

Dier v Suffolk County Water Auth.

2013 NY Slip Op 30564(U)

March 14, 2013

Supreme Court, Suffolk County

Docket Number: 02201/10

Judge: Emily Pines

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

COPY

Present: **HON. EMILY PINES**
J. S. C.

Motion Date: 12-18-2012
Submit Date: 12-18-2012
Motion No.: 004 *MD*
 Final
 Non Final

_____ **X** Action 1
ROBERT DIER, Index # 02201/10

Plaintiff,

-against-

**SUFFOLK COUNTY WATER AUTHORITY, S&S WATER
CONNECTION INC., MCCARTHY MANAGEMENT, INC., and
THOMAS MCCARTHY,**

Defendants.

_____ **X** Action 2
Index # 310106/11

MCCARTHY MANAGEMENT INC.,

Third Party Plaintiff,

-against-

BURT'S RELIABLE INC.,

Third Party Defendants.

_____ **X**

ORDERED that the motion (003) by third-party defendant Burt's Reliable, Inc. for summary judgment dismissing the third and fourth causes of action in the third-party complaint is denied; and it is further

ORDERED that counsel for movant shall serve a copy of this Order with Notice of Entry

upon counsel for plaintiff and other defendants, pursuant to CPLR 2103(b)(1), (2) or (3), within thirty (30) days of the date the order is entered and thereafter file the affidavit(s) of service with the Clerk of the Court; and it is further

ORDERED that the parties are directed to appear in the chambers of the undersigned for a pre-trial conference on May 16, 2013.

In this action, the plaintiff, Robert Dier, seeks money damages resulting from alleged water damage to his real property located at 355 Terry Lane in the Town of Southold, New York (“the premises”), which he claims was caused by the defendants’ negligence. The complaint reveals that the plaintiff retained the defendant Thomas McCarthy and defendant/third-party plaintiff McCarthy Management, Inc. (“McCarthy”) to renovate and sell his house. McCarthy subcontracted out the plumbing work to third-party defendant Burt’s Reliable, Inc. (“Burt’s”). The record reveals that the plumbing work was performed in May, 2007. Subsequently, upon reaching a \$150,000 budget, the plaintiff declined to pay for any further work and McCarthy stopped all work at the premises. By that time, rough plumbing was installed in the bathrooms and the pipes were capped. The complaint alleges that on or about October 15, 2008, defendants Suffolk County Water Authority and S & S Water Connection, Inc. were replacing an existing water main in the neighborhood. When the water main was reattached to the subject premises and repressurized, the plumbing caps applied by Burt’s popped off, causing flooding from the third floor down to the first floor of the premises. The complaint alleges that severe water damage resulted from the defendants’ negligence in failing to protect the subject premises.. The complaint alleges that the plaintiff lacked the funds to repair the damage and sold the premises in an “as is” condition for substantially less than the value of the premises.

McCarthy commenced a third party action against Burt’s and subsequently amended the third-party complaint. The third-party complaint alleges four causes of action: that Burt’s was negligent, that McCarthy is entitled to common law indemnification, that McCarthy is entitled to contractual indemnification, and that Burt’s breached a contractual term requiring it to obtain insurance naming McCarthy as an additional insured. Burt’s now moves to dismiss McCarthy’s

third and fourth causes of action in the third-party complaint.

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The burden is upon the moving party to make a prima facie showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material facts (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 760 NYS2d 397 [2003]).

The evidence submitted by Burt's was insufficient to meet its burden of establishing, as a matter of law, that there were no agreements to indemnify McCarthy, and that Burt's was not required to obtain liability insurance naming McCarthy as an additional insured. Burt's contends that separate indemnification agreements were not signed prior to each project undertaken by it in conjunction with work performed for McCarthy. Burt's relies on the deposition testimonies of McCarthy and Robert Ghosio, Jr., vice president of Burt's, neither of whom made reference to any written agreements between McCarthy and Burt's for indemnity or insurance procurement with regard to the work performed at the plaintiff's premises, but instead referred to verbal agreements to perform work.

In support of its motion, Burt's submits, *inter alia*, the pleadings, the personal affidavit of Robert Ghosio, Jr., three copies of insurance/hold harmless agreements between McCarthy and Burt's, and a copy of an insurance policy. Mr. Ghosio avers that he is employed by Burt's as vice president and general manager. He states that John Romanelli, now deceased, had personal knowledge of the work that Burt's performed for McCarthy at the plaintiff's premises. Ghosio states that, to his knowledge, there were no indemnification agreements between McCarthy and Burt's for all projects. He further states that Burt's work at the plaintiff's residence was performed on a time and material basis and that the parties agreed that invoices would be submitted for payment.

The record reveals three agreements between Burt's and McCarthy. The first agreement, dated May 18, 2002 and executed by John Romanelli, now deceased, provides as follows:

Insurance

Burt's Reliable, Inc., at its own expense, shall procure, carry and

maintain on all its operations, Workers' Compensation and Employers Liability Insurance covering all its [sic] employees, Public Liability and Property Damage Insurance, and Automotive Liability and Property Damage Insurance. Coverage limits shall be at least \$1,000,000 Per Occurrence and \$2,000,000 General Aggregate covering Bodily Injury, Property Damage and Contractual liability. Burt's Reliable, Inc. Is required to name McCarthy Management, Inc. And Owner as additional insureds [sic] on the above-described Subcontractor's General Liability Policy.

Burt's [sic] Reliable, Inc. shall provide to McCarthy Management, Inc., prior to commencement of work, a certificate from the insurance companies that the above described policies are in full force and will not be cancelled without thirty (30) days' [sic] written notice to McCarthy Management, Inc.

Hold Harmless - Indemnification

Burt's Reliable, Inc. shall indemnify and hold harmless McCarthy Management, Inc. and Owner against ay claims, damages, losses and expenses including legal fees arising out of or resulting from performance of subcontracted work to the extend caused in whole or in part by the Subcontractor or anyone directly or indirectly employed by the Subcontractor.

The second agreement, whose language is identical to the first agreement, bears a fax date stamp of 7/12/2004, and was also executed by John Romanelli. The third agreement, titled Subcontract Agreement Rider (McCarthy Management, Inc./Burt's Reliable), is dated November 26, 2008.

It is well settled that contractual indemnity depends upon the language of the contract at issue and a party 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." *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 344 NYS2d 336 (1973); *see also, Hogeland v Sibley, Lindsay & Curr Co.*, 42 NY2d 153, 159, 397 NYS2d 602 (1977); *Rodriguez v Baker*, 91 AD2d 143, 146, 457 NYS2d 801 (1983), *aff'd* for reasons stated below 61 NY2d 804, 473 NYS2d 972 (1984). Here, contrary to the defendant's claims, there were two indemnification and insurance agreements in existence prior to the plaintiff's renovation project. A plain reading of the agreements required Burt's to procure insurance and indemnify McCarthy on all its operations. Therefore, they applied to the work performed at the plaintiff's premises. Burt's


submits no legal support for its contention that separate agreements must be executed for each project to be effective. Under the present circumstances the Court need not determine whether the 2008 agreement applies retroactively to the work performed by Burt's at the premises.

Burt's also failed to demonstrate that it had insurance coverage and named McCarthy as an additional insured during the period that it worked at the plaintiff's premises. The record reveals that the insurance policy, dated January 4, 2008, for the policy period October 30, 2007 through October 30, 2008 did not cover the period during which Burt's performed the plumbing work at the plaintiff's premises. In addition, the "Additional Insured" endorsement does not name McCarthy.

Since the defendant failed to satisfy its burden as the party moving for summary judgment, it is unnecessary to analyze the sufficiency of the plaintiff's opposition. *McArthur v Muhammad*, 27 AD3d 532, 810 NYS2d 352 (2006); *Valdez v Aramark Servs., Inc.*, 23 AD3d 639, 804 NYS2d 811 (2005); *Nationwide Property Cas. v Nestor*, 6 AD3d 409, 774 NYS2d 357 (2004). Accordingly, summary judgment is inappropriate and the defendant's motion is denied. *See generally, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 (1980).

Accordingly, the motion to dismiss the third and fourth causes of action in the third-party complaint is denied.

Dated: March 14, 2013
Riverhead, New York



Emily Pines
J. S. C.

Final
 Non Final

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