SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART IAS MOTION 53EFM

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BARRY ROBINSON, OTHERS SIMILARLY SITUATED,

Plaintiff,

- v -

FOREMOST GLATT KOSHER CATERERS, INC, RAM CATERERS OF OLD WESTBURY, LLC,RANDY ZABLO, ANGELA ZABLO, JEFFREY BECKER, SIMON AUERBACHER, JEREMY GOLDFEDER, KENNETH GREIF, WILLIAM KOHANE,

Defendant.

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INDEX NO. 158042/2018

MOTION DATE 2/10/20

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

FOREMOST GLATT KOSHER CATERERS, INC

Plaintiff,

-against-

KENSINGTON EVENT STAFFING, JOHN DOE CORPORATIONS A, B AND C

Defendant.

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Third-Party
Index No. 595199/2019

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 002) 47, 48, 49, 50, 51, 52, 53, 54, 55, 58, 59, 60

were read on this motion to/for DISMISS.

Upon the foregoing documents, third-party defendant Kensington Events Inc.'s (**Kensington**) motion to dismiss the third-party complaint of third-party plaintiffs Foremost Glatt Kosher Caterers, Inc. (**FGKC**) pursuant to CPLR §§ 3211 (a) (1) and (7) is denied.

Barry Robinson, a former catering service worker, commenced this action on behalf of himself and a putative class of similarly-situated catering service workers pursuant to New York Labor Law (Labor Law) §§ 190 *et seq.* and 196-d and 12 NYCRR Part 146 against FGKC, Ram Caterers of Old Westbury, LLC (**Ram Caterers**), and their principals, alleging that they unlawfully collected and retained mandatory service charges from 2012 to the present without properly advising customers that it was not a gratuity for the service staff. FGKC and individual defendants Randy Zablo, Angela Zablo, and Jeffrey Becker moved to dismiss the complaint pursuant to CPLR §§ 3211 (a) (1) and (7). By decision and order, dated January 29, 2019, the court denied the motion to dismiss as to defendant FGKC and granted the motion to dismiss as to Mr. Zablo, Ms. Zablo, and Mr. Becker.

FGKC filed a third-party summons and complaint against Kensington on February 22, 2019, alleging that Kensington, not FGKC, employs, pays, and supervises the service staff at all catering events and FGKC is solely hired as a caterer to provide Glatt Kosher food. FGKC alleges that Kensington should therefore be held liable to indemnify KGKC for any amount of damages recovered from them in the first-party action.

A party may move for judgment dismissing one or more causes of action on the ground that the pleadings fail to state a cause of action for which relief may be granted (CPLR § 3211 [a] [7]). On a motion to dismiss pursuant to CPLR § 3211 (a) (7), the court must afford the pleadings a liberal construction and accept the facts alleged in the complaint as true, according the plaintiff the benefit of every favorable inference (*Morone v Morone*, 50 NY2d 481, 484 [1980]). The court's inquiry on a motion to dismiss is whether the facts alleged fit within any cognizable legal

theory (*id.*). Bare legal conclusions are not accorded favorable inferences, however, and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999]). A party may also move to dismiss based on documentary evidence pursuant to CPLR § 3211 (a) (1). A motion to dismiss pursuant to CPLR § 3211 (a) (1) will be granted only where the documentary evidence conclusively establishes a defense to the plaintiff's claims as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326 [2002]).

FGKC seeks indemnification from Kensington. Contractual indemnification "requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify (*Martins v Little 40 Worth Assocs., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). In this case, however, there is no allegation of any such contractual expression or implication of an intention to indemnify. Accordingly, FGKC has not alleged facts sufficient to establish its entitlement to contractual indemnification.

Nevertheless, FGKC argues that it is entitled to common-law indemnification. In general, common-law indemnification is available "in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer" (*Mas v. Two Bridges Assoc.*, 75 NY2d 680, 690 [1990]). To establish entitlement to common-law indemnification, a party must show: (1) that it has been held to be vicariously liable, (2) there is no showing of the party's own negligence, and (3) there is no proof that the party exercised actual supervision of work (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 377-378 [2011]). Contractual *authority* to direct and supervise work is not sufficient absent a showing that the party exercised *actual* direction and supervision (*id.* at 378).

Here, FGKC alleges in its third-party complaint that Kensington employs, pays, and supervises all catering staff employed at the events in which FGKC provided Glatt Kosher food and that Kensington maintained and exercised complete direction and supervision over the staff (Third Party Complaint ¶¶ 2-4). FGKC further alleges that Kensington had the sole power to determine employee wages, had sole responsibility for paying the staff at each event, and had sole responsibility for setting the rules governing the conduct of the staff (*id.* ¶ 12, 14). In addition. FGKC alleges that it did not exercise any control or supervision of the catering staff and has never hired or paid any such staff directly (*id.* ¶¶ 8-9). These allegations, taken as true for the purposes of this motion to dismiss, sufficiently state a cause of action for indemnification.

Although Kensington denies that it was the Plaintiffs' employer and argues that the motion to dismiss should be granted because if FGKC is found to be the employer then it would not be entitled to indemnification under Labor Law 196-d, the argument is unavailing at this stage in the proceedings. First, FGKC's allegation that Kensington and not FGKC was the Plaintiffs' employer must be taken as true for the purposes of this motion to dismiss pursuant to CPLR § 3211 (a) (7). Second, even if FGKC is found to be an employer of the Plaintiffs, it is possible that FGKC and Kensington may be found to be joint employers (*see Zheng v Liberty Apparel Co. Inc.*, 355 F 3d 61, 72 [2d Cir 2003]).

To the extent that Kensington argues that the FGKC's indemnity claim is not ripe, the argument fails. Although FGKC has not yet been held to be liable in the first party action, it is entitled to implead Kensington in a third-party action to establish the parties' rights and liabilities (*Mars Assoc., Inc. v NY City Educ. Constr. Fund*, 126 AD2d 178, 192 [1st Dept 1987] ["for the sake of

fairness and judicial economy, the CPLR allows third-party actions to be commenced in certain circumstances before they are technically ripe, so that all parties may establish their rights and liabilities in one action"]).

Accordingly, it is

ORDERED that Kensington Events, Inc.'s motion to dismiss is denied; and it is further

ORDERED that Kensington Events, Inc. shall file an answer to the third-party complaint within 30 days of the date of the decision and order herein.

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2/11/2020
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE