

Barbarino v 8121 Prop., LLC
2022 NY Slip Op 31894(U)
June 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 517840/2017
Judge: Wayne P. Saitta
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At an IAS Term, Part 29 of the Supreme Court
of the State of New York, held in and for the
County of Kings, 360 Adams Street Brooklyn,
New York, on the 15th day of June, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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JOHN BARBARINO,

Plaintiffs,

Index No.: 517840/2017

-against-

DECISION AND ORDER
MS #11, #12 #13

8121 PROPERTY, LLC, J MART GROUP, INC., RENHE
MARKET INC., N T FIRST DECORATION INC., and COS
CONSTRUCTION INC.,

Defendants.

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8121 PROPERTY, LLC, J MART GROUP, INC. and RENHE
MARKET INC.,

Third-Party Plaintiffs,

-against-

BARMOR REHAB INC.,

Third-Party Defendant.

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The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	205-207, 229-231, 236-237
Answering Affidavit (Affirmation) _____	244, 250, 246-248, 251
Reply Affidavit (Affirmation) _____	259, 256-257, 264
Supplemental Affidavit (Affirmation) _____	
Pleadings – Exhibits _____	208-228, 245, 232-238-243, 265
Stipulations – Minutes _____	
Filed Papers _____	

This action arises from an accident that occurred on November 26, 2016 when Plaintiff tripped and fell on construction debris in the parking lot adjacent to the property located at 8121 Utrecht Avenue, Brooklyn, New York (the Premises).

The Premises were owned by Defendant 8121 PROPERTY LLC (Defendant 8121 PROPERTY). Defendant RENHE MARKET, INC. (Defendant RENHE) was the tenant in possession of the Premises and was doing business as J MART GROUP LLC (Defendant J MART). Defendants NT FIRST DECORATION, INC. (Defendant NT FIRST) and BARMOR REHAB INC. (Defendant BARMOR) were contractors retained by Defendant RENHE.

At the time of Plaintiff's accident, the Premises was being renovated from a Waldbaums Supermarket to a J-Mart Supermarket. Defendants NT FIRST and BARMOR were performing exterior renovation in the area of the parking lot. Defendant BARMOR did not appear in the action.

Defendant COS CONSTRUCTION INC (Defendant COS) filed a work permit with the New York City Department of Buildings (DOB) for exterior renovation of the Premises on September 5, 2017.

Defendant COS's motion

Defendant COS moves for summary judgment dismissing the complaint and any and all cross-claims, counter-claims, and common law negligence claims as against it.

Plaintiff does not oppose. Therefore, Plaintiff's claims as against Defendant COS must be dismissed.

Defendant NT FIRST does not oppose. Therefore, NT FIRST's claims for contractual indemnification and common law indemnification and contribution against Defendant COS must be dismissed.

Co-Defendants 8121 PROPERTY, J MART, and RENHE oppose arguing that Defendant COS is liable because it filed for a permit with DOB for exterior renovation at the Premises prior to the date of Plaintiff's accident and was listed as the general contractor on such permit.

However, Jiansheng Wu, the sole owner of Defendant COS, testified that he did not perform any work at the Premises and only filed the permit on behalf of Defendant BARMOR for work that had already been completed. Mr. Wu did testify that in 2017 he applied for a work permit on behalf of "Miller" with whom he had a good relationship because Miller was the general contractor for the construction project at the Premises in 2016 and had passed away, so as a favor to his deceased friend and mentor, Mr. Wu applied for permits so the project could be finalized "even though the work was already done – the actual construction work ...was already done. They still needed however, to finish the – the various paperwork". "Miller" was Morris Miller of BARMOR.

Co-Defendants 8121 PROPERTY, J MART, and RENHE failed to raise any triable issues of fact as to Defendant COS's involvement at the Premises at the time of Plaintiff's accident. It is undisputed that Plaintiff's accident occurred on November 26, 2016. Defendant COS did not file the permit until September 5, 2017, almost 10 months later, and there was no evidence presented that COS did any work at the site prior to the date of the accident.

Further, co-Defendants 8121 PROPERTY, J MART, and RENHE failed to produce any evidence that there was a contract between COS and any of the other parties which required COS to indemnify or provide insurance to any of the other parties.

Therefore, the claims for contractual indemnification and common law indemnification and contribution against Defendant COS by co-Defendants 8121 PROPERTY, J MART, and RENHE must be dismissed.

Defendant NT FIRST's motion and Defendants 8121 PROPERTY, J MART, and RENHE's cross-motion

Defendant NT FIRST moves for summary judgment dismissing the complaint and any and all cross-claims as against it.

Co-Defendants 8121 PROPERTY, J MART, and RENHE oppose and cross-move for summary judgment for their claims for contractual indemnification and breach of contract as against Defendant NT First.

I. Defendant NT FIRST's motion to dismiss complaint

Defendant NT FIRST argues that it did not owe Plaintiff a duty of care and none of the *Espinal* exceptions are applicable, specifically because NT FIRST was only responsible for interior work at the Premises. Plaintiff opposes arguing that Defendant NT FIRST is liable under *Espinal*. Co-Defendants 8121 PROPERTY, J MART, and RENHE argue that there is nothing in the contract between NT FIRST and RENHE to show that NT FIRST only preformed interior work and that there is evidence that NT FIRST performed work in the outside loading dock area where Plaintiff's accident occurred.

There are “three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care--and thus be potentially liable in tort--to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, ‘launche[s] 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 the other party's duty to maintain the premises safely” (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136, 140 [2002]).

When a contract is so “comprehensive and exclusive as to preventative maintenance, inspection and repair”, thus making the contractor “the sole privatized provider” as to the safety and cleanliness of the premises, then the contracting party has entirely displaced the owners duty to maintain the premises safely (*see Church ex. Rel. Smith v. Callanan Industries, Inc.*, 99 NY2d 104, 113 [2002]).

The contract between Defendants NT FIRST and RENHE covers maintenance of the premises:

Contractor is solely responsible for initiating, maintaining, and supervising all safety precautions and measures in connection with the performance of this Contract and agrees to take all safety precautions with respect to his work and shall comply with all applicable laws, ordinances, rules and regulations and lawful orders of any public or government authority for the safety of persons or property.

However, as discussed, it is unclear from the contact what the scope of Defendant NT FIRST’s work was at the Premises. Therefore, there is a question of fact as to what work NT FIRST’s contract, and specifically this maintenance provision, applies to. Defendant REHNE had also contracted with Defendant BARMOR for this project at the Premises but did not produce any contracts it had with BARMOR. Further, co-Defendants 8121 PROPERTY, J MART, and RENHE did not produce any contracts for the installation or repaving of the parking lot for a period of two years prior to Plaintiff’s accident.

Plaintiff did not plead the detrimental reliance exception under *Espinal*.

However, here, there are questions of fact as to whether Defendant NT FIRST created the condition Plaintiff fell on in the loading dock area.

First, the contract does not specify what the scope of NT FIRST’s work was at the Premises. The contract merely references “Per blueprint and Plans”, but no blueprint or plans were attached to the contract nor have any been produced.

Second, there is conflicting testimony as to whether NT FIRST was retained to perform interior work only at the Premises. Wu Lian Shao, owner of co-Defendants 8121 PROPERTY and J MART, testified that he contracted with Gi Lin Zhong, a manager at Defendant NT FIRST, to do renovation on both the inside and outside of the property and that Zhong was the one who worked on the area of the loading dock.

However, Zhong contradicted Shao's testimony. Zhong testified that he would take direction from Shao and Shao's representative concerning the work to be done, but that the work he did for NT FIRST involved only the inside of the Premises and that the exterior was done by other people.

As there is a question of fact whether NT FIRST created the condition alleged to have caused Plaintiff's accident, that portion of Defendant NT FIRST's motion for summary judgment dismissing Plaintiff's complaint as against it must be denied.

II. Co-Defendants 8121 PROPERTY, J MART, and RENHE's claims for contractual indemnification against NT FIRST

Co-Defendants 8121 PROPERTY, J MART, and RENHE argue that they should be granted summary judgment on their claims for contractual and common law indemnification and contribution against NT FIRST based on the language of the contract between NT FIRST and RENHE, the witnesses' testimony, and the documentary evidence. Defendant NT FIRST argues that these claims should be dismissed because its duty to indemnify under the contract was not triggered and the indemnity provisions are void and unenforceable under the General Obligations Law.

“The right to contractual indemnification depends upon the specific language of the contract” (*Burgos v. 14 East 44 St., LLC*, 203 AD3d 688, 628-629 [2d Dept 2022], quoting

O'Donnell v. A.R. Fuels, Inc., 155 AD3d 644, 645 [2d Dept 2017]). “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 circumstances” (*id.*, quoting *George v. Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). “A party that moves for summary judgment dismissing a claim for contractual indemnification must make a prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim” (*id.*). “This may be accomplished by showing that, under the circumstances, an indemnification clause in a contract between the parties either was not triggered or was otherwise inapplicable” (*id.*).

Here, the indemnification provision in paragraph 6 and 7 of the contract between Defendant RENHE and Defendant NT FIRST provides in part that the Contractor shall indemnify the owner and its agents to the extent such Claims arise out of, result from, or are connected with the Contractors performance of the contract. Further, paragraph 9 provides that the “Contractor is solely responsible for initiating, maintaining and supervising all safety precautions and measures in connection with the performance of this Contract and agrees to take all safety precautions with respect to his work and shall comply with all applicable laws, ordinances, rules and regulations and lawful orders of any public or governmental authority for the safety of persons or property”.

However, as discussed, there are questions of fact as to whether Plaintiff’s injury arose from Defendant NT FIRST’s work and therefore both Defendant NT FIRST and co-Defendants 8121 PROPERTY, J MART, and RENHE’s motions as to the contractual indemnification claims must be denied.

III. Co-Defendants 8121 PROPERTY, J MART, and RENHE's claim for failure to procure insurance against NT FIRST

Defendant NT FIRST argues that co-Defendants 8121 PROPERTY, J MART, and RENHE's claims for failure to procure insurance must be dismissed as those Defendants have their own insurance.

Here, Defendant NT FIRST did not fulfill its obligations under its contract with RENHE to procure insurance to cover co-Defendants 8121 PROPERTY, JMART and RENHE for claims for bodily injury among other things. While NT FIRST did procure a policy which covered these co-Defendants as additional insureds, the additional insured coverage excluded claims for bodily injury.

“Where . . . the promisee has its own insurance coverage, recovery for breach of a contract to procure insurance is limited to the promisee's out-of-pocket expenses in obtaining and maintaining such insurance, i.e., the premiums and any additional costs incurred such as deductibles, co-payments, and increased future premiums” (*Lima v. NAB Const. Corp.*, 59 AD3d 395, 398 [2d Dept 2009]). Co-Defendants 8121 PROPERTY, J MART, and RENHE may still recover any monies they expended on premiums for their insurance, any costs they incurred in defending this action, as well as any damages they are found to be liable for which exceed their own coverage but are within the coverage limits required by the agreement between NT FIRST and REHNE.

IV. Defendant NT FIRST's motion to dismiss Defendant COS's cross-claims for contractual indemnification, failure to procure insurance, and common law indemnification and contribution

Defendant NT FIRST argues that Defendant COS's cross-claims for contractual indemnification and failure to procure insurance must be dismissed because there is no

agreement between NT FIRST and COS. Defendant NT FIRST further argues that all claims for common law indemnification and contribution must be dismissed because NT FIST is completely free from fault in Plaintiff's accident. Defendant COS does not oppose so Defendant NT FIRST's motion to dismiss those claims should be granted.

WHEREFORE, it is ORDERED that the Plaintiff's complaint against Defendant COS is DISMISSED; and it is further

ORDERED that Defendant NT FIRST's claims for contractual indemnification and common law indemnification and contribution against Defendant COS are DISMISSED; and it is further

ORDERED that co-Defendants 8121 PROPERTY, J MART, and RENHE's claims for failure to procure insurance, contractual indemnification and common law indemnification and contribution against Defendant COS are DISMISSED; and it is further

ORDERED that that part of Defendant NT FIRST's for summary judgment dismissing Plaintiff's complaint as against it is DENIED; and it is further

ORDERED that that part of Defendant NT FIRST's motion for summary judgment dismissing co-Defendants 8121 PROPERTY, J MART, and RENHE's claims for contractual indemnification, common law indemnification and contribution, and failure to procure insurance is DENIED; and it is further

ORDERED that that part of Defendant NT FIRST's motion for summary judgment dismissing Defendant COS's cross-claims for contractual indemnification, failure to procure insurance, and common law indemnification and contribution is GRANTED; and it is further

ORDERED that co-Defendants 8121 PROPERTY, J MART, and RENHE's cross-motion for summary judgment on their claims for contractual indemnification and failure to procure insurance against Defendant NT FIRST is DENIED.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.