Sealy v 2 GCT Partners LLC
2015 NY Slip Op 31339(U)
June 22, 2015
Supreme Court, Queens County
Docket Number: 25040/2012
Judge: Robert J. McDonald

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

NIGEL SEALY,

Plaintiff,

- against -

2 GCT PARTNERS LLC and BOSTON PROPERTIES INC.,

Defendants.

- x

Index No.: 25040/2012

Motion Date: 02/18/15

Motion No.: 160

Motion Seq.: 5

2 GCT PARTNERS LLC and BOSTON PROPERTIES INC.,

Third-Party Plaintiffs,

-against-

A&L CESSPOOL SERVICE CORP.

Third-Party Defendant.

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The following papers numbered 1 to 15 read on this motion by third-party defendant, A&L CESSPOOL SERVICE CORP., for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint:

	Papers Numbered
Notice of Motion-Affidavits-Exhibits-Memo of Law	1 - 6
Affirmation in Opposition-Exhibits.....	7 - 11
Reply Affirmation-Memo of Law.....	12 - 15

This is an action to recover for personal injuries allegedly sustained by plaintiff, Nigel Sealy, on March 19, 2011, when he fell from a ladder while in the course of his employment with third-party defendant, A&L Cesspool Service Corp. (A&L), at the building owned and managed by the defendants located at 140 E. 45th Street, New York, New York. At the time of the accident, the

plaintiff was employed by third-party defendant, A&L. Plaintiff alleges that he fell from a ladder at the defendant's building while he was snaking a clog in the trap of the building. In the main action, the plaintiff has asserted causes of action for negligence and violations of Labor Law §§ 200, 240 and 241(6).

Plaintiff commenced an action against the owners of the building by filing a summons and complaint on December 18, 2012. On or about February 27, 2013, defendant filed a verified answer to the complaint. On or about May 10, 2014, defendants 2 GCT Partners and Boston Properties filed a third-party complaint against A&L Cesspool Service Corp. asserting two causes of action, one for contractual indemnification and one for breach of contract for failure to procure insurance. A&L filed an answer to the third-party complaint on July 24, 2013. Plaintiff filed a Note of Issue on April 23, 2014. This matter is now on the calendar of the Trial Scheduling Part for June 24, 2015.

Third-party defendant, A&L, now moves for summary judgment dismissing the third party complaint for contractual indemnification and breach of contract on the ground that A&L did not enter into any contracts, agreements or purchase orders with the building owners in connection with the plaintiff's accident which took place on March 19, 2011. A&L asserts that it provided sewer and drain cleaning services to the property only upon request from Boston Properties. Third-party defendant contends that each requested service would be performed at the property pursuant to a purchase order or emergency service request issued by Boston Properties. Third-party defendant alleges that for the particular service involved in this plaintiff's accident on March 19, 2011, Boston Properties did not issue a purchase order or an indemnification contract to A&L. In fact, it is alleged that the last purchase order received from Boston Properties was a one page purchase order dated February 11, 2011 (No. 228753). A&L contends that it has no record of receiving any attachments with that purchase order. Specifically, A&L contends it did not receive a "Schedule A Insurance Specifications Attachment to Purchase Order" or the "Terms and Conditions of Purchase Order" or Schedule A-1" that were attached to the third-party complaint.

A&L also claims that it did not discuss, negotiate, sign or agree to the terms of the attachments which include a purported agreement pursuant to which A&L agreed to indemnify and to procure insurance for the benefit of the building owners. Moreover, A&L claims that its final work order prior to the accident, dated February 11, 2011, was completed on March 12, 2011 and there was no notification from the defendants that there was a problem with the work.

Therefore, A&L claims that the third-party action is prohibited by the workers' compensation law as there was no written contract agreeing to indemnification between A&L and the third-party plaintiffs in existence at the time of the plaintiff's accident. A&L contends that there is no documentary proof in the record proving that A&L expressly agreed to indemnify third-party plaintiffs in a written contract with regard to the last work order before the accident and no other written contract exists.

Further, the movant asserts that neither the purchase order nor the "Terms and Conditions of Purchase Order" contain any language expressly requiring A&L to indemnify 2 GCT Partners or Boston Properties Inc (citing O'Berg v MacManus Group, Inc., 33 AD3d 599 [2d Dept. 2006]). Counsel argues that without proof of the existence of an express agreement by third-party defendant for contribution and/or indemnification with regard to the work done by the plaintiff on March 19, 2011, the complaint must be dismissed pursuant to Workers Compensation Law § 11 (citing Ruane v Allen-Stevenson School, 82 AD3d 615 [1st Dept. 2011]; Ascencio v Briarcrest at Macy Manor, LLC, 60 AD3d 606 [2d Dept. 2009][section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer `expressly agreed' to indemnify the claimant" [2d Dept. 2009]; Ealem v Eurotech Constr. Corp., 307 AD2d 217 {1st Dept. 2003]). Counsel states that no written contract exists in which A&L expressly agreed to indemnify the third-party defendants for the service provided by A&L on the date of the accident and no evidence that the work done on that date was pursuant to a purchase order which contained a rider for indemnification. Third-party defendants also assert that the terms and conditions of the purchase order and the Schedule A Insurance Specifications Attachment to Purchase Order are unenforceable on the ground that the terms are unconscionable and ambiguous.

In support its motion, the defendants attach an affidavit from Mr. Livio Forte, Vice President of A&L since 1974. He states that he searched the records of A&L and found that A&L has no record of any contract agreement or purchase order entered into between it and Boston Properties for the service provided by the plaintiff on March 19 2011. In addition, the defendant provides an excerpt of the plaintiff's examination before trial in which he states that he believed that he was called to the building on March 19, 2011 on an emergency basis to clear a clogged line which was causing water to drip. Mr. Forte states that A&L received no attachments regarding insurance with respect to the

purchase order dated February 11, 2011. He also states that the work order of February 11, 2011 was completed on March 12, 2011 and paid for on March 15 and March 16, 2011. He states he did not negotiate the terms included in the documents titled "Schedule A Insurance Specifications Attachment to Purchase Order" and he did not sign an agreement or agree to the terms contained in the attachments.

In opposition, defendants contend that the motion to dismiss the third-party complaint must be denied because A&L was contractually obligated to indemnify and insure the defendants based upon the insurance requirements contained in the written contract entitled "Terms and Conditions of Purchase Order" that was allegedly in effect on the date of the plaintiff's accident. In support of its opposition, the third-party plaintiffs submit a copy of the pleadings; a copy of the transcript of the deposition testimony of Richard Jennings;, a copy of the purchase order dated February 11, 2011 signed by Boston Properties; a copy of the invoices dated March 15 and March 16, 2011; a copy of the "Schedule A Insurance Specifications Attachment to Purchase Order" a copy of "Terms and Conditions to Purchase Order" and the deposition testimony of Mr. Livio Forte.

Counsel for third-party plaintiffs asserts that the affidavit of Livio Forte, submitted in support of the defendants' motion should be disregarded as it contradicts his prior deposition testimony. Further, third-party plaintiffs assert that the deposition testimony of Mr. Jennings, the buildings's property manager, demonstrates that he signed a purchase order dated February 11, 2011, generated by Boston Properties and issued to A&L for preventative maintenance work at the building. The work was completed on March 12, 2011, a week before the accident, and paid invoices issued the third-party plaintiffs on March 15 and March 16. However, Jennings testified that the work performed by plaintiff on March 19, 2011 the date of the plaintiff's accident relates back to the purchase order of February 11, 2011.

Counsel claims that when the February 11th purchase order was sent by the third-party plaintiffs to A&L, it was accompanied by at least two other documents including the building's insurance requirements and the terms and conditions of the purchase order. Counsel asserts that the purchase order is essentialy a written contract and once A&L performs the work described in the purchase order, they have agreed to accept the terms and conditions that were issued with the purchase order. Third-party plaintiffs contend that Mr. Forte testified at his deposition that he did not know if the work being performed on

Martch 19, 2011 was an emergency service. He also stated that if there is a problem with a job and a customer calls back that they would go back and repair it for free and would not generate a bill. Further, third-party plaintiff points out that Forte testified that it is possible that the work plaintiff was doing when he had the accident was a recall.

Third-party plaintiffs argue that it is undisputed that a Purchase Order was issued by defendants to A&L dated February 11, 2011. It is also undisputed that A&L invoiced the work from that purchase order stating the work was completed on March 12, 2011. Third-party plaintiffs claim that Forte testified that the work plaintiff was doing on March 19, 2011 could have been a recall and if so A&L would not have issued an invoice for that date nor issued a new purchase order. Third-party plaintiffs claims that the purchase order of February 11, 2011 was issued to A&L with the written insurance specifications and the writtem terms and conditions of the purchase order. Counsel claims that Mr. Jennings testimony creates a question of fact as to whether the insurance agreements were actually provided to the defendants and whether those agreements were in effect on the date of the accident. Third-party plaintiff's counsel claims Forte's affidavit belies his deposition testimony because he testified that he did not deal with purchase orders at all. Third-party plaintiffs also claim that the defendants failed to meet its burden of proof for summary judgment because there are questions of fact as to whether the work being performed was pursuant to a purchase order of February 11, 2011 and whether the insurance specifications which were part of that purchase order were in effect on March 19, 2011. Counsel asserts that the documents submitted with the purchase order contained an indemnity provision and an insurance procurement provision both of which were in effect on the date of the accident.

The plaintiff submit the deposition testimony of Richard Jennings, Property Manager for Boston Properties. He testified that he signs off on the purchase orders. There was no invoice for the date of the accident. He states that on the date in question, A&L was supposed to clean out the sewer traps, sewer drains, main sewer drain. He states the March 19th job during which plaintiff was injured was regular maintenance. He states that for each job a purchase order was generated. In addition to the purchase order there are two other sheets that are sent with the purchase order, including the insurance requirements. He does not know for certain whether the insurance requirements were sent to A&L. He states that the purchase order is a contract. He states that the intent of the terms of the contract is that if A&L performs the work they are accepting the terms and

conditions. However, he also states that A&L never affirmatively accepted the terms in writing or verbally. He did not negotiate any of the terms of the insurance agreements with A&L. Once A&L completed the work plaintiffs would send an invoice. He would approve payment of the invoices. He approved the purchase order for February 11th which was for preventative maintenance. The invoices for the job were received on March 15 and 16th. The invoices state that the work was performed on March 12, 2011. He states he does not know why the invoices state that the work was performed on March 12, 2011 when plaintiff Sealy was injured performing the work on March 19th. He states it possible that A&L performed he work on March 12th but then came back on March 19th .

Livio Forte, the Vice President of A&L testified at an examination before trial on September 22, 2014. He states that usually A&L would issue a proposal for the work before any physical work was done but most of the time the jobs were emergencies. If its an emergency call than A&L does not issue a proposal. He stated that he did not see an invoice for work performed on the March 19th. He states that A&L does not give an invoice when the job is a recall and they would go back and in that case they would repair a problem for free. He states that he did not know if Mr. Sealy was performing a recall job on March 19th. He also testified that he did not know if the purchase orders were accompanied by the indemnity documents. He also stated he doesn't deal with insurance matters and didn't know if A&L had insurance naming additional insureds. He did not know if the work being done on March 19th was an emergency request or a recall due to a problem from a prior job. If it was a recall there would be no invoice.

In reply, third-party defendants assert that Mr. Jennings testified that he did not send the documents and if they were sent they would have been sent by Laura Gorman of his office. He did not know for certain whether the documents were sent. He also testified that he did not negotiate the terms of Schedule A and the Terms of the Purchase Order with anyone. Counsel asserts that there is no proof in the record that the terms and conditions were sent. Third-party defendants point out that Mr. Jennings testified that A&L did not affirmatively accept the terms contained in Schedule A and he did not know what a "Schedule A-1" was.

Upon review and consideration of the third-party defendants' motion, the affirmation in opposition and the reply thereto this court finds as follows:

Based upon the evidence submitted by both parties, including the deposition testimony of Mr. Forte and Mr. Jennings, it is clear that a certain purchase order dated February 11, 2012 was generated by Boston Properties for maintenance of sewer ejector tanks and main house traps in the building owned by Boston Properties at 140 E. 45th Street, New York, N.Y. The total price for the job was estimated to be $718.58. The purchase order was signed by Mr. Jennings on February 16, 2011. The A&L invoices dated March 15th and March 16th also make clear that the agreed upon work was completed on March 12, 2011, seven days before the plaintiff's accident.

Here, the court finds that movants have demonstrated prima facie that they did not receive the attachments to the purchase order which purportedly required A&L to indemnify the building owners and to procure insurance naming third-party plaintiffs as additional insureds. There is no evidence in the record documenting the fact that the attachments were sent to the third-party defendants. Third-party defendants presented evidence demonstrating that they did not receive the attachments with the purchase order dated February 11, 2011. Moreover, Mr. Jennings testified he was not sure if the attachments were sent. In addition it is clear that no paper work at all was generated with respect to the job performed by the plaintiff on March 19, 2011 when he was injured.

In addition, even if the court found that there was a question of fact as to whether the third-party defendants received the attachments to the purchase order or whether the job performed by Mr. Sealy on the 19th relates back to the February 11th purchase order, this court finds that the two documents attached to the third-party complaint and allegedly transmitted or sent to A&L with the purchase order entitled "Insurance Specifications Attachment to Purchase Order" and "Terms and Conditions of Purchase Order" are insufficient to constitute a binding enforceable agreement. As such, the third-party complaint seeking indemnification is precluded by Workers' Compensation Law § 11 (see Tonking v Port Auth., 3 NY3d 486 [2004][WCL § 11 bars common law third-party actions against employers for indemnification or contribution if the plaintiff unless "the third-party action is for contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant]). The intention to indemnify must be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (see Masciotta v Morse Diesel Intl., 303 AD2d 309 [1st Dept. 2003]; Roldan v New York Univ., 81 AD3d 625 [2d Dept. 2011]; Kennelty v Darlind Constr., 260 AD2d 443[2d Dept. 1999]).

Here, there was no indication that the parties intended to be bound by the indemnification contract. The parties both agree that there were no negotiations or discussions regarding the terms of the indemnification or additional insureds, that the third-party defendants did not sign the agrement or purchase order and Mr. Jennings stated that he did not obtain an affirmative acceptance of the terms and conditions of those documents in writing or verbally from A&L (see DiNovo v Bat Con, Inc., 117 AD3d 1130 [3rd Dept. 2014]; Ealem v. Eurotech Constr. Corp., 307 AD2d 217 [1st Dept. 2003]).

This Court also finds that the document labeled "Terms and Conditions of Purchase Order" is unenforceable as being unconscionable and ambiguous. Firstly, the 21 paragraphs of the document are contained on one page in extremely fine print which is practically illegible. Secondly, the terms are ambiguous as the pertinent clause states that the Vender shall maintain insurance coverage as set forth in Schedule A and that the vendor shall indemnify the "Buyer Entities" listed on "Schedule "A-1." However, the "Buyer Entities" are not defined or named in any of the printed documents and Schedule A-1, which purportedly contains the name of the "Buyer Entities," was not produced by the third-party plaintiffs. In fact, Mr. Jennings testified he did not know what Schedule A-1 was. Schedule A also states that all policies shall be endorsed to name the entities listed on Schedule A-1 Buyer Entities. However, as stated above, no Schedule A-1 was produced by the plaintiffs and "Buyer Entities" to be named as additional insureds are not defined in the purchase order or Terms and Conditions of Purchase Order. There is no record that Boston Properties conveyed Schedule A-1 to A&L. Thus, this Court finds that the documents are unclear and ambiguous as to whom the vendor is agreeing to indemnify and name as an additional insured. Further, as stated above none of the terms in either document were discussed or negotiated with A& L. and there was no signature line on the purchase order for A&L to accept the terms and conditions of the purchase order.

In opposition the third-party plaintiff's failed to raise a question of fact.

Therefore, this Court finds that the third-party action for contractual indemnification and breach of contract must be dismissed. The documents sibmitted by the defendants which purport to require contractual indemification are unconscionable, ambiguous, and is not sufficient to constitute a written contract in which the third-party defendant clearly and "expressly agreed" to indemnify the third-party plaintiff. As stated by the Court of Appeals in Tonking v Port Auth., 3 NY3d 486 [2004], "requiring

the indemnification contract to be clear and express furthers the spirit of the legislation." Also see Ruiz-Hernandez v TPE NWI Gen., 106 AD3d 627 [1st Dept. 2013]; Susko v. 337 Greenwich LLC, 103 AD3d 434 [1st Dept. 2013]; Bizjak v Gramercy Capital Corp., 95 AD3d 469 [1st Dept. 2012]; O'Berg v. MacManus Group, Inc., 33 AD3d 599 [2d Dept. 2006]).

Accordingly, for all of the above stated reasons it is hereby,

ORDERED, that the third-party defendant's motion for summary judgment dismissing third-party plaintiffs' complaint is granted, and it is further,

ORDERED that this matter remains on the calendar of the Trial Scheduling Part for June 24, 2015.

Dated: June 22, 2015
Long Island City, N.Y.

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ROBERT J. MCDONALD
J.S.C.