Govenar v Brushstroke
2017 NY Slip Op 30424(U)
March 2, 2017
Supreme Court, New York County
Docket Number: 160114/2013
Judge: Arlene P. Bluth
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

---X

JODY GOVENAR,

Plaintiff,

DECISION & ORDER
Index No. 160114/2013

-against-

Mot. Seq. 015

BRUSHSTROKE, BOJI D/B/A BRUSHSTROKE, BOULEY DUANE STREET D/B/A BOULEY RESTAURANT, ACTION CARTING ENVIRONMENTAL SERVICES, INC., ONE HUDSON PARK ASSOC LLC, ABBEVILLE PRESS INC, ONE HUDSON PARK INC, A&L CESSPOOL SERVICE CORP., SCIENTIFIC FIRE PREVENTION CO., NEW YORK NAUTICAL INSTRUMENT & SERVICE CORP., THE ANDREWS ORGANIZATION, INC.

Defendants.

---X

The motion by Samiro Services., d/b/a Scientific Fire Prevention Company, s/h/a Scientific Fire Prevention Co., ("Samiro") to dismiss plaintiff's complaint and all cross-claims against it pursuant to CPLR 3211(a)(1) or, in the alternative, for summary judgment is granted only to the extent that plaintiff's complaint against Samiro is dismissed and all cross-claims against Samiro are dismissed except for Brushstroke's cross-claims for contractual indemnity and breach of contract for failure to purchase insurance.

Background

This action arises out of alleged injuries suffered by plaintiff on the sidewalk near 30 Hudson Street, New York, New York on July 28, 2013. Defendant Brushstroke operates a

restaurant at the above address. Plaintiff contends that she slipped on oily grease. The parties dispute the origin of this alleged grease.

Samiro claims that plaintiff's complaint should be dismissed because the deposition testimony and document discovery demonstrates that Samiro could not be responsible for the grease. Samiro insists it only cleaned the kitchen exhaust system for Brushstroke Restaurant and did not touch the grease trap at the restaurant. Therefore, Samiro contends, it could not have caused any grease to leak because it did not remove liquid grease from the restaurant. Samiro argues that it would clean the 'grease filters' located inside the kitchen hood on a monthly basis and then place these filters back in the hood. Samiro alleges that there are work orders for every service it performed and that it would not have touched the grease trap without generating a similar work order.

Samiro also insists that it did not do any work at Brushstroke Restaurant between May 6, 2013 and August 19, 2013 and concludes that this forecloses any claim for liability against Samiro. Samiro contends that the testimony of Chef Yamada (a chef at Brushstroke) claiming that Samiro was the grease removal company for the restaurant is not supported by the evidence.

In opposition, defendant Brushstroke argues that it takes no position with respect to plaintiff's claims against Samiro but insists that this Court must sustain Brushstroke's cross-claims against Samiro because Samiro does not explain why Brushstroke's cross-claims should be dismissed.[1]

---

[1]Counsel for Samiro insists that this Court should ignore Brushstroke's opposition papers because they were submitted late. However, the Court, in its discretion, will consider Brushstroke's papers because there is no prejudice to Samiro. In any event, as will be evident below, consideration of Brushstroke's papers was not dispositive because Samiro did not meet its burden regarding two of Brushstroke's cross-claims.

In opposition, plaintiff claims that Samiro created or exacerbated a dangerous condition. Plaintiff insists that the deposition testimony indicates that Samiro's employees would use a hose to remove grease from the hoods and that the grease would be caught in a plastic tarp. Plaintiff concludes that these tarps were then placed in trash cans, which were brought outside, right next to where plaintiff slipped.

Discussion

"On a CPLR 3211 motion to dismiss, the court will 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 within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the

opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee,* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court will treat Samiro's motion as a motion for summary judgment.

Plaintiff's Complaint

Plaintiff asserts only a cause of action for negligence against Samiro. "[A] plaintiff in a negligence claim must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Aracelis On v BKO Express LLC*, 45 NYS3d 68, 70, 2017 NY Slip Op 00281 [1st Dept 2017] [internal quotations and citation omitted]).

Here, plaintiff failed to raise an issue of fact to defeat Samiro's evidence that Samiro did not cause the grease to spill on the sidewalk. Plaintiff claims that she slipped and fell on July 28, 2013 and Samiro argues that the last time it performed work at Brushstroke prior to plaintiff's accident was on May 6, 2013. Specifically, Samiro, relying on its invoices, claims that it did not perform any work at Brushstroke between May 6, 2013 and August 19, 2013 (*see* affirmation of Samiro's counsel, exhs S, T). Mr. Klein (Samiro's CEO) testified that Samiro did not perform its monthly filter cleaning services in June or July of 2013 (*id.* exh N at 41). Samiro also

submitted a document containing a note from a Samiro employee stating that he attempted to perform the cleaning work on June 11, 2013, but that the customer (Brushstroke) was not ready (*id.* exh T).

Based on the above facts, the Court finds that plaintiff cannot establish causation. Plaintiff's claim against Samiro relies upon the premise that Samiro created an oily, greasy sidewalk that remained wholly unchanged from May 6, 2013 to July 28, 2013 (the date of the accident). The cleanliness of New York City sidewalks changes daily and the parties presented no evidence to suggest that this sidewalk was not cleaned (or it did not rain) for two and a half months.[2] Therefore, Samiro's motion for summary judgment is granted and plaintiff's complaint against Samiro is dismissed.

Brushstroke's Cross-Claims

Brushstroke alleges cross-claims against Samiro for common law contribution, common law indemnification, contractual indemnification and breach of contract for failing to secure insurance.[3]

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

---

[2]This observation relies upon the unproven premise that Samiro's negligence caused a greasy sidewalk on May 6, 2013.

[3]Samiro contends that all defendants assert these cross-claims, but only Brushstroke opposes the motion.

"Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine" (*Edge Mgmt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). "[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia,* 259 AD2d at 65).

As an initial matter, Brushstroke's cross-claims for common law indemnification and contribution are dismissed because the Court has found that Samiro was not negligent as a matter of law. Samiro cannot be required, pursuant to the common law, to indemnify or to contribute to a finding of liability against Brushstroke if Samiro is not at fault.

Although it appears that the service agreements between Samiro and Brushstroke (*see* affirmation of Samiro's counsel, exhs Q, R) do not require Samiro to indemnify or purchase insurance, Samiro failed to address the specifics of its argument that these cross-claims should be dismissed.

The entirety of Samiro's motion focuses on the issue of negligence. However, as stated above, Samiro's negligence is irrelevant to whether it owed contractual indemnity to Brushstroke or whether it breached a contract with Brushstroke. The question for this Court is whether a contract existed between these parties and whether provisions of such a contract required Samiro to indemnify and purchase insurance for Brushstroke. It is not the role of this Court to review Samiro's exhibits and generate (and subsequently accept) arguments in support of Samiro's requested relief. The Court cannot assume, for example, that the service agreements submitted

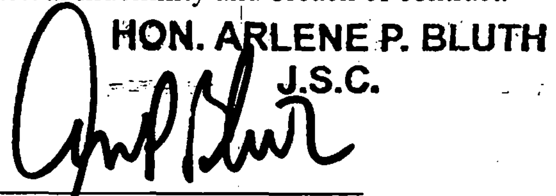
constitute the entirety of the agreements between Samiro and Brushstroke. On a summary judgment motion, a party must meet its prima facie burden to demonstrate the absence of a material issue of fact rather than assume that the Court will find support buried in its exhibits.

Further, Brushstroke correctly points out that this Court should disregard any arguments that Samiro raises for the first time in reply. Therefore, this Court cannot consider Samiro's arguments, made for the first time in reply, that no contract exists to support Brushstroke's cross-claims for contractual indemnity and breach of contract.

Accordingly, it is hereby

ORDERED that the motion by Samiro is granted only to the extent that plaintiff's complaint is dismissed as against Samiro and all cross-claims against Samiro are severed and dismissed except for Brushstroke's cross-claims for contractual indemnity and breach of contract.

This is the Decision and Order of the Court.



Dated: March 2, 2017
New York, New York

ARLENE P. BLUTH, JSC