

Moore v URS Corp.
2019 NY Slip Op 31039(U)
March 28, 2019
Supreme Court, New York County
Docket Number: 160630/2014
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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WALTER MOORE and RAYDA MOORE,

Index No. 160630/2014

Plaintiffs

- against -

URS CORPORATION, URS CORPORATION-NEW
YORK, LIRO PROGRAM AND CONSTRUCTION
MANAGEMENT, P.C., LIRO PROGRAM AND
CONSTRUCTION, PE, P.C., LIRO ENGINEERING
& CONSTRUCTION MANAGEMENT, P.C.,
URS/LIRO JV, and TOTAL SAFETY
CONSULTING, LLC,

Defendants
-----x
-----x

TSC 2012 LLC,

Third Party Plaintiff

- against -

PRISMATIC DEVELOPMENT CORP. JH REID-
JOINT VENTURE, PRISMATIC DEVELOPMENT
CORP., and JH REID,

Third Party Defendants
-----x
-----x

LIRO PROGRAM AND CONSTRUCTION
MANAGEMENT, P.C., and LIRO PROGRAM AND
CONSTRUCTION, PE, P.C.,

Second Third Party Plaintiffs

- against -

PRISMATIC DEVELOPMENT CORP. JH REID-
JOINT VENTURE, PRISMATIC
DEVELOPMENT CORP., and JH REID,

Second Third Party Defendants

-----x
-----x

URS CORPORATION, URS CORPORATION-NEW YORK, and URS CORPORATION as part of the URS/LIRO JOINT VENTURE,

Third Third Party Plaintiffs

- against -

PRISMATIC DEVELOPMENT CORP. JH REID-JOINT VENTURE, PRISMATIC DEVELOPMENT CORP., and JH REID,

Third Third Party Defendants

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DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

Plaintiffs sue to recover damages for personal injuries and lost services sustained March 1, 2012, when plaintiff Walter Moore was working on a construction project where defendants URS Corporation, URS Corporation-New York, LIRO Program and Construction Management, P.C., LIRO Program and Construction, PE, P.C., and LIRO Engineering & Construction Management, P.C., as joint venturers, were the construction managers. Nonparty City of New York owned the construction site. Third party defendants Prismatic Development Corp., plaintiff's employer, and JH Reid claim they formed a joint venture to perform work on the project. Third party defendants move for summary judgment dismissing all claims against third party defendants in all three third party actions. C.P.L.R. § 3212(b). For the reasons explained below, the court grants their motion in part.

I. NON-CONTRACTUAL INDEMNIFICATION AND CONTRIBUTION CLAIMS

Third party defendants contend that New York Workers' Compensation Law §§ 11 and 29(6) bar the claims against third party defendants for non-contractual, implied indemnification and for contribution. Workers' Compensation is an employee's exclusive remedy against his employer for an injury sustained in the course of his employment and bars any other claims against his employer for that injury. N.Y. Workers' Comp. Law §§ 11, 29(6); Fleming v. Graham, 10 N.Y.3d 296, 299 (2008); Macchirole v. Giamboi, 97 N.Y.2d 147, 149-50 (2001); Heritage v. Van Patten, 59 N.Y.2d 1017, 1019 (1983); Alba v. Dani Michaels, Inc., 303 A.D.2d 257, 257 (1st Dep't 2003). The parties do not dispute that Prismatic Development Corp. was plaintiff's employer and paid plaintiff Workers' Compensation when he was injured, but do not stipulate to the authenticity or admissibility of Prismatic Development's joint venture agreement with JH Reid.

Workers Compensation would bar the claims against JH Reid only if the evidence establishes that JH Reid was a joint venturer with Prismatic Development. Cortes v. Skanska USA Civ. Northeast, Inc., 154 A.D.3d 538, 539 (1st Dep't 2017); Colon v. Aldus III Assoc., 296 A.D.2d 362, 362 (1st Dep't 2002). See Smith v. 21 W. LLC Ltd. Liab. Co., 29 A.D.3d 360, 361 (1st Dep't 2006). Robert Gamba, Prismatic Development's chief executive officer, authenticates only his own signature on the joint venture agreement dated July 22, 2010, and does not identify the signature of JH Reid's representative to authenticate the

contract. B & H Florida Notes LLC v. Ashkenazi, 149 A.D.3d 401, 403 n.2 (1st Dep't 2017). Only persons with first hand knowledge of a document may authenticate it. Moon 170 Mercer, Inc. v. Vella, 146 A.D.3d 537, 538 (1st Dep't 2017); Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d 520, 521-22 (1st Dep't 2016); Babikian v. Nikki Midtown, LLC, 60 A.D.3d 470, 471-72 (1st Dep't 2009). The failure to authenticate a document renders it inadmissible. Wells Fargo Bank, N.A. v. Jones, 139 A.D.3d at 522; AO Asset Mgt. LLC v. Levine, 128 A.D.3d 620, 621 (1st Dep't 2015); IRB-Brasil Resseguros S.A. v. Portobello Intl. Ltd., 84 A.D.3d 637, 637-38 (1st Dep't 2011).

Absent an agreement, evidence of an intent to associate as joint venturers, a mutual contribution of property, financing, effort, skill, or knowledge, a joint ownership or joint control of the joint enterprise, and a sharing of profits and losses may establish a joint venture. Slabakis v. Schik, 164 A.D.3d 454, 455 (1st Dep't 2018); Massey v. Byrne, 112 A.D.3d 532, 533 (1st Dep't 2013); Langer v. Dadabhoy, 44 A.D.3d 425, 426 (1st Dep't 2007); Richbell Info. Servs. v. Jupiter Partners, 309 A.D.2d 288, 298 (1st Dep't 2003). Gamba attests to none of these factors.

Third party defendants contend that simply attaching the joint venture agreement or other documents to the affirmation by third party defendants' attorney renders them admissible, relying on DeLeon v. Port Auth. of N.Y. & N.J., 306 A.D.2d 146, 146 (1st Dep't 2003). In that action, however, a lease administrator demonstrated personal knowledge regarding the record keeping

procedures of the business whose records were admissible and laid the requisite business record foundation for their admissibility. Here, third party defendants' attorney does not attest to any personal knowledge regarding the contracts. Murray v. City of New York, 74 A.D.3d 550, 550 (1st Dep't 2010); Babikian v. Nikki Midtown, LLC, 60 A.D.3d at 471. An attorney's affirmation may serve as a vehicle for presenting only evidence that is otherwise admissible; the attorney's bare affirmation, without authentication or a foundation for admissibility upon personal knowledge, does not render an attachment admissible. Zuckerman v. City of New York, 49 N.Y.2d 557, 563 (1980); Melniker v. Melniker, ___ A.D.3d ___, 2019 WL 1064110, at *1 (1st Dep't Mar. 7, 2019); Aur v. Manhattan Greenpoint Ltd., 132 A.D.3d 595, 595 (1st Dep't 2015); Furlender v. Sichenzia Ross Friedman Ference LLP, 79 A.D.3d 470, 470 (1st Dep't 2010). Since third party defendants fail to present admissible evidence of their joint venture, Workers' Compensation bars the implied indemnification and contribution claims against only Prismatic Development Corp.

II. CONTRACTUAL INDEMNIFICATION CLAIMS

Third party defendants meet their burden to show that they owe defendants no contractual duty to indemnify defendants by, in effect, denying that any contract required third party defendants to do so. Even though third party defendants present their contracts with the City and with defendant Total Safety Consulting, LLC, and a contract between defendant URS/LIRO joint venture and the City again by attaching the contracts to the

attorney's affirmation without authenticating them, defendants in opposition may rely on the inadmissible evidence that third party defendants present. E.g., Mitchell v. Calle, 90 A.D.3d 584, 585 (1st Dep't 2011); Ayala v. Douglas, 57 A.D.3d 266, 267 (1st Dep't 2008); Navedo v. Jaime, 32 A.D.3d 788, 789-90 (1st Dep't 2006); Thompson v. Abbasi, 15 A.D.3d 95, 97 (1st Dep't 2005). See Joseph v. Board of Educ. of the City of N.Y., 91 A.D.3d 528, 529 (1st Dep't 2012); Dembele v. Cambisaca, 59 A.D.3d 352, 352 (1st Dep't 2009); Hernandez v. Almanzar, 32 A.D.3d 360, 361 (1st Dep't 2006). Defendants primarily contend that third party defendants' motion is premature pending further disclosure, however, and rely on the contracts presented only to the extent that they may be interpreted to provide that URS/LIRO was the City's agent and not an independent contractor as identified in one of the contracts.

A. The Relevant Contractual Provisions

The question whether URS/LIRO was the statutory agent of the City, the owner of the construction site, under the New York Labor Law is distinct from whether URS/LIRO was City's agent under any contract, a question governed by the contract's terms. See Barreto v. Metropolitan Transp. Auth., 25 N.Y.3d 426, 434 (2015); Walls v. Turner Constr. Co., 4 N.Y.3d 861, 863-64 (2005); Santos v. Condo 124 LLC, 161 A.D.3d 650, 653 (1st Dep't 2018); Coretto v. Extell W. 57th St., LLC, 137 A.D.3d 677, 678 (1st Dep't 2016). Paragraph 7.4 of third party defendants' contract with the City provides that third party defendants "shall indemnify, defend and hold the City, its employees and agents

(the 'Indemnitees') harmless against any and all claims." Aff. of Daniel Mevorach Ex. F, at 10. Since the contract nowhere, identifies URS/LIRO or any other defendant as the City's agent, defendants are not entitled to indemnification under this contract. Paragraph 7.6 of the contract further recites that the "provisions of this Article shall not be deemed to create any new right of action in favor of third parties against the Contractor or the City." Id. at 11.

Section 13.1 of the contract between URS/LIRO and the City identifies URS/LIRO as an independent contractor without authority to bind the City. See Shawmut Woodworking & Supply, Inc., v. ASICS Am. Corp., 162 A.D.3d 486, 487 (1st Dep't 2018); Quik Park W. 57 LLC v. Bridgewater Operating Corp., 148 A.D.3d 444, 445 (1st Dep't 2017); Superb Gen. Contr. Co. v. City of New York, 70 A.D.3d 517, 518 (1st Dep't 2010). Therefore defendants fail to demonstrate that either of these contracts, between third party defendants and the City and between URS/LIRO and the City, named URS/LIRO the City's agent or otherwise imposed on third party defendants a duty to indemnify any of defendants.

Prismatic Development Corp.'s agreement with Total Safety Consulting in correspondence dated September 6, 2011, provides that:

To the fullest extent permitted by law, Subcontractor shall defend, indemnify and hold harmless Owner, Contractor, Architect and consultants, agents and employees of any of them (individually or collectively, "Indemnity") from and against claims, damages, liabilities, losses and expenses, including but not limited to reasonable attorneys' fees, arising out of the negligent performance or negligent lack of performance under the agreement

Gamba Aff. Ex. C, at 2. This contract unambiguously requires "Subcontractor" to indemnify third party defendant Prismatic Development Corp. under specified circumstances, although the contract nowhere mentions other third party defendants or their joint venture. While the contract does not define "Subcontractor" and in another provision refers to Total Safety Consulting's "Subcontractors," id., the context of the indemnification provision and the remainder of the contract demonstrate that Total Safety Consulting is the "Subcontractor" that owes indemnification, and no party contends that Total Safety Consulting is not the "Subcontractor" under this contract.

More to the point of the relief that third party defendants' motion seeks, this contract unambiguously does not require third party defendants to indemnify any party, let alone third party plaintiff TSC 2012, which does not show that it is a party to the contract; a defendant that plaintiff sues, such that it might incur liability or expenses; or the same entity as Total Safety Consulting. Total Safety Consulting relies on the contract's reference to an unexecuted "Total Safety Proposal dated July 27, 2011," id. at 1, which third party defendants concede includes a provision requiring them to indemnify "TSC 2012, LLC," but the reference specifies that only payments under the September 2011 contract will be governed by the July 2011 proposal:

Payments will be approximately every two weeks within 10 days of invoice, all in accord with the attached Total Safety Proposal dated July 27, 2011 4% COLA applies to rates as per Total Safety Proposal.

Id. These terms are consistent with the "PAYMENT" provisions in

the July 2011 proposal, which dictate the amount of a "retainer," when it is to be paid, when invoices are to be sent, deduction of the retainer from the final invoice, and a 4% cost of living increase applicable to rates one year after the start of contract services. Aff. in Opp'n of Charles T. Glaws Ex. A, at 5. Therefore the later agreement's reference to these provisions is not a wholesale incorporation of the July 2011 proposal, including its unexecuted indemnification provision. See Hooper Assoc. v. AGS Computers, 74 N.Y.2d 487, 491-92 (1989); Millennium Holdings LLC v. Glidden Co., 146 A.D.3d 539, 545 (1st Dep't 2017); Campos v. 68 W. 86th St. Owners Corp., 117 A.D.3d 593, 595 (1st Dep't 2014).

B. Defendants' Opposition Based on C.P.L.R. § 3212(f)

Defendants ask the court to deny third party defendants summary judgment dismissing defendants' contractual indemnification claims until defendants have been provided an opportunity to conduct depositions. C.P.L.R. § 3212(f) permits the court to deny summary judgment when "facts essential to justify opposition may exist but cannot then be stated," and disclosure is necessary to reveal those facts. Figueroa v. City of New York, 126 A.D.3d 438, 439 (1st Dep't 2015). See Nascimento v. Bridgehampton Constr. Corp., 86 A.D.3d 189, 192 (1st Dep't 2011); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d 562, 563 (1st Dep't 2011); Kent v. 534 East 11th Street, 80 A.D.3d 106, 114 (1st Dep't 2010); Griffin v. Pennoyer, 49 A.D.3d 341, 341 (1st Dep't 2008). Under

C.P.L.R. § 3212(f), however, defendants must show that their depositions of third party defendants or other witnesses may lead to evidence necessary to sustain their contractual indemnification claims and oppose third party defendants' motion and that that evidence is exclusively within third party defendants' knowledge and control. Santana v. Danco Inc., 115 A.D.3d 560, 560 (1st Dep't 2014); Harlem Real Estate LLC v. New York City Economic Dev. Corp., 82 A.D.3d at 563; Kent v. 534 East 11th Street, 80 A.D.3d at 114. Defendants must support such a contention with more than "mere hope or conjecture." Barnes-Joseph v. Smith, 73 A.D.3d 494, 495 (1st Dep't 2010). See Kent v. 534 East 11th Street, 80 A.D.3d at 114; MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d 404, 405 (1st Dep't 2010). They may not merely speculate that deposition testimony may raise factual issues. Kent v. 534 East 11th Street, 80 A.D.3d at 114; Barnes-Joseph v. Smith, 73 A.D.3d at 495; MAP Mar. Ltd. v. China Constr. Bank Corp., 70 A.D.3d at 405.

By failing to specify any facts that depositions or other disclosure might reveal to defeat dismissal of defendants' contractual indemnification claims, however, defendants offer nothing more than speculation that disclosure might support their opposition to summary judgment. In fact, defendants' opposition presents purely legal questions regarding interpretation and application of unambiguous contractual terms between third party defendants and the City, between URS/LIRO and the City, and between Prismatic Development and Total Safety Consulting. The

relevant contractual terms set forth above are not reasonably susceptible of more than one interpretation. See Universal Am. Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa., 25 N.Y.3d 675, 680 (2015); Ellington v. EMI Music, Inc., 24 N.Y.3d 239, 244 (2014); Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co., 143 A.D.3d 146, 151 (1st Dep't 2016); Chen v. Yan, 109 A.D.3d 727, 729 (1st Dep't 2013). The contracts' plain terms, not the parties' understanding of the contracts, govern the parties' rights and obligations under the contracts. A contract's provisions are not ambiguous merely because the parties may interpret the provisions differently. Universal Am. Corp. v. Natl. Union Fire Ins. Co. of Pittsburgh, Pa., 25 N.Y.3d at 680; Lend Lease (U.S.) Constr. LMB Inc. v. Zurich Am. Ins. Co., 136 A.D.3d 52, 56 (1st Dep't 2015), aff'd, 28 N.Y.3d 675 (2017); CT Inv. Mgt. Co., LLC v. Chartis Specialty Ins. Co., 130 A.D.3d 1, 6-7 (1st Dep't 2015). Where contractual terms are unambiguous, the court must enforce their plain meaning. Beardslee v. Inflection Energy, LLC, 25 N.Y.3d 150, 157 (2015); IDT Corp. v. Tyco Group, S.A.R.L., 13 N.Y.3d 209, 214 (2009); Gilbane Bldg. Co./TDX Constr. Corp. v. St. Paul Fire & Mar. Ins. Co., 143 A.D.3d at 156; Orix Venture Fin. LLC v. Eagle Ltd., 120 A.D.3d 1108, 1109 (1st Dep't 2014).

No depositions or other disclosure would defeat summary judgment on these issues. Therefore the lack of disclosure is not a basis to deny summary judgment.

III. CONCLUSION

Consequently, the court grants third party defendants' motion for summary judgment to the extent of dismissing all non-contractual, implied indemnification claims and all contribution claims against Prismatic Development Corp. and dismissing all contractual indemnification claims in the three third party actions. C.P.L.R. § 3212(b) and (e). This decision constitutes the court's order. The Clerk shall enter a judgment dismissing those claims.

DATED: March 28, 2019



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.