

Milligan v M&R Realty Holding Co., LLC
2020 NY Slip Op 34432(U)
December 3, 2020
Supreme Court, Queens County
Docket Number: 707560/18
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

12/3/2020

12:05 PM

Present: HONORABLE ALLAN B. WEISS
Justice

IAS Part 2

COUNTY CLERK
QUEENS COUNTY

PETER MILLIGAN,

Index No. 707560/18

Plaintiff,

Motion Date: 9/16/20

-against-

Motion Seq. No. 3

M&R REALTY HOLDING CO., LLC,
CVS ALBANY, L.L.C., and MASPETH NY
CVS, L.L.C.,
Defendants.

X

The following papers numbered EF56 to EF103 read on this motion by Case Snow Management Inc. ("Case"), for dismissal of the Third-Party Action brought by CVS Albany, LLC (hereinafter referred to as "CVS") against Case and (2) alternatively, for conditional grant of summary judgment against Second Third-Party Defendant Tarr's Snow Removal, LLC (hereinafter referred to as "Tarr's"), on Case's claim for contractual indemnification and for failure to procure insurance and name Case as an additional insured.

Papers
Numbered

Notice of Motion - Affidavits - Exhibits.....	EF56-EF69, 96-99
Answering Affidavits - Exhibits	EF70-EF78, 100-102
Reply Affidavits	EF80-EF82, 103

Upon the foregoing papers it is ordered that the motion is determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on May 13, 2017, while walking on a sidewalk adjacent to the CVS Store #5773 located at 69-80 Grand Avenue, Maspeth, NY 11378 (hereinafter referred to as "CVS"). The complaint alleges that he tripped and fell over a raised corner of a metal sidewalk grate. CVS alleges in its Third-Party Action that Case, its snow removal contractor, created the alleged defective condition with a snow plow. Case, in turn, commenced a second third party action against Tarr's, a subcontractor that Case had allegedly engaged to actually perform the work. The third-party complaint alleged, in effect, separate causes of action for contractual and common-law indemnification for any damages Case might be found liable for in the main action, as well as a cause of action to recover damages for breach of contract for the alleged failure of Tarr's to procure insurance coverage, as required by a provision in the snow-removal contract (hereinafter the contract).

Case moves for summary judgment in its favor dismissing the third-party complaint, and alternatively for summary judgment in its favor on its claims for contractual indemnification and for breach of contract based on Tarr's alleged failure to procure insurance coverage. The motion is opposed by M&R Realty Holding Co., LLC, CVS Albany, LLC and Maspeth NY CVS, LLC.

CPLR 3212(f) permits a party opposing summary judgment to obtain further discovery when it appears that facts supporting the position of the opposing party exist but cannot be stated (*see Urcan v Cocarelli*, 234 AD2d 537 [2d Dept 1996]). Under CPLR 3212(f), "where facts essential to justify opposition to a motion for summary judgment are exclusively within the knowledge and control of the movant, summary judgment may be denied.... This is especially so where the opposing party has not had a reasonable opportunity for disclosure prior to the making of the motion" (*Juseinoski v New York Hosp. Med. Ctr. of Queens*, 29 AD3d 636, 637 [2d Dept 2006], quoting *Baron v Incorporated Vil. of Freeport*, 143 AD2d 792, 792-793 [2d Dept 1988]; *see Urcan v Cocarelli, supra; Halpern Dev. Venture v Board of Trustees of Vil. of N. Tarrytown*, 222 AD2d 652 [2d Dept 1995]).

Here, the second third-party action was filed on October 31, 2019, a mere 4 months prior to the filing of the motion for summary judgment, and second third-party defendant Tarr's filed an answer on December 31, 2019, a mere 2 months prior

to the instant motion. There is significant documentary discovery and depositions that remain outstanding. In fact, no depositions have taken place in the second third-party action. The opponents of the motion provided proper evidentiary bases supporting their request for further discovery (*see Ruttura & Sons Constr. Co. v Petrocelli Constr. Co.*, 257 AD2d 614, 615 [2d Dept 1999]). Furthermore, defendants established that it had not yet received an adequate opportunity to conduct discovery into several relevant issues, certain of which are exclusively within the knowledge of Case (*see CPLR 3212[f]; Firesearch Corp. v Micro Computer Controls Corp.*, 240 AD2d 365, 366 [2d Dept 1997]; *Urcan v. Cocarelli, supra*; *Halpern Dev. Venture v Board of Trustees of Vil. of N. Tarrytown, supra*; *Baron v Incorporated Vil. of Freeport, supra*). There is significant outstanding discovery and a great deal of information regarding the practices and procedures of the third-party defendant and the second third-party defendant regarding their contractual obligations. Because information that would illuminate the issues is solely within Case's possession, defendants are entitled to take proper depositions (*see Radon Constr. Corp. v Alcon Constr. Corp.*, 277 AD2d 368 [2d Dept 2000]; *Graves v Merco Props.*, 199 AD2d 240 [2d Dept 1993]; *Bigman v Dime Sav. Bank of N.Y., FSB*, 153 AD2d 912 [2d Dept 1989]; *Simon v Advance Equip. Co.*, 126 AD2d 632 [2d Dept 1987]). Accordingly, the motion for summary judgment is denied as premature.

Relatedly, since there is no finding as yet as to Case's negligence, summary judgment on its third-party cause of action for contractual indemnification is premature (*see Gil v Manufacturers Hanover Tr. Co.*, 39 AD3d 703, 704-05 [2d Dept 2007]; *Watters v R.D. Branch Assoc., LP*, 30 AD3d 408, 409-410 [2d Dept 2006]).

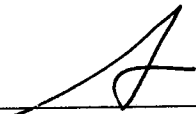
It is well settled that an agreement to purchase insurance coverage is clearly distinct from and treated differently from the agreement to indemnify (*see Kinney v G.W. Lisk Co.*, 76 NY2d 215 [1990]; *McGill v Polytechnic Univ.*, 235 AD2d 400 [1997]; *Mathew v William L. Crow Constr. Co.*, 220 AD2d 490 [2d Dept 1995]). Given that the insurance procurement clause is entirely independent of the indemnification provisions in the contract (*Kinney v Lisk Co.*, 76 NY2d at 219), a final determination of liability for the failure to procure insurance "need not await a factual determination as to whose negligence, if anyone's, caused the plaintiff's injuries" (*Kennelty v Darlind Constr.*, 260 AD2d 443, 445 [2d Dept 1999]). Here Case established Tarr's failure to procure the required coverage. Therefore, Case is entitled to summary judgment on its breach of contract claim as against Tarr's (*see Kinney v Lisk Co.*, 76 NY2d at 219; *Spector v Cushman & Wakefield, Inc.*,

100 AD3d 575, 575–576 [1st Dept 2012]; *Moll v Wegmans Food Mkts.*, 300 AD2d 1041, 1042 [4th Dept 2002]).

Conclusion

The branch of the motion by Case which is for summary judgment in its favor dismissing the third party complaint is denied as premature, with leave to renew following discovery. The branch of the motion which is, alternatively, for summary judgment in its favor on its claims for contractual indemnification is also denied. The branch of the motion which is for summary judgment in its favor on its breach of contract claim against Tarr's, is granted.

Dated: December 3, 2020



J.S.C.

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QUEENS COUNTY**