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

PRESENT: MANUEL J. MENDEZ PART 13
Justice

EAMONN CASSIDY,
Plaintiff,
-against-
GREATER NEW YORK AUTOMOBILE DEALERS ASSOCIATION, INC., GEORGE P. JOHNSON COMPANY and AMERICAN HONDA MOTOR CO., INC.,
Defendants.
GEORGE P. JOHNSON COMPANY,
Third-Party Plaintiff,
-against-
FREEMAN DECORATING SERVICES, INC., and FREEMAN EXPOSITIONS, INC.,
Third-Party Defendants.

INDEX NO. 159713/2015
MOTION DATE 04/25/2018
MOTION SEQ. NO 005
MOTION CAL. NO

The following papers, numbered 1 to 8 were read on this motion to dismiss the Third-Party Complaint.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1- 3
Answering Affidavits — Exhibits	4 -6
Replying Affidavits	7 - 8

Cross-Motion: Yes [X] No

Upon a reading of the foregoing cited papers, it is Ordered that Third-Party Defendants Freeman Decorating Services, Inc. and Freeman Expositions, Inc.'s (collectively "Freeman") motion to dismiss Defendant/Third-Party Plaintiff George P. Johnson Company's ("GPJ") Third-Party Complaint pursuant to CPLR §3211[a][1] and [7], is granted. GPJ's Third-Party Complaint is dismissed.

Plaintiff allegedly sustained personal injuries at the Javits Center, New York, New York ("Javits Center") on two separate occasions occurring approximately one year apart on May 7, 2013 and April 10, 2014. Plaintiff was a carpenter journeyman working at the Javits Center who would report to the Labor Hall and be assigned to work for a specific contractor. Both alleged injuries occurred while Plaintiff reported to Freeman. This action, brought in New York County, New York Supreme Court, Index No: 159713/2015 ("Action 1") revolves around Plaintiff's alleged trip and fall on electrical wires while he was setting-up a Honda Car Booth during the 2014 Winter New York Auto Show. At the time Freeman outsourced Plaintiff to provide labor to GPJ. Plaintiff commenced this action on September 22, 2015 to recover damages against Defendants Greater New York Automobile Dealers Association, Inc., GPJ, and American Honda Motor Co., Inc. for his alleged trip and fall. On October 24, 2017 GPJ commenced a third-party action against Freeman alleging contractual indemnification and common law indemnification and contribution.

In Action 2 Plaintiff asserted claims against the Advertising Specialty Institute and ASI Show, Inc. (collectively "ASI") in New York County, New York Supreme, Index Number 152942/2016 ("Action 2") related to an incident where Plaintiff was injured while setting-up ASI's 2013 Advertising Show. Action 2 settled with prejudice via stipulation. This Court dismissed ASI's third-party Complaint against Freeman for indemnification and contribution on February 7, 2017 (NYSCEF Docket No.: 68). This Court held that the documentary evidence conclusively established that "Plaintiff was a special employee of Freeman and as such ASI [was] not entitled to Common Law indemnification or contribution" (*Id*).

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

Freeman now moves to dismiss GPJ's Third-Party Complaint pursuant to CPLR §3211[a][1] and [7]. GPJ opposes the motion.

To dismiss an action pursuant to CPLR §3211[a][1], the documentary evidence must unequivocally contradict plaintiff's factual allegations and conclusively establish a defense to the action as a matter of law(Goshen v Mut. Life Ins. Co., 98 NY2d 314, 746 NYS2d 858, 774 NE2d 1190 [2002]). On a CPLR §3211[a][1] motion to dismiss, the defendant has the "burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Fortis Fin. Servs. v Fimat Futures USA, Inc., 290 AD2d 383, 737 NYS2d 40 [1st Dept. 2002]).

To dismiss a complaint for failure to state a cause of action pursuant to CPLR §3211[a][7], there can be no legally cognizable theory that could be drawn from the complaint. The test of the sufficiency of a complaint is whether liberally construed, it states in some recognizable form a cause of action known to the law (Union Brokerage, Inc. v Dover Insurance Company, 97 AD2d 732, 468 NYS2d 885 [1st Dept. 1983]). A motion for dismissal will fail if the pleading states a cause of action, and if from its four corners factual allegations are discerned, which when taken together, manifest any cause of action cognizable at law (Quinones v Schaap, 91 AD3d 739, 937 NYS2d 262 [2nd Dept. 2012]). Allegations that are nothing more than bare legal conclusions are not given any inference in determining whether the plaintiff has stated a cause of action (Leder v Spiegel, 31 AD3d 266, 819 NYS2d 26 [1st Dept. 2006]).

A party is not entitled to contractual indemnification unless the claim falls within the scope of the indemnity provision (Soto v Alert No. 1 Alarm Sys., 272 AD2d 466, 707 NYS2d 507 [2nd Dept. 2000]). Indemnity provisions must be narrowly construed to avoid reading unintended obligations into them (905 5th Assocs., Inc. v Weintraub, 85 AD3d 667, 927 NYS2d 29 [1st Dept. 2011]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and surrounding facts and circumstances" (Hooper Assocs., Ltd. v AGS Computs., Inc., 74 NY2d 487, 549 NYS2d 365, 548 NE2d 903 [1989]).

The relevant language in the Master Service Agreement between GPJ and Freeman states:

> Indemnification. Freeman will indemnify and hold harmless GPJ, its officers, directors, and employees from and against any bodily injury or property damage liability claims, judgments, damages, costs or expense, including reasonable attorneys' fees to the extent, *arising out of or occasioned by the negligence or willful misconduct of Freeman*, except for occurrences or accidents caused by the negligence of GPJ or for occurrences or accidents caused by any other party (Moving Papers Ex. 7-C, emphasis added).

The Master Service Agreement's unambiguous language provides that Freeman does not owe contractual indemnity to GPJ unless the claim arises from Freeman's own negligence or willful misconduct and without any negligence from GPJ or the other

Defendants. The record establishes that Plaintiff's alleged fall did not arise out of or was occasioned by negligence or willful misconduct attributed to Freeman. Freeman was not responsible for the installation of the electrical wiring that Plaintiff tripped over, nor the cleaning up of any hydraulic fluid spills, which Plaintiff alleges also caused his fall. Furthermore, Plaintiff's Complaint does not allege that his injuries were the result of any of Freeman's actions (Moving Papers Ex. 1). Freeman's motion to dismiss GPJ's causes of action for contractual indemnification is granted.

"A worker may be deemed a special employee where he or she is transferred for a limited time of whatever duration to the service of another" (Thompson v Grumman Aerospace Corp., 78 NY2d 553, 578 NYS2d 106, 585 NE2d 355 [1991]). A court is most likely to find that a special employment exists where the "transferee controls and directs the manner, details, and ultimate result of the employee's work" (Grilikhes v Int'l Tile & Stone Show Expos, 90 AD3d 480, 934 NYS2d 384 [1st Dept. 2011]). In the absence of "grave injury," the Workers' Compensation Law §11 bars third persons from seeking contribution or indemnity from an employer when its employee is injured in a work-related accident (Acosta v S.L. Green Mgmt. Corp., 267 AD2d 67, 699 NYS2d 402 [1st Dept. 1999], Workers' Compensation Law §11). The statute does not, however, bar such an action if the employer had a contract with the third person, prior to the accident, in which it agreed to indemnify, or contribute to payment, for a loss by the employee (Acosta, *supra*). "The grave injuries listed [in the Workers Compensation Statute] are deliberately both narrowly and completely described. The list is exhaustive, not illustrative; it is not intended to be extended absent further legislative action" (Castro v United Container Mach. Group, 96 NY2d 398, 761 NE2d 1014, 736 NYS2d 287 [2001]).

As this Court previously held in its February 7, 2017 Decision, the documentary evidence unequivocally establishes a defense for Freeman as a matter of law and contradicts GPJ's factual allegations. Plaintiff was a special employee of Freeman negating GPJ's ability to recover damages from Freeman under a theory of common law contribution and/or indemnification. Plaintiff would report to the Labor Hall at the Javits Center where he would be assigned to work for a contractor. He reported to Freeman in both incidents. Freeman would log his hours, dictate his work assignment and supply him with the necessary tools. Since Plaintiff's Complaint did not allege a grave injury pursuant to the exhaustive list in Workers Compensation Law §11, GPJ's causes of action seeking damages for common law contribution and/or indemnification against Freeman are dismissed.

ACCORDINGLY it is ORDERED, that Third-Party Defendants' Freeman Decorating Services, Inc. and Freeman Expositions, Inc.'s motion to dismiss Defendant/Third-Party Plaintiff George P. Johnson Company's Third-Party Complaint pursuant to CPLR §3211[a][1] and [7], is granted, and it is further,

ORDERED, that Defendant/Third-Party Plaintiff George P. Johnson Company's Third-Party Complaint against Third-Party Defendants Freeman Decorating Services, Inc. and Freeman Expositions, Inc. is dismissed with prejudice, and it is further,

ORDERED, that the caption in this action is amended as follows:

EAMONN CASSIDY,

Plaintiff,

-against-

GREATER NEW YORK AUTOMOBILE DEALERS ASSOCIATION, INC., GEORGE P. JOHNSON COMPANY and AMERICAN HONDA MOTOR CO., INC.,

Defendants.

and it is further,

ORDERED, that within thirty (30) days from the date of entry of this Order Third-Party Defendants Freeman Decorating Services, Inc. and Freeman Expositions, Inc. shall serve a copy of this Order with Notice of Entry on all parties, upon the Trial Support Clerk located in the General Clerk's Office (Room 119) and the County Clerk (Room 141B) who are directed to amend the caption and the court's records accordingly, and it is further,

ORDERED, that the Clerk of Court enter Judgment dismissing the Third-Party Complaint.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: May 2, 2018

MANUEL J. MENDEZ
J.S.C.

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE