

<b>Ramos v 200 W. 86 Apts. Corp.</b>
2019 NY Slip Op 31957(U)
June 28, 2019
Supreme Court, New York County
Docket Number: 155667/18
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

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NESTOR RAMOS AND MYRIAM RAMOS,

Plaintiffs,

-against-

Index No. 155667/18

Motion Seq. No.: 001

200 WEST 86 APARTMENTS CORP.,

Defendant.

-----X  
200 WEST 86 APARTMENTS CORP.,

Third-Party Plaintiff,

-against-

BEN SEVIER AND SARAH SEVIER,

Third-Party Defendants.

-----X

**DORIS LING-COHAN, J.:**

Third-party defendants Ben Sevier and Sarah Sevier move, pursuant to CPLR 3211 (a) (1) and (7) for an order dismissing the third-party complaint, granting them a default judgment on their counterclaim, and awarding them attorney’s fees, pursuant to their proprietary lease.

This case arises from an accident suffered by plaintiff Nestor Ramos, while he was working for a contractor on the Seviers’ cooperative apartment (Apartment). Plaintiff sued defendant 200 West 86 Apartments Corp., the owner of the building in which the Apartment is located, alleging claims under Labor Law §§ 200 and 241 (6). Defendant thereupon impleaded the Seviers, alleging negligence, seeking common-law indemnification and contractual indemnification, and

alleging breach of their agreement to procure liability insurance naming defendant as an additional insured.

Defendant's claim for contractual indemnification is based upon provisions that appear in an "Alteration Agreement" (Agreement), entered into by the Seviere, prior to the commencement of work on the Apartment, and appended as exhibit 2 to the affidavit of Burt Wallack. Wallack is the principal of defendant's managing agent. The Agreement, however, is unenforceable, because it provides, at paragraph 33, that it will "have no force or effect until [it] has been executed by an officer of the Corporation or your Managing Agent." The Agreement was executed solely by the Seviere. *See* Wallack Affidavit, Exhibit 2, at 11. Consequently, defendant's claim for contractual indemnification fails.

The Seviere's obligation to procure liability insurance, naming defendant as an additional insured, likewise arises from the Agreement, at paragraph 3 (d). Accordingly, it too is unenforceable.

Common-law indemnification is available to a party that

"has been held to be vicariously liable without proof of any negligence or actual supervision on its own part [, but it] may only be imposed against those parties . . . who exercise actual supervision."

*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 377-378 (2011); *see also Berihuete v 565 W. 139<sup>th</sup> St., L.P.*, 171 AD3d 667, 667 (1st Dept 2019). Here, the third-party complaint alleges not a single fact supporting a claim that the Seviere committed a negligent act or omission, or that they exercised supervision over the work being performed in their Apartment. Accordingly, both the claim of negligence and the claim for common-law indemnification fail. Defendant states the elements of a claim of negligence, but does not assert how the Seviere may have breached a duty

that they owed to defendants, or how they caused an injury to defendants. See Fippinger aff, ¶ 40.

“The critical requirement for [. . . a claim of contribution] 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. v Facilities Dev. Corp.*, 71 NY2d 599, 603 (1988); *see also Residential Bd. of Mgrs. of 310 W. 52<sup>nd</sup> St. Condominium v El-Ad 52 LLC*, 140 AD3d 536, 537 (1st Dept 2016). The injury, here, is the injury claimed by plaintiff. Defendant fails, however, to allege that, or in what way, the Seviere breached any duty, which breach caused or augmented plaintiff’s claimed injury.

The Seviere’s proprietary lease provides, at paragraph 28, that attorney’s fees are to be paid to defendant, if it prevails in an action or proceeding against the Seviere. Real Property Law (RPL) § 234 provides that, where a lease provides for attorney’s fees to be paid to a prevailing landlord, a reciprocal provision, providing for attorney’s fees to be paid to a prevailing tenant, will be implied. Without citing any case on point that supports its position, defendant argues that RPL § 234 does not apply to tenant shareholders of a cooperative building. The law, however, is to the contrary. *433 Sutton Corp. V Broder*, 107 AD3d 623, 626 (1st Dept 2014) *revd. on other grounds* 22 NY3d 1161 (2014); *Matter of Cohan v Board of Directors of 700 Shore Rd. Waters Edge, Inc.*, 108 AD3d 697, 700 (2d Dept 2013). Thus, the Seviere are entitled to attorney’s fees for defending the within third-party action.

Accordingly, it is hereby

ORDERED that the motion of third-party defendants Ben Sevier and Sarah Sevier for dismissal is granted and the third-party complaint is dismissed, with costs and disbursements as taxed by the Clerk of the Court upon the presentation of an appropriate bill of costs; and it is further

ORDERED that, with respect to third-party defendant's entitlement to attorneys' fees, within 45 days of entry of this order, third-party defendants shall serve upon defendant/third-party plaintiff a detailed Affirmation of Fees and Costs (with supporting billing records), to be reviewed by defendant/third-party plaintiff and, should defendant/third-party plaintiff agree with such defense fees/costs, they shall be satisfied within 30 days of receipt of the Affirmation of Fees and Costs. If defendant/third-party plaintiff disputes such fees/costs, within 30 days of receipt of the Affirmation of Fees and Costs, defendant/third-party plaintiff shall supply to third-party defendant, in writing, specific reasons for its objections . If the parties are unable to agree on the amount of the defense fees/costs owed to third-party defendants after conferring with each other, the issue of fees/costs will be referred to a Special Referee, to hear and determine, in accordance with CPLR 4317 (b), upon notice to the Court, by joint letter, on or before October 31, 2019<sup>1</sup>; and it is further

ORDERED that within 45 days of entry of this order, third-party defendants shall serve a copy upon all parties, with notice of entry.

Dated: June 28, 2019

  
Doris Ling-Cohan, J.S.C.

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<sup>1</sup> Failure to comply with this order, may be deemed a waiver or default on the claim for fees/costs, if appropriate.