

**Wai Cheung v 48 Tenants' Corp.**

2019 NY Slip Op 32306(U)

July 31, 2019

Supreme Court, New York County

Docket Number: 158886/2013

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 32

Justice

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INDEX NO. 158886/2013

WAI CHEUNG,

MOTION DATE 06/18/2019

Plaintiff,

MOTION SEQ. NO. 005

- v -

48 TENANTS' CORP., THE SAINT FAUSTINA REVOCABLE TRUST,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER)

Defendant 48 Tenants' Corporation's motion for summary judgment on the contractual indemnification claim is denied. The cross-motions submitted by plaintiff and defendant Saint Faustina Revocable Trust are untimely and therefore denied.

**Background**

This case arises from personal injuries allegedly sustained by plaintiff after a construction accident on December 4, 2012 at 48 Great Jones Street in Manhattan. The building is a coop owned by defendant 48 Tenants' Corporation ("48 Tenants"). Defendant, the Saint Faustina Revocable Trust ("the Trust"), is a shareholder in the coop and owns a unit on the second floor, which is where the accident occurred. The Trust was created by Mr. and Mrs. Gaffigan, who reside in the unit in question. The Gaffigans were in the process of renovating the unit before moving in. They hired non-party Steven Moy and his company SNM Construction to perform construction work.

The Gaffigans claim that Moy was the general contractor of the project. Plaintiff works as a carpenter for ICI, an alleged subcontractor of SNM Construction.

On the day of the accident, plaintiff was building a door frame for the unit. He got on a ladder to place screws into the frame. As he began drilling the screws, his ladder began to move and plaintiff fell off the ladder. He brought an action against defendants for personal injuries under the Labor Law.

Defendant 48 Tenants' brings the instant motion, seeking summary judgment against co-defendant, the Trust, alleging that the Trust is obligated to fully defend, indemnify, and hold 48 Tenants' harmless in this action, pursuant to an indemnification clause in the lease entered into between the parties.<sup>1</sup> 48 Tenants' argues that the Trust is obligated to indemnify 48 Tenants' because paragraph nine of the lease requires indemnification when the alleged injuries are "due wholly or in part to any act, default or omission...of any person...visiting in the Loft" (NYSCEF Doc. No. 90, citing to proprietary lease, NYSCEF Doc. No. 102 at ¶ 9). The crux of the argument is: because plaintiff was the Trust's visitor on the day of the accident, the Trust alone is liable for any injuries suffered by plaintiff.

The Trust opposes the motion for contractual indemnification, insisting that it is not obligated to indemnify 48 Tenants' because: (1) plaintiff is not a "visitor" for the purposes of this indemnification clause (2) 48 Tenants' has failed to establish that the indemnification clause is applicable and (3) and because no members of the Trust agreed to any amendments to the lease which would obligate the Trust to indemnify 48 Tenants'.

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<sup>1</sup> The Court notes that in 48 Tenants' Notice of Motion, the relief requested is summary judgment on the grounds that plaintiff has failed to establish a prima facie case of negligence. However, in the motion papers, 48 Tenants' basis for summary judgment is contractual indemnification from co-defendant, the Trust. Because the entire body of the motion is about contractual indemnification against co-defendant, and was treated as such by all parties, the Court will only consider that argument.

Plaintiff cross-moves for an Order finding defendants strictly liable for plaintiff's injuries pursuant to Labor Law § 240(1) and §241 (6). However, the Court will not consider the cross-motion because it was filed later than 120 days of the filing of the note of issue, in contravention of this Part's rules and of *Brill v City of New York* (2 NY3d 648, 814 NE2d 431 [2004]). The Trust also cross-moves to dismiss plaintiff's strict liability claims against it. That cross-motion is also untimely, and the Court will not consider it. Because the only timely motion made was 48 Tenants' motion for summary judgment based on contractual indemnification, that motion is the only one that is being considered. To the extent that the Trust's cross-motion/opposition is responsive to the timely motion for summary judgment based on contractual indemnification, those arguments will be considered.

### Discussion

To be entitled to the remedy of summary judgment, the moving party "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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or

resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, then the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

“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. 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 that the parties did not intend to be assumed. Where there is an ambiguity as to the meaning of a lease prepared by the landlord, the ambiguity should be resolved in favor of the lessee” (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 595, 988 NYS2d [2014] [internal citations and quotations omitted]).

### **The Term “Visitor”**

The indemnification clause of the lease states:

“The Lessee agrees to save the Lessor harmless from all liability, loss, damage, and expenses arising from injury to person or property occasioned by Lessee’s negligence, malfeasance, or the failure to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any person *dwelling or visiting in the loft* or by the Lessor, its agents, servants or contractors when acting as agent for the Lessees as in this Lease provided. This Paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessees” (emphasis added).

(NYSCEF Doc. No. 102 at pg. 7)

48 Tenants’ argument that plaintiff qualifies as a “visitor” under the lease is unconvincing. The facts of this case are similar to those in *Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 988 NYS2d 1 [1st Dept 2014]. In that case, the Court considered whether a contractor and its

employees should be considered “visitors” under the indemnification clause at issue. The Court held, “Here, the term ‘visitor’ is not defined in the proprietary lease, and a reasonable interpretation of any person . . . visiting in the apartment . . . would distinguish plaintiff, a worker or ‘servant’ . . . from a visitor” (*id.* [internal quotations and citations omitted]). Here, plaintiff was hired to perform renovation work on the loft before the tenants moved in. Plaintiff did not know who lived in the loft or who it belonged to. There are no facts that would indicate plaintiff was a visitor visiting the tenant. He was simply a worker on a job site and a reasonable interpretation of the lease does not indicate that contractors and their workers are considered visitors.

#### **Applicability of Indemnification Clause**

In its opposition to the motion, the Trust further argues that it is not obligated to indemnify 48 Tenants’ based on the last sentence of the indemnification clause, which states: “[t]his Paragraph shall not apply to any loss or damage when Lessor is covered by insurance which provides for waiver of subrogation against the Lessee” (NYSCEF Doc. No. 102 at pg. 7). The Trust claims that 48 Tenants’ has not shown “that it is *not* covered by insurance which provides for waiver of subrogation against the Trust” (NYSCEF Doc. No. 130 at ¶ 47). Put another way, the Trust’s argument is that if 48 Tenants’ are covered by insurance, then the indemnification clause is not triggered. The Trust emphasizes that it is 48 Tenants’ burden to show that it does not have insurance and therefore, the indemnification clause *is* applicable.

In reply, 48 Tenants’ claims that there is no insurance policy which would preclude the applicability of the indemnification clause and insists that it is the Trust’s burden to produce any alleged insurance agreement. Based on the motion papers, it is unclear to the Court whether any insurance agreement exists because neither party has shown its existence or lack thereof. Accordingly, the Court cannot grant summary judgment and this issue is left for trial.

### Amendment of the Proprietary Lease

48 Tenants' claims that it is entitled to indemnification based upon language in ¶ 3.4 of a document entitled "Amendment of Proprietary Lease." That provision states:

"The Tenant-Shareholder will not require, permit, suffer or allow any work, decoration, alteration, repair, or upkeep of the Apartment or any part thereof, cleaning of any window in the Apartment from the outside (within the meaning of the New York Labor Law) unless all equipment and safety devices required by law, ordinance, rules and regulations, including, without limitation, the New York Labor Law, are provided and used, and unless the industrial code of the State of New York is fully complied with; and the Tenant-Shareholder hereby agrees to indemnify the Apartment Corporation and its employees, other Tenant-Shareholders, and the managing agent, for all losses, damages or fines suffered by them as a result of the Tenant Shareholder's requiring, permitting, suffering or allowing any work, decoration, alteration, repair, or upkeep of the Apartment or any part thereof, or any window in the premises to be cleaned from the outside, in violation of the any [sic] of the requirements of the aforesaid laws, ordinances, regulations and rules."

(NYSCEF Doc. No. 103 at ¶ 3.4)

48 Tenants' argues that this provision obligates the tenant-shareholder to indemnify the coop if the tenant-shareholder allows work to be done on the premises without proper safety equipment as is defined under the Labor Law and Industrial Code. The Trust claims that Mrs. Gaffigan never signed this Amendment of Proprietary Lease, and contrary to 48 Tenants' position, she never admitted to signing and agreeing to it during her deposition. Upon reviewing the deposition transcripts, the Court finds no basis to conclude that Mrs. Gaffigan agreed to or signed this document. Mrs. Gaffigan's signature does not appear on this document. Furthermore, the document is only mentioned once during Ms. Gaffigan's deposition (NYSCEF Doc. No. 100 at pg. 31) and she never admits to having knowledge of the contents of this document. Therefore, the Court cannot conclude that the Trust consented to the terms of this document without a clear showing that any member of the Trust or the trustee actually agreed and signed it. As 48 Tenants'

has not provided a signed copy, it has failed in its initial burden on summary judgment and the motion must be denied.

**Summary**

It was 48 Tenants' obligation to show that the indemnification clause is applicable to the facts present here; it failed to do so. Its argument that plaintiff was a visitor in the loft is unconvincing in light of the Appellate Division's holding that workers hired to do renovation work are not considered "visitors." The Court cannot read in a duty to indemnify absent a clear showing that this was the intention of the parties. Moreover, the Court finds that 48 Tenants' was unable to show that the indemnification provision in the lease amendment was signed by the Trust. The motion for summary judgment on the contractual indemnification claim is denied.

Furthermore, because the plaintiff's and Trust's cross-motions were unrelated (the cross motions present claims based on Labor Law § 240[1] and § 241[6]) and untimely, they are denied (*see Brill v City of New York*, 2 NY3d 648, 814 NE2d 431 [2004]).

Accordingly, it is hereby

ORDERED that defendant 48 Tenants' Corporation's motion for summary judgment against co-defendant, the Saint Faustina Revocable Trust, is denied; and it is further

ORDERED that all other motions and cross-motions are unrelated and denied as untimely.

7/31/19

DATE

ARLENE P. BLUTH  
HON. ARLENE P. BLUTH

CHECK ONE:

- CASE DISPOSED
- GRANTED
- DENIED
- SETTLE ORDER
- INCLUDES TRANSFER/REASSIGN

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT
- OTHER
- REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: