Baudanza v Our Rental Corp.
2019 NY Slip Op 31383(U)
May 14, 2019
Supreme Court, New York County
Docket Number: 151425/2013
Judge: Shlomo S. Hagler

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

----------X

JOSEPH MARIO BAUDANZA and ANGELA BAUDANZA,

Plaintiffs,

- against -

OUR RENTAL CORP., THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, TISHMAN CONSTRUCTION CORPORATION, TURNER CONSTRUCTION COMPANY, JUDLAU CONTRACTING, INC., LOWER MANHATTAN DEVELOPMENT CORPORATION, SILVERSTEIN PROPERTIES, INC., and SCHWING AMERICA, INC.,

Defendants.

----------X

Index No.: 151425/2013

Motion Sequence No.: 003

DECISION/ORDER

HON. SHLOMO S. HAGLER, J.S.C.:

Plaintiffs Joseph Mario Baudanza ("Baudanza") and his wife, Angela Baudanza, brought this personal injury action arising from a construction site accident, against defendants Our Rental Corp. ("Our Rental"), The Port Authority of New York and New Jersey ("Port Authority"), Tishman Construction Corporation ("Tishman"), Turner Construction Company ('Turner"), Judlau Contracting, Inc. ("Judlau"), Lower Manhattan Development Corporation, Silverstein Properties, Inc. ("Silverstein") and Schwing America, Inc. ("Schwing"). In its Answer to the Second Amended Complaint, Our Rental asserts cross-claims against all codefendants for contribution, common law indemnification and contractual indemnification. It also asserts a cross-claim for breach of agreement to procure insurance and to indemnify against Judlau ("Fourth Cross-Claim").

Our Rental now moves for summary judgment, seeking a declaration that Judlau is obligated to reimburse Our Rental for the defense costs and fees incurred in defending this

action, based on Judlau's failure to accept Our Rental's tender of defense and indemnification and its failure to procure insurance coverage for Our Rental. Port Authority, Tishman, Turner, Lower Manhattan Development Corporation, Silverstein and Judlau (collectively, the "Cross-Moving Codefendants") cross-move for summary judgment dismissing all Our Rental's cross-claims.

BACKGROUND FACTS

On May 3, 2012, Our Rental, as lessor, and Judlau, as lessee, entered into a lease ("Lease") for the use and operation of a cement pump truck. In pertinent part, the Lease contains the following indemnification provisions:

> "We assume no liability for loss or damage on account of accidents, delays due to defective material or to motor or engine troubles, or delays in the delivery or removal of equipment. You agree to defend and indemnify us against all loss, damage, expense and penalty arising from any action on account of personal injury or damage to property occasioned by the operation, handling or transportation of this equipment during the rental period."
>
> * * *
>
> "LIABILITY AND INDEMNIFICATION: Lessee shall indemnify and hold harmless Lessor and its employees harmless for personal injury, death or damages to equipment material and/or supplies belonging to Lessor's employees, if such damage, loss, injury or death arises from or is the result of the sole or contributory negligence or fault of Lessee or its employees. Lessee also agrees to accept all responsibility financially for any damage to equipment caused by accident, vandalism or theft."

The Lease also contains the following insurance procurement provision:

> "YOU shall maintain during the term of the agreement comprehensive general liability [sic] including contractual with limits no less than a One Million Dollar combined single limit. Certificate of insurance naming lesser [sic] as additional insured shall be furnished. All such policies shall provide that they will be primary to and will receive no contribution from, any policies of insurance maintained by the lessor. All insurance shall also

> include a waiver at [sic] subrogation in favor of lesser [sic]. IT is understood and agreed that we shall be saved harmless from all court actions and all claims for injuries to persons or through the use of the equipment while in your possession" (Affirmation in Support, Exhibit "K").

On May 3, 2012, Baudanza, an employee of non-party Ferrara Brothers Building Materials Corporation, was delivering cement to Judlau at the World Trade Center construction site. As Baudanza was off-loading concrete from his cement mixer truck into the hopper of a cement pump truck Our Rental had supplied to Judlau, the elbow assembly on the pump truck cracked and concrete struck Baudanza causing personal injuries. Judlau rented the pump truck from Our Rental.

Plaintiffs commenced the instant action on February 15, 2013. During the course of discovery, Nick Avella ("Avella"), Our Rental's sales manager, testified that "[his] understanding [of the accident was] that a cast outlet part failed and cracked and . . . sprayed high pressure concrete" (Affirmation in Support of Cross-Motion and in Opposition, Exhibit "C" at 26:6-10). He also testified that the pump truck was purchased new from Schwing and was approximately one year old at the time of the accident (*id.* at 87:4-23, 88:17-18). He acknowledged that Our Rental was responsible for the proper and safe maintenance of the pump truck (*id.* at 107:15-24), but stated that, upon examining the pump truck at the accident site, he did not see any signs of wear on the outlet pipe assembly (*id.* at 98:21-99:5). Avella did not think that the accident was caused by "any kind of wear item on anything or neglect or something like that" (*id.* at 106:23-25). Nonetheless, he did not rule out wear and tear as a possible cause of the accident. In pertinent part, Avella stated as follows:

> "I didn't rule it out because I don't have knowledge of exactly what happened, but I did feel that it wouldn't be wear only because it was a new pump. I didn't leave like saying it wasn't us. I felt

> like it was a new pump, it's a new machine, everything on there is new and tight" (*id.* at 107:9-14).

By letters dated June 7, 2013 and March 26, 2015, Our Rental tendered its defense to Judlau (Affirmation in Support, Exhibit "H"). On August 3, 2015, the parties attended a compliance conference at which the court ordered "[defendants'] counsel to communicate response to tender upon receipt of response from clients/insurers" (*id.*, Exhibit "I"; NYSCEF document number 72). Judlau never responded to Our Rental's tender.

Our Rental states that its insurance provider, the Insurance Company of the State of Pennsylvania, provided its defense. Annexed as Exhibit "A" to its Affirmation in Reply is a copy of the policy, which identifies Ruttura & Sons Construction Co., Inc. ("Ruttura") as the named insured and states that the policy premium for the policy period May 1, 2012 through May 1, 2013 is $573,320 (Affirmation in Reply, Exhibit "A", form CG DS 01 10 01 at 1). According to Our Rental, "Our Rental and [Ruttura] are jointly owned and Our Rental is covered under Ruttura's insurance policy per written contract" (*id.*, ¶ 5). Our Rental also claims that, in defending this action, it incurred attorneys' fees in excess of $55,000.

On November 28, 2016, the parties entered into a stipulation stating that plaintiffs settled their claims against all defendants for $3,535,000 (the "Stipulation"). The Stipulation further provided that Our Rental would pursue its cross-claims against Judlau and extended the Note of Issue deadline to March 31, 2017 (NYSCEF Document Number 76). Our Rental did not contribute towards the settlement.

On March 16, 2017, Our Rental filed the instant motion for summary judgment and filed the Note of Issue. On June 16, 2017, the Court (Hon. Martin Schoenfeld, J.S.C.) adjourned the summary judgment motion to July 28, 2017 at counsel for Judlau's request because counsel for Judlau was on trial in another matter, which commenced on April 10, 2016 and concluded on

June 16, 2017 (*See* NYSCEF Document Number 99). On July 21, 2017, the Cross-Moving Codefendants filed their cross-motion.

Our Rental contends that pursuant to the plain language of the Lease's indemnification provision, stating that Judlau would indemnify Our Rental against any loss arising out of the operation of the pump truck, it is entitled to recover the legal fees incurred in defending this action. It argues further that, because Judlau failed to procure coverage for Our Rental, as an additional insured, pursuant to the Lease, Judlau is liable for all resulting damages, including the cost and expenses incurred defending the action. In opposition and in support of their cross-motion, the Cross-Moving Codefendants maintain that all of the cross-claims should be dismissed, because: (1) Our Rental fails to establish that it was free from negligence; (2) the Lease's indemnification provisions are in conflict with one another and are ambiguous, particularly with respect to attorneys' fees; (3) the indemnification provisions are in violation of General Obligation Law ("GOL") § 5–322.1; and (4) Judlau's failure to procure insurance entitles Our Rental to out-of-pocket damages only, which do not include attorneys' fees, and in any event Our Rental has failed to assert or demonstrate that it incurred any out-of-pocket costs. In reply to the cross-motion, Our Rental maintains that the cross-motion is untimely and, procedurally defective because, with the exception of Judlau, none of the Cross-Moving Codefendants are parties to Our Rental's motion.

DISCUSSION

Summary Judgment

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant 'must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Madeline D'Anthony Enters., Inc. v*

Sokolowsky, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*id.* at 324). Once the movant satisfies its burden, the opposing party must "'produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d at 607, quoting *Alvarez v Prospect Hosp.*, 68 NY2d at 324).

Cross-Motion for Summary Judgment

As a preliminary matter, Our Rental's arguments that the cross-motion by the Cross-Moving Defendants is defective on the basis that (1) Our Rental moved for summary judgment only against Judlau and not the other Cross-Moving Defendants; and (2) the Cross-Motion is untimely, are unavailing. First, the CPLR only requires that service of a cross-motion be made "upon the moving party" as was done here (CPLR 2215; *see Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 88 [1st Dept 2013] ("[t]he rule is that a cross motion is an improper vehicle for seeking relief from a nonmoving party"); *see also* Patrick M. Connors, Practice Commentaries, McKinney's Cons. Laws of NY, 2016, CPLR C2215:1 ("[a] cross-motion is merely a motion by *any party* against the party who made the original motion, made returnable at the same time as the original motion" [emphasis added]). Therefore, any of the parties to the action were free to make the cross-motion.

Second, the cross-motion is timely. Given that the Note of Issue was filed on March 16, 2017 [NYSCEF Doc # 91], summary judgment motions were due sixty days after filing of the Note of Issue (May 15, 2017) (See Preliminary Conference Order, dated December 9, 2013 [NYSCEF Doc # 42]. Our Rental argues that as the Cross-Moving Codefendants had until May

15, 2017 to move for summary judgment, their cross-motion filed on or about July 21, 2017 is untimely.[1] "A cross motion for summary judgment made after the expiration of the [court ordered 60-day period] may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief "nearly identical" to that sought by the cross motion" (*Filannino v Triborough Bridge & Tunnel Auth.*, 34 AD3d 280, 281 [1st Dept 2006]; *lv dismissed* 9 NY3d 862 [2007] [plaintiff's cross-motion addressed a different cause of action than defendant's motion and was therefore untimely]; *see Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 [1st Dept 2005]). Here both the motion and cross-motion seek summary judgment on Our Rental's cross-claims. As such, the cross-motion raises issues "nearly identical" to the Our Rental's summary judgment motion (*See cf Muqattash v Choice One Pharm. Corp.*, 162 AD3d 499, 500 [1st Dept 2018] [court properly declined to consider the cross-motions as they "did not raise issues 'nearly identical' to those raised in the timely initial motions"]; *Maggio v 24 W. 57 APF, LLC*, 134 AD3d 621, 628 [1st Dept 2015]).

Indemnification and Failure to Procure Insurance

The interpretation of an unambiguous contract is a question of law for the court (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 192 [1st Dept 1995]). Whether a contract is ambiguous is also a determination for the court (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]). "A contract is ambiguous if the provisions in controversy are reasonably or fairly susceptible of different interpretations or may have two or more different meanings" (*New York City Off-Track Betting Corp. v Safe Factory Outlet, Inc.*, 28 AD3d 175, 177 [1st Dept 2006] [internal quotation marks and citation omitted]; *see also Johnson v Lebanese*

[1] The Court (Hon. Martin Schoenfeld, J.S.C.) granted an adjournment of the motion for summary judgment to July 28, 2017 (NYSCEF Doc # 99).

Am. Univ., 84 AD3d 427, 429 [1st Dept 2011] [internal quotation marks and citations omitted] ["language in a contract will be deemed unambiguous only if it has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion"]).

"A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005] [internal quotation marks and citations omitted]). However, an agreement to indemnify, that is "collateral to a contract . . . relative to . . . construction" and seeks to indemnify the promisee against its own negligence, "is against public policy and is void and unenforceable" (General Obligation Law § 5–322.1; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 794–795 [1997]). Nevertheless, such an agreement is enforceable if it contains a savings clause, limiting indemnification "to the fullest extent permitted by law," or to the extent the party to be indemnified is found to be free of negligence (*See Johnson v Chelsea Grand E., LLC*, 124 AD3d 542, 543 [1st Dept 2015] [internal quotation marks and citations omitted] [finding that an indemnification provision did not violate GOL § 5–322.1, where it was limited by, among other things, the phrase "[t]o the fullest extent permitted by law"]; *Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179 [1990] ["[w]ithout a finding of negligence on the part of [the general contractor], [GOL] § 5-322.1's prohibition against indemnifying a contractor for its own negligence is inapplicable"]).

Where there is a breach of an agreement to procure insurance, the proper measure of damages "is the full cost of insurance to [claimant], i.e., the premiums it paid for its own insurance, any out-of-pocket costs that may have been incurred incidental to the policy, and any

increase in its future insurance premiums resulting from the liability claim" (*Trokie v York Preparatory School*, 284 AD2d 129, 130 [1st Dept 2001], citing *Inchaustegui v 666 5th Ave. Ltd. Partnership,* 96 NY2d 111 [2001]).

On the issue of indemnification, the Lease's indemnification provisions are unambiguous. The Cross-Moving Codefendants contend that the Lease is ambiguous because the indemnification provisions are in direct conflict regarding whether the subject accident would trigger Judlau's duty to indemnify, as one contains a negligence trigger and the other does not. There is no conflict or ambiguity demonstrated between the two provisions. The provisions merely protect against different risks—one against loss stemming from the operation of Our Rental's equipment during the leasing period, regardless of lessee's negligence, and the other against loss caused by lessee's negligence. The two provisions have "definite and precise meaning[s]" and are "unattended by danger of misconception," and, as such, are unambiguous (*Johnson v Lebanese Am. Univ.*, 84 AD3d at 429).

Here, the accident arose from the operation of the pump truck while Judlau was leasing said truck. Our Rental is not alleging negligence on the part of Judlau or its employees. As such, the circumstances fall squarely within the first indemnification provision, which requires that Judlau "defend and indemnify [Our Rental] against all loss, damage, expense and penalty arising from any action on account of personal injury or damage to property occasioned by the operation, handling or transportation of this equipment during the rental period" (Affirmation in Support, Exhibit "K").

While the provision does not specifically list litigation expenses incurred in defending a personal injury action, Judlau is nonetheless required to pay such expenses. "[B]road indemnification agreements will be interpreted as embracing litigation expenses where that

meaning clearly appears from the clause on application of the usual criteria for construing contracts, even though such a term does not specifically appear in the agreement" (*Breed, Abbott & Morgan v Hulko*, 139 AD2d 71, 74, 75-76 [1st Dept 1988], *affd* 74 NY2d 686 [1989] [finding that an indemnification clause covering "any claims, damages, losses or expenses" was intended to embrace litigation expenses]).

Here, the parties' unmistakable intent that Judlau be responsible for the costs of defending against plaintiffs' action is communicated by the provision's broad language, which encompasses not only the duty to indemnify Our Rental against "all . . . expense . . . arising from any action on account of personal injury . . . occasioned by the operation . . . of [the pump truck] during the rental period," but also the duty to defend against such action (Affirmation in Support, Exhibit "K"; *see Matter of New York City Asbestos Litig.*, 142 AD3d 408, 410 [1st Dept 2016] (finding that an agreement to indemnify "all losses, damages, claims, liens and encumbrances, or any or all of them, arising out of or in any way connected with the work" entitled the defendant "to attorneys' fees incurred in defending against plaintiff's action" from its codefendant); *see also Nigri v Liberty Apparel Co., Inc.*, 76 AD3d 842, 844 [1st Dept 2010] [internal citations omitted] ["[t]he clause 'all claims, actions, litigation, and other liabilities[,] costs and expenses' constitutes broad language that is generally interpreted to encompass attorneys' fees"]; *Boshnakov v Board of Educ. of Town of Eden*, 302 AD2d 857, 858-859 [4th Dept 2003] [internal citation omitted] [finding that an agreement to indemnify "'from and against all claims or suits' [was] broad enough to encompass the attorney's fees and disbursements, particularly in view of the fact that" the agreement contained a duty to defend]).

To the extent Judlau relies on *Hooper Assoc. v AGS Computers* (74 NY2d 487 [1989]) and its progeny, such cases are inapposite, as they stand for the simple proposition that "a

promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees" and that "the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*id.* at 492). *Hooper Assoc.* has no bearing on the instant case, where Our Rental is seeking indemnification for expenses incurred in defending a third-party claim. Indeed, the court in *Hooper Assoc.* found that the indemnification clause at issue in that case did not allow plaintiff to recover attorneys' fees incurred in a suit against defendant, because it was clearly intended to indemnify plaintiff against third-party claims only (*see id.* at 492-493, 494; *see also Matter of New York City Asbestos Litig.*, 142 AD3d at 410, citing *Hooper Assoc. v AGS Computers*, 74 NY2d 487).

However, in light of the evidence that Our Rental was responsible for maintaining the subject pump truck (*see* Affirmation in Support of Cross-Motion and in Opposition, Exhibit "C" [Avella Deposition at 107:15-24), an issue of fact as to its negligence precludes a grant of summary judgment in its favor. While Our Rental points to Avella's testimony that the pump truck was a year old at the time of the accident and that his inspection of the truck, after the accident, did not reveal any wear (*see id.* at 87:4-23, 88:17-18, 98:21-99:5), Avella also testified that he could not eliminate wear and tear as the cause of the accident (*see id.* at 107:2-14. Accordingly, the unresolved issue of Our Rental's potential negligence prohibits the grant of summary judgment on its contractual indemnification claim (*Compare Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301, 302 [1st Dept 2004] [finding that "summary judgment in favor of the indemnitee on a claim for contractual indemnification [was] inappropriate" where "a triable issue of fact exist[ed] as to whether [indemnitee's] negligence with respect to the

scaffold [that caused the accident] contributed to plaintiff's accident," since the indemnitee "provided the scaffold in question and its president admitted responsibility for monitoring its condition and for scaffold 'safety issues'"], with *Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556, 556 [1st Dept 2007] [finding that lessor established prima facie entitlement to contractual indemnity from lessee, "by demonstrating, through deposition testimony and other evidence, that the fogger machines and floor that caused plaintiff's injury were under the exclusive control of [lessee], and that [lessee] had directed every aspect of the work through which plaintiff was injured"; and, "[i]n light of [such] unrebutted prima facie demonstration that [lessor] was not negligent in the occurrence of the accident," GOL § 5–322.1 was inapplicable); *see also Radeljic v Certified of N.Y., Inc.*, 161 AD3d 588, 590 [1st Dept 2018] [finding that, "[i]n light of the issues of fact that exist[ed] as to the extent of defendant's liability for causing plaintiff's injuries, summary judgment on defendant's contractual indemnification claim against [third-party defendant] would [have been] premature"]).

Turning to Our Rental's cross-claim for breach of the Lease's insurance procurement provision, Judlau does not dispute that it failed to procure the required coverage for Our Rental. Accordingly, at oral argument on the instant motion and cross-motion, this Court stated that it was "granting the motion for summary judgment as to liability for failing to procure an insurance [policy] under the contract" (NYSCEF document number 120, 6/18/18 tr at 4:9-11).

In addition, during oral argument on June 18, 2018, Our Rental conceded that it was not entitled to attorneys' fees and was seeking only a refund of its insurance premium as its damages (*id.* at 2:13-21). As the only evidence of Our Rental's insurance premium at the time was a policy issued to Ruttura, showing the policy's premium was originally $573,320, and a statement from counsel that "Our Rental is covered under Ruttura's insurance policy per written contract"

(Tait Reply affirmation, ¶ 5), this Court permitted additional discovery on the issue Our Rental's out-of-pocket damages, with discovery to be served within 30 days (NYSCEF document number 120, 6/18/18 tr at 7:3-15).

By letter dated November 8, 2018, Our Rental informed this Court that Judlau served additional discovery demands on July 18, 2018 and that Our Rental served its response on August 15, 2018. Our Rental's counsel states that the insurance policy which covered Our Rental also covered other entities and that the estimated premium was $573,230 which was later adjusted to $917,363. The letter provides that Our Rental's discovery response showed that "the insurance premiums [of entities covered under Ruttura's policy] were based on the percentage of sales (2.25%) of each entity…. , and [that] the amount of the insurance premium attributable to Our Rental's sales was $109,284" (NYSCEF document number 119). However, nothing in the record supports any of these assertions. As such, the amount of damages arising from Judlau's failure to procure insurance constitutes an issue of fact. Accordingly, Our Rental's motion for summary judgment on its cross-claim for breach of the Lease's insurance procurement provision is granted as to liability only.

To the extent that the Cross-Moving Codefendants seek dismissal of Our Rentals' cross-claims for common law indemnification and contribution, they fail to make a prima facie showing of entitlement to such relief. "Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers" (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *see also Stallone v Plaza Constr. Corp.*, 95 AD3d 633, 634 [1st Dept 2012] [declining to dismiss cross-claims for contribution and indemnification where the defendant "ha[d] not been found free from negligence"]). To the extent that they seek dismissal of Our Rental's cross-claims for contractual indemnification and breach of the Lease's insurance

procurement provision, the cross-motion is denied for the reasons discussed above. Therefore, the Cross-Moving Codefendants' cross-motion is denied in its entirety.

CONCLUSION

Accordingly, it is hereby

ORDERED that Our Rental's motion for summary judgment is granted to the extent of granting partial summary judgment in favor of defendant Our Rental Corp. and against defendant Judlau Contracting, Inc. as follows: Defendant Judlau Contracting, Inc. is found liable to defendant Our Rental Corp. on the fourth cross-claim, to the extent it is based on Judlau Contracting, Inc.'s breach of the subject insurance procurement clause, and the issue of the amount of damages shall be determined at trial; and it is further

ORDERED that the action shall continue as to the first through third cross-claims; and it is further

ORDERED that the cross-motion of defendants The Port Authority of New York and New Jersey, Tishman Construction Corporation, Turner Construction Company, Lower Manhattan Development Corporation, Silverstein Properties, Inc. and Judlau Contracting, Inc. is denied.

The Clerk shall enter judgment accordingly.

Dated: May 14, 2019

ENTER:
SO ORDERED
J.S.C.
SHLOMO HAGLER
J.S.C.