

Bertuccio v Blowout Enters., LLC

2023 NY Slip Op 35026(U)

November 27, 2023

Supreme Court, Suffolk County

Docket Number: Index No. 602887/2020

Judge: Vincent J. Martorana

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

Short Form Order

INDEX NO: 602887/2020

Supreme Court of the State of New York
IAS Part 23 - County of Suffolk

PRESENT: Hon. Vincent J. Martorana

RALPH BERTUCCIO,

Plaintiff,

- against -

BLOWOUT ENTERPRISES, LLC, PAUL D.
DELVECCHIO, JR. A/K/A DJ PAULY D/B/A BLOWOUT
ENTERTAINMENT, MORE THAN MUSIC &
ENTERTAINMENT, LTD., MARLANE, INC. D/B/A
FUSION PRODUCTIONS, and PRESIDENT CATERERS
OF PLAINVIEW LTD.,

Defendants.

BLOWOUT ENTERPRISES, LLC and PAUL D.
DELVECCHIO, JR.,

Third-Party Plaintiffs,

- against -

STACY WOF SY and TEMPLE CHAVERIM,

Third-Party Defendants,

TEMPLE CHAVERIM,

Second Third-Party Plaintiff,

- against -

PRESIDENT CATERERS OF PLAINVIEW LTD.,

Second Third-Party Defendant.

MORE THAN MUSIC & ENTERTAINMENT, LTD. and
MARLANE, INC. D/B/A FUSION PRODUCTIONS,

Third Third-Party Plaintiffs,

- against -

STACY WOF SY and TEMPLE CHAVERIM,

Third-Party Defendants.

ORIG. RETURN DATE: 07/27/23

ADJOURNED DATE: 08/03/23

MOTION SEQ. NO.: 002 - MG

PLTF'S/PET'S ATTY:

Siben & Siben LLP
90 East Main Street
Bay Shore, New York 11706

DEFT'S/RESP'S ATTY:

Tyson & Mendes, LLP
Attorneys for Defendants/Third Third-Party
Plaintiffs More than Music and Marlane
420 Lexington Avenue, Suite 2800
New York, New York 10017

Hoffman, Roth & Matlin LLP
Attorneys for Defendants/Third-Party
Plaintiffs Blowout and DelVecchio
505 Eighth Avenue, Suite 1704
New York, New York 10018

Wade Clark Mulcahy LLP
Attorneys for Third-Party Defendant Wofsy
180 Maiden Lane
New York, New York 10038

Kerley, Walsh, Matera & Cinquemani, P.C.
Attorneys for Second Third-Party Defendant
and Third Third-Party Defendant Temple
Chaverim and President Caterers
2174 Jackson Avenue
Seaford, New York 11783

Ralph Bertuccio v Blowout Enterprises, et al.
Hon. Vincent J. Martorana

Index No.: 602887/2020
Page 2

Upon efiled documents numbered 105-113, 118-125; it is

ORDERED that the within motion by Temple Chaverim seeking dismissal of the third-third party claims alleged against it by Third Third-Party Plaintiffs, More Than Music & Entertainment, Ltd and Marlane, Inc d/b/a Fusion Productions, pursuant to CPLR§3211(a)(7), is granted.

The within action seeks damages for personal injuries allegedly sustained by Plaintiff on October 11, 2019, while he was working for an event planner at a bat mitzvah being held at Temple Chaverim of Plainview. Plaintiff asserts that the negligence of defendants caused a speaker that was part of the sound system set up for the event, to fall and hit him, resulting in injury. Three third-party actions have been filed, as captioned above. One of the Third Third-Party Defendants, Temple Chaverim, now seeks dismissal of the claims against it, pursuant to CPLR§3211(a)(7).

The third, third-party complaint asserts a single cause of action as against Temple Chaverim, that being one for common law indemnification. Third Third-Party Plaintiffs, More Than Music & Entertainment, Ltd and Marlane, Inc d/b/a Fusion Productions, aver that they have not committed any act that would subject them to liability. They further claim that the injury here at issue occurred at premises owned and operated by Temple Chaverim, that, “[u]pon information and belief the purported injury was caused, in whole or in part, by the negligence of Temple Chaverim or employees or agents,” and “Temple Chaverim is therefore liable to indemnify MTM and Blowout for any liability incurred in the Underlying Lawsuit.”

“The principle of common-law, or implied, indemnification permits one who has been compelled to pay for the wrong of another to recover from the wrongdoer the damages it paid to the injured party” (*Curreri v Heritage Prop. Inv. Trust, Inc.*, 48 AD3d 505, 507, 852 NYS.2d 278 [2d Dept 2008]; see *D’Ambrosio v City of New York*, 55 NY2d 454, 460, 450 NYS2d 149 [1982]). “[T]he key element of a common-law cause of action for 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”” (*Raquet v. Braun*, 90 NY2d 177, 183, 659 NYS.d 237 [1997](quoting *Mas v. Two Bridges Assocs.*, 75 NY2d 680, 690, 555 NYS2d 669 [1990]; see also *Ponce v. Miao Ling Liu*, 123 AD3d 786, 787, 998 NYS2d 450, 451 [2d Dept. 2014]). A party asserting a claim for indemnification must allege in its pleading the existence of a duty owed to it by the party from whom indemnification is sought (*Ponce v. Miao Ling Liu*, *supra* at 787 [2d Dept. 2014]; *Razdolskaya v. Lyubarsky*, 160 AD3d 994, 76 NYS3d 95 [2d Dept. 2018]; *Kingston Check Cashing Corp. v. Nussbaum Yates Berg Klein & Wolpow, LLP*, 218 AD3d 760, 194 NYS3d 495 [2d Dept. 2023]). “The duty that forms the basis for the liability arises from the principle that “every one is responsible for the consequences of his own negligence, and if another person has been compelled * * * to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him” (*Raquet v. Braun*, *supra* at 183 quoting *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 NY 461 [1892]).

“The party seeking indemnification ‘must have delegated exclusive responsibility for the duties giving rise to the loss to the party from whom indemnification is sought,’ and must not have committed actual wrongdoing itself” (*Tiffany at Westbury Condominium v Marelli Dev. Corp.*, 40 AD3d 1073, 1077, 840 NYS2d 74 [2d Dept 2007], quoting *17 Vista Fee Assoc. v Teachers Ins. & Annuity Assn. of Am.*, 259 AD2d 75, 80, 693 NYS2d 554 [1st Dept 1997]).

Ralph Bertuccio v Blowout Enterprises, et al.
Hon. Vincent J. Martorana

Index No.: 602887/2020
Page 3

“Common-law indemnification is warranted where a defendant's role in causing the plaintiff's injury is solely passive, and thus its liability is purely vicarious” (*Balladares v Southgate Owners Corp.*, 40 AD3d 667, 671, 835 NYS2d 693 [2d Dept 2007]; see *Dreyfus v MPCC Corp.*, 124 AD3d 830, 830, 3 NYS3d 365 [2d Dept. 2015]; *Board of Managers of 125 N. 10th Condo. v. 125 North 10, LLC*, 150 AD3d 1063, 1064, 55 NYS3d 374, 376 [2d Dept. 2017]). “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” (*Desena v North Shore Hebrew Academy*, 119 AD3d 631, 635, 989 NYS2d 505 [2d Dept 2014] [internal quotation marks omitted]; see *Board of Mgrs. of Olive Park Condominium v Maspeth Props., LLC*, 170 AD3d at 647, 95 NYS3d 344 [2d Dept 2019]; *Hamed v. City of New York*, 186 AD3d 677, 127 NYS3d 330 [2d Dept. 2020]).

In considering a party's motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a) (7), the pleadings must be given a liberal construction, the allegations must be accepted as true and the stated claims must be given every possible favorable inference in determining whether or not they fit into any cognizable legal theory (*Chanko v. Am. Broad. Companies Inc.*, 27 NY3d 46, 29 NYS3d 879 [2016]; *Goshen v. Mut. Life Ins. Co. of New York*, 98 NY2d 314, 746 NYS2d 858 [2002]; *Leon v Martinez*, 84 NY2d 83, 614 NYS2d 972 [1994]). Bare legal conclusions are not presumed to be true and do not receive the benefit of such favorable inference (*Grant v. DiFeo*, 165 AD3d 897, 86 NYS3d 575 [2d Dept. 2018]; *TMCC, Inc. v Jennifer Convertibles, Inc.*, 176 AD3d 1135, 111 NYS3d 102 [2d Dept. 2019]). Affidavits submitted to remedy any defects in the complaint may be considered (*Chanko v. Am. Broad. Companies Inc.*, *supra*; *Leon v Martinez*, *supra*); however, if evidentiary material is considered, “the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he has stated one’” (*Sokol v. Leader*, 74 AD3d 1180, 1180–82, 904 NYS2d 153 [2d Dept. 2010] (*quoting Guggenheimer v Ginzburg*, 43 NY2d at 275); *Porat v. Rybina*, 177 AD3d 632, 111 NYS3d 625 [2d Dept. 2019]). In considering evidentiary material in support of a motion to dismiss on this basis, whether or not plaintiff might ultimately survive a summary judgment motion or prevail on the merits is not part of the analysis (*Doe v. Ascend Charter Sch.*, 181 AD3d 648, 121 NYS3d 285 [2d Dept. 2020]; *Neuman v. Echevarria*, 171 AD3d 767, 97 NYS3d 203 [2d Dept. 2019]; *Sokol v. Leader*, *supra*).

Here, Temple Chaverim argues that Third Third-Party Plaintiffs, More Than Music & Entertainment, Ltd and Marlane, Inc d/b/a Fusion Productions, were responsible for setting up the sound equipment here at issue and that a party who is sued for its own wrongdoing cannot assert a claim for common law indemnification. Temple Chaverim further notes that there are no vicarious liability claims by Plaintiff as Against Third-Third Party Plaintiffs.

In opposition, Third Third- Party Plaintiffs argue that the Temple had a duty to Plaintiff to provide adequate security and to keep Plaintiff safe. They also argue that Plaintiff is asserting a vicarious liability claim against them because language in the complaint states that Defendants/ Third-Third Party Plaintiffs were reckless and negligent in setting up the sound equipment, in causing or allowing Plaintiff to become injured and in failing to provide Plaintiff a safe place to work. Third Third-Party Plaintiffs further assert that, even if the court finds that the claims for indemnification fail, that they have claims for contribution and the court should permit them to amend their complaint to add claims for contribution.

Ralph Bertuccio v Blowout Enterprises, et al.
Hon. Vincent J. Martorana

Index No.: 602887/2020
Page 4

The allegation against Temple Chaverim by Third Third-Party Plaintiffs is that they are entitled to indemnification because Plaintiff's injury was caused by the negligence of Temple Chaverim. However, as set forth above, a party asserting a claim for indemnification must allege in its pleading the existence of a duty owed to it by the party from whom indemnification is sought, not that a duty was owed to another (*Ponce v. Miao Ling Liu, supra*). No such duty to Third Third-Party Plaintiffs is alleged. Furthermore, it is alleged by Plaintiff that his injury was caused by the negligence of More Than Music & Entertainment, Ltd and Marlane, Inc d/b/a Fusion Productions. Common law indemnification only applies where the role of the party seeking indemnification is solely passive or vicarious (*Board of Managers of 125 N. 10th Condo. v. 125 North 10, LLC, supra*).

Based upon the foregoing, Third Third-Party Plaintiffs have failed to state a cause of action as against Temple Chaverim. Accordingly, Temple Chaverim's motion seeking dismissal of the claims against it by More Than Music & Entertainment, Ltd and Marlane, Inc. d/b/a Fusion Productions, is granted pursuant to CPLR§3211(a)(7). Third-Third Party Plaintiffs' request for leave to amend their complaint to add a claim for contribution is denied, as it is not properly noticed as a motion and fails to comply with the requirements of CPLR§3025.

Dated: November 27, 2023
Riverhead, New York



VINCENT J. MARTORANA, J.S.C.

CHECK ONE: FINAL DISPOSITION NON-FINAL DISPOSITION