

Sharapov v Caroline Apts. Preserv., L.P.

2023 NY Slip Op 34833(U)

June 2, 2023

Supreme Court, Kings County

Docket Number: Index No. 518073/2017

Judge: Carl J. Landicino

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At an IAS Term, Part 81 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 2nd day of June 2023.

PRESENT:

CARL J. LANDICINO, J.S.C.

-----X
ALISHER SHARAPOV and NARGIZA KOBILOVA,

Index No.: 518073/2017

Plaintiffs,

-against-

DECISION AND ORDER

CAROLINE APARTMENTS PRESERVATION, L.P.,
CAROLINE HOLDINGS, LLC, PREFERRED CONCEPTS,
LLC, THE RELATED COMPANIES, L.P. and SHERMAN
PARKING INC.,

Motion Sequence #4

Defendants.

-----X
CAROLINE HOLDINGS, LLC and PREFERRED CONCEPTS,
LLC,

Third-Party Plaintiffs,

-against-

LA CASA DEL MOFONGO 207, LLC,

Third-Party Defendant.

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

Papers Numbered (NYSCEF)

Notice of Motion/Cross Motion and	
Affidavits (Affirmations) Annexed	127-143,
Opposing Affidavits (Affirmatio.....	145-148,
Reply Affidavits (Affirmations).....	150
Memoranda of Law.....	144

After a review of the papers and oral argument the Court finds as follows:

Defendant/Third-Party Plaintiff Caroline Holdings, LLC (“Caroline”) moves (motion sequence #4) for summary judgment on its third-party claims for: 1) contractual and common law indemnification, including attorneys’ fees and disbursements, and 2) breach of contract relating to failure to procure insurance, as against Third-Party Defendant, La Casa Del Mofongo 207, LLC (“La Casa”). This action

concerns Plaintiff's alleged fall from a ladder during construction work at 546 West 207th Street, New York, New York (the "Property") on November 17, 2016. Caroline contends that it entered into a lease agreement with La Casa for the Premises known as 546-558 West 207th Street, New York, New York, which apparently included the Property, on March 1, 2016 (the "Lease").

Caroline argues that the Lease contains both indemnity and insurance procurement provisions in its favor. Caroline argues that La Casa is obligated to indemnify and hold Caroline harmless. Caroline also contends that La Casa agreed to procure insurance in the policy amount of \$1 million per occurrence and excess insurance in the amount of \$5 million with additional insureds including Caroline, its managing agent, each mortgagee and the underlying lessor.

La Casa contends that Caroline is not entitled to contractual indemnification because the Plaintiff's alleged accident and resulting injuries did not occur at the Property and was not a product of La Casa's negligence or intentionally wrongful acts or omissions. La Casa relies upon a hospital record from November 18, 2016 provided by Coney Island Hospital. The record indicates that Plaintiff stated that he fell and injured his elbow while running for a train on November 17, 2016, the day of the alleged accident. In addition, La Casa argues that Caroline's breach of contract claim should be dismissed as it has failed to make a *prima facie* showing that it has incurred damages. Pursuant to a Stipulation of Settlement dated November 1, 2021, La Casa agreed to pay Plaintiff \$50,000.00 in order to settle this action. In furtherance of that settlement, Plaintiff agreed to release Caroline, the remaining Defendants, and La Casa from any claims in relation to the instant action. Apparently, Caroline had not signed the stipulation of discontinuance as of the time the motion papers were signed. As such, La Casa contends that Caroline did not incur any damages, despite the fact that La Casa did not have insurance at the time of the alleged accident. Additionally, La Casa contends that Caroline's motion is premature as La Casa has not been afforded the opportunity to conduct discovery in relation to Caroline's purported attorney's fees and disbursements.

Summary judgment is a drastic remedy that deprives a litigant of his or her day in court, and it “should only be employed when there is no doubt as to the absence of triable issues of material fact.” *Kolivas v. Kirchoff*, 14 AD3d 493, 787 N.Y.S.2d 392 [2d Dept 2005], citing *Andre v. Pomeroy*, 35 NY2d 361, 364, 362 N.Y.S.2d 1341 [1974]. The proponent for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. See *Sheppard-Mobley v. King*, 10 AD3d 70, 74, 778 N.Y.S.2d 98 [2d Dept 2004], citing *Alvarez v. Prospect Hospital*, 68 NY2d 320, 324, 508 N.Y.S.2d 923 [1986], *Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 N.Y.S.2d 316 [1985]. “In determining a motion for summary judgment, evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inference must be resolved in favor of the nonmoving party.” *Adams v. Bruno*, 124 AD3d 566, 566, 1 N.Y.S.3d 280, 281 [2d Dept 2015] citing *Valentin v. Parisio*, 119 AD3d 854, 989 N.Y.S.2d 621 [2d Dept 2014]; *Escobar v. Velez*, 116 AD3d 735, 983 N.Y.S.2d 612 [2d Dept 2014].

Once a moving party has made a *prima facie* showing of its entitlement to summary judgment, “the burden shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action” *Garnham & Han Real Estate Brokers v. Oppenheimer*, 148 AD2d 493, 538 N.Y.S.2d 837 [2d Dept 1989]. Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers. See *Demshick v. Cmty. Hous. Mgmt. Corp.*, 34 AD3d 518, 520, 824 N.Y.S.2d 166, 168 [2d Dept 2006]; see *Menzel v. Plotnick*, 202 AD2d 558, 558–559, 610 N.Y.S.2d 50 [2d Dept 1994].

Generally, “[a] party's right to contractual indemnification depends upon the specific language of the relevant contract.” *Desena v. N. Shore Hebrew Acad.*, 119 AD3d 631, 636, 989 N.Y.S.2d 505 [2d Dept 2014]. “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.” *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 548 N.E.2d 903 [1989]. What is more, “[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.”

-*Reisman v. Bay Shore Union Free Sch. Dist.*, 74 A.D.3d 772, 773, 902 N.Y.S.2d 167, 169 [2nd Dept, 2010].

Turning to the merits of Caroline's motion in relation to its claim for contractual indemnification, the Court finds that Caroline has not met its *prima facie* burden. Article 9.2 of Caroline's [landlord] Lease with La Casa [tenant] provides:

Subject to the provisions of Section 9.1.3, tenant shall indemnify and hold harmless landlord and any landlord party from and against any and all third-party claims and liabilities arising out of, or based upon, (a) either (i) any accident, injury or damage whatever occurring during the term in, at or upon the premises, (ii) the presence or operation of any tenant facilities (including those located outside the premises), or (iii) the performance of any tenant work (except, in any of the cases described in clauses (i) (ii) or (iii) above, to the extent such claims or liabilities arise out of, or are based upon, any negligent or intentionally wrongful act or omission of landlord or employees, agents or contractors), or (b) any negligent or intentionally wrongful act or omission of tenant or any tenant party; together with all reasonable costs and expenses incurred in or in connection with such claims and liabilities, or any action or proceeding brought thereon or in respect thereof, including reasonable attorneys' fees and expenses.

Caroline asserts its entitlement to contractual indemnification pursuant to the Lease by showing that the Plaintiff claims the alleged accident occurred at the Property. The term of the Lease is 20 years commencing on or about March 1, 2016. As such, Plaintiff's allegation that the accident occurred on the 17th of November 2016, places the occurrence within the Lease term. Caroline, as the moving party, must establish that it was free from negligence. Caroline has not done so, therefore Caroline has not established a *prima facie* showing of an entitlement to contractual indemnification. There is no assertion in the moving papers that Caroline is free from negligence. Moreover, Caroline's contention that La Casa's indemnity obligation extends to Caroline's negligence is belied by the language of the contract which explicitly excepts the Landlord's fault. *See Spence v. Merrick Cent., LLC*, 188 AD3d 940, 132 N.Y.S.3d 326 [2d Dept 2020]. The Lease provision controls. Accordingly, the application for contractual indemnification is denied. *See Arriola v. City of New York*, 128 AD3d 747, 748, 9 N.Y.S.3d 344 [2d Dept 2015]; *Chuqui v. Amna, LLC*, 203 AD3d 1018, 1019, 166 N.Y.S.3d 192 [2d Dept 2022].

As to its Caroline's claim for common law indemnification from La Casa, Caroline fails to meet its *prima facie* burden.

The key element of a cause of action for common-law indemnification is not a duty running from the indemnitor to the injured party, but rather, is a separate duty owed the indemnitee by the indemnitor (*see Raquet v. Braun*, 90 N.Y.2d 177, 183, 659 N.Y.S.2d 237, 681 N.E.2d 404; *Lovino, Inc. v. Lavalley Law Offs.*, 96 A.D.3d 909, 946 N.Y.S.2d 875). “ ‘Since the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine’ ” (*Henderson v. Waldbaums*, 149 A.D.2d 461, 462, 539 N.Y.S.2d 795, quoting *Trustees of Columbia Univ. v. Mitchell/Giurgola Assoc.*, 109 A.D.2d 449, 453, 492 N.Y.S.2d 371).

-*See Metadijia Atanasoki v. Braha Industries, Inc.*, 124 AD3d 705, 706, 2 N.Y.S.3d 524, 2015 N.Y. Slip Op. 00483 [2d Dept 2015].

As indicated, Caroline does not proffer any evidence indicating that it did not cause or contribute to the Plaintiff's alleged injury and it has not shown that it is vicariously liable, as the ground lessee, for the actions of La Casa. Additionally, Caroline's attorney's affirmation and memorandum of law in support of its instant motion fails to argue why a claim for common law indemnification should be granted. As a result, Caroline's motion for summary judgment on its claim for common law indemnification is denied.¹

Turning to the merits of Caroline's motion in relation to its claim for breach of contract, the Court finds that Caroline has met its *prima facie* burden. “A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with

¹ Caroline contends that La Casa's failure to respond to Caroline's statement of material facts pursuant to 22 NYCRR § 202.8-g(c) should cause the Court to grant its motion. This rule, of recent modification, requires a statement of material facts to be included at the Court's discretion. Part 81 Rules presently do not require the statement to be provided. Moreover, many of the purported facts constitute legal conclusions. Additionally, the Court will excuse this failure under CPLR 2001. *See Disarli v TEFAF NY, LLC*, 2022 NY Slip Op 30029 [U] [Sup Ct, Kings County 2022]. Moreover, La Casa's opposing papers adequately serve as a response to the Defendant's statement of material facts.

(see *McGill v. Polytechnic Univ.*, 235 A.D.2d 400, 651 N.Y.S.2d 992; *DiMuro v. Town of Babylon*, 210 A.D.2d 373, 620 N.Y.S.2d 114).” *Rodriguez v. Savoy Boro Park Associates Ltd. Partnership*, 304 AD2d 738, 739, 759 N.Y.S.2d 107, 108, 2003 N.Y. Slip Op. 13314 [2d Dept 2003]. Caroline supports its motion for its breach of contract claiming by offering a copy of the Lease, which sets forth La Casa’s obligations thereunder to obtain insurance (Article 9). Additionally, and in response to Caroline’s Notice to Admit, La Casa conceded that it was required to procure insurance and did not obtain it by the time of the alleged accident. As such, Caroline has satisfied its burden of showing that a provision requiring procurement of insurance existed and La Casa breached its obligation to procure same. La Casa has failed to raise an issue of fact as to its liability for that breach.

Based upon the foregoing, it is hereby ORDERED as follows:

Caroline’s motion for summary judgment (motion sequence #4) is granted solely to the extent that La Casa has breached its obligation to procure insurance coverage pursuant to the terms of the Lease, and the damages caused by that breach, if any, shall be determined at trial. All other relief sought is denied.

The foregoing constitutes the Decision and Order of the Court.

ENTER:


Carl J. Landicino, J.S.C.

FILED 

JUN 05 2023

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