

CLK/HP 90 Merrick LLC v Supermedia Sales Inc.

2015 NY Slip Op 32217(U)

November 17, 2015

Supreme Court, New York County

Docket Number: 450047/2015

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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CLK/HP 90 MERRICK LLC and ABM JANITORIAL
SERVICES – NORTHEAST, INC.,

Plaintiffs,

Index No. 450047/2015

-against-

DECISION/ORDER

SUPERMEDIA SALES INC., IDEARC MEDIA, LLC,
IDEARC MEDIA CORP., SUPERMEDIA LLC,
SUPERMEDIA SERVICES – EAST, INC. and
IDEARC MEDIA SERVICES – EAST, INC.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Notice of Cross-Motion and Affidavits Annexed.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs CLK/HP 90 Merrick LLC (“CLK/HP”) and ABM Janitorial Services –
Northeast, Inc. (“ABM”) commenced the instant action against defendants SuperMedia Sales
Inc., Idearc Media, LLC, Idearc Media Corp., SuperMedia LLC, SuperMedia Services – East,
Inc., and Idearc Media Services – East, Inc. Plaintiff CLK/HP seeks a declaration that it is
entitled to contractual indemnification, common law indemnification, common law contribution,
and recovery for breach of contract in connection with a personal injury action commenced by
Jane and Steven Burgdoerfer (the “Underlying Action”). Plaintiff ABM seeks a declaration that

it is entitled to common law indemnification and common law contribution in connection with the Underlying Action. Defendants have brought the present motion for summary judgment pursuant to CPLR § 3212 to dismiss plaintiffs CLK/HP and ABM's complaint. Plaintiff CLK/HP has brought a cross-motion for summary judgment seeking a declaration that defendants have a contractual duty to indemnify plaintiff CLK/HP in connection with the Underlying Action. As will be further explained below, defendants' motion for summary judgment dismissing plaintiff CLK/HP's causes of action for contractual indemnification and breach of contract and plaintiffs CLK/HP and ABM's cause of action for common law contribution is denied. Defendants' motion for summary judgment dismissing plaintiffs CLK/HP and ABM's cause of action for common law indemnification is granted. Plaintiff CLK/HP's cross-motion for summary judgment on its cause of action for contractual indemnification is denied.

The relevant facts are as follows. In the Underlying Action, Jane Burgdoerfer claimed that she was injured when she slipped and fell on a wet floor in a kitchen located in an office at 90 Merrick Avenue, East Meadow, New York. These premises were owned by CLK/HP and leased by defendants. Ms. Burgdoerfer, who was employed by defendant Idearc Media Services – East, Inc. at the time of the alleged accident, claimed that on August 11, 2011, at about 9:00 p.m., she walked to the kitchen with a coworker to find or make food. At the time Ms. Burgdoerfer and her coworker, Olga Robertson, walked to the kitchen, Ms. Burgdoerfer did not observe any liquid on the floor outside or inside the kitchen. At a deposition, Ms. Burgdoerfer testified that she saw a janitor in the kitchen while she and Ms. Robertson made oatmeal, but she could not recall when the janitor entered. When Ms. Burgdoerfer and Ms. Robertson left the

kitchen approximately ten minutes later carrying their food, Ms. Burgdoerfer slipped and fell. She testified that after she fell, she noticed that her clothing and the floor were wet. Rosa Alvarado, identified as the janitor in the kitchen on the evening of the alleged accident, testified at a deposition that she did not mop the floor outside or inside the kitchen before Ms. Burgdoerfer slipped and fell, although she had placed a mop in the corner of the kitchen. Ms. Alvarado was an employee of ABM, the janitorial agency hired by CLK/HP to clean the premises. On or about April 2, 2010, Jane and Steven Burgdoerfer commenced the Underlying Action. On or about March 14, 2014, CLK/HP and ABM commenced a third-party action seeking a declaration that plaintiffs are entitled to contractual indemnification, common law indemnification and contribution, and recovery for breach of contract. On or about August 25, 2014, the instant action was severed from the Underlying Action.

CLK/HP's written commercial lease agreement (the "Lease") with defendants contained the following indemnification provision:

Tenant shall indemnify and save harmless Landlord against and from any and all claims by or on behalf of any person or persons, firm or firms, corporation or corporations (including Landlord) arising from the conduct or management of or from any work or other thing whatsoever done (other than by Landlord or its contractors or the agents or employees of either) in and on the Demised Premises during any period of occupancy by Tenant ... and will further indemnify and save harmless Landlord against and from any and all claims or losses arising from any condition of the Demised Premises or Tenant's occupancy thereof due to or arising from any act or omissions or negligence of Tenant or any of its agents, contractors, servants, employees, licensees or invitees and against and from all costs, expenses, and liabilities incurred in connection with any such claim or loss or action or proceeding brought thereon (including reasonable attorney fees and costs); and in case any action or proceeding be brought against Landlord by reason of any such claim or loss, Tenant, upon notice from Landlord, agrees that Tenant, at Tenant's expense, will resist or defend such action or proceeding and will employ counsel therefor reasonably satisfactory to landlord.

The Lease further provided that defendants were obligated to obtain insurance as follows:

Tenant shall obtain and keep in full force and effect during the Term, at its own cost and expense, (i) General Comprehensive Commercial Liability Insurance, such insurance to afford protection in an amount of not less than Three Million (\$3,000,000) Dollars combined single limit coverage for injury, death and property damage arising out of any one occurrence, protecting Landlord and Tenant as insureds against any and all claims for personal injury, death or property damage...

On a motion for summary judgment pursuant to CPLR § 3212, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

Defendants' motion for summary judgment dismissing plaintiff CLK/HP's cause of action for contractual indemnification and CLK/HP's cross-motion for summary judgment on its cause of action for contractual indemnification are denied on the ground that these motions are premature. A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2^d Dept 2008). 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." *Cava Constr. Co., Inc. v. Gealtex Remodeling Corp.*, 58 A.D.3d 660, 662 (2^d Dept 2009). In the present case, the Lease requires the tenant to indemnify CLK/HP where a claim arises from the conduct of the tenant or entities associated with the tenant and where a claim arises from a

condition of the premises that was caused by an act or the negligence of the tenant or entities associated with the tenant. Because there has been no determination of the negligence of the parties or the cause of the alleged accident in the Underlying Action, the court cannot determine whether CLK/HP is entitled to contractual indemnification. Thus, both defendants' motion for summary judgment dismissing plaintiff CLK/HP's cause of action for contractual indemnification and CLK/HP's cross-motion for summary judgment on its cause of action for contractual indemnification are denied.

Defendants' motion for summary judgment dismissing plaintiffs CLK/HP and ABM's cause of action for common law indemnification is granted on the ground that neither CLK/HP nor ABM are being held vicariously liable in the Underlying Action. To establish a right to common law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 4 (1st Dept 2012). Because plaintiffs in the Underlying Action seek to hold CLK/HP and ABM liable for their own negligence, not vicariously liable without proof of negligence, CLK/HP and ABM have no right to common law indemnification. Thus, defendants' motion for summary judgment dismissing plaintiffs CLK/HP and ABM's cause of action for common law indemnification is granted.

Defendants' motion for summary judgment dismissing plaintiffs CLK/HP and ABM's cause of action for common law contribution is denied on the ground that this motion is premature. A contribution claim arises when a tort-feasor claims reimbursement from "a successive, independent tort-feasor whose negligence aggravated the injured plaintiff's

damages.” *Glaser v. Fortunoff of Westbury Corp.*, 71 N.Y.2d 643, 644-45 (1988). Because there has been no determination of the negligence of the parties in the Underlying Action, the court cannot yet determine whether CLK/HP or ABM is entitled to contribution from defendants. Thus, defendants’ motion for summary judgment dismissing plaintiffs CLK/HP and ABM’s cause of action for common law contribution is denied.

Defendants’ motion for summary judgment dismissing plaintiff CLK/HP’s cause of action for breach of contract is denied as defendants have failed to establish that they obtained adequate insurance as required under the Lease. The Lease required defendants to obtain “General Comprehensive Commercial Liability Insurance” with a policy limit of at least \$3,000,000.00 per occurrence. Defendants submitted evidence that they had purchased one insurance policy issued by Zurich American Insurance Company with a policy limit of \$2,000,000.00 per occurrence, which did not meet their obligation under the Lease. To the extent that defendants submitted evidence that they had purchased an additional insurance policy in their reply papers, it is well-settled that the court will not consider evidence submitted for the first time in reply. *See Migdol v. City of New York*, 291 A.D.2d 201 (1st Dept 2002) (“The affidavit...submitted with appellant’s reply papers was properly rejected by the motion court since it sought to remedy these basic deficiencies in appellant’s prima facie showing rather than respond to arguments in plaintiff’s opposition papers.”) Thus, defendants’ motion for summary judgment dismissing plaintiffs’ cause of action for breach of contract is denied.

Accordingly, defendants’ motion for summary judgment dismissing plaintiff CLK/HP’s causes of action for contractual indemnification and breach of contract and plaintiffs CLK/HP and ABM’s cause of action for common law contribution is denied. Defendants’ motion for

