligence of the lessor, his agents, servants or employees, in the operation or maintenance of the demised premises or the real property containing the demised premises shall be deemed to be void as against public policy and wholly unenforceable

(GOL § 5-321). Thus, an indemnification clause in a proprietary lease is not enforceable under the GOL where it shifts the entire responsibility for damages from the lessor to the lessee, regardless of the lessee's own negligence, or where the clause contemplates a complete, rather than partial, shifting of liability from the lessor to the lessee, inasmuch as it makes no exception for the lessor's own negligence (*Wagner v Ploch*, 85 AD3d 1547, 1548 [4th Dept 2011]; *see* GOL § 5-321) and does not limit the lessor's recovery from the lessee to the insurance proceeds (*DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656, 659 [2d Dept 2008]).

Here, the indemnification clause provides in relevant part that:

> [T]he Lessee [Connors] agrees to save the Lessor [Great Jones] harmless from any liability, loss, damage and expense arising from injury to person or property occasioned by the failure of the Lessee to comply with any clause hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person dwelling or visiting in the apartment, or by the Lessor, its agents, servants or contractors **while acting as an agent for the Lessee** . . . This paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against Lessee

(Lease, ¶ 11 [emphasis added]).

Similar indemnification clauses set forth in proprietary leases have been found not violative of GOL § 5-321, and, therefore, have been enforced by the court (*see e.g. Agrispin v 31 E. 12th St. Owners, Inc.*,77 AD3d 562, 563 [1st Dept 2010]). The lessor is entitled to full contractual indemnification, provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citation omitted]). Here, by its clear and unambiguous terms, the clause obligates Connors to hold Great Jones harmless from liability caused by the conduct of Connors, his guests, or Great Jones, but only while Great Jones is acting as Connors' agent. Therefore, the clause is not so broadly worded so as to encompass the shifting of responsibility from Great Jones to Connors, where the liability is caused by Great Jones' conduct on its own behalf.

Further, GOL § 5-321 does not bar enforcement of the lease's indemnification provision "where there is no evidence of any negligence by the landlord, which did not supervise or control [the] work and whose liability . . . is purely statutory" (*Correa v 100 W. 32nd St. Realty Corp.*, 290 AD2d 306, 306 [1st Dept 2002]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]; *Colozzo v National Ctr. Found., Inc.*, 30 AD3d 251, 252 [1st Dept 2006]).

For these reasons, the subject indemnification clause is enforceable.

Next, the parties dispute whether the clause was triggered in the underlying circumstances here. Specifically, they dispute whether the record conclusively demonstrates that Connors was negligent, that Great Jones and CFA were negligent, that Great Jones and CFA implicitly

approved Connors' renovations to the storage mezzanine, and that the negligence of any of them caused McCarthy's accident, in whole or in part.

There is no dispute that Connors altered the unit by installing shutters on top of the knee wall and converting the storage mezzanine to a sleeping loft, without first obtaining written permission from Great Jones. In addition, the record indicates that it is not unlawful for persons to be present on the mezzanine level, that the knee wall was present in the unit before Connors purchased it, and that, during the 11-year period between his purchase and McCarthy's accident, Great Jones and CFA never objected to the changes Connors made, nor informed him that he was improperly using the storage mezzanine as a sleeping loft. The record includes testimony that Great Jones and CFA visited the unit occasionally during that period, but does not conclusively evidence that they saw, and tacitly approved, the changes made by Connors.

Under these circumstances, triable issues of fact exist regarding as to whether Great Jones and CFA had actual or constructive notice of any dangerous condition in connection with Connors' use of the storage mezzanine as a sleeping loft and if they did, whether any failure object, complain to, or inform Connors that he was improperly using the storage mezzanine as a sleeping loft arose constituted negligence. Triable issues also exist regarding whether Great Jones' affirmative approval of Connors' purchase of the unit constitutes approval of the structural condition of the unit.

Thus, the record does not conclusively demonstrate that Great Jones and CFA were not actively, rather than purely derivatively, negligent, or that such negligence was not a cause of McCarthy's accident. "Where a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature"

(*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012]); *see also*, *Prenderville v. International Service Systems,* 10 AD3d 334, 338 [1st Dept 2004]).

Next, contrary to Connors' contention, the doctrine of law of the case does not apply to this determination (*see Armetta v General Motors Corp.*, 158 AD2d 284, 285 [1st Dept 1990] ["a ruling denying a prior motion for summary judgment is not necessarily *res judicata* or the law of the case that there is an issue of fact in the case that will be established at the trial"] [internal quotation marks and citation omitted]). However, inasmuch as no new evidence has been submitted by the parties, the present determination that triable issues exist sufficient to preclude summary judgment is based on the same evidentiary record as was the prior order.

In addition, Great Jones and CFA are not estopped in equity from seeking indemnification based upon Connors' alleged lease violations and improper use of the storage mezzanine, by virtue of their 11-year failure to object to such conduct. The "doctrine precludes a party at law and in equity from denying or asserting the contrary of any material fact which he has induced another to believe and to act on in a particular manner" (*Holm v C.M.P. Sheet Metal*, 89 AD2d 229, 234 [4th Dept 1982]). "There does not have to be an actual attempt to mislead. It is sufficient that the party being estopped knew or had reason to believe that their acts or inaction might prejudice the party asserting the estoppel" (*Sterling v Interlake Indus.*, 154 FRD 579, 585 [ED NY 1994] [applying New York law]). Here, the record does not conclusively demonstrate that Great Jones and CFA ever considered notifying Connors, nor that they had reason to believe that their failure to complain might prejudice Connors.

Next, the parties dispute whether the settlement was reasonable, as a matter of law.

> [I]t is well established under New York law that, where an

> indemnitor does not receive notice of an action settled by the indemnitee, 'in order to recover reimbursement [for the settlement], [the indemnitee] must establish that [it] would have been liable and that there was no good defense to the liability'. Where the indemnitor does receive notice of the claim against the indemnitee, however, 'the general rule is that the indemnitor will be bound by any reasonable good faith settlement the indemnitee might thereafter make

(*Deutsche Bank Trust Co. of Ams. v Tri-Links Inv. Trust*, 74 AD3d 32, 39-40 [1st Dept 2010] [internal citation omitted]).

There is no real dispute that Connors has been on notice of the claims against him since November 2007, when Great Jones and CFA served their answer and cross claim to the amended complaint, although Connors contends that he did not receive prior notice of the settlement or settlement amount, and did not approve the settlement. The dollar amount of the settlement is reasonable, given the undisputed extent of McCarthy's injuries, which required surgical intervention and an extensive period of recouperation. However, as discussed above, until a determination is made apportioning liability, if any, among Connors, Great Jones, and CFA, summary judgment may not be granted on the contractual indemnification cross claim.

Next, the parties dispute whether, under the doctrine of voluntary payment, Great Jones and CFA waived their right to contractual indemnification when they settled McCarthy's claims against them.

The common-law doctrine of voluntary payment "bars recovery of payments voluntarily made with full knowledge of the facts, and in the absence of fraud or mistake of material fact or law" (*Dillon v U-A Columbia Cablevision of Westchester*, 100 NY2d 525, 526 [2003]). In general, the doctrine is applied to circumstances where a plaintiff seeks recovery of a payment

that it made voluntarily (*Gimbel Bros. v. Brooks Shopping* Ctrs., 118 AD2d 532 (2d Dept 1986)(holding that plaintiff was not entitled to recover "Sunday charges" voluntarily paid to its landlord).

The doctrine has no application to the circumstances here. First, it cannot be said that Great Jones and CFA made the settlement payment voluntarily, in view of Connors' refusal to negotiate and this court's finding of triable issues regarding their negligence (*see Hertz Corp. v Government Empls. Ins. Co.*, 250 AD2d 181, 188 [1st Dept 1998][holding that settlement of personal injury action was not voluntary where the settling defendant timely appraised co-defendant in that action of settlement efforts and co-defendant declined to participate in the defense of the lawsuit or to contribute to the settlement]). From the inception of this action, Connors has denied all liability, and refused to participate in settlement negotiations. Connors adhered to this position, even though, in the prior order, this court held that triable issues existed regarding whether Connors, as the owner of the shares appurtenant to the unit where his guest sustained injury, Great Jones, as the out-of-possession landlord with right of reentry, and CFA, as the managing agent, were negligent, and, if so, whether that negligence caused McCarthy's accident in whole or in part. In light of the prior order, Great Jones and CFA recognized that they faced potential legal liability to McCarthy, and decided to settle McCarthy's claims. For these reasons, Connors cannot be absolved from liability, if any, for his share of the settlement amount.

That branch of the motion by Great Jones and CFA to recover the attorneys' fees that they incurred in defense of this action is denied. An indemnitee is not entitled to recover attorneys' fees where, as here, the indemnification provision does not expressly authorize such recovery

(*Waverly Mews Corp. v Waverly Stores Assoc.*, 294 AD2d 130, 132 [1st Dept 2002], citing *Matter of A.G. Ship Maintenance Corp. v Lezak*, 69 NY2d 1, 5 [1986] ["(A)ttorneys' fees and disbursements are incidents of litigation and the prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties or by statute or court rule"]).

For the reasons above, the branches of the motion by Great Jones and CFA and the cross motion by Connors for summary judgment on the contractual indemnification cross claim are denied.

That branch of Connors' cross motion for summary judgment and dismissal of the cross claim for common-law contribution is granted. Pursuant to GOL § 15-108 (c), Great Jones and CFA waived that cross claim when they settled the claims asserted against them by McCarthy. "A tortfeasor that has obtained its own release from liability shall not be entitled to contribution from any other person or entity" (*Brazell v Wells Fargo Home Mtge., Inc.*, 42 AD3d at 409; *see also*, *Farrell v. Gristede's Supermarkets, Inc.*, 50 AD3d 603, [1st Dept 2008][store's settlement with personal injury plaintiff, barred store's cross claim for contribution from adjoining landowner).

That branch of Connors' cross motion for summary judgment and dismissal of the cross claim for common-law indemnification is denied. As held above, triable issues regarding each party's negligence remain.

Last, Great Jones seeks to compel Connors to respond to Great Jones' March 3, 2011 demands for discovery and inspection of documentation regarding his assets.

In opposition, Connors contends that the demand is untimely, and that the information

sought by Great Jones is confidential.

Specifically, Great Jones seeks production of Connors' asset information, including, but not limited to, Connors' businesses, properties, bank accounts, and vehicles, on the ground that Connors has repeatedly misrepresented his financial ability to cover any judgment or contribute to a settlement here. Great Jones contends that, although Connors does not possess liability insurance, it has discovered that Connors owns his own antiques business, as well as real estate in Maine, Florida, and St. Croix, in addition to the unit where the accident occurred.

The motion to compel is denied. The discovery demand is untimely on the ground that discovery closed on December 9, 2009, when McCarthy filed a note of issue and certificate of readiness for trial. Further, Great Jones has failed to demonstrate any unusual or unanticipated circumstances that developed after service of the note of issue, nor has it shown the existence of substantial prejudice, absent production of the information sought (*see Ahroner v Israel Discount Bank of N.Y.*, 79 AD3d 481, 483 [1st Dept 2010]; 22 NYCRR 202.21 [d]).

Moreover, although Great Jones contends that the information is essential to ensure that Connors does not attempt to transfer his assets in order to render himself judgment proof, the record is devoid of any evidence that Connors possesses an intent to defraud (*see Corsi v Vroman*, 37 AD3d 397, 397 [2d Dept 2007]; *see also* CPLR 6201 [3]). There is no dispute that Connors has actively participated in all phases of this action, and has owned property, resided, and worked in Manhattan for many years.

Accordingly, it is

ORDERED that motion sequence number 005 to compel discovery is denied; and it is further

ORDERED that motion sequence number 006 for summary judgment is denied; and it is further

ORDERED that the cross motion for summary judgment is granted to the limited extent of dismissing the second cross claim for common law contribution asserted by defendants Great Jones Current Project, Inc. and Carole Ferrara Associates, Inc. d/b/a CFA Management against defendant Michael Connors and that cross claim is dismissed; and it is further

ORDERED that the parties shall appear for a pre-trial conference in Part 11, room 351 on January 17, 2013 at 3:00 pm.

Dated: January 14, 2013

ENTER:

_________________________ J.S.C.

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JAN 30 2013
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