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| <b>Berkowitz v City of New York</b>                                                                                                                                                                                            |
| 2019 NY Slip Op 33130(U)                                                                                                                                                                                                       |
| October 18, 2019                                                                                                                                                                                                               |
| Supreme Court, New York County                                                                                                                                                                                                 |
| Docket Number: 159714/2018                                                                                                                                                                                                     |
| Judge: W. Franc Perry                                                                                                                                                                                                          |
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| This opinion is uncorrected and not selected for official publication.                                                                                                                                                         |

SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTYPRESENT: HON. W. FRANC PERRY

PART

IAS MOTION 23EFM

*Justice*

-----X

MARK BERKOWITZ,

Plaintiff,

- v -

THE CITY OF NEW YORK, NEW YORK CITY ECONOMIC  
DEVELOPMENT CORPORATION, GANSEVOORT  
MARKET INC.,

Defendant.

-----X

GANSEVOORT MARKET INC.

Third-Party Plaintiff,

-against-

U.S. WATER SERVICES, INC.

Third-Party Defendant.

-----X

INDEX NO.

159714/2018

MOTION DATE

October 17,  
2019

MOTION SEQ. NO.

001DECISION + ORDER ON  
MOTIONThird-Party  
Index No. 595197/2019

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31  
were read on this motion to/for

DISMISS

In this personal injury action, third-party defendant U.S. Water Services, Inc. moves to dismiss the third-party complaint pursuant to CPLR 3211 (a)(1) based on documentary evidence. Third-party plaintiff opposes the motion.

## BACKGROUND

Plaintiff alleges that he was injured as a result of an accident which occurred while plaintiff was working on a cooling tower. (NYSCEF Doc. No. 3). Plaintiff alleges that he was employed by Chemical Solutions and was on the premises to repair and clean a cooling tower

and was injured when the ladder he was using allegedly malfunctioned. (NYSCEF Doc. No. 23). On March 11, 2019, defendant/third-party plaintiff Gansevoort Market Inc. ("Gansevoort") filed a third-party complaint against U.S. Water Services, Inc. ("U.S. Water") alleging that plaintiff's employer, Chemical Solutions was retained by U.S. Water to clean the cooling tower at the subject location. (NYSCEF Doc. No. 17). The third-party complaint alleges that U.S. Water is liable to Gansevoort for breach of contract and contractual indemnity based upon an Agreement between the parties that was executed on June 28, 2018.

Third-party plaintiff alleges that around the time of plaintiff's accident, third-party defendant U.S. Water was a contractor hired by Gansevoort for water management and tank cleaning services for the subject cooling tower and that thereafter, U.S. Water submitted an indemnification agreement that forms the basis of the third-party complaint. (NYSCEF Doc. Nos. 24 and 25). In its pre-answer motion to dismiss the third-party complaint, third-party defendant U.S. Water maintains that the indemnity agreement which was entered into two months after plaintiff's alleged accident demonstrates that there was no indemnification agreement in effect at the time of plaintiff's accident and thus, the third-party complaint is without merit. Defendant/third-party plaintiff Gansevoort argues that there are issues of fact surrounding the cause of plaintiff's accident and whether the parties intended the indemnity agreement to apply retroactively which demonstrate that the third-party complaint should not be dismissed without the benefit of discovery.

#### **STANDARD OF REVIEW/ANALYSIS**

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87, 638 N.E.2d 511, 614 N.Y.S.2d 972 [1994]).

Where dismissal of an action is sought, pursuant to CPLR 3211 (a) (1), on the ground that it is barred by documentary evidence, such relief may be warranted only where the documentary evidence ““utterly refutes plaintiff's factual allegations”” and ““conclusively establishes a defense to the asserted claims as a matter of law”” (*Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433, 992 NYS2d 2 [1st Dept 2014] [internal citations omitted]).

The court is “not required to accept at face value every conclusory, patently unsupportable assertion of fact found in the complaint” and can “consider documentary evidence proved or conceded to be authentic” (*West 64th Street, LLC v Axis U.S. Ins.*, 63 AD3d 471, 471, 882 NYS2d 22 [1st Dept 2009], quoting *Four Seasons Hotels v Vinnik*, 127 AD2d 310, 318, 515 NYS2d 1 [1st Dept 1987] [internal quotation marks omitted]).

Defendant/third-party plaintiff Gansevoort maintains that its third-party complaint alleges a valid claim against U.S. Water based on the indemnity agreement, noting that a contract executed after the accident may be applied retroactively when there is evidence that establishes, as a matter of law, that the agreement pertaining to the contractor's work was made as of a pre-accident date and that the parties intended that it apply as of that date.

Defendant/third-party plaintiff Gansevoort argues that there are issues of fact presented by this record, as it contends that the indemnification agreement specifically states that U.S. Water had been engaged by Gansevoort as an equipment maintenance, water treatment and tank cleaning service and “in consideration of the payments made by Gansevoort. . . [U.S. Water] agrees to defend, indemnify and hold harmless, Gansevoort. . . from and against all actions, suits, demands, judgments, losses, liabilities, damages, costs or expenses (including without limitation, interest, penalties and attorneys' fees) (collectively, "Claims") whether arising out of contract, tort, strict liability, misrepresentation, violation of applicable law and/or any cause of

action". (NYSCEF Doc. No. 19). Based on the language of the agreement and the circumstances surrounding the execution of the agreement, Gansevoort argues that the record demonstrates that the agreement was intended to apply to work that pre-dates the accident. U.S. Water concedes that a contract may be applied retroactively where the parties intended the agreement to have retroactive effect, however, it argues that Gansevoort has failed to set forth any evidence indicating that the parties intended the indemnity agreement to apply retroactively.

Although a party generally will not have a viable claim for contractual indemnification against another where the contract between them is executed after the alleged loss (see *Beckford v City of New York*, 261 AD2d 158, 689 NYS2d 98 [1st Dept 1999]), an indemnification agreement executed after an accident has occurred may be applied retroactively where the indemnitee establishes, as a matter of law, that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended that it be applied as of that date (see *Cinquemani v Old Slip Assoc., LP*, 77 A.D.3d 603, 912 N.Y.S.2d 224 [2d Dept 2010]; *Stabile v Viener*, 291 AD2d 395, 737 NYS2d 381 [2d Dept 2002]). However, indemnity agreements are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed (see *Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 857 N.E.2d 60, 823 NYS2d 765 [2006]; *Tonking v Port Auth.*, 3 NY3d 486, 821 N.E.2d 133, 787 NYS2d 708 [2004]), and where the intent of the parties must be determined by disputed evidence or inferences outside the written words of the agreement, a triable issue of fact is presented, precluding summary judgment (see *Mikulski v Adam R. West, Inc.*, 78 AD3d 910, 912 NYS2d 233 [2d Dept 2010]; *McGovern v Gleason Bldrs., Inc.*, 41 AD3d 1295, 839 NYS2d 384 [4th Dept 2007]).

Here, defendant/third-party plaintiff Gansevoort maintains that it has raised issues of fact surrounding whether the parties intended to have the indemnity agreement apply retroactively to the work set forth in the proposal. Additionally, Gansevoort argues that evidence submitted in opposition to the motion demonstrates that U.S. Water was the entity responsible for supervising and directing the plaintiff's work based on the subcontract and/or purchase order with Chemical Solutions, and that the incident report prepared by U.S. Water, demonstrates that U.S. Water's Account Manager met with the plaintiff earlier on plaintiff's date of loss, thus raising issues of fact concerning the degree U.S. Water supervised plaintiff's work; and further noting that the proposal indicates that U.S. Water will provide water treatment training. (NYSCEF Doc. Nos. 24, 26 and 29).

Based on the record, U.S. Water has failed to demonstrate conclusively, by documentary evidence or otherwise, that the third-party complaint lacks merit. Indeed, U.S. Water has failed to submit evidence eliminating triable issues as to whether the parties intended the indemnification agreement in question to apply retroactively (see *Zalewski v MH Residential 1, LLC*, 163 AD3d 900, 82 NYS3d 40 [2d Dept 2018]; *Barrett v Magnetic Constr. Group Corp.*, 149 AD3d 1022, 53 NYS3d 350 [2d Dept 2017]; *Cacanoski v 35 Cedar Place Assoc., LLC*, 147 AD3d 810, 47 NYS3d 71 [2d Dept 2017]; *Temmel v 1515 Broadway Assocs., L.P.*, 18 AD3d 364, 795 NYS2d 234 [1st Dept 2005]; *Podhaskie v Seventh Chelsea Assocs.*, 3 AD3d 361, 770 NYS2d 332 [1st Dept 2004]).

Accordingly, it is hereby,

ORDERED that third-party defendant U.S. Water Services, Inc.'s motion sequence number 001, seeking to dismiss the third-party complaint is denied; and it is further

ORDERED that third-party defendant U.S. Water Services, Inc. is directed to serve an answer to the third-party complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for preliminary conference in Room 307, 80 Centre Street, on January 21, 2020, at 9:30 AM.

Any requested relief not expressly addressed by the Court has nonetheless been considered and is hereby denied and this constitutes the decision and order of the Court.

10/18/19  
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

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☐  
☐  
☐

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

☒

DENIED

☒  
☐  
☐  
☐

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

☐

OTHER

☐

REFERENCE

W. FRANC PERRY, J.S.C.  
**HON. W. FRANC PERRY, III**  
J.S.C.