

Persaud v VNO 100 W. 33rd St. LLC

2013 NY Slip Op 30442(U)

February 22, 2013

Supreme Court, New York County

Docket Number: 109940/2010

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
ustice

PART 8

Index Number : 109940/2010
PERSAUD, MAHAIPAUL
vs
VNO 100 WEST 33RD STREET
Sequence Number : 002
DISMISS

INDEX NO. 109940/10
MOTION DATE 9/10/12
MOTION SEQ. NO. 002

The following papers, numbered 1 to 17, were read on this motion for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____

No(s) 5-12

Answering Affidavits — Exhibits _____

No(s) 13-19

Replying Affidavits _____

No(s) 15-17

Upon the foregoing papers, it is ordered that this motion is

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

MAR 05 2013

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 2/22/13

Joan M. Kenney
JOAN M. KENNEY 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS Part 8

-----X
Mahaipaul Persaud and Ruthann Persaud,

Plaintiffs,

-against-

VNO 100 West 33rd St. LLC, Vornado
Office Management LLC, W5 Group LLC
and Waldorf Holding Corp.,

Defendants.
-----X

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion
to dismiss.

Papers

Notice of Motion, Affirmation, and Exhibits
Opposition Affirmation and Exhibits
Reply Affirmation

FILED

MAR 05 2013

Numbered

1-12
13-14
15-17

In this personal injury action, defendants, **NEW YORK COUNTY CLERK'S OFFICE** VNO 100 West 33rd St. LLC, Vornado Office Management LLC, Waldorf Holding Corp. (Waldorf), move for an Order, pursuant to CPLR 3212, dismissing the cross-claims/third-party claims of VNO 100 West 33rd St. LLC (VNO), and Vornado Office Management LLC (Vornado), as against them.

Factual Background

On or about July 27, 2010, plaintiffs initiated this action against all defendants. The claim arises from a personal injury plaintiff, Mahaipaul Persaud, allegedly sustained on April 7, 2010 (the accident) while working on a demolition site at Suite 911, 100 West 33rd St., New York, NY (the premises).

On March 29, 2012 all parties appeared for a status conference before the Court. The parties entered into a so-ordered stipulation wherein the plaintiff agreed to discontinue the action,

with prejudice, against Waldorf and W5. The “so-ordered” stipulation notes, however, that the cross-claims survive. Thereafter, by stipulation dated May 1, 2012, the parties “converted” the cross-claims by Vornado/VNO against Waldorf/W5 into “third-party” claims. This second stipulation is not “so-ordered” by the Court and a third-party action is not recorded in the Court’s docket. Accordingly, whatever the parties’ intent may have been in converting cross-claims into a “third-party” claim was actually not effectuated. To commence a third-party action, an index number and appropriate fees must be obtained/paid, together with service of a third-party complaint. Nevertheless, this Court is considering this within application to dismiss cross-claims, as there is no evidence that a third-party action was commenced; despite the parties’ stipulation dated May 1, 2012.

Briefly, on or about July 21, 2010, Waldorf/W5 and Vornado/VNO entered into an unsigned Purchase Order Agreement for the demolition of the premises. Attached to the Purchase Order is a list of terms and conditions together with a contribution/indemnification provision (the contract). This contract post-dates the date of the accident.

When plaintiff sustained the alleged injury he was working for Calvin Maintenance Company (Calvin), employees of Waldorf/W5, making plaintiff a “special employee” of Waldorf/W5.

Arguments

Moving defendants Waldorf/W5 argue that Vornado/VNO is not entitled to contractual indemnification, as no contract was in effect among the parties on the date of plaintiff’s accident; and that the cross-claims for contribution and indemnification must also fail, as they were released from any liability on plaintiffs’ purported injuries when the matter was discontinued against them with prejudice.

* 4]

Vornado/VNO maintains that their claims are not barred because plaintiff is not a special employee of movants; the contract was in effect at the time of the accident; and plaintiffs' stipulation of discontinuance specifically preserved Vornado/VNO's right to seek contribution and/or indemnity from Waldorf/W5.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion 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. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]).

A right to indemnity, as distinguished from contribution, is not dependent upon legislative will, but springs from contract, express or implied, and full, not partial reimbursement is sought. (*McDermott v City of New York*, 50 NY2d 211 [1980]). If binding, the contract/purchase order

would entitle Vornado/VNO to indemnification from movant. “Workers’ Compensation Law § 11...explicitly and unequivocally requires that any contract for indemnification be written and entered into prior to the accident or occurrence.” (*Ferri v 63 Madison Associates, L.P.*, 280 AD2d 419 [1st Dept. 2001]). Here, plaintiff’s alleged accident occurred in April of 2010, and the contract sought to be enforced by Vornado/VNO is dated July 21, 2010, approximately 3 months after the accident. Vornado/VNO has not argued that this contract relates back and/or contained language of an “effective-on” date prior to the date of the accident, thus its indemnification clause is not applicable to the case at bar.

“Contribution is generally available as a remedy ‘when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe to the injured person.’ (*Garrett v Holiday Inns*, 58 NY2d 253, quoting *Smith v Sapienza*, 52 NY2d 82).

NY General Obligations Law 15-108 states, in pertinent part:

(a) Effect of release of or covenant not to sue tortfeasors. When a release or a covenant not to sue or not to enforce a judgment is given to one of two or more persons liable or claimed to be liable in tort for the same injury, or the same wrongful death, it does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms expressly so provide, but it reduces the claim of the releasor against the other tortfeasors to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, or in the amount of the released tortfeasor’s equitable share of the damages under article fourteen of the civil practice law and rules, whichever is the greatest.

(b) Release of tortfeasor. A release given in good faith by the injured person to one tortfeasor as provided in subdivision (a) *relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules.* (Emphasis added).

As per the two stipulations of discontinuance from March 29, 2012 and May 1, 2012, respectively, and the above referenced codified and case-law, defendants Waldorf/W5 cannot be held liable for contribution because this action was discontinued against them, eliminating them as

alleged tort-feasors in this action. Again, there is no third-party action on this Court's docket.

Accordingly, it is hereby

ORDERED, that movant defendants Waldorf Holding Corporation, and W5 Group LLC's motion, to dismiss the cross-claims against it, is granted; and it is further

ORDERED, that the Clerk of the Court enter judgment in favor of Waldorf Holding Corporation and W5 Group LLC, and against Vornado Office Management LLC and VNO 100 West 33rd St. LLC, dismissing any and all cross-claims against movant.

Dated: February 22, 2013

ENTER:



Joan M. Kenney, J.S.C.