

**Carhuaricra v Macy's, Inc.**

2015 NY Slip Op 30161(U)

January 15, 2015

Supreme Court, New York County

Docket Number: 156661/2012

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Nancy M. Bannon
Justice

PART 42

ARTHUR CARHUARICRA

INDEX NO. 156661/2012

- v -

MOTION DATE 9/18/14

MACY'S, INC., HOME DELIVERY LINK, INC.,
and HOME DELIVERY LOGISTICS

MOTION SEQ. NO. 002

(and Third-Party Action)

The following papers, numbered 1 to 4, were read on the defendant/third-party plaintiff Macy's motion for summary judgment on its cross claims against the defendant/third-party defendant Home Delivery Link, Inc. and on the defendant/third-party defendant Home Delivery Link, Inc.'s cross-motion for summary judgment on their cross claims against third-party defendant Lopresto Transfer, Inc.

Table with 2 columns: Description of motion papers and No(s). Includes rows for Notice of Motion/Order to Show Cause, Notice of Cross-Motion/Order to Show Cause, Answering Affirmation(s), and Replying Affirmation.

In this action to recover damages for personal injuries, the defendant/third-party plaintiff Macy's, Inc. moves for summary judgment on its cross claims against the defendant/third-party defendant Home Delivery Link, Inc. Defendant/third-party defendant Home Delivery Link, Inc. cross-moves for summary judgment on its cross claims against third-party defendant Lopresto Transfer, Inc. For the reasons set forth below, the motion and cross motion are both denied.

On September 25, 2012, the plaintiff commenced this action to recover damages for personal injuries he allegedly sustained on March 11, 2011 while delivering furniture to Macy's. The plaintiff was employed by Lopresto, a delivery company. In the course of the delivery, the plaintiff slipped and fell on "wetness" and "wet wood and debris" in Macy's delivery area. The plaintiff alleges that Macy's had actual and constructive notice of a leak in the ceiling which created the dangerous condition.

Issue was joined by Macy's answer dated December 6, 2012. On January 7, 2013, Macy's commenced a third party action against Home Delivery Link and Lopresto asserting causes of action for, inter alia, indemnity and contribution based on the September 1, 2004 Transfer and Delivery Agreement executed by Home Delivery Link and Federated Logistics, now Macy's Logistics, a division of Macy's Corporate Services, Inc., as amended. In its answer to the plaintiff's first and second amended complaint, Macy's asserted a cross claim against Home Delivery Link for contractual

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

indemnification. In its answer, Home Delivery Link asserted cross claims against Lopresto for, inter alia, contractual indemnification.

On May 23, 2014, Macy's brought the instant motion seeking summary judgment on its cross claim against Home Delivery Link for contractual indemnification and declaring that, under the Transfer and Delivery Agreement, Home Delivery Link is obligated to defend, indemnify, and hold Macy's harmless for all liability arising out of the plaintiff's personal injury action. Macy's argues that it is entitled to all reasonable defense costs based upon the plaintiff's negligence allegations, whether Macy's was negligent or not. Macy's contends that the plain language of the agreement obligates Home Delivery Link to provide full indemnification from liability arising out of Home Delivery Link's work under the agreement, even if Macy's is found to be negligent. Macy's argues that, even though a judgment has not yet been rendered, summary judgment on its contractual indemnification claim is appropriate here.

On July 9, 2014, Home Delivery Link cross moved for summary judgment on their cross claims asserted against Lopresto for contractual indemnification and declaring that the Transfer and Delivery Agreement requires Macy's to indemnify and hold Home Delivery Link harmless for all liability arising out of the underlying personal injury action. In opposition to Macy's motion, Home Delivery Link argues that the Transfer and Delivery Agreement does not unequivocally provide for it to indemnify Macy's for Macy's own negligence. In support of its cross motion, Home Delivery Link contends that the Lease for Services of Owner-Operator executed on August 1, 2006 between Home Delivery Link and Lopresto obligates Lopresto to indemnify Home Delivery Link and Macy's for any injury, without limitation.

In opposition to the motion and cross motion, Lopresto argues that both the motion and cross motion should be denied, as the Transfer and Delivery Agreement and the Lease for Services of Owner-Operator do not unequivocally provide that Macy's is entitled to indemnification for its own negligence and that Lopresto must indemnify Home Delivery Link for its contractual liability, i.e. indemnification, owed to Macy's.

It is well settled that the proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any triable issues of fact. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 (1985). In opposition, the nonmoving party must demonstrate by admissible evidence the existence of a triable issue of fact. See Alvarez v Prospect Hospital, 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). However, if the initial burden is not met by the movant, summary judgment must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, 64 NY2d 851; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2<sup>nd</sup> Dept. 2013); O'Halloran v City of New York, 78 AD3d 536 (1<sup>st</sup> Dept. 2010).

A contract is to be construed in accordance with the parties intent. See Greenfield v Philles Records, Inc., 98 NY2d 562, 569 (2002). The court is concerned "with what the parties intended...only to the extent that they evidenced what they intended by what they wrote." Akaska Holdings, LLC v

Sweet, 115 AD3d 556 (1<sup>st</sup> Dept. 2014) quoting Ashwood Capital Inc. v OTG Mgt., Inc., 99 AD3d 1, 7 (1<sup>st</sup> Dept. 2012). An “agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms.” Greenfield v Philles Records, Inc., 98 NY2d at 569; see MHR Capital Partners LP v Presstek, Inc., 12 NY3d 640, 645 (2009); Ashwood Capital, Inc. v OTG Management, Inc., 99 AD3d 1; 150 Broadway N.Y. Associates, LP v Bodner, 14 AD3d 1 (1<sup>st</sup> Dept. 2004). A contract is unambiguous and may not be altered if “on its face it is reasonably susceptible of only one meaning.” See Greenfield v Philles Records, 98 NY2d at 570. Whether a contract is ambiguous is a question of law to be resolved by the court based on whether the language is susceptible to more than one reasonable interpretation. See Dobbs v North Shore Hematology-Oncology Assoc., P.C., 106 AD3d 771, 772 (2d Dept. 2013).

“[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor.” Reisman v Bay Shore Union Free School Dist., 74 AD3d 772, 773 (2d Dept. 2010), quoting Cava Construction Co., Inc. v Gealtec Remodeling Corp., 58 AD3d 660, 662 (2d Dept. 2009); see General Obligations Law 5-322.1; Williams v City of New York, 74 AD3d 479, 480 (1<sup>st</sup> Dept. 2010). “[C]ontracts will not be construed to indemnify [an entity] against [its] own negligence unless such intention is expressed in unequivocal terms.” Kurek v Port Chester Housing Authority, 18 NY2d 450, 456 (1966); see Sovereign Bank v Biagioni, 115 AD3d 847, 848 (2d Dept. 2014).

“An insurer’s duty to defend is liberally construed and is broader than the duty to indemnify.” Fieldston Property Owners Association, Inc. v Hermitage Insurance Co., Inc., 16 NY3d 257, 264 (2011). Such duty ensures an adequate defense of the insured without regard to its ultimate likelihood of prevailing on the merits of a claim. See Fieldston Property Owners Association, Inc. v Hermitage Insurance Co., Inc., 16 NY3d at 264. However, where the defendant is not an insurer, “its duty to defend its contractual indemnitee is no broader than its duty to indemnify.” Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp., 78 AD3d 613, 613 (1<sup>st</sup> Dept. 2010); Bellefleur v Newark Beth Israel Medical Center, 66 AD3d 807, 809 (2d Dept. 2009).

Here, Macy’s failed to make a prima facie showing of entitlement to judgment as a matter of law on the issue of indemnification. Paragraph 20 of the Transfer and Delivery Agreement provides:

“CARRIER [Home Delivery Link] shall protect, indemnify, hold harmless and defend Logistics [now Macy’s], FDS, Federated and the Logistics affiliates and their respective directors, officers, employees, insurers, agents, successors and assigns (each a “Logistics Indemnitee”) from and against all suits, damages, claims (whether or not meritorious), losses, awards, costs and expenses (including reasonable counsel fees and expenses) without regard to whether incurred to contest, settle or satisfy any of the foregoing (each a “Claim”) if related to, arising from or alleged to have arisen with respect to CARRIER’s performance hereunder, including a violation of any Applicable Law or negligent act, omission or willful misconduct; *provided that*, for purposes of this Section 20, the term “CARRIER” refers to CARRIER, its affiliates and each of their respective

directors, officers, employees, agents, successors and assigns”  
[emphasis in original].

Contrary to Macy’s contention, the defense and indemnification provision did not, either on its own or read in the context of the agreement as a whole, clearly and unambiguously require Home Delivery Link to defend or indemnify Macy’s for its own negligence. See Sovereign Bank v Biagioni, 115 AD3d at 848. In addition, at this time, there has been no finding as to the negligence, if any, attributable to Macy’s in the underlying personal injury action and triable issues of fact exist as to whether Macy’s was negligent in the happening of the plaintiff’s slip and fall. Accordingly, Macy’s motion for summary judgment for contractual indemnification must be denied as premature. See Auriemma v Biltmore Theatre, LLC, 82 AD3d 1, 7 (1<sup>st</sup> Dept. 2011); Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp., 78 AD3d 613. Because Macy’s is not entitled to indemnification at this juncture, its motion for a judgment declaring that Home Delivery Link is obligated to defend it in the underlying action is also denied. See Bellefleur v Newark Beth Israel Medical Center, 66 AD3d at 809.

Likewise, Home Delivery Link failed to establish its prima facie entitlement to summary judgment on its cross claim against Lopresto for indemnification under the Lease for Services of Owner-Operator. Paragraph 13 of the Lease for Services of Owner-Operator provides:

“Owner [Lopresto] agrees to indemnify, defend and hold Carrier [Home Delivery Link], its principals, directors, officers, employees, agents, contractors, other than Owner, subsidiaries, parent, affiliates, Client and Customers [Federated Logistics, now Macy’s] (the “Indemnified Parties”) harmless from and against any and all losses, suits, actions, debts, demands, fines, judgments, damages, liability, costs, expenses (including reasonable attorneys’ fees and court costs), obligations and claims including, without limit, for injury to persons, including death, and damage to property, including if brought by Owner’s employees or agents, by reason of: (i) the Service, including, without limit, loading, unloading, transportation and placement in or on Customers’ premises, (ii) any negligence, act, or omission of Owner, its agents, contractors, employees, licensees and invitees... (vii) Owner’s provision of services of any kind to any person or entity other than Carrier, including, without limit, travel to and from such person or entity, and/or their agents, contractors, clients, customers, shippers or consignees...”

Although the Lease for Services of Owner-Operator contains a broader indemnification clause than the Transfer and Delivery Agreement, there has been no finding as to the negligence, if any, of Home Delivery Link at this time. Similarly, no such finding has been made as to the negligence, if any, of the plaintiff, as an employee of Lopresto, that may or may not have contributed to the happening of the accident. As such, Home Delivery Link failed to eliminate all triable issues of fact on the issue of indemnity. Accordingly, Home Delivery Link’s motion for summary judgment is denied as premature. See Auriemma v Biltmore Theatre, LLC, 82 AD3d at 7; Inner City Redevelopment Corp. v Thyssenkrupp Elevator Corp., 78 AD3d 613; Bellefleur v Newark Beth Israel Medical Center, 66 AD3d at 809.

