

Cugliandro v Cortlandt Town Ctr. LLC
2021 NY Slip Op 33413(U)
May 3, 2021
Supreme Court, Westchester County
Docket Number: Index No. 69975/2018
Judge: Joan B. Lefkowitz
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SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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ANNA CUGLIANDRO,

Plaintiff,

DECISION & ORDER

Index No: 69975/2018

-against-

Motion Sequence Nos. 1 and 2

CORTLANDT TOWN CENTER LLC, WALMART STORES EAST, LP, CORTLANDT MANOR WALMART SUPERCENTER STORE #2531, WALMART STORES, INC. and WAL-MART ASSOCIATES, INC.,

Defendants.

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CORTLANDT TOWN CENTER LLC and WALMART STORES EAST, LP,

Third-Party Plaintiffs,

-against-

MAPLE LEAF ASSOCIATES, INC.,

Third-Party Defendant.

-----X

The following papers (NYSCEF document nos. 34-50; 53-74) were read on: (1) the motion by the defendants/third-party plaintiffs, Cortlandt Town Center LLC and Walmart Stores East, LP, for an order granting summary judgment on their claims for contract and common-law indemnification against the third-party defendant, Maple Leaf Associates, Inc. (sequence no. 1); and on (2) the cross-motion by the third-party defendant, Maple Leaf Associates, Inc., for an order granting summary judgment dismissing the third party complaint (sequence no. 2).

Motion Sequence No. 1

Notice of Motion-Affirmation-Memorandum of Law-Exhibits (A-N)

Affirmation in Opposition

Reply Affirmation

Motion Sequence No. 2

Notice of Cross-Motion-Affirmation-Exhibits (A-P)

Affirmation in Opposition

Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion (sequence no. 1) by the defendants/third-party plaintiffs, Cortlandt Town Center LLC and Walmart Stores East, LP, for an order granting summary judgment on their third-party claims for contract and common-law indemnification, is denied; and it is further

ORDERED the cross-motion (sequence no. 2) by the third-party defendant, Maple Leaf Associates, Inc., for an order granting summary judgment dismissing the third-party complaint, is granted to the extent that the claims for breach of contract for failure to procure insurance, contract indemnification, and contribution are all dismissed, and is otherwise denied as to the claim for common-law indemnification; and it is further

ORDERED this matter is hereby referred to the Settlement Conference Part for a settlement conference. Due to the COVID-19 public health emergency, the Clerk of the Settlement Conference Part shall notify the parties of the date, time, and method of the settlement conference.

Plaintiff sues for injuries allegedly sustained on February 16, 2017, when she purportedly slipped and fell on ice on a sidewalk in front of a Walmart Store which is located within a shopping plaza known as the Cortlandt Town Center in Mohegan Lake, New York. Plaintiff commenced the instant action against Cortlandt Town Center and Walmart (defendants). Prior to the accident, in 2016, Cortlandt Town Center, as landowner, entered into a written snow and ice removal contract with the third-party defendant-contractor, Maple Leaf Associates, Inc. (Maple Leaf). Following joinder of issue by the defendants in the main action, defendants commenced a third-party action against Maple Leaf in which defendants assert liability claims against Maple Leaf under theories of contribution and common-law and contractual indemnity as well as for breach of contract for Maple Leaf's alleged failure to procure insurance.

Following the completion of discovery, the defendants/third-party plaintiffs, Cortlandt Town Center LLC and Walmart Stores East, LP, move for an order granting summary judgment on their claims for contractual and common-law indemnity against the third party defendant, Maple Leaf (motion sequence no. 1). Maple Leaf cross-moves for an order granting summary judgment dismissing the third-party complaint (motion sequence no. 2). For clarity purposes, the court addresses the motion by the defendants/third-party plaintiffs and the cross-motion by the third-party defendant in reverse order.

Motion by the Third-Party Defendant
Sequence No. 2

Maple Leaf moves for an order granting it summary judgment dismissing the third-party complaint. As indicated above, the third-party complaint asserts causes of action against Maple Leaf to recover for breach of contract for alleged failure to procure insurance, contract indemnification, contribution, and common-law indemnification. For the reasons set forth below, the motion is granted in part and denied in part.

Failure to Procure Insurance

“A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with” (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011] [internal quotation marks omitted]).

Here, Maple Leaf established its *prima facie* entitlement to judgment as a matter of law dismissing the cause of action for breach of contract for failure to procure insurance by demonstrating that the contract did not contain an insurance procurement provision (*see Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1402, 1405 [2d Dept 2018]). Accordingly, the burden of going forward shifted to the third-party plaintiffs to raise a triable issue of material fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

In opposition, the third-party plaintiffs failed to raise a triable issue of material fact (*see* CPLR 3212 [b]). Accordingly, that branch of Maple Leaf’s cross-motion seeking summary judgment dismissing the cause of action asserted in the third-party complaint for breach of contract is granted, and this claim is dismissed.

Contract Indemnification

“The right to contractual indemnification depends upon the specific language of the contract. 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 facts and circumstances” (*Bleich v Metropolitan Mgt., LLC*, 132 AD3d 933, 934 [2d Dept 2015] [internal quotation marks and citations omitted]). The contract between Cortlandt Town Center and Maple Leaf provides, in pertinent part, as follows:

“To the fullest extent permitted by law, Owner [Cortlandt Town Center] shall indemnify, defend and hold harmless the Vendor [Maple Leaf] and its affiliated entities, subsidiaries, employees, officers, directors (“Vendor Indemnitees”) and anyone who might be liable by, through or under the Vendor Indemnitees from and against any claims for bodily injury or

property damage, including but not limited to reasonable attorneys' fees and costs, to the extent arising out of or resulting from Owner's negligent acts or omissions, with no imputed liability for the acts or omissions of any third parties."

Here, Maple Leaf established its *prima facie* entitlement to judgment as a matter of law dismissing the cause of action to recover for contract indemnification by demonstrating that it did not have a contractual obligation to indemnify the third-party plaintiffs (*see Reimold v Walden Terrace, Inc.*, 85 AD3d 1144, 1146 [2d Dept 2011]). The contract only obligated Cortlandt Town Center to indemnify Maple Leaf, not vice versa. Accordingly, the burden of going forward shifted to the third-party plaintiffs to raise a triable issue of material fact (*see Zuckerman*, 49 NY2d at 557).

In opposition, the third-party plaintiffs failed to raise a triable issue of material fact (*see CPLR 3212 [b]*). Accordingly, that branch of Maple Leaf's cross-motion seeking summary judgment dismissing the cause of action asserted in the third-party complaint for contract indemnification is granted, and this claim is dismissed.

Contribution

A claim for common-law contribution rests upon the principle of apportionment of liability amongst joint tortfeasors, both of whom owed a duty to an injured plaintiff (*see Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568 [1987]; *Smith v Sapienza*, 52 NY2d 82, 87 [1981]). "In determining whether a valid third-party claim for contribution exists, the critical issue is whether the third-party defendant owed a duty to the plaintiff which was breached and which contributed to or aggravated plaintiff's damages" (*Bivona v Danna & Assoc., P.C.*, 123 AD3d 956, 958-959 [2d Dept 2014] [internal quotation marks and brackets omitted]). Generally, where a third-party defendant has a limited contractual obligation to provide snow and ice removal services, such obligations do not render the contractor liable in tort for injuries sustained by third parties (*see Somekh v Valley Natl. Bank*, 151 AD3d 783, 785 [2d Dept 2017]). In *Espinal v Melville Snow Contrs.*, 98 NY2d 136 (2002), the Court of Appeals explained that exceptions to this general rule apply "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced another party's duty to maintain the premises safely" (*id.* at 140 [internal quotation marks, brackets, and citations omitted]). A third-party defendant-contractor moving for summary judgment dismissing a claim for contribution must demonstrate, *prima facie*, that it did not owe a duty of care to the injured plaintiff and that it did not owe the third-party plaintiff a duty of care independent of its contractual obligations (*see Jaikran v Shoppers Jamaica, LLC*, 85 AD3d 864, 866 [2d Dept 2011]; *Roach v AVR Realty Co., LLC*, 41 AD3d 821, 824 [2d Dept 2007]).

Here, Maple Leaf established its *prima facie* entitlement to judgment as a matter of law dismissing the cause of action to recover for contribution by demonstrating that the plaintiff was not a party to its snow and ice removal contract with Cortlandt Town Center and that none of the *Espinal* exceptions applied. Thus, it demonstrated that it did not owe a duty of care to the injured plaintiff (see *Rudloff v Woodland Pond Condominium Assn.*, 109 AD3d 810, 810-811 [2d Dept 2013]). Further, Maple Leaf established, *prima facie*, that it did not owe the third-party plaintiffs a duty of care independent of its contractual obligations (see *Littleton v Amberland Owners, Inc.*, 94 AD3d 953, 954 [2d Dept 2012]; *Roach*, 41 AD3d at 824). Accordingly, the burden of going forward shifted to the third-party plaintiffs to raise a triable issue of material fact (see *Zuckerman*, 49 NY2d at 557).

In opposition, the third-party plaintiffs failed to raise a triable issue of material fact (see CPLR 3212 [b]; see *Jaikran*, 85 AD3d at 866). Accordingly, that branch of Maple Leaf's cross-motion seeking summary judgment dismissing the cause of action asserted in the third-party complaint for contribution is granted, and this claim is dismissed.

Common-Law Indemnification

"The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party" (*Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 808 [2d Dept 2009]). "If, in fact, an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of a contractor engaged by a landowner, the contractor may be held liable to the landowner for common-law indemnification" (*Arrendal v Trizechahn Corp.*, 98 AD3d 699, 700 [2d Dept 2012]). A third-party defendant-contractor moving to dismiss a common-law indemnification claim must demonstrate, *prima facie*, that the injured plaintiff's accident was not due solely to its negligent performance or nonperformance of an act solely within its province (see *Roach*, 41 AD3d at 824).

Here, the papers submitted raise triable issues of material fact precluding the grant of summary judgment dismissing the claim for common-law indemnification. Pursuant to the contract, the third-party plaintiffs were not obligated to perform any snow or ice removal at the premises. Rather, this job belonged solely to Maple Leaf. As such, a question of fact exists as to whether the subject accident was due solely to Maple Leaf's negligent performance or nonperformance of an act solely within its province (see *Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2d Dept 2006]; *Croci v Walden Fire Dist.*, Sup Ct, Orange County, December 18, 2018, Onofry, J., index No. 006822/2015; cf. *Arrendal*, 98 AD3d at 700). Accordingly, that branch of Maple Leaf's cross-motion seeking summary judgment dismissing the cause of action asserted in the third-party complaint for common-law indemnification is denied.

Motion by the Defendants/Third-Party Plaintiffs
Sequence No. 1

Cortlandt Town Center LLC and Walmart Stores East, LP, collectively move for an order granting summary judgment on their third-party claims for contractual and common-law indemnity against the third-party defendant, Maple Leaf. For the reasons that follow, the motion is denied.

Contract Indemnification

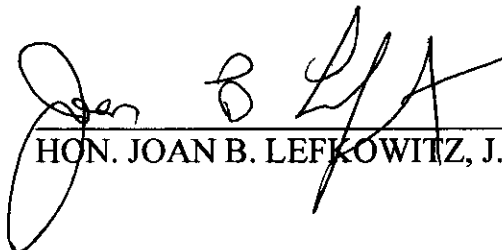
Insofar as the court has awarded Maple Leaf summary judgment dismissing so much of the third-party complaint that asserts a cause of action to recover for contractual indemnity, this branch of the motion by the defendants/third-party plaintiffs is denied as academic.

Common-Law Indemnification

The papers submitted raise triable issues of material fact as to whether the subject accident was due solely to Maple Leaf's negligent performance or nonperformance of an act solely within its province (*see Benedetto*, 32 AD3d at 875; *Croci v Walden Fire Dist.*, Sup Ct, Orange County, December 18, 2018, Onofry, J., index No. 006822/2015; *cf. Arrendal*, 98 AD3d at 700). Accordingly, this branch of the motion by the defendants/third-party plaintiffs is denied.

ENTER,

Dated: White Plains, New York
May 3, 2021


HON. JOAN B. LEFKOWITZ, J.S.C.