Diaz v Morell Bldrs. Inc.
2024 NY Slip Op 32549(U)
July 10, 2024
Supreme Court, Kings County
Docket Number: Index No. 520379/2023
Judge: Devin P. Cohen
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Supreme Court of the State of New York
County of Kings

Part LL1M

Index Number 520379/2023
Seqs. 003

DECISION/ORDER

EDILBERTO DIAZ,

Plaintiff,

against

MORELL BUILDERS INC. AND BEDSTUY PRIME 26 LLC,

Defendants.

BEDSTUY PRIME 26 LLC,

Third-Party Plaintiff,

against

L&T 17 CORP.,

Third-Party Defendant.

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	Var.
Other	

Upon the foregoing papers, third-party defendant L&T 17 Corp. (L&T)'s motion to dismiss (Seq. 003) is decided as follows:

Introduction

L&T seeks an order dismissing Bedstuy Prime 26 LLC (Bedstuy's) third-party complaint against it pursuant to CPLR § 3211 (a) (1) and (7). L&T contends that the action is barred by New York Workers' Compensation Law §11 because L&T employed plaintiff, which is undisputed. It is also undisputed that plaintiff has not alleged that he sustained a grave injury as defined by Worker's Compensation Law § 11.

Procedural Posture

Plaintiff commenced this action on July 14, 2023 by filing a summons and complaint. Defendant Bedstuy filed an answer on August 15, 2023, and Bedstuy thereafter filed a third-party complaint against L&T on December 14, 2023. L&T did not interpose an answer or otherwise make a motion before the expiration of its time to do so under CPLR 320 and is therefore in default. L&T filed the instant motion on March 21, 2024.

Analysis

To dismiss a claim pursuant to CPLR 3211 (a) (1), the movant must produce documents that resolve "all factual issues as a matter of law, and conclusively [dispose] of the plaintiff's claim" (*534 K, LLC v Flagstar Bank, FSB*, 187 AD3d 971 [2d Dept 2020]; *see also Braun Soller v Dahan*, 173 A.D.3d 803, 805 [2d Dept 2019]). Documentary evidence for the purpose of this statute includes "out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable" (*McDonald v O'Connor*, 189 AD3d 1208, 1210 [2d Dept 2020]). Affidavits are neither anticipated nor intended by the CPLR as substitutes for testimony, and rarely warrant dismissal of a plaintiff's claims (*VIT Acupuncture, P.C. v State Farm Auto. Ins. Co.*, 958 NYS2d 64, 2010 NY Slip Op 51560[U] [Civ Ct, Kings County 2010]; *Sokol v Leader*, 74 AD3d 1180, 1182 [2d Dept 2010]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346 [2d Dept 2003]).

As an initial matter, a motion to dismiss pursuant to CPLR 3211 (a) (1) must be made prior to or in a responsive pleading; failure to do so waives a party's right to bring such a motion (CPLR 3211 [e]). Because L&T's time to answer has expired, it has waived its right to move under CPLR 3211 (a) (1).

The timing under CPLR 3211 (e) for motions made pursuant to CPLR 3211 (a) (7) is more permissive, and therefore L&T's motion as to that section will be considered on the merits. "Under CPLR 3211 (a) (7), the applicable test is whether the pleading states a cause of action, not whether the proponent of the pleading, in fact, has a meritorious cause of action . . . The court must determine whether, accepting as true the factual averments of the complaint and according the plaintiff the benefits of all favorable inferences which may be drawn therefrom, the plaintiff can succeed upon any reasonable view of the facts stated" (*Board of Educ. Of City School Dist. Of City of New Rochelle v County of Westchester,* 282 AD2d 561 [2d Dept 2001]).

Under Workers' Compensation Law §11, employers who provide workers' compensation coverage to their employees are immune from tort liability. Once the employer's liability for providing workers' compensation benefits is established, that employee cannot sue the employer for damages sustained from the injury except where indemnification is "based upon a provision in a written contract entered into prior to the accident" (NY WCL § 11; *see NY Hosp. Med. Ctr. of Queens v Microtech Contr. Corp.*, 22 NY3d 501 [2014]). Plaintiff's complaint states that he was employed by L&T (complaint at ¶ 12). There is no allegation of a grave injury in the record and Bedstuy does not oppose dismissal of the common-law indemnification and contribution causes of action based on the Workers' Compensation bar. Therefore, L&T's motion is granted as to these claims.

L&T argues that Bedstuy's claim for contractual indemnification should be dismissed because L&T never entered a contract wherein it agreed to indemnify Bedstuy. In opposition, Bedstuy provides both a sub-contractor agreement and an excerpted indemnification provision in favor of Bedstuy and against L&T. Both parties' signatures are memorialized on the same page of the indemnification provision. Although the sub-contractor agreement is dated August 12,

2022, the signatures on the excerpted indemnification provision are dated January 4, 2024. Bedstuy's manager, Sasson Mahgerefteh, provides an affidavit stating that the indemnification provision was included in the original contract from 2022, but that when he could not find the original, he requested that L&T re-sign the provision in 2024 (Mahgerefteh aff. at ¶ 3). In its reply papers, L&T argues that the date on the indemnification agreement renders it insufficient to support a claim for contractual indemnification because the agreement did not pre-date the accident (aff. in reply at ¶ 6).

Bedstuy has demonstrated that L&T agreed to indemnify Bedstuy; L&T does not argue that the indemnification provision was fraudulent or obtained illicitly. The only question is whether L&T's contractual obligation to indemnify was in effect at the time of plaintiff's accident. The face of the indemnification agreement would indicate that the agreement post-dated the accident, and that Bedstuy's claim is precluded by Workers' Compensation Law § 11. However, Bedstuy produced an affidavit from an individual claiming first-hand knowledge that the indemnification provision was in effect at the time of plaintiff's accident and that the agreement provided to the court was a new memorialization of an old agreement. In its papers, L&T neither explicitly denies Mr. Mahgerefteh's contention that the original 2022 contract included the indemnification provision nor provides an affidavit from a knowledgeable party that contradicts Bedstuy's contentions. The mere existence of an agreement that post-dates an accident does not preclude the existence of an agreement that pre-dated the accident. Resolving the disagreement between L&T and Bedstuy about when L&T's contractual indemnification obligation was agreed to requires a factual determination, including a credibility assessment, that is beyond the scope of a CPLR 3211 motion to dismiss. L&T's motion is therefore denied as to this claim.

Additionally, third-party defendant L&T is currently in default. L&T did not request leave to file a late responsive pleading in its motion. The instant motion was filed after the time to file a responsive pleading had expired under CPLR 320. While a motion to dismiss can be made at any time, filing such a motion does not cure the default nor entitle the movant to interpose an answer if the motion is denied (*McGee v Dunn*, 75 AD3d 624 [2d Dept 2010]). L&T therefore remains in default.

Conclusion

Accordingly, third-party defendant L&T's motion (Seq. 003) is granted as to the common-law indemnification and contribution claims against it; the motion is denied as to the contractual indemnification claim.

This constitutes the decision of the court.

July 10, 2024
DATE

DEVIN P. COHEN
Justice of the Supreme Court