

<b>Robinson v CAMBA, Inc.</b>
2018 NY Slip Op 31077(U)
June 4, 2018
Supreme Court, Kings County
Docket Number: 512296/15
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS : PART 9**

X

**ANITA ROBINSON,**

**Plaintiff,**

**-against-**

**CAMBA, INC. 1424 HERKIMER STREET  
DEVELOPMENT, LLC, and MAGNOLIA HOUSE  
WOMEN'S SHELTER,**

**Defendants.**

**DECISION / ORDER**

**Index No. 512296/15  
Motion Seq. No. 4  
Date Submitted: 5/3/18  
Cal No. 42**

X

**CAMBA, INC. 1424 HERKIMER STREET  
DEVELOPMENT, LLC,**

**Third-Party Plaintiffs,**

**-against-**

**FJC SECURITY SERVICES, INC.,**

**Third-Party Defendant.**

X

*Recitation, as required by CPLR 2219(a), of the papers considered in the review of the third-party defendant's motion for summary judgment.*

Papers	NYSCEF Doc.
Notice of Motion, Affirmation and Exhibits Annexed.....	<u>95-111</u>
Affirmation and Opposition Exhibits Annexed.....	<u>113-115</u>
Reply Affirmation.....	<u>116</u>

**Upon the foregoing cited papers, the Decision/Order on this application is  
as follows:**

This is a personal injury action arising out of a slip and fall on a wet floor on July 30, 2015 at the Magnolia House Women's Shelter at 1424 Herkimer Street, Brooklyn,

New York. Plaintiff Anita Robinson was an employee of movant, third-party defendant FJC Security Services, Inc. Her accident occurred during the course of her employment as a security guard. Third-party defendant FJC moves for summary judgment dismissing the complaint as against it as well as any cross claims, for summary judgment on its counterclaim for attorneys' fees and costs incurred in defending this action, and for summary judgment on its counterclaim for contractual indemnification against CAMBA if the complaint is not dismissed as against it.

FJC contends that, pursuant to the agreement between FJC and CAMBA, and the provisions in Workers Compensation Law § 11, the third-party plaintiffs, that is CAMBA, 1424 Herkimer and Magnolia,<sup>1</sup> are not entitled to contractual indemnification or contribution from FJC. Further, FJC asserts that, based upon the terms of the agreement, FJC is entitled to a defense, indemnification and attorneys' fees from CAMBA. FJC also argues that as none of the plaintiff's injuries which are alleged in her bill of particulars constitute a "grave injury" under Workers Compensation Law § 11, it cannot be sued for common law indemnification or contribution. Movant also argues that ¶ 9 of the agreement (Exhibit K) between FJC and CAMBA specifically precludes any liability on the part of FJC for a slip, trip or fall on or near the premises and additionally provides that CAMBA agrees to indemnify, defend and hold FJC harmless against any claims by third parties.

In their affirmation in opposition, CAMBA and 1424 Herkimer question whether the carve-out from liability for slip and fall accidents applies to an FJC employee,

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<sup>1</sup>Magnolia House is not listed in the caption of the third party complaint but was included in the notice of impleader as a third-party plaintiff (see exhibit E).

alleging that the provision was either intended to only cover claims by residents of the shelter, or is at best ambiguous and subject to multiple interpretations. They point out that discovery has yet to be completed.

Insofar as plaintiff did not sustain a grave injury under Worker's Compensation Law § 11, there is no basis for common law indemnity or contribution from plaintiff's employer FJC, and the third-party plaintiffs' do not dispute this (see *Ibarra v Equipment Control*, 268 AD2d 13, 17 [2d Dept 2000]). Further, because there is no contract between FJC and 1424 Herkimer or Magnolia, there is no basis for contractual indemnification running to those entities (see *Pallotta v City of New York*, 94 AD3d 838, 839 [2<sup>nd</sup> Dept 2012]).

With regard to CAMBA's claim for contractual indemnification, FJC points out that the agreement between CAMBA and FJC specifically excludes slip and fall claims from FJC's duty to indemnify CAMBA. While the agreement includes, at ¶ 9, indemnification in favor of CAMBA for any "negligent or wrongful" acts or omissions on the part of FJC employees, the provision that follows expressly provides that "notwithstanding anything herein to the contrary, FJC shall not be liable to (CAMBA) or its invitees, agents and employees for any injury (including death), for any loss, claim, damage, suit or action arising from a slip, trip or fall while on or near the premises of (CAMBA), thereby superceding and limiting the prior provision in the agreement to indemnify CAMBA under the present circumstances. Further, the cause of plaintiff's accident is not claimed to be the result of either plaintiff's or FJC's negligence. The provision cannot be read to mean that FJC must indemnify CAMBA for CAMBA's negligence.

While the contract provision does not expressly address claims by a FJC employee, the language is clear and unambiguous. Thus, as a matter of law, it precludes the consideration of any extrinsic evidence with regard to the parties' intent (see *Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Moreover, the indemnification provision must be construed narrowly (see *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491–92 [1989] ["When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (internal citations omitted)]). Further, insofar as the motion is based upon the interpretation of an unambiguous contract provision, additional discovery will not alter the outcome.

To the extent the third-party plaintiffs claim in their affirmation in opposition to have a separate claim based on FJC's failure to procure the insurance required by the contract, the third-party complaint does not plead such a cause of action. It simply concludes in paragraph 13 that "defendants/third-party plaintiffs shall be entitled to recover from third-party defendant FJC the amount of such judgment in whole or in part by way of contractual indemnification, common law indemnification, contribution, breach of contract, breach of warranty or otherwise according to law." In any event, the agreement does not include a requirement that FJC name the third-party plaintiffs as additional insureds on FJC's general liability policy (see Exhibit J, ¶ 2) (see *Becarie v Union Bank of Switzerland*, 272 AD2d 162, 163 [1<sup>st</sup> Dept 2000] ["nor can damages be

construed in this case on a basis that UBS had failed to provide liability insurance covering accidents in the driveway, insofar as the rental contract did not impose such an obligation on the landlord but only required property insurance").

Turning to the branch of FJC's motion for summary judgment on its counterclaim for attorneys' fees and costs in defending this third-party action, the agreement provides that CAMBA shall indemnify and defend FJC from all claims by third-parties, thereby supporting FJC's motion, as plaintiff is not a party to the contract. In light of the court's dismissal of the complaint, the motion is limited to FJC's attorneys' fees and costs incurred in defending against third-party plaintiff 1424 Herkimer's claims. Contrary to the third-party plaintiffs' contention, CAMBA's obligation to indemnify and defend FJC is not inconsistent with FJC's obligation to indemnify CAMBA for FJC's negligent or wrongful acts or omissions. That obligation runs from FJC to CAMBA to the extent claims against CAMBA arise out of FJC's negligent or wrongful acts or omissions, not to claims by non-parties to the contract against CAMBA, which claims do not allege any wrong-doing on FJC's part (for which CAMBA owes FJC a defense and indemnification).

Accordingly, it is

**ORDERED** that third-party defendant FJC Security Services, Inc. is granted summary judgment dismissing the third-party complaint as well as any cross claims and the county clerk is directed to enter judgment accordingly, and it is further

**ORDERED** that third-party defendant FJC is granted summary judgment on its counterclaim against third-party plaintiff CAMBA, Inc. for payment of its attorneys' fees

and costs incurred in defense of the third-party action. A Referee Referral Order is issued simultaneously herewith.

This constitutes the decision and order of the court.

Dated: June 4, 2018

ENTER:



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Hon. Debra Silber, J.S.C.

Hon. Debra Silber  
Justice Supreme Court