

Ortiz v Rainbow Assocs., LLC
2019 NY Slip Op 32709(U)
August 19, 2019
Supreme Court, Kings County
Docket Number: 507093/2015
Judge: Carolyn E. Wade
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At Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Brooklyn, New York on the 19th day of August 2019

PRESENT:
HON. CAROLYN E. WADE,

Justice

-----X
DAVID J. ORTIZ,

Plaintiff,

Index No. 507093/2015

-against-

Seq 4

DECISION and ORDER

RAINBOW ASSOCIATES, LLC,

Defendant.

-----X
RAINBOW ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

ADVANCED HVAC TECHNOLOGIES, LLC,

Third-Party Defendant.

-----X

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Recitation, as required by CPLR §2219 (a), of the papers considered in the review of third-party defendant ADVANCED HVAC TECHNOLOGIES, LLC 's motion:

Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed.....	<u>1</u>
Cross-Motion and Affidavits/Affirmations.....	<u> </u>
Answering Affidavits/Affirmations.....	<u>3</u>
Reply Affidavits/Affirmations.....	<u> </u>
Memorandum of Law.....	<u>2,4</u>

Upon the foregoing cited papers and after oral argument, third-party defendant, Advanced HVAC Technologies, LLC, moves for an Order: (a) pursuant to CPLR § 3211 (a) (1), dismissing the First Cause of Action in the Third-Party Complaint, (b) pursuant to CPLR §§ 3211 (a) (5) and (7), dismissing the Second Cause of Action in the Third-Party Complaint, (c) pursuant to CPLR §3211 (a) (7), dismissing the Third Cause of Action in the Third-Party Complaint; and/or (d) in the alternative, pursuant to CPLR §1010, severing the Third-Party Action in its entirety.

Relevant Facts

The underlying labor law action was commenced by plaintiff DAVID J. ORTIZ (“Plaintiff”), an employee of third-party defendant ADVANCED HVAC TECHNOLOGIES, LLC (“Advanced”), to recover damages for injuries he allegedly sustained on February 4, 2015 after falling from a ladder. Defendant/third-party plaintiff RAINBOW ASSOCIATES, LLC. (“Rainbow”) was the owner of 1601 Ocean Parkway, Brooklyn, New York 11223 (the “Premises”), and non-party Malek Management Corp. (“Malek”) was the Premises’ property manager. Advanced and Malek entered into an agreement (the “Work Agreement”) for the former to perform work at the Premises. On or about June 9, 2015, Plaintiff filed the Summons and Complaint to commence this action. Thereafter, on or about June 28, 2018, Rainbow served their Third-Party Summons and Complaint on Advanced. The instant motion ensues.

Arguments

Advanced’s motion

In support of the instant motion, Advanced contends that all three causes of action in Rainbow’s third-party Complaint should be dismissed. As to the First Cause of Action for contractual indemnification, Advanced argues that the Work Agreement does not provide that Rainbow was a party to the indemnification clause. On the Second Cause of Action sounding in

negligence, Advanced claims that the three-year statute of limitations for Rainbow to bring its third-party action has expired on February 4, 2018, as the accident occurred on February 4, 2015. However, the third-party complaint was not filed until June 28, 2018. In addition, Advanced avers that Rainbow failed to plead the elements of negligence with the requisite specificity. With respect to the Third Cause of Action for common-law indemnification, Advanced argues that Rainbow is not entitled to that relief pursuant to Workers' Compensation Law § 11.

Moreover, Advanced asserts that the third-party Complaint should be dismissed without prejudice or severed from the Complaint. Advanced states that the main action in this matter is ready for trial and a note of issue has been filed; yet, discovery has not been conducted in the third-party action. It further avers that there is no true identity of legal issues between the two actions, as the initial Complaint concerns Plaintiff's allegations of injury, while the third-party action is premised on Rainbow's indemnification claims against Advanced.

Rainbow's opposition

In opposition, Rainbow asserts that since the Work Agreement provides that Advanced will be directing all work and supplying equipment including the subject ladder, it is entitled to common-law and contractual indemnification. On the issue of the Workers' Compensation Law, Rainbow contends that Plaintiff "has potentially suffered" a grave injury, which would permit a third-party claim against Advanced as his employer. Rainbow also argues that the statute of limitations has not expired on its indemnification claim, as it has not made a payment to Plaintiff. Lastly, Rainbow states that the initial action and the third-party action are similar in law and facts, and that parties will be able to complete discovery before the trial is scheduled.

Analysis

***CPLR 3211 (a) (1) dismissal on the First Cause of Action in the Third-Party Complaint
(Contractual Indemnification)***

“A motion to dismiss on the basis of CPLR 3211(a)(1) should be granted only where the documentary evidence that forms the basis of the defense is such that it refutes the plaintiff’s factual allegations or conclusively disposes of the plaintiff’s claims as a matter of law” (*Cassese v SVJ Joralemon, LLC*, 168 AD3d 667, 668 [2d Dept 2019]; see *Schiller v Bender, Burrows and Rosenthal, LLP*, 116 AD3d 756, 757 [2d Dept 2014]; *Goshen v Mut. Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

Here, the indemnification provision in Section 16 of the Work Agreement provides that “[Malek] will save and hold harmless [Advanced] and its officers, directors, agents and employees or any of them from any and all claims, demands, actions or liability of any nature based upon or arising out of any breach of this Contract” (Ex. A, Third-Party Complaint). The Work Agreement contained no express agreement by Advanced to indemnify Rainbow for injuries alleged in this case. Since the Work Agreement conclusively disposes of the contractual indemnification claim, the First Cause of Action in the Third-Party Complaint is hereby dismissed (*Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669).

***CPLR 3211 (a) (5) dismissal on the Second Cause of Action in the Third-Party Complaint
(Negligence)***

A personal injury claim alleging negligence is governed by the three-year statute of limitations period provided in CPLR 214 (5) (*Erickson v YMCA of Nyack*, 108 AD2d 720 [2d

Dept 1985]; *Schulz v Waldorf*, 69 AD3d 920 [2d Dept 2010], which runs from the date of injury (*Cubito v Kreisberg*, 69 AD2d 738, 740 [2d Dept 1979], *affd*, 51 NY2d 900 [1980]). Here, Rainbow's negligence claim against Advanced is barred by the statute of limitations, as the date of injury is February 4, 2015 and the third-party action was commenced on June 28, 2018.

Dismissal of the Third Causes of Action in the Third-Party Complaint (common-law indemnification) on the basis of CPLR 3211 (a) and (7), and Workers' Compensation Law Section 11

“On a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference” (see *Leon v Martinez*, 84 NY2d 83, 87 [1994]; *Nestor v Putney Twombly Hall & Hirson, LLP*, 153 AD3d 840, 841 [2d Dept 2017]). “Workers' Compensation Law § 11 prohibits third-party claims for indemnification against an employer unless the employee has sustained a ‘grave injury’ or there is a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the third-party claimant” (*Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669; see Workers' Compensation Law § 11; *Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367 [2005]; *Muhjaj v 77 Water St., Inc.*, 148 AD3d 1165, 1166 [2d Dept 2017]).

Here, Advanced established its entitlement to dismissal of the third-party cause of action for common-law indemnification pursuant to CPLR 3211(a)(7). Specifically, the Third-Party Complaint failed to allege, either directly or by reference to the plaintiffs' underlying complaint,

that Plaintiff suffered a "grave injury" as defined by Workers' Compensation Law § 11 (*Cassese v SVJ Joralemon, LLC*, 168 AD3d at 669; *Cueto v Hamilton Plaza Co., Inc.*, 67 AD3d 722, 724 [2d Dept 2009]).

Accordingly, based upon the above, ADVANCED HVAC TECHNOLOGIES, LLC's motion to dismiss the First, Second and Third Causes of Action in RAINBOW ASSOCIATES, LLC's Third-Party Complaint is **GRANTED**.

The branch of Advanced's motion to sever the Third-Party Complaint from the main Complaint is hereby rendered moot.

This constitutes the Decision and Order of the Court.



HON. CAROLYN E. WADE
ACTING SUPREME COURT JUSTICE

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