Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice

IAS Part 14

ARSEN BABAKHANOV,
Plaintiff(s),

- against -

DIAZ AUSTIN ASSOCIATES, L.P., et al.,
Defendant(s).

DIAZ AUSTIN ASSOCIATES, L.P.,
Third-Party Plaintiff(s),

- against -

YAKOV VAYNSHTEYN,
Third-Party Defendant(s).

Index No. 719561 2020

Motion Date October 12, 2021

Motion Cal. No. 3

Motion Seq. No. 11

The following papers read on this motion by third-party defendant (Vaynshteyn) for an order awarding him summary judgment dismissing the third-party complaint.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	EF90-99
Answering Affirmation - Exhibits.....	EF103-106
Reply.....	EF108

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

Plaintiff commenced this action to recover damages for personal injuries alleged to have been sustained as a result of a workplace accident which occurred on December 28, 2015, when he fell off a ladder on the premises owned by defendant/third-party plaintiff Diaz Austin Associates, L.P. (Diaz), and leased to defendant VYG Group 1 Inc., a/k/a VYG Group

Inc. (VYG), pursuant to a lease dated August 12, 2015. Vaynshteyn is the president of VYG. On January 29, 2019, Diaz commenced a third-party action against Vaynshteyn in his individual capacity, seeking indemnification and contribution against him based upon a "Good Guy Guaranty" the latter executed as part and parcel of the lease. Vaynshteyn made a preanswer motion to dismiss the third-party complaint on October 26, 2020, which was denied as premature by order dated March 25, 2021 (Purificacion, J.). The court determined that:

> "the indemnification provision of the lease between VYG Group and Diaz provides that VYG shall indemnify Diaz in the event it has itself been found to be actively negligent. Viewing the lease provision, it does not provide indemnification for strict liability, which is not the product of active negligence, but is by definition, passive in nature. At this time, VYG has not been determined to be actively negligent, but only liable due to the strict liability provisions of the scaffold law. Since there remain triable issues of fact as to whether VYG bears liability for active negligence under Labor Law § 200 and common law negligence, the issue of indemnification remains open, and therefore the motion to dismiss is deemed premature."

On May 7, 2021, Vaynshteyn answered the third-party complaint, interposing general denials and fourteen affirmative defenses. The instant motion ensued.

In support thereof, Vaynshteyn points to an assignment of lease, dated November 11, 2019, whereby the lease was assigned to a new tenant, to wit: Versailles Palace LLC (Versailles). As part of the assignment, Diaz agreed that, upon satisfaction of certain conditions listed therein and upon full execution and delivery of the lease agreement, VYG "is fully released of any liability and responsibility of the Lease." Diaz also agreed "to look to the Assignee and its guarantors, as though the Assignee was the original lessee under the Lease, for the performance of all terms, obligations, covenants and conditions under the Lease and agrees to give notice of default by Assignee to Assignee only." The conditions were: (1) VYG reimbursing Diaz for all attorney's fees and disbursements incurred in connection with Diaz's approval of the assignment, in the amount of $4,500.00; (2) VYG's payment of $76,965.00 to Diaz, representing the former's liability to the latter for causing an increase in the annual premium of the building's property casualty insurance; and (3) execution and delivery to Diaz of a "good guy" guaranty by the sole principals of Versailles.

Per Vaynshteyn's affidavit, he states that all of the above conditions have been met, inasmuch as he authorized Versailles to remit the specified payments of the purchase price due to VYG directly to Diaz, and he delivered to Diaz a good guy guaranty executed by the principals of Versailles. He states that it was the intention and understanding of the parties

in executing the assignment was that he and VYG would not longer be liable for the terms under the lease, including but not limited to, the indemnity provision and liability stemming from this action. He explains further that, given that the assignment was executed by Diaz, he did not realize it was necessary to advise his and VYG's attorney of the assignment until he learned that, even though the underlying case settled at mediation, Diaz was still pursuing claims against him individually.

In opposition to the motion, counsel first argues that the motion requires denial since Vaynshteyn has been litigating the action since February 2019 and has only raised the assignment for the first time now, causing Diaz substantial prejudice. To that end, Vaynshteyn took a contradictory position in his preanswer motion to dismiss on October 26, 2020, wherein which he claimed that the lease established a defense to the action as a matter of law, making no reference to the assignment which had been executed months prior. Instead, he relied upon the lease which he now states has no bearing on the legal obligations of the parties. Further, there was no reference to the assignment of lease and any purported release contained therein in Vaynshteyn's answer, which included fourteen affirmative defenses (CPLR 3013); thus, the defense has been waived.

Counsel further explains that in May 2021, he implored Vaynshteyn's attorney to attend the mediation scheduled for the following month, so as to contribute to a settlement in exchange for a release of third-party claims. He did not participate. The direct claims against Diaz were settled with plaintiff. It would appear that now Vaynshteyn is raising the assignment of lease defense only after the direct action was settled.

Second, counsel argues that the language of the agreement does not address existing obligations among the parties, only "further" obligations. The assignment was also "effective as of November 11, 2019." Moreover, if Vaynshteyn and Diaz intended the assignment to serve as a release to the claims herein, reference to the litigation (which complaint against Vaynshteyn was filed months earlier) should and would have been expressly referenced.

In reply, defense counsel argues that Diaz would not be prejudiced by the assertion of the release inasmuch as Diaz was a party thereto and had full knowledge of its execution (both at the time of the motion to dismiss as well as when it agreed to settle with plaintiff).

Finally, it is argued that the language of the release clearly concerns the claims of the underlying litigation and contains no qualifying language. Further, Diaz's interpretation of the lease would render the release illusory and, as such, it cannot be interpreted that way.

The motion is denied, as Vaynshteyn has waived its defense. CPLR § 3018 (b) specifically provides that a "party shall plead all matters which if not pleaded would be likely

to take the adverse party by surprise or would raise issues of fact not appearing on the face of a prior pleading such as . . . release" (*see John T. Brady & Co. v City of New York*, 104 Misc 2d 773 [Sup Ct, New York County 1980], *affd* 84 AD2d 517 [1st Dept 1981]). Diaz has established that it would be substantially prejudiced by Vaynshteyn's lack of specificity in pleading this defense inasmuch as the parties have been litigating this matter since early 2019, and there was no mention of the assignment of lease either in Vaynshteyn's preanswer motion or in his answer to the third-party complaint (the latter two being after execution of the assignment). The issue was not raised until after Diaz settled its claims with plaintiff. Thus, Vaynshteyn should be estopped from raising the assignment at this juncture, after Diaz settled the direct action against it.

Moreover, and consistent with the above, Diaz has demonstrated prejudice in its ability to prepare for this defense, particularly given the fact that Vaynshteyn took a contrary position in its preanswer motion (after the assignment was executed) which relied upon the terms of the lease to support its motion, said lease which now Vaynshteyn claims has no bearing on its legal obligation to Diaz.

Accordingly, the motion is denied.

Dated: November 3, 2021

J.S.C.