Comfort Living Furniture Inc. v McDonald Design Furniture Inc.
2023 NY Slip Op 31691(U)
May 18, 2023
Supreme Court, Kings County
Docket Number: Index No. 504641/2018
Judge: Leon Ruchelsman

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : CIVIL TERM: COMMERCIAL 8

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COMFORT LIVING FURNITURE INC.,

Plaintiff, Decision and order

- against - Index No. 504641/2018

MCDONALD DESIGN FURNITURE INC. and 1571 HOLDING LLC,

Defendant, May 18, 2023

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1571 HOLDING LLC,

Third-Party Plaintiff,

-against-

RYBAK DEVELOPMENT AND CONSTRUCTION CORP.,

Third-Party Defendant,

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PRESENT: HON. LEON RUCHELSMAN Motion Seq. #6 & #7

The defendant/third party plaintiff has moved seeking to vacate the note of issue and for an extension of time in which to move for summary judgement. The third party defendant has moved seeking to dismiss the complaint on the grounds it fails to state any cause of action, essentially seeking summary judgement the complaint alleges no causes of action. The motions have been opposed respectively and papers have been submitted by the parties and arguments held. After reviewing all the arguments this court now makes the following determination.

Background

As recorded in prior orders in July 2001, Matthew Ferrigno and Victoria Ferrigno leased their property located at 1571 McDonald Avenue, Brooklyn, NY to the defendant McDonald Design

Furniture for a duration of 100 years. Located on this property was a building ("the Store") and an adjacent large open area ("Lot"). In February 2010, Matthew Ferrigno and Victoria Ferrigno changed the name of the owner of the land to Ferrigno Family Trust and renewed their lease with the defendant.

In September 2011, defendant subleased the first floor of the store to Comfort Living Furniture for a duration of 10 years. Subsequently, in October 2012, defendant subleased the basement of the store to the plaintiff for a duration of 9 years. Prior to the defendant commencing excavating the lot, the defendant created a holding company called 1571 Holding LLC. In January 2018, a permit to excavate property was issued to 1571 Holding LLC. After excavation work commenced, plaintiff claims that due to negligence on behalf of the construction crew, the store experienced severe flooding which destroyed a significant portion of plaintiff's inventory, forced the plaintiff to close the store for a period of time, and forced the plaintiff to expend a significant amount of time and money in order to clean up the flooded area and to replace the destroyed merchandise. A lawsuit was commenced seeking damages for those losses sustained. The defendant 1571 Holding LLC commenced an action against third party defendant Rybak Development and Construction Corp., alleging that defendant was responsible for the damages sustained. As noted, Rybak has moved seeking to dismiss the

third party complaint and the defendant/third party plaintiff has moved seeking to vacate the note of issue and for additional time to seek summary judgement.

Conclusions of Law

Where the material facts at issue in a case are in dispute summary judgment cannot be granted (Zuckerman v. City of New York, 49 NYS2d 557, 427 NYS2d 595 [1980]). Generally, it is for the jury, the trier of fact to determine the legal cause of any injury, however, where only one conclusion may be drawn from the facts then the question of legal cause may be decided by the trial court as a matter of law (Marino v. Jamison, 189 AD3d 1021, 136 NYS3d 324 [2d Dept., 2021).

The third party complaint filed by 1571 Holding LLC contains three causes of action, common law and contractual indemnification and contribution all directed at Rybak for the work Rybak conducted at the premises. Rybak has moved seeking to dismiss the third party complaint on the grounds it never entered into a contract with 1571 Holding LLC. Rather, the contract was entered into with non-party 1571 Development LLC and therefore cannot owe any indemnification or contribution to the third party plaintiff.

The Construction Management Agreement states it is entered into between Rybak and 1571 Development LLC. However, the

signature page lists third party plaintiff 1571 Holding LLC and it is executed by Semyon Vays as a member (see, Construction Management Agreement [NYSCEF Doc. No. 131]). Further, the rider to the agreement is executed by Mark Zeldin on behalf of 1571 Development LLC. Thus, there is confusion as to the correct party that executed the contract together with Rybak. In addition, the deposition testimony of Semyon Vays does not resolve this confusion. Mr. Vays testified that in October 2018 a sublease agreement was entered into whereby 1571 Holding subleased the premises to 1571 Development (see, Deposition of Semyon Vays, page 198 [NYSCEF Doc. No. 135]). It is difficult to conclude that 1571 Development LLC, as a subtenant entered into contracts for construction work as an owner. Moreover, that sublease specifically states that "all of the terms and conditions of the Ground Lease shall be binding on the parties to this Sublease, their successors and assigns, as if they were the parties thereto; that is, those binding the landlord in the Ground Lease shall bind Sub-Landlord herein, and those binding the tenant in the Ground Lease shall bind Sub-Tenant herein" (see, Paragraph 4 of the sublease [NYSCEF Doc. No. 130]). Consequently, the sub-tenant 1571 Development maintains all the rights and obligations of 1571 Holding LLC the tenant of the ground lease. Thus, there are questions whether they may be treated as the same entity. Further confusion exists because the

sublease is executed on behalf of 1571 Development LLC by Sergey Rybak. Mr. Rybak is listed as the president of the third party defendant Rybak Development and Construction Corp., (see, Construction Management Agreement [NYSCEF Doc, No. 131]). Thus, the same individual is an authorized signatory of both entities that executed the construction agreement. There are thus certainly questions of fact concerning the relationship between 1571 Development and 1571 Holding (and Rybak Development) sufficient to deny any summary determination regarding the correct entity that entered into the agreement with Rybak.

Turning to the specific claims, common law or implied indemnification permits a party who has been required to pay to recover from the wrongdoer (Schottland v. Brown Harris Stevens Brooklyn LLC, 137 AD3d 997, 27 NYS3d 634 [2d Dept., 2016]). It is well settled that to establish a claim for indemnification the plaintiff must prove not only that it was not guilty of any negligence but must also prove that Rybak was guilty of some negligence that contributed to the causation of the accident (Perri v. Gilbert Johnson Enterprises Ltd., 14 AD3d 681, 790 NYS2d 25 [2d Dept., 2005]). There are surely questions whether any negligence was committed and consequently the motion seeking to dismiss the two indemnification claims are denied.

Further, it is well settled that contribution is available where two or more tortfeasors combine to cause an injury and is

determined in accordance with the relative culpability of each such person (Godoy v. Abamaster of Miami Inc., 302 AD2d 57, 754 NYS2d 301 [2d Dept., 2003]). CPLR §1401 states that where two or more persons (or entities) are subject to liability for the same "personal injury, injury to property or wrongful death" they may claim contribution among them (id). Thus, contribution is only available where tort liability is sought in the underlying case (Board of Education of Hudson City School District v. Sargent, Webster, Crenshaw & Folley, 71 NY2d 21, 523 NYS2d 475 [1987]). Thus, contribution is unavailable where damages sought are exclusively for breach of contract (Ruby Land Development Ltd. v. Toussie, 4 AD3d 518, 771 NYS2d 701 [2d Dept., 2004]). An examination of the plaintiff's third party complaint demonstrates the claims are based upon negligence in addition to breach of contract and consequently th motion seeking to dismiss the contribution cause of action is denied.

Thus, the motion seeking summary judgement dismissing the third party complaint is denied.

Concerning the motion seeking to strike the note of issue, it is true that a timely motion to vacate a Note of Issue should be granted where the movant has demonstrated that the case is not ready for trial (Mosley v. Flavius, 13 AD3d 346, 785 NYS2d 742 [2d Dept., 2004], see, also, 22 NYCRR §202.21(e)). The defendant/third party plaintiff asserts that discovery has not

been completed. The third party defendant does not really dispute that contention but asserts the defendant/third party plaintiff waived any requests for any further discovery. There is no merit to the argument the requests for any further discovery was waived. Further, the note of issue contains a jury demand that is improper. Therefore, the motion seeking to vacate the note of issue is granted. The time in which to file any summary judgement motion is extended to sixty days following the completion of all discovery.

So ordered.

ENTER:

DATED: May 18, 2023
Brooklyn N.Y.

Hon. Leon Ruchelsman
JSC