

Lazo v Triangle Plaza 11, LLC

2023 NY Slip Op 34842(U)

August 21, 2023

Supreme Court, Kings County

Docket Number: Index No. 502205/2018

Judge: Lisa S. Ottley

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS – PART 24

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ANGEL LAZO,

Plaintiff,

-against-

Decision & Order

Index No. 502205/2018

Motion Seq. 9

TRIANGLE PLAZA II, LLC., and TRIANGLE PLAZA
II MANAGER, INC.,

Defendants.

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TRIANGLE PLAZA II LLC., and TRIANGLE PLAZA.,

Third-party Plaintiff,

-against-

Third-Party Action

LTCI LTD., LARGO THEATRE CONSTRUCTION,
LTD., MARCO DESIGNS, LLC.,

Third-party Defendants.

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HON. LISA S. OTTLEY, J.S.C.

Recitation as required by CPLR 2219(a), of the papers considered in the review of this Notice of Motion for Summary Judgment and to Amend, submitted on May 22, 2023.

Papers	Numbered
Notice of Motion and Affirmation.....	1&2 [Exh. A-M]
Affirmation in Opposition.....	4&5 [Exh. A-D]
Reply Affirmation.....	7
Memoranda of Law.....	3; 6 and 8

Plaintiff, Angel Lazo commenced this action against defendant, Triangle Plaza II LLC and Triangle Plaza II Manager, Inc., for injuries he alleges were sustained when he fell from a ladder or scaffold at the premises known as 2855 Ulmer Street, Whitestone, New York. Plaintiff asserts claims pursuant to Labor Law 200, 240 and 241(6), as well as common law negligence against the defendants. Triangle Plaza II, LLC and Triangle Plaza II Manager, Inc., thereafter, commenced a third-party action against LTCI, LTD, Largo Theater Construction, Ltd., and Marco Designs, LLC., seeking common-law contribution, as well as common law and

contractual indemnification.

Third-party defendants, LTCl, Ltd and Largo Theater Construction, Ltd., move pursuant to CPLR 3212(b) for an order granting summary judgment dismissing the third-party claims by defendant/third-party plaintiffs, for contractual indemnification and breach of contract for failure to procure insurance as against, LTCl, Ltd and Largo Theatre Construction; and pursuant to CPLR 3025(b), granting third-party defendants leave to amend their Answer to correct the terminology by which they have appeared. Defendant, Triangle and Triangle Plaza oppose the third-party defendants' motion for summary judgment on the issue of indemnification but do not oppose the relief sought pursuant to CPLR 3025(b).

After argument on the motion, the court finds as follows:

First, the court granted that portion of the third-party plaintiff's motion pursuant to CPLR 3025(b) since there was no opposition. The order was granted on December 6, 2022. In addition, the court also notes that the only issues to be addressed pursuant to the motion for summary judgment are contractual indemnification and breach of contract for failure to procure insurance. The discovery has since been completed, therefore, arguments raised as to summary judgment being premature are now moot.

Discussion

In the case at bar, the third-party defendant argues that it does not have any contractual obligation to indemnify or procure insurance on behalf of the Triangle defendants since they are not named as indemnities under the contract between NAI Entertainment and Largo Theatre Construction, Inc., a/k/a LTCl, nor identified as Owner. LTCl points to the three documents that its contract with NAI Entertainment consist of: (1) AIA Document A101-2017 Standard Form of Agreement between Owner and Contractor; (2) AIA Document A201-2017, General Conditions of the Contract for Construction; and (3) AIA Document A101-2017, Insurance and Bonds, as amended.

The indemnity provision which is set forth in Section 3.18.1 of the second document, referred to above as (2) AIA Document A201-2017 states the following:

To the fullest extent permitted by law, the Contractor [Largo a/k/a LTIC] shall defend, indemnify, and hold harmless the Owner, NAI Entertainment Holdings LLC (if the named Owner in the Agreement, National Amusements, Inc., consultants, and agents and employees of any of them (Individually and "Indemnatee" and collectively, the "Indemnitees") from and against liabilities, fines, claims, suits, demands, damages, losses, and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work caused in whole or in part by

the negligent or other acts or omission of [LTCI], a Subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable regardless of whether or not such claim, damage, loss or expense is caused in part by an Indemnitee. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist as to a party or person described in this Section 3.18.

In addition, §A.3.1.3 entitled, Additional Insured Obligations, reads as follows:

To the fullest extent permitted by law, the Contractor shall cause the Commercial general liability and excess or umbrella coverage to include (1) The Owner, NAI Entertainment Holdings, LLC (if the named Owner in the Agreement is a separate entity) and National Amusements, Inc., as Additional insureds for claims caused in whole or in part by the Contractor's Negligent acts or omissions during the Contractor's operations; and (2) the Owner, NAI Entertainment Holdings, LLC (if the named Owner in the Agreement is a separate entity) and National Amusements, Inc., as additional Insureds for claims caused in whole or in part by the Contractor's negligent Acts or omissions for which loss occurs during completed operations. The Additional insured covered shall be primary and non-contributory to any of the Owner's general liability insurance policies and shall apply to both ongoing and completed operations. To extent commercially available, the additional insured coverage shall be no less than that provided by Insurance Services Office, Inc. (ISO) forms CG 20 10 ED 10 01 or CG 20 37 ED 10 01.

LTCI argues that the General Conditions and Standard Form of Agreement define NAI Entertainment Holdings LLC ("NAI Entertainment") as the "Owner," and not Triangle Plaza, and therefore, since NAI is defined as the "Owner," it would be contrary to the terms of the contract to interpret it as creating "a contractual relationship of any kind" between Largo a/k/a LTCI and any entity other than NAI Entertainment.

In opposition to LTCI's arguments, Triangle argues that an issue of fact exists as to which entity is in fact the "Owner" since both Triangle and NAI Entertainment Holdings have been referred to as the "Owner." In addition, Triangle argues that the construction contract and lease support Triangle's argument that it is entitled to contractual indemnification and should have been named as an additional insured on LTCI and/or Largo's insurance policy because the intention was that the "Owner" was to be named as an additional insured and to be provided with indemnity. Triangle further argues that the fact that the lease obligates NAI to defend and indemnify the Owner, who is Triangle, to defend and indemnify Triangle is a valid claim against NAI which is an additional insured under the Phoenix/Travelers policies issued to Largo, and as such, Triangle's claim for defense and indemnification as against NAI

should be covered by Phoenix/Travelers in that coverage under the policy is afforded for claims, not just when a party is named in a lawsuit.

In the case at bar, the written agreement entered into on or about December 20, 2017, is between LTCI/Largo and NAI and annexed as Exhibit “1 and 2 “to the moving papers and at Exhibit “L.” The plaintiff was employed by Marco Design, LLC, who was a subcontractor hired by LTCI. Largo was the general contractor.

“A party’s right to contractual indemnification depends upon the specific language of the relevant contract;” and “the 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 circumstances.” See, *McNamara v. Gusmar Enterprises, LLC*, 204 A.D.3d 779, 167 N.Y.S.3d 123 (2nd Dept., 2022). In the absence of a legal duty to indemnify, a contract for indemnification should be strictly construed to avoid imputing any duties which the parties did not intend to assume. *McNamara v. Gusmar Enterprises, LLC, supra*. In opposition to LTCI/Largo’s motion for summary judgment, Triangle argues that the contract/agreement defines the term “Owner” to be the Owner or the Owner’s authorized representative (Document A201-2017, General Conditions of the Contract for Construction), and that the contract states that indemnity and additional insured is provided to include “the Owner NAI Entertainment Holdings, LLC (if the named Owner in the Agreement is a separate entity) and National Amusements, Inc., and therefore, Triangle, who is the Owner, is to be named as an additional insured and to be provided with indemnity. LTCI/Largo argues that General Conditions, Standard Form Agreement and Exhibit A each define NAI Entertainment Holdings LLC as the Owner and not Triangle Plaza.

In the case at bar, the arguments as to who in fact is the “Owner,” raises a triable issue of fact as to a party’s right to contractual indemnification and the obligation to procure insurance.

Accordingly, the motion for summary judgment is hereby denied in its entirety. As previously stated, the part of the motion to amend was granted on December 6, 2022.

This constitutes the order of this Court.

Dated: Brooklyn, New York
August 21, 2023



HON. LISA S. OTTLEY, J.S.C.

HON. LISA S. OTTLEY

2023 SEP 18 AM 10:30
KINGS COUNTY CLERK
FILED