

Oesterle v A.J. Clark Real Estate Corp.
2015 NY Slip Op 32323(U)
December 8, 2015
Supreme Court, New York County
Docket Number: 153081/13
Judge: Kelly A. O'Neill Levy
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
ARNDT OESTERLE,

Plaintiff,

-against-

A.J. CLARK REAL ESTATE CORP., HUDBAR
ASSOCIATES, LLC, SAMMY'S RENOVATIONS,
INC. N. METRO CONSTRUCTION, INC. a/k/a
N. METRO CONSTRUCTION

Defendants.

-----X
A.J. CLARKE REAL ESTATE CORP., HUDBAR
ASSOCIATES, LLC,

Third-Party Plaintiffs,

-against-

MET LIFE AUTO & HOME INSURANCE
COMPANY,

Third-Party Defendant.

-----X
SAMMY'S RENOVATIONS, INC.

Second Third-Party Plaintiff,

-against-

PREFERRED CONTRACTORS INSURANCE
COMPANY RISK RETENTION GROUP, LLC.

Second Third-Party Defendant.

-----X

Index No. 153081/13
Motion Sequence # 003

DECISION & ORDER

Hon. Kelly O'Neill Levy, J.:

Third-Party Defendant Metropolitan Property and Casualty Insurance Company (s/h/a Met Life Auto & Home Insurance Company) ("Metropolitan") moves to dismiss the verified third-party complaint of A.J. Clarke Real Estate Corp. ("A.J. Clarke") and Hudbar Associates, LLC ("Hudbar") pursuant to CPLR 3211(a)(1), (3), and (7). The motion is granted for the reasons set forth below.

Discussion

It is undisputed that Metropolitan insured plaintiff Arndt Oesterle for his apartment, located at 72 Barrow Street, Apartment 5U in Manhattan, and its contents, and that in April 2010, a fire occurred in the apartment resulting in certain losses to Oesterle. Metropolitan paid Oesterle's resulting insurance claim in the amount of \$223,955, the maximum under the policy. In 2012, Metropolitan, as subrogee of Oesterle, filed suit under Index No. 100584/2012 against A.J. Clarke, Hudbar, Sammy's Renovations, Inc. ("Sammy's"), and N. Metro Construction, Inc., a/k/a N. Metro Construction ("N. Metro") seeking to recover the full amount of insurance proceeds that Metropolitan had paid to Oesterle. That action was settled and per the agreement, A.J. Clarke, Hudbar, Sammy's, and N. Metro collectively paid Metropolitan \$141,000 in exchange for a release.

Metropolitan submits with its moving papers the release, policy, and claim payments, which it argues establish that Metropolitan cannot be liable for any damages in excess of the policy limits. Metropolitan points to the following specific language in the release in support of its argument: "[Metropolitan] agrees to indemnify and hold harmless [the aforementioned defendants – including A.J. Clarke and Hudbar] from any and all actions, claims, liens, or demands of any

nature that are filed or will be filed against them, which arise out of or related to the damages paid by [Metropolitan] to its insured Arndt Oesterle.”

Plaintiff Oesterle brought the primary action here against A.J. Clarke, Hudbar, Sammy’s, and N. Metro. Absent was Metropolitan, from which Oesterle had already recovered the maximum under his insurance policy. In the complaint, Oesterle states: “[t]hat the plaintiff’s insurance company, Met Life Auto Home Insurance Company, has paid portions of the claim made by the plaintiff and that portions of the plaintiff’s claim were not covered and, accordingly, the plaintiff is commencing this action for that portion of his damages that were not covered by his insurance company, Met Life Auto Home Insurance Company.” (Complaint at ¶ 26).

In their third-party complaint, A.J. Clarke and Hudbar make claims for common-law and contractual indemnification and contribution against Metropolitan. A.J. Clarke and Hudbar assert that “Prior to April 14, 2010 [the date of the fire giving rise to the complaint], third-party plaintiff entered into an agreement with third-party defendant. Third-party plaintiff begs leave to refer to the full terms and conditions of said agreement upon the trial of this action.” (TPC at ¶ 13). No evidence of this agreement has been produced to the court to date.

The court first examines the common law indemnity claim and notes that “a party sued for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification.” *Mathis v. Central Park Conservancy*, 674 N.Y.S.2d 336, 337 (1st Dep’t 1998). In the underlying action here, Oesterle’s claims against A.J. Clarke and Hudbar are for “negligently hiring, appointing, and/or selecting Sammy’s to perform repairs and/or construction to the roof at the subject premises” and not on a theory of vicarious liability (Complaint, ¶ 31). Accordingly, the claim for common law indemnification is dismissed under CPLR 3211(a)(7).

The court next addresses Metropolitan's CPLR 3211(a)(1) argument that the contractual indemnity claim must be dismissed on the ground that "a defense is founded upon documentary evidence." When moving under this subsection, the defendant has the burden of submitting documentary evidence that, on its own, "resolves all factual issues as a matter of law and conclusively disposes of the plaintiff's claim." *Fortis Fin. Svcs, LLC v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 (1st Dept 2002)(citing to *Scadura v. Robillard*, 256 A.D.2d 567 (2d Dept 1998)). Dismissal of a complaint on the ground of documentary evidence is warranted where the evidence submitted conclusively establishes a defense as a matter of law. *See 150 Broadway N.Y. Assoc., L.P. v. Bodner*, 14 AD3d 1, 5 (1st Dep't 2004).

"[A] valid release constitutes a complete bar to an action on a claim which is the subject of the release." *Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 98 (1st Dep't 2006). A defendant has the initial burden of establishing that it has been released from any claims. *Mangini v McClurg*, 24 NYd 556, 563 (1969). "A release is a contract, and its construction is governed by contract law" [(*Cardinal Holdings, Ltd. v Indotronix Intl. Corp.*, 73 AD3d 960, 962 (2d Dept 2010), quoting *Lee v Boro Realty, LLC*, 39 AD3d 715, 716 (2d Dept 2007))] and one "that is complete, clear, and unambiguous on its face must be enforced according to the plain meaning of its terms." *Alvarez v Amicucci*, 82 AD3d 687, 688 (2d Dept 2011).

Here, the March 15, 2012 release includes language that Metropolitan "agrees to indemnify and hold harmless [A.J. Clarke, Hudbar, Sammy's, and N. Metro] from any and all actions, claims, liens, or demands of any nature that are filed or will be filed against them, which arise out of or related to the damages paid by [Metropolitan] to its insured Arndet [sic] Oesterle..." (Release at ¶ 3). Therefore, as Metropolitan persuasively argues, any indemnification is limited to what Metropolitan had already paid to Oesterle and Metropolitan is

not obligated to indemnify A.J. Clarke and Hudbar for any claims or damages in excess.

Moreover, no proof has been put before the court that any agreement predating April 10, 2010 exists apart from the vague and conclusory statement in the third-party complaint about the existence of same. As Metropolitan met its initial burden of establishing a defense as a matter of law on the indemnification claims, the burden shifts to A.J. Clarke and Hudbar to establish or plead an issue as to whether the release bars them. They have failed to do so, instead arguing that discovery is necessary to ascertain whether Plaintiff Oesterle claims for the same losses already reimbursed by Metropolitan despite the language in the underlying complaint expressly stating that he is not.

Finally, on the issue of contribution, Metropolitan correctly points out that contribution is not permissible where the alleged tort is “essentially a breach of contract.” *See Elkman v. Southgate Owners Corp.*, 246 A.D.2d 314, 314 (1st Dep’t 1998), *Westbank Contr., Inc. v. Rondout Val. Cent. School Dist.*, 46 A.D.3d 1187, 1190 (3d Dep’t 2007). Here, the third-party complaint states that A.J. Clarke and Hudbar seek contribution as a result of the breach of the purported pre-April 14, 2010 agreement that has not been produced. Coupled with Plaintiff’s statement in the complaint that he is not claiming for losses already paid by Metropolitan, dismissal of the contribution claim is appropriate.

In light of the dismissal, the court will not reach the remainder of the arguments.

Accordingly, it is hereby

ORDERED that the motion to dismiss of METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY (S/H/A MET LIFE AUTO & HOME INSURANCE COMPANY) is granted.

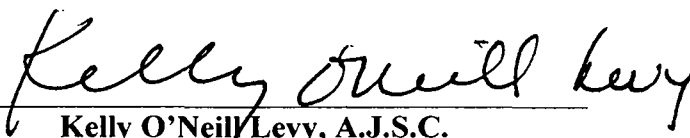
The Clerk is directed to enter judgment in favor of third-party defendant

METROPOLITAN PROPERTY AND CASUALTY INSURANCE COMPANY (S/H/A MET LIFE AUTO & HOME INSURANCE COMPANY) dismissing the first third-party complaint against it.

This constitutes the decision and order of the court.

ENTER:

Dated: December 8, 2015
New York, New York



Kelly O'Neill Levy, A.J.S.C.

HON. KELLY O'NEILL LEVY