

Oak Leaf Constr. Group, Inc. v Czerwinski
2020 NY Slip Op 34805(U)
October 23, 2020
Supreme Court, Suffolk County
Docket Number: Index No. 611830/2018
Judge: David T. Reilly
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SHORT FORM ORDER

INDEX No. 611830/2018

CAL. No. 202000449OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 30 - SUFFOLK COUNTY

P R E S E N T :

Hon. DAVID T. REILLY
Justice of the Supreme Court

MOTION DATE 7/29/20
ADJ. DATE _____
Mot. Seq. #001 - MotD

-----X
OAK LEAF CONSTRUCTION GROUP, INC.,

Plaintiff,

- against -

MARIUSZ CZERWINKSI and LAUREN
CZERWINSKI,

Defendants.
-----X

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Upon the reading and filing of the following papers in this matter: (1) Notice of Motion by defendant Mariusz Czerwinski, dated July 1, 2020, and supporting papers; (2) Affirmation in Opposition by defendant Lauren Czerwinski, dated July 13, 2020; and (3) Reply Affirmation by defendant Mariusz Czerwinski, dated July 20, 2020, and supporting papers; it is

ORDERED that the motion by defendant Mariusz Czerwinski i/s/h/a Mariusz Czerwinski for an Order pursuant to CPLR 3212, granting partial summary judgment in his favor and against defendant Lauren Czerwinski on his first and second cross claims, is granted to the extent of granting conditional partial summary judgment on his first cross claim in the amount of any judgment recovered by the plaintiff against him, and is otherwise denied.

By way of this action, the plaintiff seeks to recover from the defendants the principal balance due of \$69,237.07, plus interest, allegedly due and owing for renovations it performed from July 2015 through September 2015 at the residential property located at 12 Shore Road, Remsenburg, New York.

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It appears that the property was the defendants' residence during their marriage. When the defendants agreed to dissolve their marriage in 2017, they entered into a stipulation of settlement pursuant to which it was agreed, *inter alia*, that Lauren would receive sole title to the marital residence and "hold [Mariusz] harmless and indemnify him for any claims arising out of the ownership of the marital residence both during the course of the marriage and after. [Mariusz] shall fully cooperate in defense of any such claim and shall have no authority to settle the claim(s)." The defendants' judgment of divorce, dated August 8, 2017, incorporates the stipulation of settlement by reference and provides that it shall survive and not merge in the judgment; it also directs the defendants "to comply with every legally enforceable term and provision" of the stipulation of settlement. According to Mariusz, Lauren has refused his demands to provide him with a defense in this action, and he has solely borne the costs of his defense to date.

In his answer, Mariusz pleads two cross claims against Lauren. The first seeks indemnity for any judgment the plaintiff obtains against Mariusz. The second seeks indemnity for any and all claims and expenses associated with the defense of this action, irrespective of whether the plaintiff obtains a judgment against Mariusz.

Now, discovery having been completed and a note of issue having been filed on March 12, 2020, Mariusz timely moves for summary judgment on his cross claims.

A party is entitled to contractual indemnification for damages so long as the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and surrounding facts and circumstances (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 521 NYS2d 216 [1987]). "[T]he right to contractual indemnification depends upon the specific language of the contract" (*Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588, 590 [1995]).

Here, there is a clear indication that the parties intended that Lauren would indemnify Mariusz "for any claims arising out of the ownership of the marital residence," including the plaintiff's claims in this lawsuit. Contrary to the claim by her attorney, the request for indemnification is not premature. "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*Jardin v A Very Special Place*, 138 AD3d 927, 930, 30 NYS3d 270, 274 [2016]). Accordingly, Mariusz is entitled to summary judgment on the first cross claim, on condition that the plaintiff recover judgment against him.

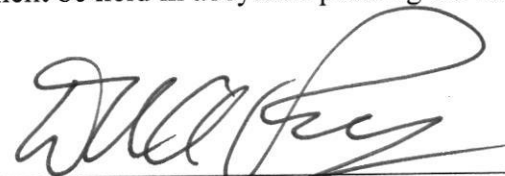
As to the second cross claim, however, there is no indication of any agreement that Mariusz would be indemnified for attorney's fees incurred in defending such claims if, as here, he retained his own counsel. Upon review of the stipulation of settlement, and in light of the requirement that Mariusz "cooperate" in the defense, the defendants evidently anticipated that they would be represented by the same attorney, or that Lauren would direct a joint defense; they do not seem to have considered what would happen if, for any reason, Mariusz engaged separate counsel. Since it appears, on the record

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presented, that the current situation was beyond the defendants' contemplation at the time of their agreement, the Court finds issues of fact as to their intent, sufficient to defeat summary judgment.

The Court directs that entry of partial summary judgment be held in abeyance pending the trial or other disposition of the action (*see* CPLR 3212 [e] [2]).

Dated: October 23, 2020


 J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION **HON. DAVID T. REILLY**