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SUPREME COURT - PART 50
COUNTY OF SUFFOLK - STATE OF NEW YORK

PRESENT

HON. ANDREW G. TARANTINO, JR.
A.J.S.C.

Index No. 00663/2014
Orig. Date: 11/21/2014
Adj. Date: 04/21/2014
Motion Dec. **001: MG**

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BRIANNA CRISTIANO,

Plaintiff(s),

ORDER GRANTING SUMMARY JUDGMENT

-against-

CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP and CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP BOARD OF EDUCATION,

Defendant(s),

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CONNETQUOT CENTRAL SCHOOL DISTRICT OF ISLIP,

Third-Party Plaintiff,

-against-

SECTION XI OF THE NEW YORK STATE PUBLIC HIGH SCHOOL ATHLETIC ASSOCIATION,

Third-Party Defendant.

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Upon consideration of the Notice of Motion to dismiss the third party complaint against the third party defendant Section XI of the New York State Public High School Athletic Association ["Section XI" or "NYSPHSAA"], the supporting affidavit and affirmation, the memorandum of law, and supporting exhibits, the affirmation in opposition on behalf of the defendant third party plaintiff Connetquot Central School District of Islip and Connetquot Central School District of Islip Board of Education ["the District"], and exhibits A and B, the reply affirmation, Section XI's Affidavit in Support of Summary Judgment and exhibits A through F, and the District's Supplemental Affirmation in Opposition, it is

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ORDERED that the motion to dismiss the third party complaint, converted by the Court to a summary judgment motion on notice to the attorneys for the parties by Order dated March 18, 2015, is granted, the third party complaint against Section XI is dismissed, and the remaining third party claims are severed.

The parties' familiarity with the underlying facts set forth in the Court's Order dated March 18, 2015, is assumed and will not be repeated here except to inform the instant decision. Briefly, the main action is one for personal injuries allegedly sustained by a student athlete at a track and field event conducted at Connetquot High School within the District on April 16, 2011. The plaintiff in the main action alleges that the District was negligent, inter alia, in the manner in which its employees or agents supervised the pole vault event at which the plaintiff was injured. On April 25, 2014, the District impleaded Section XI and alleged that pursuant to an agreement between the District and Section XI, Section XI agreed to indemnify and hold the District harmless against claims, damages, and liability arising out of Section XI NYSPHSAA's performance. The "agreement" was not otherwise identified. The second, third, and fourth causes of action in the third party complaint allege that Section XI is liable to the District based on principles grounded in common law indemnification and contribution. No factual allegations were included in the District's third party complaint supporting these various theories of recovery.

Both Section XI's original dismissal motion submitted in November of 2014, and the District's opposition included factual affidavits. By order dated March 18, 2015, the Court converted Section XI's motion to dismiss to one for summary judgment, and invited the parties to augment their submissions, if they chose to do so, within thirty days from the date of this order. Both parties availed themselves of that opportunity.

Section XI submitted an additional affidavit by its Executive Director dated April 14, 2015, further supporting its argument with respect to the common law indemnity and contribution third party claims that Section XI has a purely administrative/ministerial role in the assignment and payment of athletic officials who are independent contractors for which Section XI has no vicarious liability for negligence. According to NYSPHSAA's Executive Director, as far as officials assigned by the different sections throughout the state, the officials are not employed by any of the sections. They are deemed by contract between Section XI and the President's Council of Officials and officials organizations, to be independent contractors. "Notwithstanding any other provisions to the contrary, each approved official shall be acting in his/her capacity as an official as an independent contractor with regard to his /her relationship to any member school, the NYSPHSAA, Inc. or any of its subdivisions and in no way does an employer: employee relationship exist."

The collective bargaining agreement between Section XI and the officials organizations also indicates that for all intents and purposes the officials are to be designated as independent contractors. The officials are provided with IRS Form 1099 for independent contractors for tax reporting purposes, and are ineligible for unemployment benefits from NYSPHSAA, Inc. According to the additional affidavit from the current Executive Director, officials are not vetted or supervised by the various NYSPHSAA sections. The NYSPHSAA handbook provides that the details of game administration for interscholastic contests are the responsibility of secondary school authorities.

With respect to the third party claims for common law indemnification and contribution, Section XI established its entitlement to summary judgment as a matter of law (*see Begley v. City of New York,* 111 A.D.3d 5, 972 N.Y.S.2d 48 [2d Dept. 2013]). The general rule is that a party who retains an independent contractor, as distinguished from a mere employee or servant, is not liable for the independent contractor's negligent acts (*see, Kleeman v. Rheingold,* 81 N.Y.2d 270, 598 N.Y.S.2d 149, 614 N.E.2d 712 [1993]; *Rosenberg v. Equitable Life Assur. Socy.*, 79 N.Y.2d 663, 668, 584 N.Y.S.2d 765, 595 N.E.2d 840; *Gravelle v. Norman*, 75 N.Y.2d 779, 782, 552 N.Y.S.2d 86, 551 N.E.2d 579; *Besner v. Central Trust Co.*, 230 N.Y. 357, 362, 130 N.E. 577; PROSSER AND KEETON, TORTS § 71 [5th ed.]; *see also*, RESTATEMENT [SECOND] OF TORTS § 409 [1965]). The principle that an employer is not liable for the acts of independent contractors is subject to several categories of exceptions, which include an employer's negligence in selecting, instructing, or supervising the contractor, and instances in which the employer is under a specific nondelegable duty (*see Begley v. City of New York, supra* at 28).

According to the affidavit of Section XI's Executive Director Donald Webster dated September 9, 2014, Section XI does not train, assess, or certify officials; the names of certified officials are provided to Section XI by the local members of the Presidents' Council of Officials. The Presidents' Council is responsible for the competency and proficiency of officials. The written contract between NYSPHSAA Inc. and the Presidents' Council of Officials for the period July 1, 2013, and June 30, 2018, provides that the parties regard officials to be independent contractors. The District provided no evidence that Section XI was responsible for training, assessing or certifying officials that the District uses to supervise its athletic competitions.

The other exception to the general rule of non-liability for the negligence of independent contractors is the "nondelegable duty exception, which is applicable where the party 'is under a duty to keep premises safe' " (*Blatt v. L'Pogee, Inc.*, 112 A.D.3d 869, 978 N.Y.S.2d 291 [2d Dept. 2013]; *Backiel v. Citibank*, 299 A.D.2d 504, 505, 751 N.Y.S.2d 492, *quoting Rosenberg v. Equitable Life Assur. Soc of U.S.*, 79 N.Y.2d 663, 668, 584 N.Y.S.2d 765, 595 N.E.2d 840). Whenever the general public is invited into places of public assembly, "the owner of such premises is charged with the duty to provide members of the general public with a reasonably safe premises, including a safe means of ingress and egress" (*Thomassen v. J & K Diner*, 152 A.D.2d 421, 424, 549 N.Y.S.2d 416; *see Podlaski v. Long Is. Paneling Ctr. of*

Centereach, Inc., 58 A.D.3d 825, 826, 873 N.Y.S.2d 109; *LoGiudice v. Silverstein Props., Inc.*, 48 A.D.3d 286, 287, 851 N.Y.S.2d 187; *Backiel v. Citibank, supra*). Section XI did not have a nondelegable duty because it assigned officials or may have designated the athletic field where the alleged injury occurred.

Neither the District's opposition to Section XI's original dismissal motion, nor its opposition to the now converted summary judgment motion, asserts by affidavit from a person with personal knowledge that facts essential to justify opposition and available only to Section XI exist regarding the issue of Section XI's potential liability as an employer for the acts of the assigned official at the time of the accident, but can not be stated (see CPLR 3212 [f]). As the Court presaged in its March, 2015 Order, an attorney's conclusory affirmation that summary judgment should be denied because discovery is necessary is simply insufficient to raise an issue of fact precluding summary judgment (*Suero-Sosa v. Cardona,* 112 A.D.3d 706, 977 N.Y.S.2d 61 [2d Dept. 2013]).

It is incumbent upon the opposing party to provide an evidentiary basis to suggest that discovery might lead to relevant evidence (*see Lauriello v. Gallotta*, 59 A.D.3d 497, 498–499, 873 N.Y.S.2d 690; *Brewster v. Five Towns Health Care Realty Corp.*, 59 A.D.3d 483, 484, 873 N.Y.S.2d 199; *Leeds, Morelli & Brown, P.C. v. Hernandez*, 55 A.D.3d 794, 795, 866 N.Y.S.2d 311; *Conte v. Frelen Assocs.*, LLC, 51 A.D.3d 620, 621, 858 N.Y.S.2d 258) or that the facts essential to justify opposition to the motion were in the exclusive knowledge and control of the moving party (*see Cajas–Romero v. Ward,* 106 A.D.3d 850, 852, 965 N.Y.S.2d 559; *Anzel v. Pistorino*, 105 A.D.3d 784, 786, 962 N.Y.S.2d 700; *Buchinger v. Jazz Leasing Corp.*, 95 A.D.3d 1053, 1054, 944 N.Y.S.2d 316; *Savage v. Quinn*, 91 A.D.3d 748, 750, 937 N.Y.S.2d 265).

In light of the foregoing discussion, and in the absence of any evidentiary basis to suggest that discovery might lead to relevant evidence, Section XI's motion for summary judgment with respect to the second, third, and fourth causes of action in the third party complaint for common law indemnification and contribution, respectively, is granted and the causes of action are dismissed.

Regarding the first cause of action for contractual indemnification, NYSPHSAA's more recent affidavit from its Executive Director attests that there is no contract, compact, or policy that in any manner would support the District's contention that an individual section like Section XI must indemnify a school district on a claim for damages made by an athlete alleging injuries resulting from participation in a sporting event. A party's right to contractual indemnification depends upon the specific language of the relevant contract (*see Sawicki v. GameStop Corp.*, 106 A.D.3d 979, 981, 966 N.Y.S.2d 447; *Alfaro v. 65 W. 13th Acquisition, LLC*, 74 A.D.3d 1255, 904 N.Y.S.2d 205). "The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491–492, 549 N.Y.S.2d

365, 548 N.E.2d 903). In the absence of a legal duty to indemnify, a contractual indemnification provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903; *see Baginski v. Queen Grand Realty, LLC*, 68 A.D.3d 905, 907, 891 N.Y.S.2d 448).

Section XI established by proof in evidentiary form that there was no contract that in any manner would support the District's contractual indemnity claim. In opposition, the District's attorney affirmed that the District was a member school of Section XI, that to date, no agreement has been provided by Section XI, and one has not been found by the School District although it is undertaking to do so. Section XI has denied that there is any such agreement. The Court takes note that the third party complaint alleging a contractual indemnity claim was filed more than one year ago. Section XI's dismissal motion was first noticed on October 10, 2014. One would assume that if such a contract existed, the District would have located it by now. The District has failed to provide an evidentiary basis to raise an issue of fact that a written contract exists between Section XI and the District, much less one that includes a promise to indemnify the District clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." (*Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903).

Thus, the district has also failed to raise a triable issue of fact precluding summary judgment on the District's first cause of action for contractual indemnity (*Smith v. Xaverian High School,* 270 A.D.2d 246, 703 N.Y.S.2d 526 [2d Dept. 2000] [third party defendant moving for summary judgment presented evidence that there was no written contract with third party plaintiff upon which claim for contractual indemnification could be based; no merit to contention that motion to dismiss the third-party complaint should be denied because further discovery might reveal such a contract]).

Section XI's summary judgment motion is granted, the third party complaint against it is dismissed, and the remaining third party claims are severed.

Dated: JUN 26 2015

ANDREW G. TARANTINO, JR., A.J.S.C.

____ FINAL DISPOSITION **XX__NON-FINAL DISPOSITION**