

Galasso v Red Apple Locust Valley LLC

2020 NY Slip Op 31340(U)

May 8, 2020

Supreme Court, New York County

Docket Number: 152207/2017

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. PAUL A. GOETZ PART IAS MOTION 47EFM

Justice

-----X

BARBARA GALASSO,
Plaintiff,

- v -

RED APPLE LOCUST VALLEY LLC, ET AL.,
Defendants.

-----X

INDEX NO.	152207/2017
MOTION DATE	
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

The following e-filed documents, listed by NYSCEF document number (Motion 001) 41-51, 54-64 were read on this motion to/for SUMMARY JUDGMENT

Plaintiff Barbara Galasso, a former employee of third-party defendant Apple Bankcorp Inc., previously dissolved and merged into Apple Bank for Savings ("Apple Bank"), commenced this action to recover for personal injuries she suffered when she slipped and fell on black ice on December 16, 2016, as she was walking from her car to the entrance of the bank. Third-party defendant now moves pursuant to CPLR 3212 to dismiss the third-party complaint asserted against it by defendant/third-party plaintiff Red Apple Locust Valley LLC and JCLV LLC (together "RALV"), the owners of the premises.

With respect to the claims for common law indemnification and contribution asserted in the third-party complaint, third-party defendant Apple Bank argues that these claims are barred by Workers' Compensation Law § 11. It is well-established that "[w]here an employee is injured in the course of employment, his exclusive remedy against his employer is ordinarily a claim for workers' compensation benefits." *Valenziano v. Niki Trading Corp.*, 21 A.D.3d 818, 820 (1st Dep't 2005) (citing Workers' Compensation Law § 11). Similarly, the employer cannot be held liable for common law indemnification and contribution claims asserted by third-parties unless

the employee sustained a “grave injury” as defined by Workers’ Compensation Law § 11. *Clavin v. CAP Equipment Leasing Corp.*, 156 A.D.3d 404, 404 (1st Dep’t 2017) (citing Workers’ Compensation Law § 11). Injuries qualifying as grave are narrowly defined in Workers’ Compensation Law § 11. *Castro v. United Container Machinery Group, Inc.*, 96 N.Y.2d 398, 401 (2001). Further, the statute does not bar third-party claims against an employer if the employer had a contract with the third party, prior to the accident, in which it agreed to indemnify, or contribute to payment, for a loss by the employee. *Fiorentinno v. Atlas Park LLC*, 95 A.D.3d 424, 428 (1st Dep’t 2012).

In order to be entitled to dismissal of the contribution and indemnification claims, third-party defendant Apple Bank, as the movant on summary judgment, has the burden of showing that plaintiff Barbara Galasso was its employee at the time of the accident and that she did not suffer a “grave injury” as defined by Workers’ Compensation Law § 11. *Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342, 343 (1st Dep’t 2006). Here, third-party defendant Apple Bank has met this burden by submitting plaintiff’s bill of particulars and her deposition testimony in which she states that she was working as a customer service representative for Apple Bank at the time of the incident. Affirmation of Kritine M. Taylor dated December 11, 2019, Exh. G (Plaintiff’s Bill of Particulars, para. 19); Exh. D (Plf Dep. Tr. 8). Third-party defendant also submitted evidence that plaintiff applied for and received Workers’ Compensation benefits as a result of the incident and that the injuries she suffered, which consisted of a right ankle fracture, do not constitute a “grave injury” within the meaning of the Workers’ Compensation Law. Taylor Aff., Exh. H (Workers’ Compensation Claim documents); Exh. G (Plaintiff’s Bill of Particulars, para. 14); Exh. D (Plf Dep. Tr. 86). In opposition, defendant/third-party plaintiff JALV does not dispute these facts and effectively concedes that its claims for common law indemnification and contribution are barred

by the Workers' Compensation Law. Affirmation of Edward Reilly dated January 2, 2020, p. 8. Accordingly, the contribution and indemnification claims in the third-party complaint will be dismissed.

Next, third-party defendant Apple Bank argues that JALV's claim for contractual indemnification should be dismissed because the parties' lease makes no mention of an attorneys' fees or indemnification provision. "A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances." *Campos v. 68 East 86th Street Owners*, 117 A.D.3d 593, 595 (1st Dep't 2014). When a party has no legal duty to indemnify, a contract which assumes that obligation must be strictly construed and any ambiguity as to the meaning of a lease prepared by the landlord should be resolved in favor of the lessee. *Id.* Further, "[c]ourts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an 'unmistakable intent' to indemnify." *Great Northern Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 417 (2006).

Here, third-party defendant Apple Bank submits the lease in effect at the time of plaintiff's accident, which does not contain an indemnification provision requiring third-party defendant to hold JALV harmless for claims brought against it by third-parties. Taylor Aff., Exh. J, paras. 29, 49 (only two lease provisions mentioning indemnification which are unrelated to claims asserted here). In opposition, JALV points to paragraphs 12 and 47 of the lease, which it argues should be construed together as an indemnification provision. Paragraph 12 provides that the landlord, JALV is exempt from liability from any injuries to person or property due to "steam, electricity, gas, water, rain, ice or snow, or any leak or flow from or into any part of" the building. Taylor Aff., Exh. J, para. 12. However, this provision does not mention third parties or

liability to third parties, and therefore cannot be construed as an indemnity provision as to third parties as JALV contends. *See Campos*, 117 A.D.3d at 595 (where a party is under no duty to indemnify another, a contract assuming that obligation must be strictly construed). Rather, this provision is reasonably construed to release RALV, as landlord, from any liability to the tenant, Apple Bank, for damages resulting from the items listed therein. *See Davidow v. Jenks*, 48 N.Y.S.2d 586, 587 (Sup. Ct. Monroe Cty. 1944). Likewise, JALV's reliance on paragraph 47 of the lease is similarly unavailing. This paragraph of the lease simply requires Apple Bank to maintain general liability insurance and does not mention anything about Apple Bank's obligation to indemnify RALV for any claims or losses brought by third parties. Taylor Aff., Exh. J, para. 47.

Finally, to the extent that RALV seeks, in its opposition, to assert a claim for breach of contract against Apple Bank for failure to procure insurance, this relief must be denied as RALV failed to cross-move for this relief and failed to attach a proposed amended pleading. In any event, this claim lacks merit as Apple Bank did procure a general liability policy in accordance with paragraph 47 of the lease. Affirmation of Kristine M. Taylor dated January 7, 2020, Exh. A, pp. 354-55. Accordingly, it is

ORDERED that third-party defendant Apple Bank's motion for summary judgment is granted and the third-party complaint is dismissed, with costs and disbursements awarded to the movant, and the Clerk shall enter judgment accordingly; and it is further

ORDERED that the caption shall be amended to reflect the dismissal of the third-party complaint; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (60 Centre Street, Room 141B) and the Clerk of the General

Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the parties being added pursuant hereto; and it is further

ORDERED that such service upon the County Clerk and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address (www.nycourts.gov/supctmanh)).

5/8/20

DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE