

Verizon N.Y., Inc. v Felix Indus., Inc.

2016 NY Slip Op 33108(U)

July 21, 2016

Supreme Court, New York County

Docket Number: 114431/2009

Judge: Michael D. Stallman

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This opinion is uncorrected and not selected for official publication.

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: Hon. MICHAEL D. STALLMAN PART 21
Justice

VERIZON NEW YORK, INC., INDEX NO. 114431/2009
Plaintiff, MOTION DATE 7/7/16
- v - MOTION SEQ. NO. 004
FELIX INDUSTRIES, INC., CITNALTA CONSTRUCTION
and FELIX ASSOCIATES, LLC, Defendants

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NEW YORK

(And two third-party actions).

The following papers, numbered 1 to 9, were read on this motion to dismiss and cross motion for summary judgment

- Notice of Motion —Affirmation — Exhibits A-F | No(s). 1-2
- Notice of Cross Motion —Affirmation—Exhibits A-E —Affidavit of Service | No(s). 3-5
- Affirmation in Opposition —Exhibits A-H —Affidavit of Service | No(s). 6-7
- Reply Affirmation—Affidavit of Service | No(s). 8-9

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

Upon the foregoing papers, it is ordered that this motion to dismiss the first third-party complaint as against third-party defendant City of New York is granted without opposition, and the Clerk is directed to enter judgment dismissing the first third-party action as against third-party defendant City of New York, together with costs and disbursements to this defendant, as taxed by the Clerk upon presentation of a bill of costs; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the cross motion by second third-party defendant

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Metropolitan Transportation Authority, for summary judgment in its favor on its cross claim against third-party plaintiff Citnalta Construction for contractual indemnification is denied; and it is further

ORDERED that the case is restored to active status.

The underlying action arises out of property damage to plaintiff's equipment/facilities on the northwest corner of Cortlandt Street and Broadway in Manhattan on October 19, 2007, allegedly due to an underground water pipe leak. The leak allegedly resulted from allegedly negligent excavation and backfilling that occurred during a subway/transit project taking place in the area.

It appears that plaintiff, defendant Felix Associates, and defendant/third-party plaintiff Citnalta attended a private mediation and settled the underlying action. (Sisnett Affirm. ¶ 4; Peace Opp. Affirm. ¶ 19.) The entire case was marked disposed.

Meanwhile, on May 26, 2015, third-party defendant City of New York (City) served a 90-day notice upon all parties, pursuant to CPLR 3216, to resume prosecution of the case. (Sisnett Affirm., Ex D.)

Pursuant to CPLR 3216, the City now moves for dismissal of the third-party complaint and all cross claims, which is not opposed. Second third-party defendant Metropolitan Transportation Authority (MTA) cross-moves for summary judgment in its favor on its cross claim against third-party plaintiff Citnalta Construction (Citnalta) for contractual indemnification. Citnalta opposes the MTA's cross motion.

The City's motion is granted without opposition.

Turning to the cross motion, the MTA seeks to recover its costs and expenses incurred in the defense of the second third-party action, which amounts to \$6,488.08. (Shein Affirm. ¶ 27.)

As a preliminary matter, the Court notes that the MTA's cross motion is not a true cross motion, because it seeks relief against a nonmovant, i.e., Citnalta, and not against the movant, the City. (Patrick

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M. Connors, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR C2215:1.) Thus, "a cross motion is an improper vehicle for seeking relief from a nonmoving party." (*Kershaw v Hosp. for Special Surgery*, 114 AD3d 75 [1st Dept 2013].) However, the Court will disregard this defect, which in this case is non-prejudicial.

The MTA maintains that it is entitled to contractual indemnification pursuant to Article 6.03 of the agreement between the MTA and Citnalta for rehabilitation of the Fulton Street Station, which states, in relevant part:

"The Contractor shall indemnify and save harmless the Indemnified Parties, to the fullest extent permitted by law, from loss and liability upon any and all claims and expenses, including but not limited to attorneys' fees, on account of such injuries to persons or such damage to property, irrespective of whether it shall have been due in part to the negligence of the Contractor or its subcontractors or negligence of the Indemnified Parties, or of any other persons, but excepting bodily injuries and property damage to the extent caused by the negligence of the Contracting Party or the Authority."

(Shein Affirm., Ex B [emphasis supplied].) Article 6.01 states that the term "Indemnified Parties" shall consist of the following parties, including their officers, employees and agents:

1. The City
2. The Authority
3. The Government
4. The State
5. The MTA."

(*Id.*) A letter agreement dated October 17, 2005 also added "MTA Capital Construction" to the end of Article 6.01. (*Id.*)

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As Citnalta indicates, the indemnity provisions exclude indemnity for property damage "caused by the negligence of the Contracting Party [i.e., the MTA]." Moreover,

"Pursuant to General Obligations Law § 5-322.1, any construction contract purporting to indemnify a party for its own negligence is void and unenforceable, although contracts requiring parties to procure insurance are not similarly void. Consequently, a party to a contract who is a beneficiary of an indemnification provision must prove itself to be free of negligence; to any extent that the negligence of such a party contributed to the accident, it cannot be indemnified therefor."

(Reynolds v County of Westchester, 270 AD2d 473, 474 [2d Dept 2000] [internal citation omitted].) Thus, on a motion for summary judgment, "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor." *(Bellefleur v Newark Beth Israel Med. Ctr., 66 AD3d 807, 808 [2d Dept 2009].)*

Here, the MTA did not meet its prima facie burden of demonstrating that it was free from negligence. "[W]here the indemnitee's negligence remains unresolved, summary judgment in favor of the indemnitee on a claim for contractual indemnification is inappropriate." *(Pardo v Bialystoker Ctr. & Bikur Cholim, Inc., 10 AD3d 298, 302 [1st Dept 2004].)*

Therefore, the MTA's cross motion for contractual indemnification against Citnalta is denied.

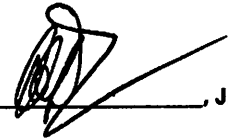
Finally, upon the Court's own initiative, the action is restored to active status. The entire case was inadvertently marked disposed, when the third-party claims had not been resolved.

The Court reminds the remaining parties that, as per the prior so-ordered stipulation dated July 7, 2016, the parties are scheduled to return to IAS Part 21 on November 3, 2016 at 9:30 a.m. In the

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meantime, Citnalta and the MTA could endeavor to settle the MTA's cross claim instead of expending additional time and money litigating the cross claim. Unless Citnalta and the MTA stipulate to a settlement beforehand, they both shall appear at the conference by attorneys fully authorized to resolve all issues.

Dated: 7/25/16
New York, New York

 J.S.C.

- 1. Check one:.....
 - CASE DISPOSED
 - NON-FINAL DISPOSITION
- 2. Check if appropriate:..... MOTION IS:
 - GRANTED
 - DENIED
 - GRANTED IN PART
 - OTHER
- 3. Check if appropriate:.....
 - SETTLE ORDER
 - SUBMIT ORDER
 - DO NOT POST
 - FIDUCIARY APPOINTMENT
 - REFERENCE

HON. MICHAEL D. STALLMAN

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