

Ortiz-Zayas v 98 Rivington Realty Corp.

2020 NY Slip Op 32018(U)

June 25, 2020

Supreme Court, New York County

Docket Number: 159710/2016

Judge: Lyle E. Frank

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. LYLE E. FRANK Justice PART IAS MOTION 52EFM

ELBA ORTIZ-ZAYAS, ESQUIO ZAYAS, Plaintiff, - v -

INDEX NO. 159710/2016 MOTION DATE N/A MOTION SEQ. NO. 004

98 RIVINGTON REALTY CORP., CATHERINE DELI & BAGELS, Defendant.

DECISION + ORDER ON MOTION

98 RIVINGTON REALTY CORP. Plaintiff,

Third-Party Index No. 595999/2018

-against-

THE CITY OF NEW YORK Defendant.

CATHERINE DELI & BAGELS Plaintiff, -against-

Second Third-Party Index No. 596028/2018

THE CITY OF NEW YORK Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 158, 159, 160, 161, 162, 163, 164, 168, 169

were read on this motion to/for RENEW AND REARGUE

Defendant/third-party plaintiff 98 Rivington Realty Corp. ("98 Rivington") moves to renew and reargue this Court's January 30, 2020 Decision and Order dismissing its cross-claims against co-defendant/second third party plaintiff Catherine Deli & Bagels ("Catherine Deli").

Catherine Deli & Bagels cross-moves to reargue the same order, insofar as it denied Catherine Deli's motion to dismiss the direct action.¹

98 Rivington Realty Corp. moves based on the incorrect previous assertion of Catherine Deli that it did not obtain insurance for 98 Rivington as required by the lease between these parties, and thus that the Court incorrectly dismissed all cross-claims. Catherine Deli & Bagels (Catherine Deli) moves on the ground that it did not as a matter of law obtain a special use from the metal platform that allegedly caused plaintiff to trip and fall. For the reasons set forth below, 98 Rivington's motion is granted in part and its crossclaims for common law indemnity and contribution are reinstated. The cross-motion is denied as this Court relies on the January 30 Decision and Order.

Discussion

The January 30, 2020 Decision and Order was predicated in part on the fact that Catherine Deli did not procure insurance for 98 Rivington. Catherine Deli correctly stated in its affirmation in support of its motion for summary judgment, contractual indemnification provisions such as the one here are generally prohibited by General Obligations Law § 5-321. Of this, there appears to be little dispute. However, when such a provision is contained in a commercial lease negotiated at arm's length between two sophisticated parties and is coupled with an insurance procurement requirement, General Obligations Law § 5-321 does not preclude enforcement (*see Castano v. Zee-Jay Realty Co.*, 55 A.D.3d 770, 866 N.Y.S.2d 700 [2008]). 98 Rivington's crossclaims against Catherine Deli were initially dismissed because in its moving papers, Catherine Deli asserted that it had not purchased insurance as required by the lease. Since then it has become clear that Catherine Deli was incorrect with the court in its assertion. The

¹ The Court would like to thank Kevin Mills for his assistance in this matter.

burden was never on 98 Rivington to prove that there was insurance, rather, it was up to Catherine Deli to prove that there was not, and thus General Obligations Law § 5-321 still applied. In retrospect, Catherine Deli clearly never met that burden.

However, while the renewal part of this motion is granted, the cross-claim for contractual indemnity remains dismissed without prejudice. Catherine Deli has provided to this Court the additional insured endorsement. This document provides coverage for 98 Rivington, but only for where 98 Rivington “is being held responsible for the acts, omissions and/or negligence of [Catherine Deli].”². Thus, it appears the parties cannot be said to have agreed to have liability for 98 Rivington’s negligence transferred to a third party through a business arrangement, the rationale the Court of Appeals has given for the carveout of what would otherwise be impermissible. *Great N. Ins. Co. v. Interior Construction Corp.*, 7 N.Y.3d 412, 823 N.Y.S.2d 765 (2006). However, this is the first time this Court has reviewed any documents related to this insurance coverage. 98 Rivington correctly points out that discovery is not yet complete and there are additional portions of the insurance agreement this Court has not seen.

This Court is not unmindful of the fact that this holding would seem to reward Catherine Deli for failing to provide a more robust insurance for 98 Rivington, but 98 Rivington obviously would still have available other legal avenues should it feel aggrieved by what has occurred. Moreover, as noted above, this finding is without prejudice to 98 Rivington bringing this motion to renew and/or reargue again should additional relevant information be found during ongoing discovery.

² This document was provided to the Court following oral argument. Due to the COVID pandemic, 98 Rivington was unable to get this to the Court prior to then, and thus the Court agreed to take this document into consideration. The other parties were given one week following submission to add papers in response to the submission of this document. 98 Rivington then timely filed an additional letter to the Court in support of their position.

Where this Court did err in its January 30, 2020 order is in dismissing all of the cross-claims. Catherine Deli's prior moving papers gave a rationale for why the contractual indemnity provision should be dismissed, but not the other cross-claims. As such, in re-reviewing the submissions in this case, the Court restores the cross-claims for common law indemnity and contribution. Based on the foregoing, it is hereby

ORDERED, that the motion by 98 Rivington Realty Corp. to renew and reargue is granted in part and the cross claims of common law indemnity and contribution are restored, and it is further

ADJUDGED, that Catherine Deli's motion to reargue is denied.

6/25/2020
DATE


LYLE E. FRANK, J.S.C.
**NON. LYLE E. FRANK
J.S.C.**

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE