

Merchan v Merkel Props., LLC
2014 NY Slip Op 31230(U)
May 9, 2014
Supreme Court, New York County
Docket Number: 105602/10
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: L.B. York
Justice

PART 2

Beatriz Marchon,
-v-
Merkel Properties, et al

INDEX NO. 105602/10

MOTION DATE _____

MOTION SEQ. NO. 008

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

MAY 13 2014

COUNTY CLERK'S OFFICE
NEW YORK

[Signature]

_____, J.S.C.

LOUIS B. YORK
J.S.C.

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

Dated: 3/9/14

- 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 2

-----X
BEATRIZ MERCHAN,

Plaintiff,

Index No. 105602/10

-against-

MERKEL PROPERTIES, LLC, THE ESTATE OF
FRED STARK, RITA STARK and JFK CENTER
ASSOCIATES, LLC,

DECISION AND ORDER

Defendants.

-----X
MERKEL PROPERTIES, LLC and JFK CENTER
ASSOCIATES, LLC,

Third-Party Plaintiffs,

Index No. 590257/12

- against-

ALLIED/CMS, INC. and U.S. ENVIRONMENTAL
ABATEMENT, CORP.,

FILED

MAY 13 2014

Third-Party Defendants.

-----X
LOUIS B. YORK, J.:

COUNTY CLERK'S OFFICE
NEW YORK

This is a motion for summary judgment in favor of defendant/third party plaintiffs Merkel Properties, LLC ("Merkel") and JFK Center Associates, LLC ("JFK Center") on the issue of contractual indemnification, common law indemnification, and breach of contract against third-party defendant U.S. Environmental Abatement, Corp. ("U.S. Environmental"). The Court grants third-party plaintiffs' motion for summary judgment for the reasons set forth below.

JFK Center hired third-party defendant U.S. Environmental to perform asbestos abatement at a building that Merkel owned and leased to JFK Center. The building was unoccupied and being prepared for demolition during the time of the alleged injury. The

building had several floors with both cement and wood flooring. At the time of the alleged accident, plaintiff worked for U.S. Environmental. U.S. Environmental had hired plaintiff to clean the dust in the building with a broom and water. While plaintiff walked on the second floor, she felt a pain in her left foot and fell to the ground. When she took off her shoe and looked around, she observed a nail coming out of the floor. On that day, employees of U.S. Environmental were removing the wood flooring on the second floor. It set up the work area and only U.S. Environmental and the other third party defendant's employees were there at the time of the alleged accident.

Plaintiff subsequently commenced this action against defendants/third party plaintiffs Merkel and JFK Center, alleging that they are liable for her injuries. Merkel and JFK Center brought a third party action against U.S. Environmental and Allied/CMS, Inc. on the basis of indemnification and breach of contract. Currently, they move for summary judgment against U.S. Environmental.

A movant seeking summary judgment "must establish a prima facie entitlement to a judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact." *Brandy B. v. Eden Cent. School Dist.*, 15 N.Y.3d 297, 302, 907 N.Y.S.2d 735, 737 (2010)(quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 925 (1986)). Therefore, a court should not award summary judgment if "there is any doubt as to the existence of a factual issue or . . . the existence of a factual issue is even arguable." *Asabor v. Archdiocese of New York*, 102 A.D.3d 524, 527, 961 N.Y.S.2d 17, 21 (1st Dept. 2013). Here, Merkel and JFK Center argue that they are not liable and that they should be indemnified based on the clause in the contract between JFK Center and U.S. Environmental. U.S. Environmental

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argues that the contract was between JFK Center and U.S. Environmental only and that Merkel was not a party. "A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." *Van Kipnis v. Van Kipnis*, 11 N.Y.3d 573, 575, 900 N.E.2d 977, 980 (2008). Here, Merkel is the owner of the building and the contract between JFK Center and U.S. Environmental was in effect at the time of the alleged injury. Counsel has annexed a copy of the contract.

The contract's indemnification clause is in section 8.13.2:

To the fullest extent permitted by law...the Contractor shall indemnify . . . the Owner, Architect, Architect's consultants [sic] against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributed to bodily injury, sickness, disease or death..., but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for those acts they may be liable. . . .

Under the plain language of the contract, then, U.S. Environmental must indemnify Merkel and JFK Center.

Moreover, in order to show their right to summary judgment for contractual indemnification, Merkel and JFK Center "must prove [themselves] free from negligence, because to the extent [their] negligence contributed to the accident, [they] cannot be indemnified." *Cava Constr. Co. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662, 871 N.Y.S.2d 654, 656 (2nd Dept. 2009). The deposition testimony of Beatriz Merchan, Daniel Carpio and James Levin indicate that U.S Environmental set up the work area where the alleged injury occurred and individuals associated with Merkel and/or JFK Center visited infrequently only to make sure that the building was secured. Merkel and JFK Center had no part in the asbestos abatement procedure or in the inspection or maintenance of the area where the alleged injury occurred. There is no evidence that

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Merkel and JFK Center were aware of the condition of the flooring before the alleged accident, and no evidence that Merkel or JFK Center were present at the building on the date of the accident before it occurred. U.S. Environmental was solely responsible for the safety of its employees at the job site. JFK Center and Merkel never held any safety meetings at the building or otherwise supervised or controlled U.S. Environmental's employees. See *Mouta v. Essex Market Dev. LLC*, 106 A.D.3d 549, 550-51, 966 N.Y.S.2d 13, 15 (1st Dept. 2013). Accordingly, Merkel and JFK Center are entitled to summary judgment on their claim for contractual indemnification.

With respect to third party plaintiffs' common law indemnification claim, "a party cannot obtain common law indemnification unless it has been held to be vicariously liable without proof of negligence or actual supervision on its part." *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 377, 929 N.Y.S.2d 556, 563 (2011). In addition, "[c]ommon-law indemnification is generally available in favor of one who is held responsible solely by the operation of law because of his relation to the actual wrongdoer." *McCarthy*, 17 N.Y.3d at 375, 929 N.Y.S.2d at 560-61 (internal quotation marks and citations omitted). In this case, third party plaintiffs have established a *prima facie* claim for summary judgment based on their cause of action for common law indemnification. The record establishes that U.S. Environmental directly hired plaintiff, directly instructed her what to do at the building, and directly supervised and controlled the area where she allegedly sustained her injuries. In *Bellefleur v. Newark Beth Israel Medical Center*, the court upheld the trial court's dismissal of the defendant's cross claim for common law indemnification because the third party defendant did not have a duty to monitor the area where the alleged injury occurred. *Bellefleur v. Newark Beth*

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Israel Medical Center, 48 A.D.3d 505, 506, 852 N.Y.S.2d 278, 279 (2nd Dept. 2008). As stated, third party defendants have not provided any evidence that Merkel and JFK Center created the defective condition – a nail in the floor – that caused the alleged injury.

In addition, according to U.S. Environmental's own supervisor Daniel Carpio, U.S. Environmental was responsible for providing safety equipment and conducted daily safety meeting. (See Dep. at p 10, ll 22-23). Merkel and JFK Center did not instruct plaintiff at any time prior or during the alleged day of injury, or were they present at the subject building. In *Balladares v. Southgate Owners Corp.*, the court dismissed the common law indemnification claim against third party defendant because third party defendant demonstrated that they did not exercise supervisory control over the plaintiff's work, and that they neither created nor had actual or constructive knowledge of any allegedly dangerous condition. *Balladares v. Southgate Owners Corp.*, 40 A.D.3d 667, 670, 835 N.Y.S.2d 693, 697 (2nd Dept. 2007). As there is no evidence that Merkel and JFK Center were in any way negligent and there is evidence that U.S. Environmental was the sole supervisor, third-party plaintiffs have shown their right to summary judgment on their claim for common law indemnification.

Merkel and JFK Center are entitled to summary judgment on their breach of contract claim. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." *DiBuono v. Abbey, LLC*, 83 A.D.3d 650, 652, 922 N.Y.S.2d 101 (2nd Dept. 2011). Third party plaintiffs have met this burden by submitting a copy of the

certificate of liability insurance, which, as mentioned, stated that U.S. Environmental was to name Merkel and JFK Center as additional insured parties under U.S. Environmental's policy of insurance. In *DiBuono v. Abbey*, the court granted summary judgment based on a breach of contract for failure to procure insurance because the lease stated that lessee was to maintain in full force and effect certain insurance policies including naming defendant as insured party, which third party defendant was not able to produce. *DiBuono*, 83 A.D.3d 650, 922 N.Y.S.2d 101. In the present case, third party defendant's only response is providing a copy of the insurance policy and contends that it had insurance at the time of the alleged injury. However, third party plaintiffs argue that if the insurance policy provided by U.S. Environmental indeed named Merkel and JFK Center, then U.S. Environmental should indemnify both Merkel and JFK Center, which U.S. Environmental has not done. The Court grants Merkel and JFK Center summary judgment for the breach of contract claim.

Accordingly, it is

ORDERED that third-party plaintiffs' motion for summary judgment is granted with costs and disbursements to third-party plaintiffs as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: May 9, 2014

FILED

MAY 13 2014

COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

[Signature]

Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.