

Morales v 310 W. End Ave. Owners Corp.

2014 NY Slip Op 30759(U)

February 21, 2014

Sup Ct, Bronx County

Docket Number: 305529/12

Judge: Howard H. Sherman

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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 4

FREDDY MOHALES,

Plaintiff,

against

310 WEST END AVENUE OWNERS CORP. and
ZARME R. SHAHNAWAZ,

Defendants.

Index No.: 305529/12

DECISION/ORDER

Howard H. Sherman
J.S.C.

The following papers 1-2 read on this motion for dismissal noticed on September 16, 2013 and duly submitted on the Motion Calendar of October 28, 2013.

	<u>PAPERS NUMBERED</u>	
Notice of Motion - Exhibits and Affidavits Annexed	1	
Answering Affidavit and Exhibit A	2	

Upon the foregoing papers this motion by defendant Zarme R. Shahnawaz for an order pursuant to CPLR § 3211(a)(7) dismissing the cross-claim is denied.

In this action plaintiff seeks damages for injuries alleged to have been sustained when he fell off a ladder while performing alterations in a residential cooperative apartment.

By prior decision/order of this court plaintiff's Labor Law §§240(1), 241(6) and 200 claims against the individual defendant were dismissed upon a finding that the defendant shareholder/proprietary lessee established as a matter of law the homeowner's exemption to 240(1) and 241(6) and for purposes of Labor Law § 200 liability, upon a dispositive showing that defendant neither supervised nor controlled

the means and methods of plaintiff's work .

Defendant now moves for an order pursuant to CPLR §3211(a)(7) dismissing the co-defendant's indemnification cross-claims on the grounds that the indemnification agreement contained in the Alteration Agreement between the individual defendant and 310 West End Owners Corp. ("310 West End") is unenforceable pursuant to General Obligations Law § 5-321.

In opposition, 310 West End argues that defendant should not be permitted to make successive fragmentary ¹ "attacks" and should have asserted all available grounds for relief on the earlier dispositive motion.

In addition, it is argued that the indemnification agreement is enforceable as being in the nature of a construction contract, and not a residential lease, and even if it were considered the latter, dispositive relief is precluded in light of unresolved material issues of fact including whether the indemnification clause is enforceable as incorporated within an agreement that was negotiated at arm's length by sophisticated parties who,² used insurance to allocate the risk of liability to third parties (see, Great Northern Inc. Co. v. Interior Constr. Corp., 7 N.Y.3d 412; 857 N.E.2d 60 [2006]).

Discussion and Conclusions

It is settled that the sole criterion for deciding a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned, which when taken together,

¹See NYP Holdings Inc. v McClear Corp., 83 AD 3d 426, 427, 921 NYS 2d 35 [1st Dept. 2003]).

²].

manifest any cause of action cognizable at law a motion for dismissal will fail . The reviewing court is required to construe the complaint liberally, and to accept as true the facts alleged in the complaint, according plaintiffs the benefit of every possible favorable inference (see, African Diaspora Mar. Corp. v. Golden Gate Yacht Club, 109 A.D.3d 204,211, 968 N.Y.S.2d 459 [1st Dept. 2013]).

Upon a review of the individual defendant's earlier motion, it is clear that while seeking an award of summary judgment dismissing both the complaint and any cross-claims, no argument was addressed to the latter.

It is the finding of this court that 310 West End has sufficiently stated cross-claims for indemnification including contractual indemnification as predicated upon paragraph 6 of the November 23, 2011 Alteration Agreement between the parties.

That provision is as follows:

6. Indemnification by Shareholder. Shareholder hereby indemnifies and holds harmless the Corporation, the Corporation's Board of Directors, architect or engineer, the Managing Agent, and other shareholders and residents of the Building against any damages suffered to persons or property as a result of the Work, whether or not caused by negligence, and for any and all liabilities arising therefrom or incurred in connection therewith. Shareholder shall reimburse the Corporation, the Corporation's architect or engineer, Managing Agent and other shareholders and residents of the Building for any losses, costs, fines, fees and expenses (including without limitation, reasonable attorneys, fees and disbursements) incurred as a result of the work.

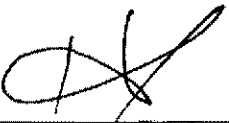
Also included within the terms of the agreement as pre-conditions to the commencement of the agreed-upon alterations, is a requirement that Shahnawaz procure Workers' Compensation and comprehensive general liability insurance naming 310 West End Corporation, the shareholder, and the managing agent as additional named insureds. The terms of the coverage and the monetary limits are also specified therein. As such, it would appear unambiguous here, that the parties were using

insurance as a way of allocating the risk of liability to third parties (see, Great Northern Insurance Co. v Interior Constr. Corp., op.cit at 418; see also, 45 Broadway Owner LLC v NYSA-ILA Pension Trust Fund, 107 AD 3d 629, 970 NYS 2d 1 [1st Dept. 2013]). As such, even in the context of a lease or license provision, such indemnification provision may be deemed enforceable (see, Port Parties Ltd. v Merchandise Mart Props. Inc., 102 AD 3d 539, 959 NYS 2d 37 [1st Dept. 2013]).

Accordingly, for the reasons above stated, the motion for an order dismissing the cross-claim of defendant 120 West End Avenue is denied.

This constitutes the decision and order of this court.

Dated: February 27, 2014
Bronx, New York



Howard H. Sherman
J.S.C.