

**Evans v City of New York**

2015 NY Slip Op 32060(U)

February 3, 2015

Supreme Court, New York County

Docket Number: 102654/09

Judge: Donna M. Mills

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2/4/15  
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SUPREME COURT OF THE STATE OF NEW YORK—NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 58

JOY EVANS,

Plaintiff,

-v-

THE CITY OF NEW YORK, et al.,  
Defendants.

**FILED**

FEB 04 2015

**NEW YORK  
COUNTY CLERKS OFFICE**

INDEX No. 102654/09

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 006

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits 2

Replying Affidavits 3

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED

DECISION.

**RECEIVED**  
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NYS SUPREME COURT CIVIL

Dated: 2/3/15

*[Signature]*

**DONNA M. MILLS, J.S.C.**

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 58

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JOY EVANS,

INDEX NO.  
102654/09

Plaintiff,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.  
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**FILED** **SECTION/ORDER**

FEB 04 2015

NEW YORK  
COUNTY CLERK'S OFFICE

DONNA M. MILLS, J.:

In this personal injury action, plaintiff Joy Evans settled in August 2013, however a stipulation of discontinuance has not been filed since defendants 1625 Broadway, Inc. and Olmstead Properties, Inc. ("1625 Broadway") seek contractual indemnification, including but not limited to reimbursement for the attorney's fees expended by moving defendants in connection with the instant action. 1625 Broadway now moves for summary judgment pursuant to CPLR §3212 on the cross-claim for contractual indemnification against defendant Daffy Taffy Deli, Inc., individually and as successor to Belly Delly Deli Corp. ("Daffy Taffy").

In the underlying action, plaintiff appeared for an Examination Before Trial on April 13, 2010 and testified that her accident occurred on December 14, 2007 on the sidewalk in front of 1625 Broadway near a bus stop. On that day, plaintiff testified that as she stepped off a bus at the aforementioned location, her right foot landed in a hole on the sidewalk near a bus shelter and she fell.

It is not disputed that the alleged accident occurred on the sidewalk in front of the premises leased to Daffy Taffy by 1625 Broadway. Daffy Taffy however contends that it was not responsible to maintain the sidewalk near the bus shelter because its lease with

Landlord is silent with respect to responsibility for maintaining the bus shelter location. The lease states in relevant part:

Tenant shall also, at its own cost and expense, put, keep, replace and maintain in thorough repair and in good, safe and substantial order and condition, and free from dirt, snow, ice, rubbish and other obstructions or encumbrances, the sidewalks, areas, coal chutes, sidewalk hoists, railings, gutters, and curbs in front of and adjacent to the demised premises.

The lease further provided, at paragraph 20, that tenant shall indemnify and save harmless Landlord against and from all costs, expenses, liabilities, losses, damages, injunctions, suits, actions, fines, penalties, claims and demands of every kind or nature, including reasonable counsel fees, by or on behalf of any person, party or governmental authority whatsoever arising out of (a) any failure by tenant to perform any of the agreements, terms, covenants or conditions of the lease on tenant's part to be performed, (b) any accident, injury or damage which shall happen in or about the demised premises or appurtenances or on or under the streets, sidewalks in front of or adjacent thereto, during the term.

On February 16, 2012, Mi Young Beyn appeared on behalf of Daffy Taffy and testified that it was not responsible for maintaining the relevant area of the sidewalk by the bus shelter. In addition, it is alleged that Daffy Taffy did not remove snow and ice from the bus stop, and as such, that area would be excluded from the lease provision requiring that the sidewalk in front of the subject premises be maintained by them.

CPLR § 3212(b) requires that for a court to grant summary judgment, the court must determine if the movant's papers justify holding, as a matter of law, "that the cause of

action or defense has no merit.” It is well settled that the remedy of summary judgment, although a drastic one, is appropriate where a thorough examination of the merits clearly demonstrates the absence of any triable issues of fact (Vamattam v Thomas, 205 AD2d 615 [2nd Dept 1994]). It is incumbent upon the moving party to make a prima facie showing based on sufficient evidence to warrant the court to find movant’s entitlement to judgment as a matter of law (CPLR § 3212 [b]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). Summary judgment should be denied when, based upon the evidence presented, there is any significant doubt as to the existence of a triable issue of fact (Rotuba Extruders v Ceppos, 46 NY2d 223 [1978]). When there is no genuine issue to be resolved at trial, the case should be summarily decided (Andre v Pomeroy, 35 NY2d 361, 364 [1974]).

A party is entitled to contractual indemnification where the intention to indemnify is “clearly implied from the language and purposes of the entire agreement and the surrounding circumstances” (Torres v LPR Land Dev. & Constr., Inc., 54 AD3d 668, 670 [2d Dept 2008]). “In addition, 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.” ’ (*Id.* at 773 quoting Cava Const. Co., Inc. v. Gealtec Remodeling Corp., 58 AD3d 660, 662 [2nd Dept 2009].)

Here, 1625 Broadway met its initial burden of demonstrating its entitlement to contractual indemnification by submitting the lease and the deposition testimony of the

plaintiff and Mi Young Beyn. The lease included an express indemnification clause in favor of 1625 Broadway, which obligated Daffy Taffy, to indemnify 1625 Broadway against any and all costs, expenses, liabilities ... resulting from .... the failure of the tenant to perform any covenant of the lease. In addition, 1625 Broadway established that it was free from negligence. The evidence established that plaintiff allegedly fell on the sidewalk by the bus shelter in front of 1625 Broadway. Thus, plaintiff's accident occurred adjacent to the demised premises leased to Daffy Taffy and is, therefore, within its responsibility to maintain. In opposition, the Daffy Taffy defendant failed to raise a triable issue of fact as to whether the contractual indemnification clause should not be enforced.

In summary, the lease's indemnification and insurance procurement provisions are valid and enforceable; the indemnification and insurance procurement provisions provide an unmistakable intent that 1625 Broadway has a contractual right to be indemnified by Daffy Taffy. Therefore, based on these reasons, 1625 Broadway's motion for summary judgment on its cross-claim against Daffy Taffy is granted.

Accordingly, it is

ORDERED that defendant 1625 Broadway's motion for summary judgment on the cross-claim for contractual indemnification against defendant Daffy Taffy Deli, Inc., individually and as successor to Belly Delly Deli Corp. is granted; and it is further

ORDERED that the issue of ascertaining and computing the amount of reasonable counsel fees due to the respective attorneys for their work on behalf of 1625 Broadway is referred to a court Referee for a hearing to determine such fees; and it is further

ORDERED that said Referee is to report to this Court with all convenient and deliberate speed, except that, in the event of and upon the filing of a stipulation of the

parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid issues; and it is further

ORDERED that this motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for 1625 Broadway shall, within 30 days from the date of this order, serve a copy of the order with notice of entry, together with a completed Information Sheet, upon the Special Referee Clerk in the Motion Support Office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (Part 50R) for the earliest convenient date.

Dated: 2/3/15

ENTER:  


J.S.C.  
**DONNA M. MILLS, J.S.C.**

**FILED**  
FEB 04 2015  
NEW YORK  
COUNTY CLERK'S OFFICE