Keith v Bronfman
2019 NY Slip Op 30140(U)
January 18, 2019
Supreme Court, New York County
Docket Number: 155144/2018
Judge: David Benjamin Cohen
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DAVID BENJAMIN COHEN, *Justice* — PART IAS MOTION 58EFM

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LEAH KEITH,

Plaintiff,

- v -

YEFIM BRONFMAN, YAKOBINA STOTLAND,

Defendant.

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INDEX NO. 155144/2018

MOTION DATE 08/10/2018, 08/24/2018

MOTION SEQ. NO. 001 002

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 14, 18, 24, 26, 27

were read on this motion to/for DISMISS DEFENSE.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 25, 28, 29, 30, 31

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

According to the Complaint, Yefim Bronfman is the owner of two apartments in a condominium building located at 530 West End Avenue, New York, New York. Bronfman owns an apartment on the twelfth-floor where he resides and on the tenth floor. Initially, the tenth-floor apartment was occupied by Bronfman's mother but following her death, defendant Yakobina Stotland occupied the premises. In the first part of 2018, work was performed in the tenth-floor apartment, including the installation of new appliances. One of the new appliances was a refrigerator that was supposed to be connected to a water line. The Complaint alleges that the work was performed in manner that caused a water leak and damaged plaintiff's apartment which was located right below the tenth-floor apartment. Plaintiff brought this action and alleged two causes of action. The first cause of action, brought against both defendants, is for

negligence in the duty of defendants to supervise and verify the adequacy of the work performed in the tenth-floor apartment. Plaintiff also alleged a cause of action against Bronfman only pursuant to RPL 339-j.

Defendant Bronfman filed an Answer to the Complaint and Defendant Stotland filed a pre-answer motion to dismiss (Mot. Seq. 1). Stotland sought dismissal of the action pursuant to CPLR 3211(a)(2), (7) and (10). Following the filing of Mot. Seq. 1, Bronfman filed a Third-Party action against the general contractor for the work, Hercules Contracting Inc., and P.C. Richard & Sons and related service company. The Third-Party Complaint alleges that the Third-Party defendants negligently installed the refrigerator that caused the damage. The Third-Party Complaint seeks damages for (1) negligence; (2) breach of contractual indemnification; and (3) common law indemnification and contribution. The PC Richard and Sons third-party defendants filed an Answer to the Third-Party Complaint. Hercules then filed a pre-Answer motion to dismiss based upon the fact that to the extent there was any transaction that involved it, said transactions were with Stotland and not Bronfman who had filed the Third-Party Complaint.

Stotland's motion to dismiss is denied. Contrary to Stodland's assertion, this Court does have subject matter jurisdiction to hear this matter. Aside from the fact the Complaint seeks an amount believed to be in excess of $55,000, the Supreme Court of New York, is a Court of general jurisdiction and may hear this civil action. Stotland's motion to dismiss pursuant to CPLR 3211(a)(7) and (10) is also denied. Plaintiff's first cause of action is not for negligence in the installation but rather for the alleged failure to supervise. While it is true that "a principal is not liable for the acts of independent contractors in that, unlike the master-servant relationship, principals cannot control the manner in which the independent contractors' work is performed" (*Chainani by Chainani v Bd. of Educ. of City of New York*, 87 NY2d 370, 380-81

[1995]), it is equally true that there are a number of exceptions to this rule (*Saini v Tonju Assoc.*, 299 AD2d 244 [1st Dept 2002]). "The numerous exceptions to this rule, which, for the most part, are derived from public policy concerns, "fall roughly" into three basic categories: where the employer is negligent in selecting, instructing or supervising the independent contractor; where the independent contractor is hired to do work which is "inherently dangerous"; and where the employer bears a specific, nondelegable duty" (*id.* at 245)). Here, as the Complaint alleges a cause of action against Stotland based upon a failure to supervise, plaintiff has stated a cause of action.

Similarly, the motion to dismiss in the absence of a party is denied. As the claim here is for the negligence in supervising Third-Party Defendants, the Complaint includes the proper parties. To the extent that Stotland believes that he might have a claim against the contractor/installer, Stotland may file any third-party action permitted by the CPLR, as was done by his co-defendant Bronfman. Finally, as at least one claim against the Third-Party Defendants will survive the instant motion practice, this action has the parties believed absent by Stotland.

The motion to dismiss the Third-Party Complaint is granted in part. The first and second causes of action are dismissed as there was no duty owed by the Third-Party Defendants to Bronfman, nor did Third-Party Defendants have any contract with Bronfman. Indeed, in the opposition to the motion to dismiss, Defendant Bronfman only opposition discusses the contribution cause of action and not the other two. Accordingly, the negligence and breach of contract causes of action from the Third-Part Complaint are dismissed.

The motion to dismiss the common law contribution claim is denied. Hercules argues that a claim for contribution must be predicated upon "the alleged breach of duty owed by the third-party plaintiff." However, in New York, "[w]hile the culpable party from whom

contribution is sought will ordinarily have breached a duty owed directly to the injured party, this is not invariably so . . . The critical requirement for apportionment under *Dole* or CPLR article 14 is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought" (*Nassau Roofing & Sheet Metal Co., Inc. v Facilities Dev. Corp.*, 71 NY2d 599, 603 [1988]). Here, the alleged breach by the contributing party is the negligent installation, which if found, would have had a part in causing the injuries to plaintiff and Third-Party plaintiff. Accordingly, a claim for common law contribution has been properly stated.

Similarly, although there is no basis for a cause of action for contractual indemnification, there is a basis for common law indemnification. "The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party (*see Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507 [2008]). "If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of the contractor, then the contractor may be held liable for indemnification to an owner" "(*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]). Here, the owner had properly alleged a cause of action for common law indemnification. It is therefore

ORDERED that the motion by Stotland to dismiss the Complaint is denied; and it is also

ORDERED that the motion to dismiss the Third-Party Complaint is granted to the extent of dismissing the first and second causes of action of the Third-Party Complaint.

1/18/2019
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☒ OTHER

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