

Pinto v 200 W. 108 Hous. Corp.
2016 NY Slip Op 30768(U)
April 20, 2016
Supreme Court, New York County
Docket Number: 104286/10
Judge: Shlomo S. Hagler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

Present: Hon. Shlomo S. Hagler
Justice

IAS Part: 17

RENEE PINTO,

INDEX NO: 104286/10

Plaintiff,

MOTION SEQ. NO.: 005

- against -

200 WEST 108 HOUSING CORP.,

DECISION and ORDER

Defendant.

200 WEST 108 HOUSING CORP.,

Third-Party Plaintiff,

INDEX NO: 590057/08

-against-

**ESTATE OF PETER LEKUTANAJ, JOHN
LEKUTANAJ, TRUSTEE, TACORIA
RESTAURANT and NICK'S CONSTRUCTION
GROUP CORP.,**

FILED
APR 21 2016
COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Defendants,

The following papers, numbered 1 to 18, were read on this motion and cross-motion:

	Papers Numbered
Notice of Motion.....	<u>1</u>
Affirmation in Support & Exhibits A-F.....	<u>2</u>
Affirmation in Opposition & Exhibit A	<u>3</u>
Reply Affirmation & Exhibits A-C.....	<u>4</u>
Reply Affirmation.....	<u>5</u>
Memorandum of Law in Support	<u>6</u>
Reply Memorandum	<u>7</u>
Notice of Cross-Motion & Exhibits A-H	<u>8</u>
Supplemental Affirmation & Exhibits A-D.....	<u>9</u>
Affirmation in Opposition & Exhibits A-C.....	<u>10</u>
Affirmation in Opposition.....	<u>11</u>
Affirmation in Reply.....	<u>12</u>
Affirmation in Reply.....	<u>13</u>
Brief in Further Support.....	<u>14</u>
Memorandum in Partial Opposition.....	<u>15</u>
Reply Brief.....	<u>16</u>
Memorandum of Law in Opposition.....	<u>17</u>
Transcript of Oral Argument of August 7, 2014	<u>18</u>
Other: _____	

Index No.: 104286/10; 590057/08


Motion Seq. No.: 005

Upon the foregoing papers, it is hereby ordered that this Motion and Cross-Motion are

Decided in accordance with the attached Decision and Order.

FILED
APR 21 2016
COUNTY CLERK'S OFFICE
NEW YORK

Dated: April 20, 2016
New York, New York



Hon. Shlomo S. Hagler, J.S.C.

Check one:	<input type="checkbox"/> Final Disposition	<input checked="" type="checkbox"/> Non-Final Disposition
Motion is:	<input type="checkbox"/> Granted <input type="checkbox"/> Denied	<input checked="" type="checkbox"/> Granted in Part <input type="checkbox"/> Other
Cross-Motion is:	<input type="checkbox"/> Granted <input type="checkbox"/> Denied	<input checked="" type="checkbox"/> Granted in Part <input type="checkbox"/> Other
Check if Appropriate:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> DO NOT POST	<input type="checkbox"/> REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----X
RENEE PINTO,

Plaintiff,

Index No. 104286/10

-against-

200 WEST 108 HOUSING CORP.,

Motion Sequence No.:
005

Defendant.

FILED

-----X
200 WEST 108 HOUSING CORP.,

APR 21 2016

COUNTY CLERK'S OFFICE
NEW YORK

Third-Party Plaintiff,

Third-Party Index
No. 590060/11

-against-

ESTATE OF PETER LEKUTANAJ, JOHN LEKUTANAJ,
TRUSTEE, TACORIA RESTAURANT and NICK'S
CONSTRUCTION GROUP CORP.,

DECISION & ORDER

Third-Party Defendants.

-----X

Hon. Shlomo S. Hagler, J.S.C.:

This action for personal injuries arises out of an alleged accident which occurred on March 4, 2010, when plaintiff was purportedly rebricking and pointing the brick on the outside of the back of a building located at 200 West 108th Street in Manhattan.

In a prior decision and order, dated September 12, 2013 (the "Prior Decision"), this Court determined that the parties'

"motions and cross-motions must all be denied as premature at this time. As noted above, multiple questions of fact, such as whether plaintiff was working under the direction and control of Nick [Djonovic] and/or NCC [Nick's Construction Company], the relationship

between the various defendants and Nick and NCC, and whether or not the accident occurred as plaintiff alleges, preclude summary judgment in favor of any party at this time"

(Prior Decision at 8-9).

In this motion sequence number 005, third-party defendant Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana, incorrectly sued herein as Tacoria Restaurant, ("Sacrop") moves, pursuant to CPLR 2221, for leave to reargue the part of the Prior Decision that denied Sacrop's motion for summary judgment dismissing the third-party complaint, and upon reargument, for summary judgment in Sacrop's favor, dismissing third-party plaintiff's amended complaint, and the Estate's cross-claims for common-law and contractual indemnification, and contribution against it.

Third-party defendants the Estate of Peter Lekutanaj and John Lekutanaj, Trustee (collectively, the "Estate") cross-move, pursuant to CPLR 2221, for leave to reargue the part of the Prior Decision that denied the Estate's cross-motion for summary judgment dismissing the third-party complaint, and for summary judgment against Sacrop on the Estate's cross-claims for contractual and common law indemnification, and for contribution, and upon reargument, for summary judgment dismissing the third-party complaint, and for summary judgment in the Estate's favor on its cross-claims against Sacrop for contractual and common-law indemnification, and contribution.

In its amended third-party complaint, defendant/third-party plaintiff 200 West 108 Housing Corp. ("200 West") alleges causes of action against the Estate and Sacrop for common-law and contractual indemnification, breach of contract and contribution. The Court refers to its Prior Decision for a full recitation of the facts.

During oral argument held on August 7, 2014, this Court granted Sacrop and the Estate's motions for reargument, and vacated that part of the Prior Decision which pertained to Sacrop's motion, and the Estate's cross-motion for summary judgment dismissing the third-party complaint, and the Estate's cross-motion for summary judgment on the Estate's claims for contribution and indemnification (Prior Decision at 8-9; Oral Argument at 36-37). The portion of the Prior Decision dismissing 200 West's third-party claims for contractual indemnification and the failure to procure insurance as against the Estate (Oral Argument at 6-7) is not the subject of this motion to reargue.

The issue of the timeliness of the Estate's cross-motion raised by 200 West in its papers need not be addressed as this Court already granted reargument during August's oral argument (Oral Argument at 7, 36).

Discussion

The Summary Judgment Standard

"As the proponent of the motion for summary judgment, [a party] is required to

demonstrate that there are no material issues of fact in dispute and that he is entitled to judgment and dismissal as a matter of law. Only when this burden is met, is the opposing party required to submit proof in admissible form sufficient to create a question of fact requiring a trial [internal citations omitted]"

(*Pokoik v Pokoik*, 115 AD3d 428, 428 [1st Dept. 2014]). Moreover, "[o]n a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party'" (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept. 2012], quoting *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012])).

The parties' claims for Contractual Indemnification and/or Breach of Contract

"The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract. 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 facts and circumstances. A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous [internal citations omitted]"

(*Suazo v Maple Ridge Assoc., L.L.C.*, 85 AD3d 459, 460 [1st Dept. 2011])).

As an initial matter, the Court notes that there is no contract running from third-party plaintiff 200 West and Sacrop. Accordingly, the third-party complaint insofar as alleging breach of contract and contractual indemnification against Sacrop must

be dismissed.¹

There are two leases relevant in this matter: the master lease between 200 West and the Estate, and the store sublease between the Estate and Sacrop. The Estate asserts that the sublease contains clauses requiring Sacrop to indemnify the Estate (paragraph 8) and to procure insurance for the benefit of the Estate (Estate's 7/17/14 Brief, at second unnumbered page). However, the only copies of the sublease in evidence before the court are comprised solely of the first and last pages. Paragraph 8, or any other paragraph which might provide for indemnification or for procurement of insurance, is not on either page, leaving questions of fact as to whether any such provision may be found in the subcontract, and what the content of the provision might be.

Therefore, the part of Sacrop's motion which seeks summary judgment dismissing the Estate's cross-claim for contractual indemnification is granted. Likewise, the portion of the Estate's summary judgment motion on its cross-claim against Sacrop to the extent it seeks contractual indemnification is denied, without prejudice.

Common-Law Indemnification

"To be entitled to common-law indemnification, a party must

¹As set forth above, during the oral argument held on August 7, 2014, this court dismissed 200 West's third-party claims for contractual indemnification and the failure to procure insurance as against the Estate (Oral Argument at 6-7).

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 AD3d 1, 10 [1st Dept 2012]; see also *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 [2011] ["a party cannot obtain common-law indemnification unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part. . . . Liability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision"]).

Contribution

"Contribution is available where 'two or more tortfeasors combine to cause an injury' and is determined 'in accordance with the relative culpability of each such person' [citation omitted]" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003]; see also *Mas v Two Bridges Assoc.*, 75 NY2d 680, 689-690 [1990] ["in contribution, the tort-feasors responsible for plaintiff's loss share liability for it. Since they are in pari delicto, their common liability to plaintiff is apportioned and each tort-feasor pays his ratable part of the loss"]).

Sacrop's Motion for Summary Judgment Dismissing 200 West's Third-Party Complaint, and the Estate's cross-claims Asserted Against it to the extent such claims allege common law indemnification and contribution; Estate's Cross-Motion for Summary Judgment dismissing 200 West's Third-Party Complaint and for summary judgment in its favor on its cross-claims against Sacrop, to the extent such claims allege common law indemnification and contribution.

These motions are "denied as premature, since no finding as to responsibility for plaintiff's accident has been made" *Brockman v Cipriani Wall St.*, 96 AD3d 576, 577 [1st Dept. 2012]. See *Barraco v First Lenox Terrace Assoc.*, 25 AD3d 427, 429 [1st Dept. 2006]. See also *O.K. Petroleum Distrib. Corp. v West Hempstead Water Dist.*, 131 AD3d 1143, 1144 [2d Dept. 2015]. As stated in the Prior Decision, there are multiple questions of fact, such as whether plaintiff was working under the direction and control of Nick Djonovic and or defendant Nick's Construction Group Corp., the relationship between the various defendants and whether the accident occurred as plaintiff alleges. Until such time as 200 West's liability is determined, the third party claims and cross-claims based on common law indemnification and contribution must survive.

Conclusion

On the basis of the foregoing, it is

ORDERED, that the Prior Decision which comprises the last three lines on page 8 and the first two lines on page 9, and the decretal paragraphs pertaining to those five lines is vacated, pursuant to page 37 of the transcript of the August 7, 2014 Oral

Argument; and it is further

ORDERED, that the part of Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana's motion for leave to reargue is granted; and it is further

ORDERED, that upon reargument, the part of Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana's motion which seeks summary judgment dismissing 200 West Housing Corp.'s third-party complaint to the extent the third-party complaint seeks contractual indemnification is granted; and it is further

ORDERED, that the part of Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana's motion which seeks summary judgment dismissing 200 West Housing Corp.'s third-party complaint to the extent the third-party complaint seeks common law indemnification, and contribution is denied; and it is further

ORDERED, that the part of Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana's motion which seeks summary judgment dismissing The Estate of Peter Lekutanaj and John Lekutanaj, Trustee's cross-claim for contractual indemnification is granted; and it is further

ORDERED, that the part of Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana's motion that seeks summary judgment dismissing The Estate of Peter Lekutanaj and John Lekutanaj, Trustee's cross-claims for common-law indemnification and contribution is denied; and it is further

ORDERED, that the part of The Estate of Peter Lekutanaj and John Lekutanaj, Trustee's cross-motion for leave to reargue is granted; and it is further

ORDERED, that upon reargument, the part of The Estate of Peter Lekutanaj and John Lekutanaj, Trustee's cross-motion which seeks summary judgment dismissing 200 West Housing Corp.'s third-party complaint to the extent the third-party complaint seeks common law indemnification, and contribution is denied; and it is further

ORDERED, that the part of The Estate of Peter Lekutanaj and John Lekutanaj, Trustee's cross-motion which seeks summary judgment in their favor on their cross-claims for contractual indemnification is denied; and it is further

ORDERED, that the part of The Estate of Peter Lekutanaj and John Lekutanaj, Trustee's cross-motion which seeks summary judgment in their favor on their common-law indemnification, and contribution cross-claims against Sacrop Restaurant Corp. d/b/a Taqueria Y Fonda La Mexicana is denied; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

Dated: April 20, 2016

FILED
APR 21 2016
COUNTY CLERK'S OFFICE
NEW YORK

ENTER:

J.S.C

SHLOMO HAGLER
J.S.C.