Supreme Court of New York
County of Kings
Part LL1

Index Number 519095/2017
(Seq. 005)

OMAR COLINDRES,

Plaintiff,

against

DR. BABAK MOHAJER, ET AL,

Defendants.

DECISION/ORDER

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

Papers Numbered

Notice of Motion and Affidavits Annexed..... 1
Order to Show Cause and Affidavits Annexed... ____
Answering Affidavits..... 2
Replying Affidavits..... 3
Exhibits..... ____
Other..... ____

Upon review of the foregoing papers, Cornelia Street Condominium and Maxwell-Kates, Inc.'s cross-claim for summary judgment (seq. 005) seeking indemnification against co-defendant Dr. Babak Mohajer is hereby decided as follows:

Introduction & Procedural History

The plaintiff Omar Colindres commenced this action on September 29, 2017, against defendants Dr. Babak Mohajer (Dr. Mohajer), Cornelia Street Condominium ("Cornelia"), Maxwell-Kates, Inc. ("Maxwell"), Quadrant Development Consultants ("Quadrant"), CDO Contracting Inc. ("CDO"), and REL Construction Inc. ("REL"). Plaintiff claims he sustained injuries on January 26, 2017, from a construction accident occurring at 2 Cornelia Street, unit 902, New York, New York 10014 (Cornelia Street). Defendant CDO never appeared in this action and Plaintiff was awarded a default judgment against CDO on June 6, 2018.

On March 18, 2021, the plaintiff's claim was settled before this Court for the amount of $52,500 (Stipulation of Settlement). Quadrant agreed to contribute $30,000, Dr. Mohajer agreed to contribute $15,000, and Cornelia and Maxwell collectively agreed to contribute $7,500 (*id.*). The

Parties agreed to discontinue all claims and cross-claims with the exception of Cornelia and Maxwell's cross-claim against Dr. Mohajer for indemnification (*id.*).

Defendants Cornelia and Maxwell move pursuant to CPLR Rule 3212 for summary judgment against co-defendant Mohajer for costs of $28,264.05 on the basis of contractual indemnification.

Factual Background

The following is undisputed: Cornelia owns Cornelia Street and Maxwell manages the property (Statement of Material Facts in Support at 1-2). Dr. Mohajer owns condominium unit 902 on Cornelia Street (*id.*). Dr. Mohajer hired Quadrant to perform construction on his unit (*id.*). Quadrant subcontracted with REL for the construction. Plaintiff was an employee of REL. On January 26, 2017, there was construction work occurring in Dr. Mohajer's unit when Plaintiff was injured.

While the premises is owned by Cornelia and managed by Maxwell, each unit is a privately owned condominium (*see* Holzer Affidavit). As is standard practice, when a unit owner wishes to commence a construction project in their own unit, an Alteration Agreement is entered into between Cornelia and the unit owner prior to the construction work (*id.*).

There is a nine-page Alteration Agreement (the "Agreement") dated December 20, 2016, between Cornelia (through its board of directors), Maxwell, and Dr. Mohajer in connection with the construction Dr. Mohajer was performing on his unit (*see* Alteration Agreement). The Agreement is signed by Dr. Mohajer twice (*id.*). There are no dates adjoining his two signatures (*id.*). One signature is on page seven (7) of the Agreement while the other signature is on page nine (9) of the "rider" portion addended to the Agreement (*id.*). There are no signatures from

Maxwell or Cornelia in any part of the Agreement as submitted to this Court (*id.*). Cornelia and Maxwell's names appear throughout the entire Agreement (*id*). The contract is dated December 20, 2016, which is memorialized on the first page of the Agreement (*id.*).

The Agreement is addressed to Cornelia's board and names Maxwell as an agent of Cornelia (Alteration Agreement at 7). It consists of representations the signer agrees to make to Cornelia. It contains a section on indemnification which states:

> §F.2 (c)
>
> We [the unit owner] hereby agree to indemnify and hold harmless the Indemnitiees for any damages suffered to person or property as a result of the Work performed, whether or not caused by negligence, and to reimburse the Indemnitiees for any expenses (including, without limitation, attorney's fees and disbursements incurred as a result of the Work (Agreement at 3).

Dr. Mohajer disputes that he entered into a valid contract with Cornelia and Maxwell per the Alteration Agreement. Dr. Mohajer alleges no valid contract exists for two reasons: 1) it is not signed by Cornelia or Maxwell and 2) no date adjoins either of Dr. Mohajer's signatures. It is undisputed that since the initial settlement of the case, Maxwell and Cornelia have sent numerous tender requests to Dr. Mohajer for indemnification per the Alteration Agreement (*see* Exhibits J, K, L, and M).

Analysis

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant's showing such that a trial of the action is required

(*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

In determining "whether the parties entered into a contractual agreement, it is necessary to look to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (see *Mencher v Weiss, supra; Homan v Earle*, 53 NY 267, 272). In doing so, "disproportionate emphasis is not to be put on any single act, phrase, or other expression, but, instead, on the totality of all of these, given the attendant circumstances, the situation of the parties, and the objectives they were striving to attain" (*Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.*, 41 NY2d 397, 399-400 [1977]).

Even though the Statute of Frauds jurisprudence is not applicable here, it is worth noting the Statute of Frauds can be satisfied when an agreement was signed by the party to be charged (*Kaplan v Lippman*, 75 NY2d 320, 325 [1990]). Further, "[t]here is no requirement that an agreement be signed so long as there is other proof that the parties actually agreed on it" (*Crawford v Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 35 N.Y.2d 291, 299 [1974] [holding that lack of signatures does not preclude a finding of a valid arbitration agreement]); *see* Flores v Lower E. Side Serv. Ctr., 4 NY3d 363 [2005] (holding indemnification agreement may be valid even if it is not signed by the party to be charged); *see Brown Bros. Elec. Contrs., Inc. v Beam Constr. Corp.*, 41 NY2d 397 [1977] [an unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound]); *see also Matter of Municipal Consultants & Publs. v Town of Ramapo,* 47 N.Y.2d 144, 390 N.E.2d 1143, 417 N.Y.S.2d 218 [1979] [publishing contract was enforceable even though it was never signed by a representative of the town]).

In evaluating contractual indemnification clauses, courts look to the specific language of

the contract (*George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2009]). A 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 circumstance" (*Santos v Power Auth. of State of NY*, 85 AD3d 718, 722 [2d Dept 2011]). "A party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Hirsch v. Blake Hous., LLC*, 65 AD3d 570, 571 [2nd Dept. 2009]).

In this case the issue is whether a valid contract exists between Cornelia, with Maxell as its agent, and Dr. Mohajer. There is no question of material fact that the Agreement is a valid contract with an enforceable indemnification provision.

First, Dr. Mohajer alleges that no valid contract exists because neither Maxwell nor Cornelia signed the Agreement. The Agreement is a customary form contract used by Cornelia whenever a unit owner performs construction. The goal is to enable to signer to make certain promises before he or she performs construction in their condominium unit. It was sent to Dr. Mohajer on December 20, 2016. The Agreement calls for two signatures by a unit owner, one on page seven (7) of the Agreement and another on page nine (9) of the "rider" portion of the Agreement.

The Agreement is signed by the party to be charged, Dr. Mohajer. He signed it in both places where a signature is required. This on its own satisfies the Statute of Frauds. In signing, Dr. Mohajer agreed to the representations listed on the Agreement concerning the construction process. Thereafter, Dr. Mohajer began the renovation/construction of his unit in Cornelia Street.

Dr. Mohajer began the construction on his unit after signing the Agreement. Cornelia did not object or interfere with the construction on its premises. This sequence of events reinforces the conclusion that the Agreement constituted a valid, binding contract.

Second, Mohajer alleges the contract is invalid because his signatures are not dated. However, the initial page of the Agreement bears the date December 20, 2016. Further, courts have found valid contracts bearing even fewer substantiating factors (*see Robins v Noveck*, 63 NY2d 833 [1984] [holding a document that was undated and handwritten was enforceable since it contained the essential terms and conditions to satisfy the Statute of Frauds]). As a result, this argument also fails.

Finally, Dr. Mohajer claims that Cornelia and Maxwell are liable parties and therefore the indemnification provision cannot be enforced. The only evidence Dr. Mohajer presents supporting this argument is Cornelia and Maxwell's decision to contribute towards a settlement. There is no legal support for such a proposition. To the contrary, evidence of settlement is inadmissible on the issue of liability of a defendant (*see* CPLR 4547).

Conclusion

Cornelia Street Condominium and Maxwell-Kates, Inc.'s cross-motion for summary judgment (seq. 005) for indemnification in the amount of $28,264.05 is hereby granted.

This constitutes the decision and order of the court.

March 21, 2023
DATE

DEVIN P. COHEN
Justice of the Supreme Court