SUPREME COURT OF THE STATE OF NEW YORK
BRONX COUNTY: Part 13

JOHN J. CLAVIN

Plaintiff,

v. **Index No. 20292-15E**

CAP EQUIPMENT LEASING CORPORATION, CAP RENTS SUPPLY, LLC,

Defendants.

CAP EQUIPMENT LEASING CORPORATION, CAP RENTS SUPPLY, LLC

Third-Party Plaintiffs,

v.

SCHIAVONE CONSTRUCTION CORPORATION and SCHIAVONE CONSTRUCTION CO., LLC

Third-Party Defendants.

DECISION

On 21 July 2014, Plaintiff, Mr. John J. Clavin, sustained injuries while operating a portable XAS 750 air compressor machine which allegedly had a defective door.

Defendants/Third-Party Plaintiffs, Cap Equipment Leasing Corporation and Cap Rents Supply, LLC ["Cap"], move to dismiss the Complaint under CPLR 3211(a)(1) & (a)(7), claiming they did not owe a duty of care towards Mr. Clavin. In the alternative, Movants seek conditional summary judgment under CPLR 3212(b) against Third-Party Defendants, Schiavone Construction Corporation and Schiavone Construction Co., LLC, for contractual and common law indemnification.

Third-Party Defendants, Schiavone Construction Corporation and Schiavone Construction Co., LLC ["Schiavone"] cross-move under 3212 to dismiss Cap's Third-Party Complaint.

After review of the motion papers, this Court **DENIES** Cap's motion to dismiss and summary judgment, as well as Schiavone's cross-motion for summary judgment, as questions of fact abound.

Cap's Motion To Dismiss

Generally, the court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint. *Frank v. DaimerChrysler Corp.*, 292 AD2d 118, 121 (App Div, 1st Dept 2002). Additionally, the court must accept the facts in the complaint as true, give plaintiffs the benefit of every possible favorable inference, and determine only whether the facts fit into any cognizable theory. *Vig v. New York Hairspray Co., L.P.*, 67 AD3d 140, 144-45 (App Div, 1st Dept 2009); *Nonnon v. City of NY*, 9 NY3d 825, 827 (App Ct 2007).

Movants rely on the documentary evidence defense under CPLR 3211(a)(1). To prevail under this Section, the documentary evidence must conclusively dispose of the plaintiff's claim. *Goshen v. Mutual Life Ins. Co. of NY*, 98 NY2d 314, 326 (App Ct 2002). Here, Mr. Clavin has a viable claim that he was injured as a direct result of the defective air compressor door, as seen from the medical write-ups. See Caruana Aff. at Exh. E. Accordingly, this case cannot be dismissed under this Section, especially since there is no documentary evidence that *conclusively* shows a defense regarding Cap's alleged duty of care towards Mr. Clavin.

Movants also rely on dismissal of Mr. Clavin's Complaint under CPLR 3211(a)(7). In assessing the adequacy of a complaint under this Section, the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true, and allow the plaintiff the benefit of every possible favorable inference. *Landon v. Kroll Laboratory Specialists, Inc.*, 22 NY3d 1, 5 (App Ct 2013).

Furthermore, the standard on a motion to dismiss a pleading for failure to state a cause of action is whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained. *Stendig, Inc. v. Thom Rock Realty Co.*, 163 AD2d 46, 48 (App Div, 1st Dept 1990). The pleadings must therefore be liberally construed. See CPLR 3026; *Leon v. Martínez*, 84 NY2d 83, 87-88 (App Ct 1994). Lastly, the court must accept the facts in the complaint as true, give

plaintiffs the benefit of every possible favorable inference, and determine only whether the facts fit into any cognizable theory. *Nonnon v. City of NY*, 9 NY3d 825, 827 (App Ct 2007); *Leon*, 84 NY2d at 87-88.

Here, the negligence cause of action is sufficiently pleaded, based on Mr. Clavin's right elbow injuries. In addition, there is a contractual agreement among the parties which signals this Court that a duty is owed upon an alleged breach, hence invoking a viable negligence claim. Accordingly, Cap's dismissal motion is denied.

Schiavone's Dismissal Under CPLR 3212

Similarly, both Mr. Clavin's and Cap's Third-Party Complaint have been sufficiently pleaded as questions of fact exist regarding duty owed and the extent of all the parties' comparative negligence. While a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party, there are exceptions to this general rule to which a party may be said to have assumed a duty of care to third parties. *All American Moving and Storage, Inc. v. Andrews*, 96 AD3d 674, 675 (App Div, 1st Dept 2012); *Espinal v. Melville Snow Contractors, Inc.*, 98 NY2d 136, 141-42 (App Ct 2002).

In the instant matter, Cap and Schiavone entered into a fully executed "Reservation Contract" in which Cap rented out an air compressor to Schiavone to use on a construction site. See Caporaso Aff. at ¶ 3. If it is found that a plaintiff's injuries are attributable to any negligence on his/her part, enforcement of the indemnification claim is premature. *Harasim v. Eljin Const. of NY, Inc.*, 106 AD3d 642, 644 (App Div, 1st Dept 2013); *Picaso v. 345 East 73 Owners Corp.*, 101 AD3d 511, 512 (App Div, 1st Dept 2012); New York General Obligations Law § 5-322.1 ["Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases"].

Here, Schiavone, through counsel, argues that the indemnification clause is unenforceable under GOL § 5-322.1 because the only potential basis for liability is Cap's own negligence; thus, Cap is precluded from getting contractual indemnity for its own negligence. See Caruana Reply at ¶ 13. While Mr. Caporaso attested that Schiavone agreed to assume full responsibility for equipment during the rental period [which therefore means Cap assumed no liability for loss or damage from any accidents/injury, see

"Customer's Responsibilities" under ¶ 4 of Contract],[1] Schiavone contends that Cap states there is no contract between them. See Caruana Aff. at ¶ 32.

Thus, whether or not Cap and Schiavone were indeed in a contractual relationship is a material fact which precludes granting of Schiavone's cross-motion. It therefore follows that whether Cap is entitled to contractual/common law indemnification from Schiavone is also a genuine issue of fact. Schiavone's cross-motion is thus denied.

Cap's Motion For Summary Judgment for Indemnification

An issue of fact exists regarding the enforceability of the indemnification provision under ¶ 10 of the "Reservation Contract." Where there are factual issues regarding the extent of the subcontractor's negligence, the owner's summary judgment motion based on indemnity should not be granted. *Guillory et al. v. Nautilus Real Estate, Inc.*, 208 AD2d 336, 339 (App Div, 1st Dept 1995).

Under CPLR 3212(b), the motion shall be denied if any party shall show facts sufficient to require a trial on any issue of fact. See *Vega v. Restani Constr. Corp.*, 18 NY 3d 499, 502 (App Ct 2012) (where the Appeals Court stressed that summary judgment is a drastic remedy which can only be granted upon the movant showing sufficient evidence to show the absence of any material issues of fact; if the non-movant fails to show that there are material issues of fact, the case proceeds to trial). Moreover, the purpose of the motion court is issue-finding, and not issue-determination. *Sanchez v. Finke*, 288 AD2d 122, 123 (App Div, 1st Dept 2001); *Pirrelli v. Long Island Rail Road*, 226 AD2d 166 (App Div 1st Dept 1996).

Thus, a party can prove prima facie entitlement to summary judgment through an attorney affirmation based upon documentary evidence. *Prudential Securities Inc. v. Rovello*, 262 AD2d 172 (App Div, 1st Dept 1999). Moreover, the non-movant of a summary judgment motion is entitled to all favorable inferences. *ConEd of NY, Inc. v. Jet Asphalt Corp.*, 132 AD2d 296, 300 (App Div, 1st Dept 1987).

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[1] See Caporaso Aff. at ¶ 4. Mr. Caporaso also attested that the air compressor was inspected prior to rental. Id. at ¶ 6; see also Ritzert Reply at ¶¶ 28-29.

Schiavone asserts that Cap's motion for summary judgment for indemnification should be denied because the medical evidence shows that Mr. Clavin did not sustain a grave injury. See Caruana Aff. at ¶ 37. Schiavone, through counsel, also asserts that because the Rental Agreement did not require Cap to be an additional insured under Schiavone's own insurance, Cap's claims for breach of contract should also be dismissed, along with its claims for indemnification against Schiavone. Id. at ¶ 39.

A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous. *Suazo v. Maple Ridge Assocs.*, LLC, 85 AD3d 459, 460 (App Div, 1st Dept 2011); *Martins v. Little 40 Worth Assocs., Inc.*, 72 AD3d 483, 484 (App Div, 1st Dept 2010). Here, however, questions of fact exist regarding whether there was indeed a contract and if so, whether ¶ 10 of the "Reservation Contract" is triggered, because liability is also in question. The "Reservation Contract" states that if the compressor is not in good ***mechanical*** condition, then Schiavone is to promptly notify Cap.

Thus, a question of fact also arises as to whether a defective door is deemed a "mechanical" condition that is covered under ¶ 10 of the "Reservation Contract." In addition, Mr. Clavin attested that before the incident, he informed his supervisor about the defective door. See Clavin Aff. at ¶ 7. While Mr. Clavin notified his supervisor of this problem, the outstanding question of whether this problem was the responsibility of Cap[2] or Schiavone will be resolved at trial, should the parties not settle.

Cap therefore is barred from seeking indemnity from Schiavone because liability is at issue. See *Margolin v. NY Life Inc. Co.*, 32 NY2d 149, 153 (App Ct 1973) (where a party is entitled to full indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire contract and surrounding fact).

[2] Cap, through counsel, argues that since it relinquished the duties to manage, control, or operate the machine on a daily basis because those duties were assumed by Schiavone, Cap can therefore not be held liable for Mr. Clavin's right elbow injuries. See Ritzert Reply at ¶ 22.

CONCLUSION

In sum, Defendants' motion and Third-Party Defendant's cross-motion are **DENIED** in their entirety; genuine issues of fact [comparative negligence, whether a contract exists, etc.] preclude entitlement to summary judgment and dismissal. The parties are **DIRECTED** to continue discovery.

Movants are **ORDERED** to file Notice of Entry within fourteen [14] business days from the date this Decision is entered by Bronx County Clerk of the Court.

This constitutes the Decision and Order of this Court.

Dated: December 13, 2016
Bronx, NY

Hon. Fernando Tapia, J.S.C.