

Calandra v Broadway Partners, LLC

2015 NY Slip Op 32024(U)

October 28, 2015

Supreme Court, New York County

Docket Number: 111247/2009

Judge: Robert D. Kalish

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29

-----x

Peter Calandra

Plaintiff

-against-

Broadway Partners, LLC and
450 Partners, LLC

Defendant

-----x

Broadway Partners, LLC and
450 Partners, LLC

Third- Party Plaintiff

DECISION AND ORDER

INDEX NO.: 111247/2009

-against-

Associated Press

Third-Party Defendant

-----x

Broadway Partners, LLC
and 450 Partners, LLC

Second Third-Party Plaintiff

SECOND THIRD PARTY

INDEX NO.: 590737/2011

-against-

P.C. Mechanical & Consulting, Inc.

Second Third-Party Defendant

-----x

-----X

**Broadway Partners, LLC
and 450 Partners, LLC**

Third Third-Party Plaintiff

**THIRD THIRD PARTY
INDEX NO.**

-against-

Broadway Real Estate Services, LLC

Third Third-Party Defendant

-----X

Associated Press

Fourth Third- Party Plaintiff

**FOURTH THIRD PARTY
INDEX NO.: 595014/2014**

-against-

P.C. Mechanical & Consulting, Inc.

Fourth Third- Party Defendant

-----X

Robert D. Kalish J.

Upon the foregoing papers and having conducted oral argument, the motion by the third-party Defendant/fourth third-party Plaintiff Associated Press ("AP") to:

1. dismiss the third-party plaintiff, Broadway Partners, LLC and 450 Partners, LLC's (collectively "Broadway Partners") first cause of action as alleged in their third-party complaint against AP;
2. dismiss Broadway Partners' second cause of action against AP;
3. enter summary judgment for AP against third-party Defendant P.C. Mechanical and Consulting, Inc. ("PCM") on the basis of indemnification; and
4. entering an order that AP's instant motion is timely and for good cause shown

is hereby granted and PCM's cross-motion for summary judgment dismissing AP's fourth third-party action against PCM is hereby denied to the extent as follows:

Procedural Background and underlying action

Without reiterating the entirety of the pleadings, the following recitation reflects the procedural history and allegations in the underlying actions relevant to the instant motion and cross-motion.

By summons and verified complaint dated August 5, 2009, the Plaintiff, Peter Calandra commenced an action against Broadway Partners alleging in sum and substance that on or about June 27, 2009, he was injured while working as an engineer on the premises located at 450 West 33rd Street in New York County. Plaintiff alleges that he was rebuilding a fan motor on the roof of said premises when he was injured due to exposed electrical wiring on said rooftop. Plaintiff alleges that said accident/injuries were caused by the Broadway Partners' negligence as the owners of the premises and through Broadway Partners's failure to properly maintain said premises.

Plaintiff specifically claims that while he was working on the roof of the subject premises as an employee of PCM, he was shocked by a live wire and caused to fall. Plaintiff indicated at his deposition that the electrical wire that caused his accident was attached to a cooling tower ("Cooling Tower A") which belonged to the building and was not serviced by PCM. PCM is a corporation of which the Plaintiff is the portfolio manager and his wife is the president. According to the Plaintiff, there were four cooling towers, four dry coolers and a couple of exhaust fans on the roof of the premises that were serviced by PCM. According to the Plaintiff, the loose wire that shocked him was a heat trace wire attached to the mechanical equipment located on the roof at Cooling Tower A. Plaintiff further claims that he was injured by equipment owned by the building, and that Broadway Real Estate Services LLC (a former third-party defendant in the underlying action) was responsible for the maintenance of the equipment in the area of the cooling tower where the Plaintiff was injured.

On or about January 24, 2011, Broadway Partners commenced a third-party action against AP, alleging in sum and substance that the premises located at 450 W. 33rd Street was AP's principal place of business and that the Plaintiff's accident was directly caused by AP's negligence. Broadway Partners alleged the following four causes of action against AP:

1. first cause of action for common law indemnification on the basis that AP controlled the HVAC system for 450 West 33rd Street, controlled, supervised and directed the labor and services on the HVAC system that occurred on or about June 27, 2019 and lead to the Plaintiff's alleged injuries;
2. second cause of action for contribution based upon any apportionment of responsibility for damages between and amongst the parties of the action should the Plaintiff be awarded a judgment;
3. third cause of action for contractual indemnification based upon an agreement that Broadway Partners and AP entered into prior to the alleged accident, which Broadway Partners argued included an indemnification provision; and
4. fourth cause of action for breach of contract based upon Broadway Partners' argument that AP was required pursuant to the prior agreement to provide liability insurance coverage for bodily injury and to name defendants/third-party plaintiffs as an additional insured on the insurance policy.

On or about April 3, 2014, AP commenced a fourth third-party action against PCM alleging in part that AP is entitled to contractual indemnification by PCM as to the Plaintiff's underlying action.

On or about May 6, 2015, AP made the instant motion to dismiss Broadway Partners' first and second causes of action against AP and for summary judgment against PCM on the basis of indemnification.

On or about September 8, 2015, AP, Broadway Partners, and PCM appeared before this Court for oral argument on the motion and cross-motion. At oral argument, Broadway Partners indicated that they were not opposing AP's motion as to Broadway Partners' first and second causes of action, and conceded to the dismissal of the first and second causes of action.

As such, the only issues remaining before this Court is AP's motion for summary judgment on its third-party action against PCM on the basis of contractual indemnification and PCM's cross-motion for summary judgment dismissing AP's Third-party action against PCM.

Parties Assertions

AP argues in support of its motion in sum and substance that it is entitled to full contractual indemnification by PCM as to Plaintiff's underlying action and Broadway Partners' third-party action against AP. AP argues that PCM performed maintenance services on the premises of 450 West 33rd Street under a written agreement with AP, which states that the Plaintiff Peter Calandra is "now employed by PCM and PCM desired to provide AP with maintenance and engineering services for the normal operation of AP Office Space". AP further argues that said agreement includes an indemnification provision whereby PCM agrees to "indemnify, hold harmless and defend" AP against all claims, threats or losses arising from PCM's performance under the agreement. AP further argues that there is no dispute that Peter Calandra was working in the course and scope of his employment with PCM and performing tasks pursuant to PCM's agreement with AP at the time of the alleged accident.

AP indicates in its submitted papers that AP, through its insurance carrier, National Union Fire Insurance Company, has tendered its defense and indemnity to PCM's insurance carrier Hartfield Casualty Insurance Company. However, Hartfield Casualty Insurance Company has not met its obligation to defend, indemnify or hold AP harmless pursuant to the agreement. AP now seeks an order of the Court granting it summary judgment on its claim against PCM for contractual indemnification as to the Plaintiff's underlying action, based upon the terms of the service agreement between AP and PCM.

In opposition to AP's motion and in support of its cross-motion for dismissal of AP's third-party action, PCM argues in sum and substance that AP is not entitled to contractual indemnification from PCM as to the Plaintiff's underlying accident. Specifically, PCM argues that the indemnification provision of the services agreement between AP and PCM was inserted at the sole insistence of AP and does not exempt AP for its own negligence and/or conduct. PCM argues that the services agreement only required PCM to indemnify AP as to any claims arising from PCM's performance under the services agreement, and that PCM's obligations under said contract only included providing services in the plumbing, heating and electrical areas for AP office space. PCM argues that the Plaintiff's accident did not fall within the purview of the services agreement and/or the indemnification provision therein since the Plaintiff was not providing any services relating to the plumbing, heating and electrical areas for AP office space.

PCM further argues that it is undisputed that AP had personnel on staff at the location of the accident who directed the Plaintiff to perform necessary work, and that the Plaintiff reported to said AP personnel. PCM further argues that AP employees performed inspections of the roof, including the location where the Plaintiff was supervising work prior to the accident. PCM does not dispute that Plaintiff was the principal employee in charge of PCM performing work for AP pursuant to the services agreement. However, PCM argues that Plaintiff reported to AP personnel, and that AP maintained control over both the work that lead to the accident and the roof where the accident happened. PCM further argues that AP had to pre-approve all costs for repairs. Therefore, PCM argues that AP had involvement and knowledge of all repairs, including the replacement project that the Plaintiff was supervising thirty minutes prior to the accident. As such, PCM argues that AP never delegated complete control of the roof to PCM, and therefore PCM is not responsible for any negligence related to supervision, maintenance, direction, control or inspection.

PCM further argues that even assuming that PCM was responsible for AP's supervision of the work that Plaintiff was doing, PCM is not in any way responsible for the Plaintiff's accident. PCM argues that the Plaintiff's accident occurred due to an exposed electrical wire that was attached to Cooling Tower A, which belonged to the building and does not provide cooling services to AP office space. As such, PCM argues that it did not have any responsibility to maintain Cooling Tower A under the services agreement with AP. PCM further argues that the accident occurred either 40 feet or 40 yards from the nearest equipment that provided services to AP office space, and that the accident occurred in a location that was not part of the facilities and/or area that PCM was responsible for under the service agreement with AP. PCM argues that the accident occurred 30 minutes after PCM had concluded its repair of a broken cooling tower (not Cooling Tower A). PCM further argues that at the time of the accident the work had been completed and the Plaintiff was no longer supervising any work.

PCM further argues that there are no bases for AP's causes of action for common law Indemnification and/or contribution.

In reply to PCM's opposition, AP reiterates its argument that it is entitled to contractual indemnification as to the Plaintiff's underlying action. AP argues that the only reason the Plaintiff was on the roof was to perform work for PCM, specifically to perform repairs on the AP dry coolers located on the roof. Further, the Plaintiff was on the roof almost every day and did regular maintenance on the coolers. AP argues that the Plaintiff's accident clearly arose out of work performed by PCM under the services agreement and further that the Plaintiff's accident did not occur after the work had been completed. Specifically, AP argues that the Plaintiff's accident occurred while cleaning and putting away tools, which is still part of the work.

Both AP and PCM refer to specific parts of the Plaintiff's deposition transcript in their respective submitted papers.

Analysis

A proponent of a motion for summary judgment must establish that "there is no defense to the cause of action or that the cause of action or defense has no merit," (CPLR § 3212 [b]), sufficiently to warrant the court as a matter of law to direct judgment in his or her favor (See Bush v. St. Clare's Hospital, 82 NY2d 738, 739 (NY 1993)). "The proponent of a summary judgment motion is required to make a prima facie showing of entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Failure to do so required denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 853 (NY 1985)). This standard requires that the proponent of the motion tender sufficient evidence to eliminate any material issues of fact from the case, "by evidentiary proof in admissible form" (Zuckerman v. New York, 49 N.Y.2d 557, 562 (NY1980)). Once the Movant has established their prima facie entitlement to summary judgment, the burden shifts to the party opposing the motion to raise a triable issue of fact to warrant denying summary judgment.

Having reviewed the submitted papers including the attached deposition transcript and the services agreement between AP and PCM, this Court finds that AP have established prima facie that it is entitled to summary judgment on its third-party action against PCM on the issue of contractual indemnification as a matter of law. Specifically, AP has established as a matter of law based upon the submitted papers that it is entitled to full contractual indemnification from PCM as to the Plaintiff's underlying accident based upon the indemnification provision of the services agreement between AP and PCM. Further, PCM has failed to rebut AP's prima facie showing and/or established that there are any issues of fact to warrant denying AP's motion for summary judgment on its third-party action against PCM.

The services agreement between AP and PCM included an indemnification provision that clearly required that PCM indemnify AP as to any claims arising from work conducted by PCM, including the Plaintiff's claim in the underlying action.

Where the contract is unambiguous, "its interpretation is a matter of law and effect must be given to the intent of the parties as reflected by the express language of the agreement" (Nat'l Granite Title Ins. Agency, Inc. v. CadleRock Props. Joint Venture, L.P., 5 A.D.3d 361 (NY App Div 2d Dept 2004) citing Riley v. S. Somers Dev. Corp., 222 A.D.2d 113 (N.Y. App. Div. 2d Dept 1996)). "Contracts which are clear and unambiguous should be enforced according to their plain meaning" (Cellular Tel. Co. v. 210 E. 86th St. Corp., 44 A.D.3d 77, 83 (N.Y. App. Div. 1st Dept 2007) citing South Rd. Assocs., LLC v. IBM, 4 N.Y.3d 272 (N.Y. 2005); Greenfield v. Philles Records, 98 N.Y.2d 562 (N.Y. 2002); W.W.W. Assocs. v. Giancontieri, 77 N.Y.2d 157 (N.Y. 1990)).

"Indemnification provisions are strictly construed, and the right to contractual indemnification depends upon the specific language of the contract" (Davis v Catsimatidis, 129 A.D.3d 766, 768 (NY App Div 2nd Dept 2015)(internal citations omitted)). Further, "[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is 'sufficiently clear and unambiguous'. A court must also be careful not to interpret a contracted indemnification provision in a manner that would render it meaningless. When the intent is clear, an indemnification agreement will be enforced" (See Bradley v. Earl B. Feiden, Inc., 8 NY3d 265, 274-275 (NY 2007) citing Rodrigues v N & S Bldg. Contrs., Inc., 5 NY3d 427, 433 (NY 2005); Levine v Shell Oil Co., 28 NY2d 205 (NY1971) [indemnification agreement which covered "any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property" held enforceable to require operator of gas station to cover the owner of the station's own negligence]; Gross v Sweet, 49 NY2d 102, 108 (NY 1979) ["the law . . . will recognize an agreement to relieve one party from the consequences of his negligence on the strength of a broadly worded clause framed in less precise language than would normally be required" when the agreement is negotiated by sophisticated parties as an allocation of risk]). "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 circumstances" (Campisi v Gambar Food Corp., 130 AD3d 854, 855 (NY App Div 2nd Dept 2015) citing Hooper Associates, Ltd. v. AGS Computers, Inc., 74 NY2d 487 (NY 1989))

In the instant action, the services agreement between AP and PCM included an indemnification provision that reads in relevant part as follows:

PCM agrees to and shall indemnify, hold harmless and defend AP, its directors, members, employees, agents and representatives against all claims, threats, demands or losses (including attorneys' fees) arising from PCM's performance under this agreement.

(Services Agreement section 5(c))

The indemnification agreement indicates in clear unambiguous terms that PCM would "indemnify, hold harmless and defend" AP "against all claims, threats, demands or losses (including attorneys' fees) arising from PCM's performance" under the services agreement. Further, the parties do not dispute that the Plaintiff was allegedly injured during the course of his employment with PCM.

Upon review of the submitted papers, including the Plaintiff's deposition testimony, the Court finds that on the date of the accident, the Plaintiff was on the roof of the premises working as an employee of PCM and performing services within the scope of the services agreement between AP and PCM. Further, the Court finds PCM's argument that the Plaintiff was not engaged in work at the specific time of the accident to be without merit. Whether the Plaintiff was injured while actively working on AP's dryer coolers or while cleaning up and putting tools away upon the completion of the work is of no moment. Such activity clearly falls within the plain meaning and scope of the services agreement as work arising from PCM's performance under the services agreement (See Urbina v. 26 Ct. St. Assoc., LLC, 46 AD3d

268 (NY App Div 1st Dept 2007)).

The services agreement further indicates, as PCM acknowledges, that PCM "shall be solely responsible for the hiring, discharging, training, supervision, and control of its employees" (Services Agreement section 3(c)). The fact that the Plaintiff would report to AP does not lead to the conclusion that AP controlled/supervised the Plaintiff or any PCM employee's work at the subject premises. In point of fact, the Plaintiff was employed by PCM in a supervisory position over PCM employees working at the subject premises.

As such, this Court finds that AP has established as a matter of law that it is entitled to full indemnification from PCM as to the Plaintiff's underlying claims pursuant to the clear and unambiguous terms of indemnification provision in the services agreement between AP and PCM.

Conclusion

Accordingly, and for the reasons so stated, AP's motion for summary judgement is granted in its entirety and it is hereby

ORDERED that Broadway Partners' first and second causes of action as alleged in their third-party complaint against AP are hereby dismissed; and it is further

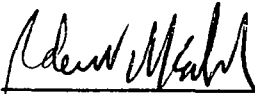
ORDERED that AP is granted summary judgement upon its third-party action against PCM for contractual indemnification as to the Plaintiff's underlying action against Broadway Partners and Broadway Partners' third-party action against AP on Broadway Partners' remaining third and fourth causes of action against AP; and it is further

ORDERED that PCM's cross-motion for summary judgment dismissing AP's third-party action against PCM is hereby denied; and it is further

ORDERED that all parties and third-parties to the underlying action will appear for a status conference before this Court on November 9, 2015 in Part 29 at 9:30 a.m.

The foregoing constitutes the Order and Decision of the Court.

Dated: October 28, 2015


_____, JSC
HON. ROBERT D. KALISH
J.S.C.