Saninocencio v Wharton Props. LLC
2022 NY Slip Op 35081(U)
June 23, 2022
Supreme Court, Bronx County
Docket Number: Index No. 26373/2017E
Judge: Marissa Soto
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 22

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MELANIE SANINOCENCIO,

Plaintiff,

-against-

WHARTON PROPERTIES, LLC its agents, servants, and /or employees, a/k/a/ WHARTON PROPERTIES DEBT, LLC., its agents, servants, and /or employees, a/k/a/ WHARTON PROPERTIES (BV) LIMITED, LLC its agents, servants, and /or employees, a/k/a/ THYSSENKRUPP ELEVATOR CORPORATION its agents, servants, and/or Employees,

Defendants,

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WHARTON PROPERTIES, LLC its agents, servants, and /or employees, a/k/a/ WHARTON PROPERTIES DEBT, LLC., its agents, servants, and /or employees, a/k/a/ WHARTON PROPERTIES (BV) LIMITED, LLC its agents, servants, and /or employees,

Third-Party Plaintiff,

-against-

AE OUTFITTERS RETAIL CO.,

Third-Party Defendants.

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AE OUTFITTERS RETAIL, CO.

Second Third Party Plaintiff,

-against-

THYSSENKRUPP ELEVATOR CORP.,

Second Third Party Defendant.

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INDEX NO. 26373/2017E

DECISION AND ORDER

MOT. SEQ. 8

Hon. Marissa Soto, J.S.C.

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

Papers:	**NYSCEF Doc. No.#**
Notice of Motion, Affirmation/Affidavit in Support and Exhibits thereto:	165 - 181
Opposition/Cross Motion Filings:	182 - 215
Reply:	195, 199, 216-217
Other: Oral Argument May 17, 2022	*1

Defendant/Third-Party Plaintiff Wharton Properties, LLC its agents, servants, and/or employees, a/k/a/ Wharton Properties Debt, LLC, its agents, servants, and/or employees, a/k/a/ Wharton Properties (BV) Limited its agents, servants, and/or employees (hereinafter "Wharton") moves for summary judgment pursuant to CPLR § 3212 seeking a judgment that Third-Party Defendant AE Outfitters Retail Co., (hereinafter "AE") is obligated to indemnify and defend Wharton in this lawsuit pursuant to the terms of AE's lease for the space in question ("Wharton Motion"). AE filed opposition to the Wharton Motion and Wharton filed its reply.

AE cross moves for summary judgment pursuant to CPLR 3212 (i) finding for AE on the issue of liability, (ii) dismissing Wharton's claims against AE; (iii) finding in favor of AE on its claims for contractual indemnification and breach of contract for failure to procure insurance against Defendant Thyssenkrupp Elevator Corporation ("Thyssenkrupp") and (iv) for such other and further relief as the Court deems just and proper ("AE's Cross Motion"). Opposition to AE's Cross Motion was filed by Melanie Saninocencio (the "Plaintiff") and Thyssenkrup. AE filed a reply.

Plaintiff brings the present action against Wharton and Thyssenkrupp alleging that both were negligent in their maintenance of the freight elevator located at 559 Broadway, New York, NY (hereinafter "Subject Premises"). In response, Wharton then filed a third-party action for indemnification and contribution against AE. AE then filed a second third party action for indemnification and contribution against Thyssenkrupp.

Plaintiff alleges that, on March 15, 2016, while Plaintiff was working, she was injured using the freight elevator. At the time of the incident, AE was the commercial tenant occupying space at the Subject Premises pursuant to a written lease with the owner of the Subject Premises being 599 Broadway JS, LLC (hereinafter "599 Broadway"). In this AE location there was a customer elevator and a freight elevator. The freight elevator was the only one that could be used for access to certain levels in the building that were inaccessible through the customer elevator. Employees used the freight elevator frequently to reach such levels for purposes of receiving shipments or moving merchandise between AE stores.

The freight elevator was designed and in use as one having both the exterior and interior doors operating automatically but due to a problem, on March 15, 2016, that was not the case. The doors would open automatically, but the interior doors had to be closed manually. This fact was known by AE, Plaintiff, and Thyssenkrupp. On the date in question, the freight elevator was in service but operating using some automatic door operation and manual door operation. Plaintiff was with a co-worker bringing items to a lower level. The two had to use the freight elevator because it was the only one that reached the destination. The co-employee with the Plaintiff pushed the call button for the freight elevator and when the elevator arrived the doors automatically opened. When the Plaintiff and her co-employee entered the freight elevator, Plaintiff pulled the interior door shut and her elbow got caught in the exterior doors which were closing.

<u>Summary Judgment Standard</u>

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of material facts. *Giuffrida v. Citibank Corp.*, 100 N.Y.2d 72 (2003). The failure to oppose a motion for summary judgment alone does not justify the granting of summary judgment. Instead, the court must still assess whether the moving party has fulfilled its burden of demonstrating that there is no genuine issue of material fact and its entitlement to judgment as a matter of law. *Winegrad, et al., v. New York University Medical Center*, 64 N.Y.2d 851 (1985); *Liberty Taxi Mgt., Inc. v. Gincherman*, 32 A.D.3d 276 (1st Dep't 2006). "In other words, even in the face of a nonmovant's silence or a poorly drafted response, summary judgment may not be granted unless the movant has met their burden of establishing entitlement to judgment as a matter of law." *Rivera v. State of New York*, 34 N.Y.3d 383, 401-402 (2019). The function of the court on a motion for summary judgment is issue finding rather than issue determination, and the court must evaluate whether the alleged factual issues presented are genuine or unsubstantive. *Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 394 (1957).

Wharton's Summary Judgment

The present action is for personal injuries allegedly sustained by the Plaintiff, an AE employee, on March 15, 2016, within a freight elevator. Wharton argues that AE is obligated to indemnify and defend Wharton on this lawsuit pursuant to a lease agreement (hereinafter "Lease") entered between 599 Broadway as the owner, and AE as the tenant, for the Subject Premises. Wharton was the property manager for 599 Broadway of the Subject Premises. Wharton argues that its right to indemnification from AE is set forth in the Lease. Wharton argues the indemnification clause contained in the Lease is unambiguous, lawful and enforceable, in particular since the freight elevator was defective and not functioning properly at the time of Plaintiff's accident. In opposition, AE argues that the indemnification provision referenced by the movant is in favor of the owner, 559 Broadway, only, as the applicable clause makes no reference to indemnifying or defending agents of the owner.

The paragraph Wharton and AE focus on in the standard form of store lease is paragraph 8, titled "Tenant's Liability Insurance Property Loss, Damage, Indemnity.

Paragraph 8 of the Lease provides

> Owner or its agents shall not be liable for any damage to property of Tenant or of others entrusted to employees of the building, nor for loss of, or damage to any property of Tenant by theft or otherwise, nor for any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Owner, its agents, servants or employees. Owner or its agents will not be liable for any such damage caused by other tenants or persons in, upon or about said building, or caused by operations in construction of any private, public or quasi public work. Tenant agrees, at Tenant's sole cost and expense, to maintain general public liability insurance in standard form and in favor of Owner and Tenant against claims for bodily injury or death or property damage occurring in or upon the demised premises, effective from the date Tenant enters into possession of the demised premises and during the term of this lease. …
>
> Tenant shall indemnify and save harmless Owner from and against all liabilities, obligations, damages, penalties, claims, costs and expenses for which Owner shall not be reimbursed by insurance, including reasonable attorneys' fees, paid, suffered or incurred as a result of any breach by Tenant, Tenant's agent, contractors, employees, invitees, or licensees, of any covenant on condition of this lease, or the carelessness, negligence or improper conduct of the Tenant, Tenant's agents, contractors, employees, invitees or licensees.
>
> Tenant's liability under this lease extends to the acts and omissions of any subtenant, and any agent, contractor, employee, invitee, or licensee of any subtenant. In case any action or proceeding is brought against Owner by reason of such claim, Tenant, upon written notice from Owner, will, at Tenant's expense, resist or defend such action or proceeding by counsel approved by Owner in writing, such approval not to be unreasonably withheld.

AE argues that the first two sentences of the paragraph explicitly reference 559 Broadway as Owner, and its agents not being liable for the listed reasons, however, the sentences that expressly use the term "indemnify" only reference the Owner without reference to its agents and therefore the indemnification requirement runs exclusively to 559 Broadway as Owner. Accordingly, AE argues since 559 Broadway is not a party to this action, AE is not obligated to indemnify anyone.

Contract Construction

The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent. *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002). Accordingly, the words used in the contract should be construed to achieve the apparent purpose of the parties. *See Slatt v. Slatt*, 64 N.Y.2d 966, 967 (1985). "A party's right to indemnification may arise from a contract or may be implied based upon the law's notion of what is fair and proper as between the parties." *McCarthy v. Turner Const., Inc.*, 17 NY3d 369, 375 (2011). However, a contract's words might "seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view." *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491-492 (1983) (*citing Robertson v. Ongley Elec. Co.*, 146 N.Y. 20, 23 (1895). This is particularly true with indemnity contracts. *Id.* When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. *Id.* (internal citations omitted). Indemnity obligations 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. *Id.* (internal citations omitted).

In contracts, the intent is evidenced by what they say in the writing as a whole or put another way a contract should be interpreted "as a harmonious and integrated whole." *Nomura Home Equity Loan, Inc., Series 2006-FM2 v. Nomura Credit & Capital, Inc.*, 30 N.Y.3d 572, 581 (2017). Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms. *Id.* "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.'" *Torres v. Morse Diesel Intern., Inc.*, 14 A.D.401, 403 (1st Dept 2005) (internal citations omitted).

Although the parties argue paragraph 8 of the Lease exclusively, in the present case, the interpretation of the Lease requires a thorough analysis of the entire Lease, which includes the rider to the Lease ("Lease Rider"). First, paragraph 42 of the Lease, titled Miscellaneous Provisions, states that "If there is any conflict between the printed form of this Lease and this Rider, then this Rider shall control." ¶42 Lease Rider. Second, Lease Rider paragraphs 8.6 and 8.7 state, in relevant, as follows:

> 8.6 Except for Owner's, its employees, agents or representatives negligent or intentional acts or omissions, … neither Owner nor its agents shall be liable for any injury or damage to persons or property or interruption of Tenant's business . . .; nor shall Owner or its agents be liable for any such damage caused by other tenants or persons in the Building or by construction of any private, public or quasi-public work; nor shall Owner be liable for any latent defect in the Premises or in the Building.
>
> 8.7 . . . [T]enant shall not do or permit anything which may subject Owner, its partners, members, shareholders, officers, directors, employees, agents (including, without limitation, leasing and managing agents) and contractors ("Indemnitees") to any liability or responsibility for injury, damages to persons or property or to any liability by reason of any violation of any Legal or Insurance Requirements, but shall exercise such control over the Premises as to fu1ly protect Indemnitees against any such liability. Except for negligent or intentional acts or omissions, Tenant shall indemnify, defend and save harmless Indemnitees against all claims, liability, costs and expenses (including, without limitation, fines and attorneys fees) arising, directly or indirectly from any (a) act or omission of Tenant, its contractors, licensees, agents, servants, invitees, employees, or visitors, (b) any accident, injury or damage to any person or property occurring during the Term (i) in or about the Premises . . . If any claim, action or proceeding is made or brought against any Indemnitee which is covered by the foregoing indemnity, then upon demand by Owner, the Tenant, at its sole cost and expense, shall resist or defend such claim, action or proceeding in the Indemnitee's name, if necessary . . .

Further, any logical reading of paragraph 8 of the standard form of store lease portion of the Lease ("Paragraph 8"), also creates an obligation to indemnify the Wharton. The first two sentences state that the Owner or its agents shall not be liable for anything other than the results of their own negligence or intentional acts. This declaration of 'no liability' is meaningless outside of indemnification. A contract does not supersede the law and therefore the determination of liability, which is a finding of legal responsibility, is not within the parties' power to assign. Therefore, the Court must look to the following sentences that then explicitly reference indemnity. Any other reading would make the two first sentences meaningless. In a commercial lease agreement negotiated and entered into by sophisticated parties, the instrument should be read to mean what it says rather than as containing internally contradictory or unlawful provisions.

Considering the Lease provisions discussed above, the Lease is clear and unambiguous and demonstrates an intention to indemnify. *Pelote v. Berean Apart. Housing Dev. Fund Comp., Inc.*, 188 A.D.3d 467, 467 (1st Dept 2020). Court finds that the Lease in its entirety, including, as modified by the Lease Rider entitles Wharton, 599's agent, to contractual indemnification by AE.

AE's Cross motion

AE's Liability Claim

AE cross moves pursuant to CPLR 3212 for summary judgment (i) on the issue of liability, (ii) dismissing Wharton's indemnification claims against AE, (iii) in favor of AE on its claims for contractual indemnification and (iv) breach of contract for failure to procure insurance against Thyssenkrupp and (v) for such other and further relief as the Court deems just and proper. Plaintiff, Thyssenkrupp, and Wharton submitted opposition papers.

Based on the Maintenance Logs (NYSCEF Doc. # 192), on January 20, 2016, there was a trouble call entry from AE assigned to a Thyssenkrupp elevator technician, William Wood (hereinafter "Mr. Wood"). There was an issue with the freight car not responding and the doors not closing. As a result, Mr. Wood installed electronic door edge front side, checked the operation and left the elevator car in service. Examination Before Trial (hereinafter "EBT") of Mr. Wood Pgs. 22-25. The Maintenance Logs and the EBT of Mr. Woods demonstrates that on the following incident dates: March 3, 2016, March 8, 2016 and March 11, 2016, Mr. Wood responded to trouble calls regarding the freight elevator not responding and doors not closing. EBT of Mr. Wood Pgs. 79 -82. AE had notice that the freight elevator was not operating as it was designed to operate — automatically. Regardless, AE continued to allow its employees to use the freight elevator. Also, Plaintiff's expert, William Seymour (hereinafter "Mr. Seymour"), (NYSCEF Doc # 144) page 2, in pertinent part states that the subject elevator suffered a failure of a door safety sensor that resulted in preventing the front doors from closing.

AE argues that the Plaintiff was the sole proximate cause of her alleged accident. AE argues that there were absolutely no issues with the freight elevator that caused or contributed to the Plaintiff's accident. This is contradicted by Plaintiff's allegations that it was negligent to permit the continued use of a known malfunctioning elevator by AE. This is a question of fact that is for the jury. AE's conclusory assertion to the contrary does not change that from a question of fact to one of law. Accordingly, AE's motion for summary judgment on liability is denied.

Wharton's summary judgment motion was discussed above and therefore will not be addressed again.

AE's Summary Judgment Motion For Indemnification By Thyssenkrupp

AE argues that it is entitled to contractual indemnification based on its agreement with Thyssenkrupp. In opposition, Thyssenkrupp argues that AE should be precluded from indemnification because of its own negligence pursuant to General Obligations Law (hereinafter "GOL") §5-322.

AE argues that paragraph 11 of its agreement with Thyssenkrupp, dated January 13, 2014 (the "Agreement"), titled "Indemnity and Liability" in relevant part, that

> [Thyssenkrupp] shall hold harmless and indemnify [AE], its managing agent, and employees against all loss or liability, demands, judgments, expenses (including attorney's fees), claims or actions based upon or arising out of damages or injury (including death) to persons or property, including property owned, leased or borrowed, incurred by or sustained in connection with the performance of this Agreement to the extent caused by the acts, omissions, or negligence of [Thyssenkrupp], its subcontractors, managing agents, servants or employees, or based upon [Thyssenkrupp]'s violation of any statute, ordinance, building code or regulation.
>
> [Thyssenkrupp]'s obligations under this paragraph do not include any injuries or damages, if any, that arise out of or result from the negligence or concurrent negligence of Purchaser, its managing agent, or other indemnitee. Contractor shall also indemnify Purchaser and Purchaser's managing agent or other indemnitee.

GOL §5-322.1 states in relevance, the following

> A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

General Obligations Law §5-322.1 prohibits the enforcement of an indemnification clause to the extent that the party seeking indemnification was negligent. *Castrogiovanni v. Corporate Property Investors,* 276 A.D.2d 660, 661 (2d Dept. 2000).

Therefore, the question presented here is not one of contract interpretation but instead of negligence. Was AE negligent in allowing its employees to use an elevator that was not operating as it was designed to operate – is a question for the jurors not a question of law. *Mannino v. J.A. Jones Const. Group, LLC,* 792 NYS2d 32 (1st Dept 2005). Accordingly, AE is not entitled to summary judgment on their cross motion for contractual indemnification in light of outstanding issues of fact as to whether AE was negligent and contributed to Plaintiff's accident.

AE's Summary Judgment Motion For Breach of Contract By Thyssenkrupp

AE also moves for summary judgment against Thyssenkrupp for breach of the Agreement. AE alleges that Thyssenkrupp breached the Agreement by not procuring insurance. AE seeks full indemnity from Thyssenkrupp in the present action as its damages. AE argues that had the Agreement been adhered to, AE would have received full indemnification through the procured insurance. Thyssenkrupp argues that there was no breach and that there was an insurance policy in place naming AE as an additional insured.

Here, there are material issues of fact regarding whether there was a breach of contract and what the appropriate damages would be if a breach was found. Accordingly, AE is not entitled to summary judgment on their cross motion for breach of contract for failure to procure insurance against Thyssenkrupp.

The Court has considered the parties various related arguments and finds them unavailing.

Accordingly, it is hereby

ORDERED AND ADJUDGED that Wharton's motion for summary judgment for indemnification against AE Outfitters Retail Co. is granted as set herein; and it is further

ORDERED AND ADJUDGED that AE Outfitters Retail Co.'s cross motion for summary judgment is denied; and it is further

ORDERED AND ADJUDGED that a copy of this Decision and Order with Notice of Entry be served by the prevailing party upon all parties to the present action within thirty (30) days of the date of entry.

This constitutes the decision and order of the Court.

Dated: June 23, 2022

HON. MARISSA SOTO, J.S.C.