

Memaj v Brotherhood Synagogue

2022 NY Slip Op 35017(U)

December 23, 2022

Supreme Court, Bronx County

Docket Number: Index No. 32702/2019E

Judge: Lucindo Suarez

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: PART 19

Mtn. Seq. # 3

ARDIT MEMAJ,

Index No.: 32702/2019E

Plaintiff,

- against -

DECISION and ORDER

THE BROTHERHOOD SYNAGOGUE,

Defendant.

and Third-Party action.

	PAPERS NUMBERED
Third-Party Defendant IRL Systems, Inc.'s Notice of Motion, Affirmation in Support, Memorandum of Law in Support, Statement of Material Facts, Exhibits	NYSCEF Doc. No. 60-83
Defendant/Third-Party Plaintiff The Brotherhood Synagogue's Notice of Cross-Motion, Affirmation in Support of Cross-Motion and Affirmation in Opposition to Third-Party Defendant IRL System, Inc.'s motion, Memorandum of Law in Support of Cross-Motion and in Opposition, Response to Counter Statement of Material Facts, Exhibit	NYSCEF Doc. No. 85-89
Third-Party Defendant IRL Systems, Inc.'s Affirmation in Opposition to the Cross-Motion and in Reply, Opposition to Third-Party Plaintiff The Brotherhood Synagogue's Statement of Material Facts, Exhibits	NYSCEF Doc. No. 90-94

Upon the enumerated papers, and due deliberation had thereon, this Court finds:

The issue in Third-Party Defendant IRL Systems, Inc.'s ("IRL") summary judgment motion is whether it established its entitlement to dismissal of the third-party claims for contractual indemnity and breach of contract for failure to procure insurance. Further, the issue in Defendant/Third-Party Plaintiff The Brotherhood Synagogue's (Brotherhood) cross-motion for summary judgment is whether it established its entitlement to judgment with respect to its third-party claim for contractual indemnification.¹

¹ CPLR §3212(a) requires summary judgment motions to "be made no later than one hundred twenty days after the filing of the note of issue, except with leave." Although Defendant/Third-Party Plaintiff The Brotherhood Synagogue's cross-motion for summary judgment was untimely, this court nevertheless will address the merits of the cross-motion as the arguments therein were "nearly identical" to the arguments set forth in IRL's timely summary judgment motion. See *Filannino v. Triborough Bridge & Tunnel Auth.*, 34 A.D.3d 280, 824 N.Y.S.2d 244 (1st Dep't 2006).

This court holds IRL established its *prima facie* entitlement to dismissal of the third-party claim for breach of contract for failure to procure insurance. However, IRL failed to demonstrate its *prima facie* burden for dismissal of the third-party claim for contractual indemnity.² In addition, Brotherhood failed to prove its *prima facie* entitlement to judgment on its third-party claim for contractual indemnification against IRL.

Plaintiff, an employee of Third-Party Defendant IRL, was allegedly injured while performing cleaning work as he was assigned to perform fire alarm inspections, cleaning, and testing. As this court observed in a prior decision (Suarez, J., Motion Sequence No. 2), Plaintiff was attempting to clean out a smoke detector and had used a ladder, provided to him by The Brotherhood, to access the smoke detector. Having ascended the ladder, Plaintiff proceeded to remove ceiling tile and as he began unscrewing the duct detector, the ladder suddenly shifted and collapsed causing him to fall to the ground.

This court, in the prior decision, held that the testimony of CEO and owner of IRL, Brendan Lally, and the contract entered into between Brotherhood and IRL established that Plaintiff's activity at the time of the accident was routine as part of the ordinary maintenance and care of Brotherhood's smoke detectors. Therefore, Plaintiff's activity was not protected under Labor Law §240(1). The Labor Law §241(6) claim was dismissed as Plaintiff did not oppose the branch of Brotherhood's summary judgment motion that sought dismissal of said claim.

With respect to the Labor Law §200 and common law negligence claim, this court, in the prior decision, also held that dismissal of this claim was denied as premature as there are triable

² Brotherhood did not oppose IRL's request to dismiss the third-party claims for common law indemnification and contribution. Therefore, IRL's summary judgment motion seeking dismissal of the third-party claims for common law indemnification and contribution is granted, without opposition, and shall not be addressed herein.

issues of fact as to whether Brotherhood provided Plaintiff with the ladder he fell from, and whether it had actual or constructive notice of the defective condition of the ladder.

Brotherhood argues it is entitled to contractual indemnity from IRL based on the 2016 contract between the parties. This contract provides: “IRL will hold the customer [Brotherhood], its officers, directors and employees harmless from damages liability expenses resulting directly from negligent acts or omissions of IRL’s employees...”

IRL adduces a 2007 maintenance agreement, which it identifies as the “applicable contract,” as well as, a copy of the 2016 agreement, which it characterized as the “inapplicable contract.” IRL argues that Brotherhood’s reliance on the 2016 agreement is misplaced and that the very existence of two separate contracts for different work raises triable issues of fact. IRL contends that the 2007 contract is the only relevant contract for the routine maintenance work that Plaintiff performed on the date of the accident.

This court finds that IRL’s performance of the maintenance work required under the contracts coupled with IRL’s receipt and execution of both contracts strongly suggest a meeting of the minds sufficient to give rise to a valid and enforceable indemnity agreement. Further, Brotherhood’s Superintendent and Building Manager, Louis Torres, in his affidavit acknowledged both contracts and authenticated his execution of the 2016 contract that contained the indemnification provision. Moreover, IRL’s owner, Brendan Lally, testified that the subject work required two separate contracts. Therefore, IRL and Brotherhood are bound by the indemnification language contained in the 2016 contract even though it appears that it was not fully executed. *See Flores v. Lower E. Side Serv. Ctr.*, 4 N.Y.3d 363, 828 N.E.2d 593, 795 N.Y.S.2d 491 (2005).

However, Brotherhood failed to meet its *prima facie* burden to be entitled to contractual indemnity from IRL at this juncture. The contractual indemnification provision in the 2016 contract does not contain language limiting indemnification to damages arising out of accidents caused by IRL's negligence or precluding indemnification for damages caused by Brotherhood's own negligence. Thus, if it is subsequently determined that the accident was attributable to any negligence on the part of Brotherhood, enforcement of the subject indemnification provision would be barred by General Obligations Law §5-322.1. Consequently, Brotherhood's application for judgment on the third-party claim for contractual indemnification claim against IRL must be denied as premature. *See Picaso v. 345 E. 73 Owners Corp.*, 101 A.D.3d 511, 956 N.Y.S.2d 27 (1st Dep't 2012).

Lastly, IRL demonstrated that it complied with its contractual obligation to procure insurance by appending commercial general liability and excess policies that were effective on the date of the accident, which included a blanket endorsement that covered any obligation by IRL to provide insurance to an additional insured. Brotherhood failed to provide an affidavit or some other form of admissible evidence demonstrating that no liability insurance was obtained by IRL. Thus, whether the insurer refused to indemnify Brotherhood does not alter the fact that IRL complied with its contractual obligations. *See Perez v. Morse Diesel Int'l, Inc.*, 10 A.D.3d 497, 782 N.Y.S.2d 53 (1st Dep't 2004).

Accordingly, it is

ORDERED, that IRL's summary judgment motion (Mtn. Seq. #3) seeking dismissal of the third-party complaint is granted in part; and it is further

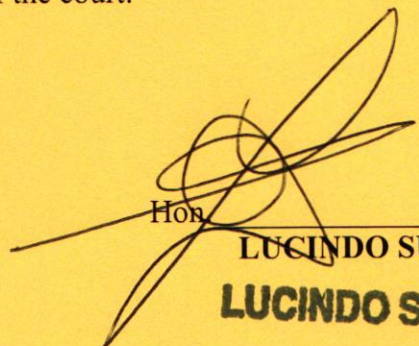
ORDERED, that the third-party claims for common law indemnity and contribution are dismissed, without opposition; and it is further

ORDERED, that the third-party claim for breach of contract for failure to procure insurance is dismissed; and it is further

ORDERED, that Brotherhood's cross-motion (Mtn. Seq. # 3) seeking judgment on its third-party claim for contractual indemnification is denied.

This constitutes the decision and order of the court.

Dated: December 23, 2022


Hon. _____
LUCINDO SUAREZ, J.S.C.
LUCINDO SUAREZ, J.S.C.