

Wilson v Davaco NCS, Inc.

2018 NY Slip Op 30079(U)

January 17, 2018

Supreme Court, New York County

Docket Number: 150590/2015

Judge: Erika M. Edwards

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

THEODORE WILSON and LYNDIA WILSON,

Index No.: 150590/2015

Plaintiffs,

DECISION/ORDER

-against-

Motion Seq. 002

DAVACO NCS, INC., MACY'S CORPORATE
SERVICES, INC., MACY'S OF NEW YORK,
MACY'S OF NEW YORK n/k/a MACY'S INC.,
MACY'S RETAIL HOLDINGS, INC., RALPH
LAUREN CORPORATION, and RALPH LAUREN
RETAIL, INC.,

Defendants,

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	1
Opposition Affidavits/Affirmations and Memos of Law annexed	2, 3
Reply Affidavits/Affirmations/Memos of Law annexed	4

ERIKA M. EDWARDS, J.:

Plaintiffs Theodore Wilson ("Plaintiff") and Lyndia Wilson (collectively "Plaintiffs") brought this action against Defendants Davaco NCS, Inc. ("Davaco"), Macy's Corporate Services, Inc., Macy's of New York, Macy's of New York n/k/a Macy's Inc., Macy's Retail Holdings, Inc. (collectively "Macy's"), Ralph Lauren Corporation, and Ralph Lauren Retail, Inc. (collectively "Ralph Lauren"), for personal injuries Plaintiff sustained when a strap broke around a stack of oak wood floor planks which Plaintiff and another worker were attempting to move on a hand jack without using a pallet base. Plaintiffs stipulated to discontinue all claims against Davaco, but the co-defendants' cross-claims against Davaco based primarily on contribution and common-law and contractual indemnification remain. Plaintiffs' allege Defendants are liable for Plaintiff's accident under common-law negligence, res ipsa and violations of Labor Law §§ 200, 240(1) and 246(1).

Davaco moves for summary judgment in its favor for dismissal of all cross-claims against it under motion sequence 002. Based on the evidence submitted and arguments raised by the parties, the court grants Davaco's motion and dismisses all cross-claims against Davaco.

Davaco argues in substance that Plaintiff was Davaco's "special employee," so all cross-claims for contribution and common-law indemnification must be dismissed as Macy's and Ralph Lauren failed to demonstrate that Plaintiff suffered a grave injury under Workers' Compensation Law § 11. Davaco further argues that it does not owe contractual indemnification to Macy's because it has no contract with Macy's and Macy's was not covered by Davaco's contract with Ralph Lauren. Davaco argues that it does not owe any contractual indemnification to Ralph Lauren because the parties are bound by the terms set forth in Ralph Lauren's Purchase Order and not Davaco's Proposal. The Purchase Order only requires Davaco to indemnify Ralph Lauren for claims related to the resale and/or use, including misuse, of merchandise and not for the work performed in this case. In the alternative, Davaco argues that should the court determine that Davaco's Proposal controls and Davaco is obligated to indemnify Ralph Lauren, then, pursuant to the terms of the Proposal, Davaco's liability should be capped at \$144,602.49, which is the amount paid by Ralph Lauren to Davaco for the project.

Although Ralph Lauren and Macy's failed to file a separate opposition to this motion, they argued in support of summary judgment in their favor and against Davaco on this issue in their summary judgment motions. Ralph Lauren argues in substance that it is entitled to contractual indemnification from Davaco because Davaco's Proposal governs the relationship between the parties, Ralph Lauren accepted the Proposal by sending its Purchase Order, Davaco performed according to the terms of the Proposal by completing the work and obtaining the insurance required by the Proposal and the course of conduct of the parties demonstrates that the parties intended to be bound by the Proposal. Macy's argues in substance that it is entitled to contractual indemnification from Davaco as a direct beneficiary of Ralph Lauren's Purchase Order since it is Ralph Lauren's customer and the Purchase Order was the controlling agreement between Ralph Lauren and Davaco.

Plaintiff was a construction laborer for True Blue Labor Ready temporary employment agency. The temp agency had a contract with Davaco to provide temporary laborers. Plaintiffs and Macy's stipulated that the store where the accident occurred was owned by Macy's Retail Holdings Incorporated. Since 2011, Ralph Lauren and Macy's had an agreement to permit Ralph Lauren to create display areas or mini shops inside of Macy's stores.

Davaco submitted a Proposal, dated July 31, 2014, to Ralph Lauren for Davaco to remove 152 wooden dance floors from Ralph Lauren display shops inside of 127 Macy's stores across the country. The Proposal included the scope of the work and pricing based on the number of shops at each location for a total amount not to exceed \$153,700. It also included several pages of terms and conditions which included an indemnification clause requiring Davaco to indemnify Ralph Lauren for all claims arising out of or related to the Proposal or the relationship between them. However, the amount was limited to money damages not to exceed the amount of fees paid by Ralph Lauren pursuant to the Proposal, which was \$144,602.49. The Proposal was unsigned.

Ralph Lauren sent Davaco a Purchase Order, dated August 14, 2014, for dance floor removal in the Macy's Men's and Women's areas for a total of \$138,100. The Purchase Order's preprinted terms and conditions primarily pertain to Ralph Lauren's purchase of merchandise or goods and it expressly states that Ralph Lauren rejects and objects to any additional or different terms which vary to any degree the terms in the Purchase Agreement unless such other terms are expressly contained in the Purchase Order. The Purchase Order also specifies that the Purchase

Order, together with any samples or any documents and materials referred to in the Purchase Order constitute the entire agreement between the parties. Additionally, the Purchase Order contains an indemnification clause for claims arising out of, or which relate to, or are connected in any way with, the resale and/or use, including misuse, of the merchandise covered by the Purchase Order.

Plaintiff was assigned to work for Davaco to remove a wooden dance floor from a Ralph Lauren shop located inside of a Macy's store in Yonkers, New York. It is undisputed that Davaco's employee directed, controlled and supervised Plaintiff's work and Davaco was responsible for controlling the means and methods of Plaintiff's work. However, it is unclear whether Davaco provided the hand jack or whether they borrowed it from Macy's. Davaco assigned Plaintiff to assist a Davaco employee in disassembling shelving racks, dismantling the oak floor planks, stacking them onto a hand truck and moving the load down to a truck to be removed from the premises and reassembling the racks. The Davaco employee directed Plaintiff to remove the planks and load them onto the hand truck.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]). Facts supported by admissible evidence must be viewed in the light most favorable to the non-movant.

The sole remedy of any employee against his employer for injuries sustained during the course of his employment is benefits under the Workers' Compensation Law (Workers' Compensation Law §§ 11 and 29[6]). An employee could have more than one employer for statutory purposes and when an employee elects to receive Workers' Compensation benefits from his general employer a special employer is also shielded from any actions at law commenced by the employee based on the exclusivity provisions of the Workers' Compensation Law (*Thompson v Grumman Aerospace Corp.*, 78 NY2d 553, 560 [1991]; *Fung v Japan Airlines co., Ltd.*, 9 NY3d 351, 358-359 [2007]).

An employer will not be liable for common-law contribution and indemnification to a third party unless the employee sustained a “grave injury” as set forth in Workers’ Compensation Law § 11 as amended in 1996 (*see Way v George Grantling Chemung Contracting Corp.*, 289 AD2d 790 [3d Dept 2001]).

A special employee is “one who is transferred for a limited time of whatever duration to the service of another” (*Thompson*, 78 NY2d at 557). Principle factors in determining the existence of a special employment relationship include who has the right to control the employee’s work, who is responsible for the payment of wages and the furnishing of equipment, who has the right to discharge the employee, and whether the work being performed was in furtherance of the special employer’s or the general employer’s business (*see Alvarez v. Cunningham Assoc., L.P.*, 21 AD 3d 517 [1st Dept 2005]). Many factors are weighed in deciding whether a special employment relationship exists, and generally no one is decisive, but the key to this determination is “who controls and directs the manner, details and ultimate result of the employee’s work” (*Thompson*, 78 NY2d at 557-558). “A finding of a special employment is justified only where the special employer exerts complete and exclusive control over the purported special employee, as to whom the general employer has relinquished all control” (*Fox v Brozman-Archer Realty Servs., Inc.*, 266 AD2d 97, 99 [1st Dept 1999] [internal citation omitted]).

A party’s right to indemnification may arise from a contract or may be implied based upon common-law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when “the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citations omitted]). According to basic contract principles, when parties agree “in a clear, complete document, their writing should . . . be enforced according to its terms” (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008] [internal quotation marks and citations omitted]).

Generally, a defendant “whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff’s injuries, and whose liability to the plaintiff is therefore primary” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006] [internal quotation marks and citations omitted]). It is premised on “vicarious liability without actual fault,” which requires that “a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine” (*id.* at 367 [internal quotation marks and citations omitted]). The shifting of loss under common-law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common-law indemnification “unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part” (*id.* at 377-378).

Generally, parties to an agreement are free to tailor their contract to meet their particular needs and to include or exclude provisions as they see fit (*Grace v Nappa*, 46 NY2d 560, 565 [1979]). Absent some indicia of fraud or other circumstances warranting equitable intervention, the court has a duty to enforce the terms of the agreement (*id.* [internal citations omitted]). When the relevant terms of an agreement are clear and unambiguous, the intentions of the parties are

apparent and the court is prohibited from altering the terms of the contract (*see Osprey Partners, LLC v Bank of N.Y. Mellon Corp.*, 115 AD3d 561, 561-562 [1st Dept 2014]). However, when the meaning of a contract provision is reasonably susceptible to more than one interpretation, courts can look to the surrounding facts and circumstances extrinsic to the agreement to determine the intent of the parties (*67 Wall St. Co. v Franklin Natl. Bank*, 37 NY2d 245, 248 [1975]).

Upon review of the evidence submitted, the court determines that Davaco has demonstrated its entitlement to summary judgment in its favor for dismissal of the cross-claims against it as a matter of law and Ralph Lauren and Macy's failed to raise any legitimate material issues of fact in dispute to preclude dismissal. Davaco established that at the time of the accident, Plaintiff was its special employee as a matter of law because Davaco assumed exclusive and complete control over the manner, details and ultimate result of Plaintiff's work and the temp agency relinquished full control over Plaintiff's work. As such, it is clear that Plaintiff was Davaco's special employee and neither Ralph Lauren, nor Macy's challenges this assertion.

As Plaintiff's special employer, Davaco is entitled to the protections of the exclusivity provisions of § 11 and 29(6) of the Workers' Compensation Law. Therefore, Davaco is not liable to Macy's or Ralph Lauren for common-law contribution and indemnification. There is no contract between Davaco and Macy's. The court finds that Macy's is not a third-party beneficiary to the contract between Davaco and Ralph Lauren. Therefore, Davaco is not liable to Macy's for contractual indemnification.

Additionally, Davaco is not liable to Ralph Lauren for contractual indemnification because the evidence demonstrates that the terms of the Purchase Order controlled the agreement and relationship between the parties. Ralph Lauren never accepted the terms of Davaco's Proposal and expressly rejected and objected to any additional or different terms that varied the terms of the Purchase Order which were not expressly set forth in or referred to in the Purchase Order. By signing the Purchase Order, the parties agreed that the Purchase Order was the entire agreement between the parties and there was no reference to the Proposal in the Purchase Order. The testimony of the witnesses demonstrated that the parties' relationship was governed by the Purchase Order and there is no objective evidence that Ralph Lauren accepted the terms of the Proposal. Simply because Davaco performed the scope of the work and obtained insurance described in the Proposal does not mean that the parties agreed to all of the terms of the Proposal, including its indemnification clause. Ralph Lauren's efforts to raise an issue of fact regarding the course of conduct between the parties and purported acceptance of the terms of the Proposal are unpersuasive. The court rejects Macy's arguments that it was a beneficiary under the Purchase Order as Ralph Lauren's customer. As such, Davaco's contractual indemnification is limited to the terms of the Purchase Order which only includes claims regarding the resale, use and misuse of the merchandise covered by the Purchase Order. Such description of merchandise is inapplicable to the facts in this case.

Therefore, Davaco did not owe contribution, common-law indemnification or contractual indemnification to Macy's or Ralph Lauren and the court dismisses all cross-claims asserted against Davaco. Since Plaintiffs previously discontinued all claims against Davaco, all claims and cross-claims against Davaco are now dismissed.

Accordingly, it is hereby

ORDERED that under motion sequence 002, the court grants Defendant Davaco NCS, Inc.'s motion to dismiss all cross-claims against it asserted by Defendants Macy's Corporate Services, Inc., Macy's of New York, Macy's of New York n/k/a Macy's Inc., Macy's Retail Holdings, Inc., Ralph Lauren Corporation, and Ralph Lauren Retail, Inc.; the court dismisses all cross-claims against Defendant Davaco NCS, Inc. without costs and the Clerk of the Court is directed to enter judgment accordingly in favor of said defendant; and it is further

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

ORDERED that the caption be amended to reflect the dismissal of all claims and cross-claims against Defendant Davaco NCS, Inc. and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for Defendant Davaco NCS, Inc. shall serve a copy of this order with notice of entry upon the County Clerk, who is directed to mark the court's records to reflect the change in the caption herein.

Date: January 17, 2018



HON. ERIKA M. EDWARDS