Soto v Village JV 500 E. 11th LLC
2016 NY Slip Op 32106(U)
October 20, 2016
Supreme Court, New York County
Docket Number: 161279/2015
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL R. EDMEAD J.S.C. *Justice* PART 35

Index Number : 161279/2015
SOTO, RICHARD
vs.
VILLAGE JV 500 EAST 11TH LLC
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE 8/22/16
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

In this personal injury action arising from a workplace accident, third party defendant C&R Construction/REN, Inc. ("C&R") moves to dismiss the third party complaint pursuant to CPLR 3211(a)(7) and (a)(1) based on documentary evidence and for failure to state a cause of action, respectively.

Factual Background

Plaintiff commenced this action alleging violations of Labor Law 200, 240, and 241(6) against defendants Village JV 500 East 11th LLC ("Village"), Kushner Companies, LLC ("Kushner") and 7-Eleven, Inc., alleging that he sustained injuries on March 16, 2013 while working at a construction site in New York, New York. In turn, Village and Kushner commenced a third party action against C&R, plaintiff's employer, for contribution and contractual indemnification (first cause of action ¶¶13-15 and 16), common law indemnification (second cause of action), and breach of agreement to provide insurance (third cause of action).

In support of its motion, C&R argues that the Construction Management Agreement (the "CMA") it entered into *with Village* to perform work at the premises was not executed until April 2013, *after* the date of the accident. There is no language in the CMA indicating that it was retroactive. Therefore, C&R cannot be liable for contractual indemnification. Further, the absence of any allegations that plaintiff suffered a grave injury is fatal to the common law contractual and contribution claims against C&R. Further, since the CMA was entered into in

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

Dated: _____ _____, **J.S.C.**

1. CHECK ONE: ..... ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. CHECK AS APPROPRIATE: .....**MOTION IS:** ☐ **GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. CHECK IF APPROPRIATE: ..... ☒ **SETTLE ORDER** ☐ **SUBMIT ORDER**

☐ **DO NOT POST** ☐ **FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

April 2013, after the date of loss, any insurance obligations would not have been in effect at the time of plaintiff's alleged accident.

In opposition, Village and Kushner argue that their claims are adequately stated and that the affidavit and attachments to the CMA attached to the motion do not constitute documetary evidence that supports dismissal. Further, there are issues of fact as to whether C&R agreed to be bound by the unsigned contract terms and whether such terms were in effect prior to date of the accident. Further, there is no proof that C&R provided plaintiff with Workers' Compensation benefits and any dismissal based on absence of an allegation of grave injury should be without prejudice pending the completion of discovery.

In reply, C&R argues that the CMA provides in Article 5(2) that it is only effective when executed by both parties, and the date is April 2013. While it may be unclear when in April 2013 the CMA became effective, it was not in effect on March 16, 2013. Also, working at the project prior to execution of CMA is not evidence of a contractual obligation to provide indemnification and insurance coverage. In any event, the CMA's merger clause provides that the CMA supercedes any prior agreements.

Discussion

In determining a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the Court's role is deciding "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]; *Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 960 NYS2d 404 [1st Dept 2013]). On a motion to dismiss made pursuant to CPLR § 3211, the court must "accept the facts as alleged in the complaint as true, accord plaintiffs "the benefit of every possible favorable inference," and "determine only whether the facts as alleged fit into any cognizable legal theory" (*Siegmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, *supra; Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972, 638 NE2d 511 [1994]).

The elements of breach of contract claim "include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 913 N.Y.S.2d 161 [1st Dept 2010]

Village and Kushner's contractual indemnification claim is adequately stated as follows:

> TENTH: That prior to March 16, 2013, the defendants/third-party plaintiffs, VILLAGE, entered into an agreement/contract with the third-party defendant, C&R, and/or was a third-party beneficiary thereof, to provide certain work and services at the premises known as 170 Avenue A, Manhattan, New York.
>
> * * * * *
>
> THIRTEENTH: That pursuant to the terms of the aforementioned agreement/contract, the third-party defendant was obligated, to the fullest extent permitted by law, to defend, indemnify, and hold harmless the defendants/third-party plaintiffs from and against all claims, losses, liability, damages, costs and expenses . . . , to the extent arising in whole or in part from the breach of contract or negligent acts or

omissions of the third-party defendant or its agents . . . in connection with the work being performed by the plaintiff at the time and place of the subject accident.

*****

FIFTEENTH: That if the plaintiff suffered any injuries and/or damages . . . then said injuries/damages were caused in whole or in part by reason of the carelessness, negligence, recklessness, acts of omission or commission, statutory violation, breach of warranty, and/or breach of contract on the part of the third-party defendant, C&R . . . .

And, the breach of contract claim based on the allegation of a failure to procure insurance claim is adequately stated as follows:

TWENTY-SECOND: That the third-party defendant, C&R, agreed to secure liability insurance in favor of, or for the benefit of the defendants/third-party plaintiffs, VILLAGE, for such liabilities as might be rendered against, VILLAGE, arising out of the services to be rendered by the third-party defendant, C&R, its agents, servants, employees and/or Trade Contractors at the premises in question.

TWENTY-THIRD: That the third-party defendant, C&R, failed to obtain the aforementioned insurance and breached the terms of its agreement/contract with the defendants/third-party plaintiffs relative thereto.

Likewise, Village and Kushner's contribution claims are adequately stated as well by the above and by the following:

SIXTEENTH: That *by reason of the foregoing*, the third-party defendant, C&R, is and will be liable to these defendants/third-party plaintiffs for *full or partial apportionment of liability and contribution* pursuant to Dole v. Dow in the event of a recovery herein, by the plaintiff.
(Emphasis added).

The common law indemnification claim is also adequately stated by the additional allegations:

EIGHTEENTH: That if the plaintiff was injured as is alleged in his Complaint, then, in that event, said injuries and/or damages were caused by the active primary fault, carelessness, want of care, negligence, breach of statutory duties and/or breach of contract of the third-party defendant, C&R; . . . with these defendants/third party plaintiffs' negligence, if any, being passive only.

NINETEENTH: That by reason thereof, the defendants/third-party plaintiffs, VILLAGE, are entitled to full and complete indemnity from the third-party defendant, C&R.

TWENTIETH: That by reason of the foregoing, the third-party defendant, C&R, will be liable to these defendants/third-party plaintiffs for the full amount of any

judgment or verdict which may be recovered by plaintiff herein, on the basis of common law, contractual and/or statutory indemnity.

However, the documentary evidence, *to wit*: the CMA, establishes that C&R's contractual indemnification and insurance procurement obligations were not in effect at the time of plaintiff's alleged injury.

A " written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Beinstein v. Navani*, 131 A.D.3d 401, 14 N.Y.S.3d 362 [1st Dept 2015]). "It is a court's task to enforce a clear and complete written agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document" (*150 Broadway N.Y. Assoc., L.P. v Bodner,* 14 AD3d 1, 6 [1st Dept 2004]; *see also Alf Naman Real Estate Advisors, LLC v. Cape Sag Developers, LLC*, 113 A.D.3d 525, 978 N.Y.S.2d 844 [1st Dept 2014] ("court properly enforced the amended limited liability agreement according to the plain meaning of its terms, without looking to extrinsic evidence to create ambiguities not present on the face of the document")). Furthermore, a contract is unambiguous if the language it uses has "a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion" (*Breed v. Insurance Co. of N. Am.*, 46 NY2d 351, 355, 413 NYS2d 352 [1978], *rearg denied* 46 NY2d 940, 415 NYS2d 1027 [1979]). Thus, if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity (*see e.g. Teichman v. Community Hosp. of W. Suffolk*, 87 NY2d 514, 520, 640 NYS2d 472 [1996]; First Natl. Stores v. Yellowstone Shopping Ctr., 21 NY2d 630, 638, 290 NYS2d 721, rearg denied 22 NY2d 827, 292 NYS2d 1031 [1968]).

The CMA clearly contains an indemnification and insurance procurement clause in favor of Village and Kushner (see Article 14 and Exhibit B).

However, Article 5(2) provides:

> Effectiveness of Agreement. This Agreement *only when executed by both parties shall be effective as of the date first stated above. All understandings and agreements heretofore had among CM and Owner with respect to the Project are merged into, or superseded by, this Agreement.* This Agreement fully and completely expresses the agreement of the parties with respect to the Services, the Work and the Project and shall not be modified or amended except by written agreement executed by each of the parties hereto. CM understands and agrees that no representations of any kind whatsoever have been made to it other than as appear in this Agreement, that it has not relied on any such representations and that no claim that it has so relied on may be made at any time and for any purpose. (Emphasis added).

The "date first stated above" is "is April 2013."

Although the affidavit submitted is not documentary evidence (*see Regini v Board of Managers of Loft Space Condominium*, 107 AD3d 496, 968 NYS2d 18 [1st Dept 2013]; *Tsimerman v. Janoff*, 40 A.D.3d 242, 835 N.Y.S.2d 146 [1st Dept 2007]), the CMA clearly establishes that it is not effective until April 2013, a date subsequent to the date of plaintiff's accident. Therefore, C&R's contractual obligations did not exist at the time of the alleged accident (*see Burke v Fisher Sixth Ave. Co.*, 287 A.D.2d 410, 731 N.Y.S.2d 724 [1st Dept 2001] (stating, "The contracts purportedly incorporating the attachments containing the indemnity and insurance procurement clauses underlying the third-party complaint were dated and executed after plaintiff's accident. Since there is nothing about these contracts to suggest that they were intended to have retroactive effect, summary judgment dismissing the third-party complaint was properly granted"); *Temmel v 1515 Broadway Assoc., L.P.*, 18 A.D.3d 364, 795 N.Y.S.2d 234 [1st Dept 2005] ("while the subsequent purchase order from Lehr to Wiltel does contain such a provision [to indemnify], it is dated more than one month after plaintiff's accident and is devoid of any language demonstrating an intention by the parties that it be retroactively applied")).

And, Village and Kushner's contention that the absence of details of when the CMA was first drafted and reviewed, and contention that issues as to when C&R was actually working at the worksite as evidenced by the CMA's "breakdowns" dated February 21, 2013 (before the date of the accident) are immaterial in light of the CMA's merger clause: "*All understandings and agreements heretofore had among CM and Owner with respect to the Project are merged into, or superseded by, this Agreement.*" In light of the merger clause, and the absence of any evidence indicating any retroactive application of the CMA, the contractual claims are refuted by the express terms of the CMA, and dismissal against Village and Kushner pursuant to CPLR 3211(a)(1) is warranted.

Yet, it is uncontested that neither the complaint nor the third party complaint alleges a "grave injury" as required to assert a third party claim for common law contribution or common law indemnification claims. Therefore, the third party claims for common law indemnification and contribution are dismissed, without prejudice to reassert upon discovery indicating that plaintiff sustained a "grave injury" (*Tonking v. Port Authority of New York and New Jersey*, 3 N.Y.3d 486, 821 N.E.2d 133, 787 N.Y.S.2d 708 [2004] (Where the plaintiff has not sustained a "grave injury," section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer "expressly agreed" to indemnify the claimant.")).

Conclusion

Based on the foregoing, it is hereby

ORDERED that third party defendant C&R Construction/REN, Inc.'s motion to dismiss the third party complaint pursuant to CPLR 3211(a)(7) and (a)(1) based on documentary evidence and for failure to state a cause of action, respectively, is granted as follows:

ORDERED that third party plaintiffs Village JV 500 East 11th LLC and Kushner Companies, LLC's common law contribution and indemnification claims against C& R Construction are severed and dismissed pursuant to CPLR 3211(a)(7) without prejudice, and

Village JV 500 East 11th LLC and Kushner Companies, LLC's contractual claims for indemnification and failure to procure insurance are severed and dismissed pursuant to CPLR 3211(a)(1); and it is further

ORDERED that the remaining parties shall appear for a preliminary conference on January 17, 2017, 2:30 p.m.; and it is further

ORDERED that third party defendant C&R Construction/REN, Inc. Shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

DATED: 10.20.2016

HON. CAROL R. EDMEAD J.S.C.

J.S.C.

1. CHECK ONE :
2. CHECK AS APPROPRIATE :
3. CHECK IF APPROPRIATE :

☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

MOTION IS: ☑ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE