

<b>Means v Beach Improvements, LLC</b>
2019 NY Slip Op 34772(U)
March 29, 2019
Supreme Court, Westchester County
Docket Number: Index No. 68239/2016
Judge: Terry Jane Ruderman
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF WESTCHESTER

-----X  
PAMELA MEANS,

Plaintiff,

-against-

BEACH IMPROVEMENTS, LLC, DLC MANAGEMENT CORPORATION and THE STOP & SHOP SUPERMARKET COMPANY, LLC,

Defendants.  
-----X

BEACH IMPROVEMENTS, LLC, and DLC MANAGEMENT CORPORATION,

Third-Party Plaintiffs,

-against-

RICHARD K. FALKNER,

Third-Party Defendant.  
-----X

RUDERMAN, J.

The following papers were considered in connection with the motion by defendants and third-party plaintiffs Beach Improvements, LLC, DLC Management Corporation and the Stop & Shop Supermarket Company, LLC, for an order pursuant to CPLR 3212 granting them summary judgment on their contractual indemnification claim against third-party defendant Richard K.

Falkner:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation, Exhibits A - G	1
Affirmation in Opposition	2
Reply Affirmation	3

This is a personal injury action brought by plaintiff Pamela Means for injuries allegedly sustained as a result of a slip and fall on ice on March 20, 2015 at about 10:00 a.m. in the parking lot at 1831 Main Street, Peekskill, New York, also known as the Beach Shopping Center. The third-party claim brought by defendants Beach Improvements, LLC, DLC Management Corporation, the owner and manager of the property, against third-party defendant Richard Falkner, is based on the Service Contract between Beach Improvements, LLC and Falkner, in which Falkner agreed to “remove snow and de-ice all surfaces to maintain traffic lanes, parking areas and pedestrian walkways free of snow and ice for the protection of vehicles and pedestrians.” The contract was effective from November 1, 2013 to April 30, 2016, and contained an indemnification provision.

The movants, defendant Stop & Shop Supermarket Company, LLC and defendants/third-party plaintiffs Beach Improvements, LLC and DLC Management Corporation, now seek summary judgment on the contractual indemnification claim against Falkner, based on the indemnification provision of the Service Contract between Beach Improvements, LLC and Falkner. That provision reads:

“Contractor agrees to indemnify and hold harmless Beach Improvements, LLC (“owner”) and its agent, DLC Management Corp., against any liability, damage, loss, claims, demands and actions of any nature whatsoever, including personal injury, or death, arising from the actions or omissions of Contractor, its employees, or agents while engaged in the performance of the services described in this agreement.”

Analysis

Initially, while third-party plaintiffs Beach Improvements, LLC and DLC Management Corporation are entitled to seek summary judgment on their contractual indemnification claim against Falkner, the Stop & Shop Company LLC does not appear to be either a party to or a third-party beneficiary of the Service Contract, nor is it named as a third-party plaintiff.

The movants rely on the rule that “[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” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). There can be no question here that the contract establishes an intent to indemnify.

However, Falkner counters that “a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor” (*Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 934 [2d Dept 2015]). Based on that rule, the Court in *Watters v R.D. Branch Assoc., L.P.* (30 AD3d 408, 409-410 [2d Dept 2006]), reversed the motion court’s grant of summary judgment in favor of a shopping mall owner and against its snow removal contractor on a contractual indemnification claim, explaining that the property owner had failed to “establish as a matter of law that it was free from such negligence and that [the third-party defendant] was solely responsible for the accident” (*id.*).

Notably, the affirmation submitted in support of the motion contains no mention of the evidence or discussion of the issue of the owner’s and managing agent’s freedom from negligence. In their reply, the movants argue that in the present action, there is no evidence that

the property owner or managing agent “caused, created, or exacerbated the ice condition upon which the injured plaintiff allegedly slipped” (*Bleich* at 935), suggesting that in *Bleich* and *Watters* there was such evidence, although neither decision so states.

A party moving for summary judgment, has the initial burden to make a prima facie showing that, if un rebutted, establishes that it is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Here, to make a prima facie showing entitling them to summary judgment on their contractual indemnification claim, the movants have the burden to prove themselves free from negligence. Their submissions on the present motion contain a bare assertion so stating, but failed to make any showing to that effect.

While Beach Improvements, LLC and DLC Management Corporation may after trial be entitled to contractual indemnification at trial against third-party defendant Richard Falkner, they have not supported their right to that relief with their assertions on the present motion.

The movants’ alternative proposal, that it be awarded “a conditional judgment on the issue of indemnity” (*see Masciotta v Morse Diesel Intl.*, 303 AD2d 309, 310 [1st Dept 2003]), suffers from the same infirmity, and must also be denied.

Accordingly, it is hereby

ORDERED that the motion by defendants/third-party plaintiffs for summary judgment on their indemnification claim against third-party defendant Falkner is denied; and it is further

ORDERED that the parties are directed to appear on Tuesday, May 7, 2019 at 9:15 a.m., in the Settlement Conference Part of the Westchester County Courthouse located at room 1600,

111 Dr. Martin Luther King, Jr. Boulevard, White Plains, New York 10601, to schedule trial.

This constitutes the Decision and Order of the Court.

Dated: White Plains, New York  
March 29, 2019

  
HON. TERRY JANE RUDERMAN, J.S.C.