Basedo v New York Univ.
2020 NY Slip Op 33943(U)
October 21, 2020
Supreme Court, Queens County
Docket Number: 704335/2019
Judge: Cheree A. Buggs

Short Form Order

NEW YORK SUPREME COURT-QUEENS COUNTY

Present: **HONORABLE CHEREÉ A. BUGGS** IAS PART 30
Justice

----------X Index No. 704335/2019
RODNEY BASEDO,

Plaintiff,

Motion
Date: October 14, 2020

-against-

Motion Cal. No.:5

NEW YORK UNIVERSITY.,

Motion Sequence No.:2

Defendant.
----------X
NEW YORK UNIVERSITY,

Third-Party Plaintiff

-against-

SKINNER PLUMBING & HEATING CORP.,

Third-Party Defendant.
----------X

The following efile papers numbered EF 31-38 and 43-48 submitted and considered on this motion by third-party defendant SKINNER PLUMBING & HEATING CORP., (hereinafter referred to as "Skinner") seeking a Order pursuant to CPLR 3211(a)(1) and (7) dismissing the third-party claims asserted against Skinner based upon documentary evidence and because the Third-Party Complaint fails to state a cause of action, pursuant to CPLR 3211 (c) upon the same grounds and for such other and further relief as this Court deems just and proper.

	Papers Numbered
Notice of Motion-Affidavit-Exhibits.....	EF 31-38
Affirmation in Opposition-Exhibits.....	EF 43-46
Affirmation in Opposition- Exhibits.....	EF 47
Reply Affirmation.....	EF 48

Facts

This is a premises liability action arising out of an incident that occurred on June 22, 2018. Plaintiff RODNEY BASEDO (hereinafter referred to as "Plaintiff") was employed by Skinner. Skinner contracted with NEW YORK UNIVERSITY (hereinafter referred to as "NYU") to perform hydrostatic pressure flow testing of the building's sprinkler system. In his Complaint, Plaintiff contends NYU owned the premises where the work was performed and the incident occurred. According to Plaintiff the sidewalk grate provided access to the cellar and the subcellar, the cellar and the subcellar housed the domestic water supply. Plaintiff alleges he was injured when the sidewalk grate collapsed.

Law and Application

"To succeed on a motion to dismiss pursuant to CPLR 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]; *Teitler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also Held v Kaufman*, 91 NY2d 425 [1998]). "To qualify as documentary evidence, the evidence 'must be unambiguous and of undisputed authenticity' " (*Fontanetta v Doe*, 73 AD3d 78 [2d Dept 2010]). "Judicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other paper, the contents of which are essentially undeniable,' qualify as documentary evidence in proper cases..." (*Hartnagel v FTW Contr.*, 147 AD3d 819 [2d Dept 2017]). "On a motion to dismiss pursuant to CPLR 3211 (a) (7), the claim must be afforded a liberal construction, the facts therein must be accepted as true, and the plaintiff must be accorded the benefit of every favorable inference" (*Sawitsky v State*, 146 AD3d 914 [2d Dept 2017]; *see also Leon v Martinez,* 84 NY2d 83 [1994]).

"As a general rule, liability for a dangerous or defective condition on real property must be predicated upon ownership, occupancy, control, or special use of that property." (*See Calabro v Harbour at Blue Point Home Owners Assn., Inc*., 120 AD3d 462 [2d Dept 2014].)

NYU commenced the Third-Party Action against Skinner alleging contractual indemnification, breach of contract for failure to procure insurance, common law indemnification and contribution.

Contractual Indemnification and Breach of Contract

"The right to contractual indemnification depends upon the specific language of the contract." (*O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]; quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009]; *Bermejo v New York City Health and Hosp. Corp.*, 119 AD3d 500, 503 [2d Dept 2014].) The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances. (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491-492 [1989]; *see*

Konsky v Escada Hair Salon, Inc., 113 AD3d 656, 659 [2d Dept 2014]; *Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 807 [2d Dept 2012].) "[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." (*De Souza v Empire Tr. Mix, Inc*., 155 AD3d 605, 606 [2d Dept 2017]; quoting *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009].)

The Third-Party Complaint states in part:

> 11. In connection with the agreement between NYU and Skinner, Skinner agreed to indemnify, defend, and hold harmless NYU from any claims, suits, injuries or damages alleged to arise out of Skinner's performance of the services rendered that were called for in the Contract.
>
> 12. As a result of the foregoing, Third-Party Defendant Skinner is contractually required to indemnify, defend, and hold harmless Defendant/ Third-Party Plaintiff NYU from all defense costs and against any and all liability arising from Plaintiff's claims of injuries alleged in the Complaint in the Underlying Action and Skinner's failure to do so is in breach of that agreement.

The relevant portion of the indemnification clause of the Purchase Order between Skinner and NYU states:

> To the fullest extent permitted by law, Seller [Skinner], will defend, indemnify and hold harmless NYU... from and against any and all losses, claims, allegations... caused by, resulting from, arising out of, or occurring in connection with any of the following by Seller... (i) breach of any term or provision of this Purchase Order including representations and warranties; (ii)violation of applicable laws, rules or regulations (iii) actual or alleged infringement or other violation or misappropriation of any intellectual or other propriety right or privacy or publicity right of any third party (v) [sic] experiencing of any Security Incident; or (vi) an other acts or omissions or intentional misconduct in connection with this Purchase Order.

The relevant portion of the insurance clause in the terms and conditions of the Purchase Order between Skinner and NYU states:

> Seller will maintain: (a) Commercial General Liability Insurance, written on an occurrence basis in amounts not less than $2000 per occurrence...(b) Workers' Compensation Insurance as required by applicable law and Employer's Liability Insurance in an amount not less than US$1,000,000 for each accident... Seller will submit to NYU's Director of Insurance and Risk Management... certificates of insurance evidencing the coverage described in (a) and (c) above, to the extent applicable, and the additional insured endorsement,; such an endorsement will name NYU as an additional insured.

Skinner argues that the Plaintiff's claims against NYU are related to NYU's failure to maintain their property, and NYU cannot be indemnified for their own negligence (*see* GOL § 5-323). Skinner points to *Katherine Angwin v SRF Partnership, L.P. et al.,* 285 AD2d 568 (2d Dept 2001) where the plaintiff was injured when a magnetic lock mounted above a door frame fell and hit her on the head. Plaintiff commenced an action against, amongst others, Wells Fargo alleging that their negligent installation and maintenance of the lock caused plaintiff's injuries. Wells Fargo commenced a third-party action against plaintiff's employer, Kinray, arguing common law and contractual indemnification (*id* at 569). Kinray moved for summary judgment. As to the contractual indemnification claim Kinray alleged the indemnification clause contained in the contract did not encompass an accident caused by Wells Fargo's failure to maintain the lock (*id*). Wells Fargo cross-moved for conditional summary judgment on its contractual indemnification claim, arguing that plaintiff's claim was within the scope of the indemnification clause because Kinray was hired to install and maintain an alarm system and the magnetic lock was part of the alarm system (*id* at 568). The court affirmed the lower court's finding that Wells Fargo was not entitled to contractual indemnification. The court reasoned, the plaintiff's claim is rooted in Wells Fargo's alleged failure to properly secure and maintain the magnetic lock, therefore, it goes beyond the scope of the indemnification clause which sought to relieve Wells Fargo from liability for claims arising from the failure of its alarm equipment or service to operate (*id* at 569). Furthermore, even if the indemnification clause exempted Wells Fargo from liability for its failure to maintain equipment installed at the property, such a clause would be unenforceable (*id* at 570 see also GOL § 5-323).

Essentially, Skinner argues the indemnification provision in the Contract was not triggered by the Plaintiff's accident.

NYU argues this motion is premature because depositions have not gone forward and NYU has not been afforded the opportunity to seek discovery from Skinner to prove its contractual indemnification claim. NYU claims it has not performed discovery as to what Skinner's duties and obligations were at the property and what it directed Plaintiff to do or not to do. NYU asserts that the case law that Plaintiff relies on are all summary judgment motions, which supports their argument that this motion is premature. According, to NYU the contract between NYU and Skinner does not "[resolve] all factual issues as a matter of law, and conclusively [dispose] of the plaintiff's claim." (*Hoeg Corp. v Peebles Corp*, 153 AD3d 607 [2d Dept 2017]).

NYU asserts that there are certain facts that have yet to be discovered, such as: the manner in which the accident occurred; Plaintiff's testimony about the grate; Plaintiff's testimony about his employment and why it brought him to that grate; testimony surrounding whether Skinner or Plaintiff altered or repaired the grate; the relationship between NYU and Skinner; incident/accident reports maintained by Skinner regarding the accident; and work logs maintained by Skinner that reference the grate.

Plaintiff opposes the motion on the grounds that the portion of the indemnification clause that states "To the fullest extent permitted by law, Seller [Skinner], will defend, indemnify and hold harmless NYU... from and against any and all losses, claims, allegations... caused by, resulting from,

arising out of, or occurring in connection with... (ii)violation of applicable laws, rules or regulations" may have been triggered, but discovery remains outstanding. Plaintiff's Complaint alleges violations of various statutes within New York Labor Law.

Common Law Indemnity or Contribution

New York Workers Compensation Law § 11 states in part:

> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.
>
> For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

Here, Plaintiff's Bill of Particulars fails to identify a "grave injury" therefore, New York Workers Compensation Law § 11 bars relief under common law indemnity and contribution. Therefore it is,

ORDERED, that the branch of Skinner's motion seeking to dismiss NYU's Second Cause of Action alleging breach of obligation to procure proper insurance is granted; and it is further,

ORDERED, that the branch of Skinner's motion seeking to dismiss NYU's Third and Fourth causes of action alleging common law indemnity and contribution is granted; and it is further,

ORDERED, that the remaining branches of Skinner's motion are denied as premature.

The foregoing constitutes the decision and Order of the Court.

Dated: October 21, 2020

FILED

10/22/2020
09:24 AM

COUNTY CLERK
QUEENS COUNTY

Hon. Cheree A. Buggs, JSC