Sweet P Home Care, Inc. v Scottsdale Ins. Co.
2016 NY Slip Op 31699(U)
September 2, 2016
Supreme Court, Kings County
Docket Number: 502257/14
Judge: Larry D. Martin
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At an I.A.S. Trial Term, Part 41 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 2nd day of September, 2016.

PRESENT:

Hon. LARRY D. MARTIN, J.S.C.

SWEET P HOME CARE, INC.,

PLAINTIFF,

-VS-

INDEX No. 502257/14

SCOTTSDALE INSURANCE COMPANY and EILEEN ANDERSON,

DEFENDANTS.

The following papers numbered 1 to 4 read on this motion	Papers Numbered
Notice of Motion - Order to Show Cause and Affidavits (Affirmations) Annexed	
Answering Affidavit (Affirmation)	
Reply Affidavit (Affirmation)	
Memorandum of Law	

Upon the foregoing papers, defendants Scottsdale Insurance Company ("Scottsdale") and Eileen Anderson ("Anderson"; collectively, "defendants") move for an order: (1) pursuant to CPLR 3212, granting summary judgment dismissing the complaint herein; (2) pursuant to CPLR 3214 (b), staying all disclosure pending a determination of the instant motion; and (3) pursuant to 22 NYCRR 130.1.1(c), imposing an award of costs and sanctions in favor of defendants and as against plaintiff Sweet P Home Care, Inc. ("Sweet P").

In 2008, Sweet P (a home health care agency) and Anderson (a nurse) were sued in a related underlying nursing/medical malpractice action (the "underlying action") entitled *Mariana Ramos, as mother and natural guardian of Marian Clara Vargas-Ramos, an infant under the age of fourteen years and Mariana Ramos v Sweet Home, Inc., Sweet P Home Care, Inc. and Eileen Anderson*, index No. 30645/08. In the underlying action, the plaintiff claimed, among other things, that Anderson's care of the 2-year old infant-plaintiff caused the infant-plaintiff to go into respiratory distress on July 17, 2007 (Notice of Motion, ¶5; Affirmation in Opposition, ¶4). Plaintiff, in the underlying action,

also made direct claims against Sweet P "for sending an allegedly unqualified nurse into the [plaintiff's] home to care for a child with special needs" (Notice of Motion, ¶5). A review of the Court's record indicates that on or about, October 28, 2013, Sweet P commenced a third-party action against Scottsdale in relation to the underlying action.

Subsequently, on or about March 14, 2014 Sweet P commenced the instant action seeking, among other things, indemnification and contribution from Anderson, as well as, a declaration that Scottsdale is obligated to indemnify it for damages sustained as a result of the underlying action (Notice of Motion, exhibit A). However, in the underlying action, by decision and order (Dabiri, J.) dated March 24, 2014, Sweet P's motion for an order, among other things, granting leave to amend its answer to assert claims for indemnification and contribution against Anderson was "granted to the extent of granting [Sweet P] leave to amend [its] answer to assert a claim for contribution in the event that Anderson and plaintiff fail to settle their claims prior to trial, and granting [Sweet P] leave to amend [its] answer to assert a claim for set-off in the event that Anderson and plaintiff settle their claims prior to trial" (the "underlying order"; Notice of Motion, exhibit D). In the underlying order, the Court (Dabiri, J.) noted that "'[t]he predicate for common-law indemnity is vicarious liability without fault on the part of the proposed indemnitee, and it follows that a party who has itself participated to some degree in the wrongdoing cannot receive the benefit of the doctrine' (*Kagan v Jacobs*, 260 AD2d 442, 442 [1999])." Indeed, in the underlying order, the Court further held that "plaintiff asserts a direct claim for negligence against [Sweet P]. Moreover when deposed Patricia Smith [Sweet P's] principal, testified to her active involvement in determining Ms. Anderson's proficiency and readiness for the position."

Thereafter, by general release dated June 26, 2014, a hold harmless agreement dated June 19, 2014 and a stipulation of settlement dated June 19, 2014, Anderson settled the underlying action for $945,000 (Notice of Motion, exhibit G). By separate stipulation, Sweet P settled the underlying action for $300,000.

Contrary to Sweet P's contentions, the doctrine of law of the case is applicable to the findings made by the Court in the underlying order (Dabiri, J.) addressing its underlying motion for, among

other things, leave to amend its answer to assert causes of action for contribution and indemnification as against Anderson (*see Mosby v Parilla*, 140 AD3d 1129 [2d Dept 2016]). While the underlying determination did not involve a motion for summary judgment and findings of fact as a matter of law, Sweet P did not appeal the holdings made therein regarding the applicability of the doctrines of contribution and indemnification as between the parties.

Notably, "General Obligations Law §15-108 (b) provides that: '[a] release given in good faith by the injured person to one tortfeasor as provided in [General Obligations Law §15-108](a) relieves him from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules ..." (*Ziviello v O'Boyle*, 90 AD3d 916, 917 [2d Dept 2011]).

With respect to Sweet P's claims for contribution, the Court finds that by virtue of it having settled with the plaintiffs in the underlying action, it is not "now entitled to claim contribution from [defendants]" (*Nielsen v Greenman Bros., Inc.*, 123 AD2d 850, 850 [2d Dept 1986]) in the instant action. Moreover, "[t]here is no allegation that the release [executed in the underlying action] was not executed in good faith ..." (*Ziviello*, 90 AD3d at 91). In this regard, the Court finds that defendants have demonstrated their prima facie entitlement to judgment as a matter of law (*see* CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In opposition, Sweet P has failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986] citing *Zuckerman*, 49 NY2d at 562; *see also Winegard v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

However, it is well settled that where a party settles a tort action, he or she may "continue to pursue a cause of action for indemnification, unencumbered by section 15-108" (*McDermott v City of New York*, 50 NY2d 211, 220 [1980]) of the General Obligations Law, "as long as the settling party shows that it may not be held liable in any degree" (*Cunha v City of New York*, 12 NY3d 504, 059 [2009]). Common law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence (*Boorman v City of New York*, 34 Misc3d 435, 438 [Sup Ct, New York County 2011]).

Based upon a review of the record submitted by the parties and the relevant law, the Court finds that defendants demonstrated their prima facie entitlement to judgment as a matter of law. Defendant demonstrated that Sweet P's liability in the underlying action, if any, would not have been based solely on the acts of defendants (*see Salonia v Samsol Homes, Inc.*, 119 AD2d 394, 402 [2d Dept 1986]). Rather, it would have been based on its own actual wrongdoing (*see Bryan v CLK-HP 225 Rabro, LLC*, 136 AD3d 955, 957 [2d Dept 2016]; *U.S. Fire Insurance Co. v Raia*, 121 AD3d 970, 972 [2d Dept 2014]; *Lui v Town of East Hampton*, 117 AD3d 689, 691 [2d Dept 2014]). Furthermore, in the underlying order, it was noted that there was a direct claim of negligence by the plaintiff therein as against Sweet P, and it was also held that Sweet P's principal testified as to her active involvement in the selection of Anderson for the position. In opposition, Sweet P has failed to submit sufficient evidence in admissible form to raise a triable issue of fact (*see Alvarez*, 68 NY2d at 324).

In light of the foregoing, that branch of defendants' motion for an order, pursuant to CPLR 3214 (b), staying all disclosure until there is a determination of the instant motion, is denied as moot.

Finally, in the exercise of its discretion, the Court hereby denies that branch of defendants' motion for the imposition of costs and an award of attorney's in favor of defendants and as against Sweet P (*see* 22 NYCRR §§ 130-1.1[a], 130-1.1[c][1]; *see also U.S. Fire Ins. Co. [Raia]*, 121 AD3d at 972).

Accordingly, defendants' motion is granted to the extent that the complaint herein is dismissed.

The foregoing constitutes the decision, order and judgment of the Court.

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ENTER

HON. LARRY D. MARTIN
J.S.C.

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