

Rutigliano v Toyota Motor N. Am., Inc.

2021 NY Slip Op 30631(U)

March 2, 2021

Supreme Court, New York County

Docket Number: 158602/2015

Judge: Erika M. Edwards

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

MICHAEL RUTIGLIANO,

Index No.: 158602/2015

Plaintiff,

DECISION/ORDER

-against-

Motion Seq. 005 and 006

TOYOTA MOTOR NORTH AMERICA, INC.,
GEORGE P. JOHNSON COMPANY, FREEMAN
EXPOSITIONS, INC. and TOYOTA MOTOR
SALES U.S.A., INC.,

Defendants.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

<u>Papers</u>	<u>Numbered</u>
Motion 005	181-209, 211-217, 234-235
Motion 006	218-233, 236-244

ERIKA M. EDWARDS, J.S.C.:

Plaintiff Michael Rutigliano (“Plaintiff”) brought this personal injury action against Defendants Toyota Motor North America, Inc. (“TMNA”), George P. Johnson Company (“GPJ”), Freeman Expositions, Inc. (“Freeman”), and Toyota Motor Sales U.S.A., Inc. (“TMS”) (collectively “Defendants”).¹ Plaintiff, who was a union carpenter, was injured on March 27, 2015, when he fell seven to eight feet through a hole on the second tier of a Lexus video display wall that he was installing at an automobile show at the Jacob K. Javitz Convention Center. Non-party New York Convention Center Operating Corporation (“NYCCOC”) operates the Javits Center and it requires all carpenters and teamsters involved in setting up the displays to be employees of NYCCOC. TMS hired GPJ to design and build a video display wall for its Lexus booth at the auto show. Freeman is a contractor who procured Plaintiff and other labor from NYCCOC to GPJ for installation of the booth.

After settling with contribution from GPJ, Plaintiff discontinued the action against all Defendants on November 15, 2019, and Defendants Freeman, TMNA and TMS discontinued their cross-claims against each other. The only remaining claims are the cross-claims between Defendants GPJ and Freeman for contribution, common law and contractual indemnification and GPJ’s cross-claim for Freeman’s breach of contract for failure to procure insurance for GPJ’s benefit.

¹ Plaintiff previously discontinued his claims against Freeman Decorating Co. and the court amended the caption.

Under motion sequence 005 Freeman moves for summary judgment dismissal of all of GPJ's cross-claims and for an order granting summary judgment in Freeman's favor on its cross-claim for contractual indemnification against GPJ. Under motion sequence 006 GPJ moves for summary judgment dismissal of all of Freeman's cross-claims against it and in favor of its cross-claim for contractual indemnification against Freeman. Motion sequence numbers 005 and 006 are hereby consolidated for disposition. Both parties submitted affirmations and affidavits in support of their summary judgment motions and in opposition to the opposing party's summary judgment motions.

For the reasons set forth herein the court grants Freeman's motion for summary judgment under motion sequence 005 and denies GPJ's motion for summary judgment under motion sequence 006. As such, the court dismisses all of GPJ's cross-claims against Freeman and grants summary judgment in Freeman's favor on its cross-claim for contractual indemnification against GPJ.

Freeman argues in substance that it is entitled to summary judgment in its favor on its cross-claim for contractual indemnification because the Exhibitor's Service Manual ("ESM"), which was made available to the exhibitors by the auto show's organizer, Greater New York Automotive Dealers Association ("GNYADA"), contained Freeman's Terms & Conditions ("T & C"), including an indemnification clause requiring GPJ to indemnify Freeman. Freeman claims that GPJ is bound by the indemnification provision because GPJ accepted the terms of the T & C when its representative signed Plaintiff's Labor Work Ticket, which acknowledged acceptance of the terms and conditions found in the ESM. Additionally, GPJ entered into the booth license agreement with GNYADA, which included provisions binding GPJ to rules set forth in the company's ESM. Freeman also asserts that the labor rates section in the Master Service Agreement ("MSA") between Freeman and GPJ referred to Freeman's labor rates published in the official exhibitor service kit which included the indemnification clause.

Freeman further argues that the ESM was jointly prepared by GNYADA and GPJ had knowledge and agreed to its terms. It was posted on both websites for access by GPJ and others; Freeman distributed it in hard copy to GPJ and it was made available to GPJ's employee who signed the MSA and several of its representatives prior to the event. Additionally, Freeman argues that the parties' prior course of dealings indicated that GPJ intended to be bound by the T & C in that GPJ employees signed numerous work orders consenting to their acceptance of the terms of the T & C. The GPJ employee who signed Plaintiff's work order had apparent, if not actual, authority to accept the terms of the T & C on GPJ's behalf. Freeman argues that the T & C supplemented the MSA, not displaced it.

Freeman further argues that it was not liable for Plaintiff's injuries as Freeman was not negligent and GPJ did not contract with Freeman to supervise the labor, nor did it pay Freeman to do so. GPJ supervised Plaintiff and Freeman merely served as GPJ's conduit to procure labor from NYCCOC. Therefore, GPJ is required to indemnify Freeman pursuant to Freeman's T & C.

Freeman argues for dismissal of GPJ's cross-claims for contribution, common law and contractual indemnification and for failure to procure insurance in GPJ's favor and opposes GPJ's motion for summary judgment. Freeman states in substance that GPJ's indemnification clause in its agreement is only triggered if Plaintiff's injuries were caused by Freeman's

negligence, GPJ was liable for Plaintiff's injuries in that they created the hole, failed to erect a barrier around it and negligently supervised Plaintiff. Additionally, Freeman argues that GPJ failed to demonstrate that Freeman was negligent for the injuries and the absence of negligence by GPJ. Additionally, Freeman argues that GPJ's breach of contract claim cannot be considered to be a tort unless a legal duty independent of the contract itself has been violated and GPJ failed to demonstrate that such violation occurred. Additionally, GPJ's motion for summary judgment was served eight days late, making it an untimely cross-motion which should not be considered by the court.

GPJ argues that it is entitled to summary judgment in its favor on its cross-claim for contractual indemnification based on the indemnification clause set forth in the MSA requiring Freeman to indemnify GPJ. GPJ argues in substance that Freeman failed to demonstrate that it was free from liability for Plaintiff's accident and Freeman's liability is not extinguished by Plaintiff's settlement. Based on the terms set forth in the MSA, Freeman was obligated to provide supervision at the auto show, and since Freeman failed to do so, it is liable for Plaintiff's injuries. GPJ argues that such liability triggered the indemnification clause in favor of GPJ. Also, there has been no determination by the court that GPJ was liable.

GPJ further argues that Freeman is liable for negligent supervision of Plaintiff. Freeman sent Plaintiff and other carpenters to GPJ to work on the Lexus booth, it made sure that the right number of laborers showed up to work, whether any additional workers were needed, whether the laborers were "pulling their own weight" and it monitored the booth to sign the workers in and out. GPJ asserts that Freeman admitted that it had supervisors on site and whether it exercised its supervisory authority over Plaintiff's work at the time of the accident is irrelevant.

GPJ argues for summary dismissal of Freeman's cross-claims against it for contractual indemnification and in opposition to Freeman's summary judgment motion because the relationship between the parties is governed by the MSA, not Freeman's unilateral T & C. GPJ argues that the T & C did not supersede or modify the terms of the MSA and that the T & C is not a contract, but was merely included in the ESM which contained guidelines for the exhibitors. GPJ argues that it is not a party to the T & C and GPJ did not intend to be bound by the terms of the T & C, nor did it intend to alter the terms of the MSA.

GPJ further argues that its employee who signed the work orders was not aware of the terms of the T & C, he did not have the authority to accept its terms, and he could not bind the company to the T & C, nor alter the terms of the MSA. GPJ also argues in substance that the ESM was distributed by the Javits Center, so it is a NYCCOC document and not a Freeman document which could legally bind GPJ.

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*,

22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]). Summary judgment is "often termed a drastic remedy and will not be granted if there is any doubt as to the existence of a triable issue" (Siegel, NY Prac § 278 at 476 [5th ed 2011], citing *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept 1965]).

A party's right to indemnification may arise from a contract or may be implied based upon common law principles of what is fair and proper between the parties (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-375 [2011]). A party is entitled to full contractual indemnification when "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks and citations omitted]). According to basic contract principles, when parties agree "in a clear, complete document, their writing should . . . be enforced according to its terms" (*TAG 380, LLC v ComMet 380, Inc.*, 10 NY3d 507, 512-513 [2008] [internal quotation marks and citations omitted]).

Generally, a defendant "whose liability to an injured plaintiff is merely secondary or vicarious is entitled to common-law indemnification from the actual wrongdoer who by actual misconduct caused the plaintiff's injuries, and whose liability to the plaintiff is therefore primary" (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 366 [1st Dept 2006] [internal quotation marks and citations omitted]). It is premised on "vicarious liability without actual fault," which requires that "a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine" (*id.* at 367 [internal quotation marks and citations omitted]). The shifting of loss under common law indemnification may be implied to prevent the unjust enrichment of one party at the expense of another (*id.* at 375). However, a party cannot obtain common law indemnification "unless it has been held to be vicariously liable without proof of any negligence or actual supervision on its own part" (*id.* at 377-378).

In contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgmt.*, 259 AD2d 60, 65 [1st Dept 1999]). To establish a claim for common law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law" (*id.*).

In general, common law contribution involves the apportionment of liability amongst joint tortfeasors who owed a duty to an injured plaintiff (*Aiello v Burns Intl. Sec. Servs. Corp.*, 110 AD3d 234, 247-248 [1st Dept 2013]). However, where there is no duty owed to an injured plaintiff, a joint tortfeasor could still be held responsible for common law contribution for the portion of damages attributable to that tortfeasor's negligence if there was an independent obligation to prevent foreseeable harm (*id.* at 248; *see Guzman v Haven Plaza Housing Dev. Fund Co.*, 69 NY2d 559, 568 [1987]). Therefore, where one joint tortfeasor is found to be liable solely because of the negligence of another, indemnification, not contribution principles apply to shift the entire liability to the tortfeasor who was negligent (*Guzman*, 69 NY2d at 567-568).

A. Freeman's Cross-Claims

As an initial matter, the court finds that Freeman demonstrated a prima facie showing of entitlement to judgment as a matter of law on its cross-claim for contractual indemnification with the absence of any material issues of fact and GPJ failed to raise an issue of material fact based upon admissible evidence. Based on the facts, it is clear that Freeman was not responsible for supervising Plaintiff at the time of the accident in that GPJ did not contract with Freeman to supervise the labor for the installation of the booth, it did not pay Freeman to do so, and Freeman did not undertake such responsibility. Additionally, the record indicates that GPJ was responsible for supervising Plaintiff's work at the time of the accident. Therefore, the portion of Freeman's Terms & Conditions pertaining to labor under the supervision of exhibitor applies to these circumstances.

The Payment & Labor section of Freeman's Terms & Conditions provides as follows:

RESPONSIBILITIES:

EXHIBITOR shall be responsible for the performance of labor provided under this option. It is the responsibility of EXHIBITOR to supervise labor secured through FREEMAN in a responsible manner as to prevent bodily injury and/or property damage and also to direct them to work in a manner that is in compliance with FREEMAN'S Safe Work Rules and/or Federal, State, County and Local ordinances, rules and/or regulations, including but not limited to Show or Facility Management rules and/or regulations. It is the responsibility of EXHIBITOR to check in with the Service Desk to pick up labor, and to return to the Service Desk to release labor when work is completed.

INDEMNIFICATION:

EXHIBITOR agrees to indemnify, hold harmless, and defend FREEMAN from and against any and all demands, claims, causes of action, fines, penalties, damages, liabilities, judgments, and expenses (including but not limited to reasonable attorneys' fees and investigation costs) for bodily injury, including any injury to FREEMAN employees and/or property damage *arising out of work performed by labor provided by FREEMAN but supervised by EXHIBITOR*. Further, the EXHIBITOR'S indemnification of FREEMAN includes any and all violations of Federal, State, County or Local ordinances, "Show Regulations and/or Rules" as published and/or set forth by Facility or Show Management, and/or directing labor provided by FREEMAN to work in a manner that

violates any of the above rules, regulations, and/or ordinances (emphasis added) (Freeman's Terms & Conditions).

Here, the court finds that Freeman demonstrated that Plaintiff's injuries arose out of work he performed which was provided by Freeman, but supervised by GPJ, which is governed by the Terms & Conditions. Freeman demonstrated that although GPJ did not sign Freeman's T & C, it had or should have had knowledge of its terms, since it was made available and provided to it prior to the auto show and GPJ agreed to be bound by its terms. The surrounding facts and circumstances demonstrate that GPJ intended to agree to the terms of the T & C, including the indemnification clause, and it agreed to its terms based upon its acceptance of the ESM, which included Freeman's T & C. GPJ's representative signed Plaintiff's work ticket and acknowledged acceptance of the terms of the ESM and GPJ's booth agreement referred to acceptance of the ESM.

Freeman's Labor Work Ticket specified "[f]or Labor orders, supervision is the responsibility of the Exhibitor, unless Freeman Supervision is ordered separately. Authorized signature denotes acceptance of the terms and conditions found in the Exhibitor Service Manual" (Freeman's Labor Work Ticket). Clearly, GPJ's representative had its authority to sign the work orders on a regular basis and with each signature, he acknowledged its acceptance of the terms and conditions in the ESM, including Freeman's T & C. GPJ had knowledge of the indemnification clause, as it was made available to GPJ and provided to its representatives prior to the auto show and by accepting the terms of the ESM, it also accepted the terms of the T & C.

Therefore, GPJ is bound by the terms of the indemnification clause in Freeman's T & C and the court grants summary judgment in favor of Freeman as against GPJ on Freeman's contractual indemnification cross-claim.

B. GPJ's Cross-Claims

The court denies the portion of GPJ's motion for summary judgment in its favor on its cross-claim for contractual indemnification and grants the portion of Freeman's summary judgment motion seeking dismissal of all of GPJ's cross-claims. The court finds that GPJ failed to demonstrate its entitlement for summary judgment in its favor and Freeman demonstrate its entitlement to dismissal of all of GPJ's cross-claims as a matter of law.

GPJ's claims for contractual indemnification are based on the terms of the Master Service Agreement between GPJ and Freeman. The relevant terms of the MSA state:

Indemnification

Freeman will indemnify and hold harmless GPJ, its officers, directors, and employees from and against any bodily injury or property damage liability claims, judgments, damages, costs or expense, including reasonable attorney's fees to the extent, *arising out of or occasioned by the negligence or willful misconduct of Freeman, except for occurrences or accidents caused by the negligence of GPJ or for occurrences or accidents caused by any other party.*

The MSA's unambiguous language provides that Freeman does not owe contractual indemnity to GPJ unless the claim arises from Freeman's own negligence or willful misconduct and without any negligence from GPJ or the other parties. The record establishes that Plaintiff's injuries did not arise out of or were not occasioned by the negligence or willful misconduct of Freeman and that GPJ was liable for Plaintiff's injuries. Plaintiff discontinued his action against Freeman with prejudice and GPJ is the sole Defendant who contributed to the settlement. Freeman correctly argued that even if GPJ raised a factual issue regarding Freeman's negligence, it still would not be entitled to indemnification because it failed to demonstrate that the exclusion applies because the accident was caused by GPJ's negligence. Freeman demonstrated that Plaintiff's injuries were caused by GPJ's negligence in its design of the platform without providing protection for the opening, it created or had notice of the hazardous condition, provided inadequate supervision of Plaintiff and violated Labor Law § 240(1). GPJ failed to raise a triable issue of fact to support Freeman's negligence or willful misconduct to trigger the indemnification clause in the MSA, nor did it demonstrate the absence of its own negligence.

Additionally, Freeman demonstrated its entitlement to summary judgment dismissal of GPJ's cross-claims for contribution and common law indemnification and GPJ failed to raise a triable issue of material fact based upon admissible evidence to dispute this claim. As set forth above, to be entitled to common law indemnification from Freeman, GPJ must demonstrate that it was not negligent for causing Plaintiff's injuries and that its liability for Plaintiff's injuries was only vicarious because of Freeman's negligence.

Here, there is no indication in the record that Freeman was negligent in contributing or causing Plaintiff's accident. It did not own the booth where the accident occurred, it did not create the unsafe hazard or condition that caused the accident, and it was not responsible for supervising or directing plaintiff or the other workers who installed the booth. Thus, Freeman is entitled to dismissal of GPJ's cross-claims for contribution and common-law indemnification.

Finally, Freeman demonstrated its entitlement to summary judgment dismissal of GPJ's claim against it for failure to procure insurance and GPJ failed to raise any material issue of fact to dispute this claim. It appears that GPJ may have conceded this issue as it failed to adequately oppose dismissal. Nonetheless, the court finds that Freeman demonstrated that the relevant provision did not require Freeman to procure insurance for GPJ's benefit.

As set forth above, the court grants the portion of Freeman's motion for summary judgment in its favor on its cross-claim for contractual indemnification and grants the portion seeking dismissal of all of GPJ's cross-claims against it under motion sequence 005. The court denies the portion of GPJ's motion seeking summary judgment in its favor on its cross-claim for contractual indemnification and denies the portion seeking dismissal of all of Freeman's cross-claims against it.

Only Freeman's cross-claims against GPJ for contribution and/or common law indemnification remain. In light of the foregoing, these claims are now moot.

Therefore, it is hereby

ORDERED that as to motion sequence number 005, the court grants Defendant Freeman Expositions, Inc.'s motion for summary judgment and 1) grants judgment in favor of Defendant Freeman Expositions, Inc. on its cross-claim for contractual indemnification as against Defendant George P. Johnson Company; and 2) grants dismissal of all of Defendant George P. Johnson Company's cross-claims as against Defendant Freeman Expositions, Inc.; and it is hereby

ORDERED that as to motion sequence number 006, the court denies Defendant George P. Johnson Company's motion for summary judgment and 1) denies Defendant George P. Johnson Company's motion for judgment in its favor on its cross-claim for contractual indemnification as against Defendant Freeman Expositions, Inc.; and 2) denies Defendant George P. Johnson Company's motion for judgment seeking dismissal of all of Defendant Freeman Expositions, Inc.'s cross-claims as against Defendant George P. Johnson Company; and it is hereby

ORDERED that the Clerk is directed to enter judgment accordingly in favor of Defendant Freeman Expositions, Inc. as against Defendant George P. Johnson Company on Defendant Freeman Expositions, Inc.'s cross-claim for contractual indemnification and dismiss Defendant George P. Johnson Company's cross-claims as against Defendant Freeman Expositions, Inc; and it is hereby

ORDERED that the court denies all requested relief not expressly granted herein.

This constitutes the decision and order of the court and effectively disposes of this matter.

Date: March 2, 2021



HON. ERIKA M. EDWARDS

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J.S.C.