

<b>Familia v 133 Dyckman St. LLC</b>
2016 NY Slip Op 30502(U)
March 23, 2016
Supreme Court, New York County
Docket Number: 159323/12
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

WILFREDO MARTINEZ FAMILIA, Plaintiff

INDEX NO. 159323 /12

MOTION DATE 02-03-2016

- v -

133 DYCKMAN STREET LLC, SOLIL MANAGEMENT, NRP LLC II, MP44 LLC and LARDON WEST 66TH LLC,

MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO.

The following papers, numbered 1 to 5 were read on this motion by defendant NRP LLC II for summary judgment on it cross-claims for contractual and common law indemnification against defendant LARDON WEST 66TH LLC.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits
Replying Affidavits

Table with 2 columns: PAPERS NUMBERED, and values 1-2, 3-4, 5

Cross-Motion: [ ] Yes [X] No

Upon a reading of the foregoing cited papers, it is ordered that this motion for summary judgment requiring defendant Lardon West 66th LLC to provide contractual and common law indemnification to defendant NRP LLC II and to dismiss plaintiff's claims against NRP LLC and NRP LLC I as abandoned is granted to the extent stated herein.

Plaintiff brings this action to recover for personal injuries sustained as a result of a slip and fall that occurred as he descended the steps of a kiosk at a parking garage located at the property on Dyckman Street which was being operated by defendant Lardon West 66th LLC ( Hereinafter "Lardon"). Defendant NRP LLC II ( Hereinafter "NRP") is the owner of the Parking Lot located at 141-149 Dyckman Street and the licensor of the premises. Defendant Larden is the Licensee that manages and operates the Parking lot pursuant to a License Agreement dated December 6, 2004 that gives it the right to manage and operate the parking lot at the premises.

Defendant NRP now moves for summary judgment dismissing the claims against defendants NRP LLC and NRP LLC I as abandoned because they were not named in the Amended Complaint. No party has opposed this relief, therefore this relief is granted without opposition and any and all claims made against NRP LLC and NRP LLC I are dismissed as abandoned.

**Defendant NRP next moves for contractual and common law indemnification against defendant Lardon. It alleges that in accordance with the indemnification provision in the Licensing Agreement defendant Lardon is to indemnify it contractually and at Common Law, provide a defense and reimburse it for all legal fees incurred in the defense of this action. In support of its motion defendant NRP annexes a copy of the Licensing Agreement dated December 6, 2004, deposition testimony of the plaintiff, of its witness Christopher Plath and of Rafael Maldonado, the witness for defendant Lardon. With this evidence defendant NRP attempts to show that it was out of possession of the premises and that defendant Lardon is solely Responsible for the accident because it managed and operated the Parking Lot, and was the entity that constructed , operated and maintained the Kiosk on whose steps Plaintiff slipped and fell ( see Exhibits A through M).**

**The Licensing agreement at Paragraph 22 ( Insurance) requires the Licensee to: (A)"... obtain and keep in full force and effect during the term (1) a policy of commercial general liability insurance with a garage liability endorsement or separate garage liability policy and a broad form contractual liability endorsement under which the insurer agrees to indemnify and hold licensor harmless from and against all cost, expense and/or liability arising out of or based upon any and all claims, accidents, injuries, and damages mentioned in Paragraph 23 and/or Subparagraph (e) of this paragraph 22 covering bodily injury and property damage liability, personal injury..., all in connection with the use and occupancy of or the condition of the parking lot...the minimum limits of liability shall be in amounts not less than \$5,000,000.00 General Aggregate Per Location, \$5,000,000.00Per occurrence for bodily injury and property damage..."**

**At (d) the license agreement requires that any insurance agreement name Licensor as the insured and .... such other designees specified by Licensor as additional insureds.**

**At Paragraph 23 the License agreement requires the licensee to "...indemnify and save licensor harmless from and against (a) all claims of whatever nature against Licensor arising from any act, omission or negligence of licensee...including any claims arising from any act, omission or negligence of licensor or both licensor and licensee... This indemnity and hold harmless agreement shall include indemnity from and against any and all liability, fines, suits, demands, costs and expenses of any kind or nature incurred in or in connection with any such claim or proceeding brought thereon, and the defense thereof."**

**Defendant NRP alleges that the language in the indemnity clause, coupled with the insurance procurement clause entitle it to contractual indemnification. Furthermore, since it is not liable, it is entitled to common law indemnification as well.**

**Defendant Lardon opposes the motion and argues that the indemnification clause in the License agreement is void in accordance with the General Obligations law and that there is an issue of fact regarding defendant NRP's negligence precluding summary judgment on the Common Law indemnification claim.**

The relevant section of the General Obligations Law applicable to lease agreement is section 5-321 which makes void as against public policy and unenforceable an agreement to exempt a lessor from its own negligence ( see GOL §5-321). "However, where the liability is to a third party, General Obligations Law § 5-321 does not preclude enforcement of an indemnification provision in an agreement negotiated at arm's length between two sophisticated parties when coupled with an insurance procurement requirement, and where a party is not exempting itself from liability to the victim for its own negligence but rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance"( Great Northern Ins. Co., v. Interior Const. Corp., 7 N.Y.3d 412, 857 N.E.2d 60, 823 N.Y.S.2d 765 [2006]; DiBuono v. Abbey, LLC, 95 A.D.3d 1062, 944 N.Y.S.2d 280 [2<sup>nd</sup>. Dept. 2012]; Castano v. Zee-Jay Realty Co, 55 A.D.3d 770, 866 N.Y.S.2d 700 [2<sup>nd</sup>. Dept. 2008] finding commercial tenant's agreement to indemnify landlord enforceable with respect to pedestrian trip and fall claim, where indemnification provision was accompanied by insurance procurement requirement which afforded pedestrian adequate recourse through tenant's insurance).

The indemnification provision and insurance procurement clause afford plaintiff herein adequate recourse through Licensee's insurance. The parties are not exempting Licensor through the indemnification agreement but merely allocating the risk of liability to third parties between themselves. As such the indemnification provision in the License Agreement is valid and enforceable. Since the indemnification provision in the License Agreement is valid and enforceable defendant NRP is entitled to contractual indemnification from defendant Lardon.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact.(Klein V. City of New York, 89 NY2d 833; Ayotte V. Gervasio, 81 NY2d 1062, Alvarez v. Prospect Hospital, 68 NY2d 320). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues(Kaufman V. Silver, 90 NY2d 204; Amatulli V. Delhi Constr. Corp., 77 NY2d 525; Iselin & Co. V. Mann Judd Landau, 71 NY2d 420). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party(SSBS Realty Corp. V. Public Service Mut. Ins. Co., 253 AD2d 583; Martin V. Briggs, 235 192).

It is axiomatic that summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits(Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y.S. 2d 18, 215 N.E. 2d 341[1966];Sillman v. 20<sup>th</sup> Century-Fox Film Corp., 3 N.Y. 2d 395, 165 N.Y.S. 2d 498, 144 N.E. 2d 387[1957];Epstein v. Scally, 99 A.D. 2d 713, 472 N.Y.S. 2d 318[1984]. Summary Judgment is "issue finding" not "issue determination"( Sillman, supra; Epstein, supra). It is improper for the motion court to resolve material issues of fact. These should be left to the trial court to resolve ( Brunetti, v. Musallam, 11 A.D. 3d 280, 783 N.Y.S. 2d 347[1st Dept. 2004]).

A party seeking common law indemnification is required to prove that it is not liable for negligence other than statutorily and that the proposed indemnitor contributed to the cause of the accident. *McCarthy v. Turner Construction, Inc.*, 17 N.Y. 3d 369, 953 N.E. 2d 794, 929 N.Y.S. 2d 556 (2011). Defendant NRP's lack of negligence has not been established, this is an issue of fact to be determined by a jury.

Accordingly , it is ORDERED that defendant NRP's motion to dismiss the claims against defendants NRP LLC and NRP LLC I as abandoned because they were not named in the Amended Complaint is granted without opposition and it is further

ORDERED that the claims against defendants NRP LLC and NRP LLC I are dismissed and severed, and it is further

ORDERED that the clerk of the court enter judgment accordingly, and it s further

ORDERED that defendant's motion for contractual indemnification is granted, and it is further

ORDERED that defendant LARDON WEST 66<sup>TH</sup> LLC fully indemnify defendant NR PROPERTY 2 LLC s/h/i/a NRP LLC II including reimbursement of all legal fees and expenses incurred in the defense of this action pursuant to the License Agreement dated December 6, 2004, and it is further

ORDERED that defendant's motion for common law indemnification is denied.

ENTER: **MANUEL J. MENDEZ**  
J.S.C.

Dated: March 23, 2016

  
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Manuel J. Mendez  
J.S.C.

Check one: FINAL DISPOSITION      X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST       REFERENCE