SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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221 W. 17TH STREET, LLC,

Plaintiff,

- v -

OTL ENTERPRISES, LLC, SECURITY USA, INC., and CONTACT PLUS ELECTRICAL CORP.,

Defendants.

INDEX NO. 654525/2017

MOTION DATE N/A

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

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HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 180, 181, 185, 186, 187, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232

were read on this motion to/for JUDGMENT - SUMMARY.

In motion sequence number 004, defendant Security USA, Inc. moves, pursuant to CPLR 3212, dismissing all claims and cross claims against it.

Plaintiff 221 W. 17th Street, LLC (221) brought this action to recover for damages caused by a fire on October 20, 2015 that occurred at 221 West 17th Street, New York, New York (Premises). 221 asserts causes of action for breach of contract, negligence, and gross negligence against defendants OTL Enterprises, LLC (OTL), plaintiff's construction manager at the Premises, Contact Plus Electrical Corp. (Contact), OTL's electrical subcontractor, and Security USA, Inc. (Security), the fire guard hired by OTL. (*See generally* NYSCEF Doc. No. [NYSCEF] 2, Complaint.) In their answers, Security and Contact both cross-claim for common law indemnification and contribution. (NYSCEF 6, Security's Answer; NYSCEF 12, Contact's Answer.) In its answer, OTL

cross-claims for common law indemnification, contribution, contractual indemnification, and breach of contract to procure insurance. (NYSCEF 8, OTL's Answer.)

On the record, the court granted Security's motion for summary judgment to the extent of dismissing: (1) 221's breach of contract claim in Action 1; and (2) all cross-claims, across all five actions, for contractual indemnification and failure to procure insurance. (NYSCEF 273, 05/31/2023 tr at 47:16-24.) However, the court denied the motion for summary judgment with respect to 221's gross negligence claim and all the negligence claims, finding numerous issues of fact existed, including whether, under the totality of circumstances, Security was grossly negligent and whether the *Espinal* exceptions applied. (*Id.* at 48:3-49:14; *see Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136, 140 [2002] [setting forth the "three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care—and thus be potentially liable in tort—to third persons"]). The court reserved decision on remaining cross-claims against Security for common law indemnification and contribution. (NYSCEF 273, 05/31/2023 tr at 49:15-50:21).

Analysis

Security contends that 221, OTL and Contact's cross-claims for common law indemnification and contribution must be dismissed. Security points to its Service Agreement with OTL, which provides that Security will be liable only to the extent that the loss or damage is the result of its gross negligence. Security argues that, because its sole duty flows from the Service Agreement, in the absence of any evidence of its gross negligence, all cross-claims should be dismissed. Additionally, Security argues

that, to the extent that OTL has insurance coverage for its loss, all of OTL's cross-claims are barred by the waiver of subrogation clause in the Service Agreement.

221 responds that whether Security was grossly negligent or breached a duty of care to 221 constitute issues of fact, requiring denial of Security's motion for summary judgment. Contact also argues that the motion for summary judgment should be denied, because triable issues of fact exist as to Security's negligence. OTL acknowledges that, pursuant to the Service Agreement's exculpation clause, "[Security] will not be liable to OTL unless there is a finding of gross negligence." (NYSCEF 195, OTL's brief at 6). However, it argues, there is sufficient evidence to support a finding that Security was grossly negligent and that its breach an independent duty of care contributed to plaintiffs' damages. As for the waiver of subrogation clause, OTL contends that, because there is no clear expression of the parties' intent, it is not valid. Specifically, OTL argues that the clause: (1) fails to specify what claims are being waived; and (2) is at odds with the exculpation provision, because it does not require OTL to obtain insurance to cover losses stemming from Security's gross negligence.

Pursuant to CPLR 3212 (b), "[t]o obtain summary judgment, the movant '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.'" (*Madeline D'Anthony Enters., Inc. v Sokolowsky*, 101 AD3d 606, 607 [1st Dept 2012], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) Once the movant satisfies its burden, the opposing party must "produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action." (*Id.*, quoting *Alvarez*, 68 NY2d at 324.) "Failure to make such prima facie

showing requires a denial of the motion, regardless of the sufficiency of the opposing papers." (*Alvarez*, 68 NY2d at 324 [internal citation omitted].)

To prevail on a cross-claim for contribution, "a [defendant] is required to show that the [codefendant] owed it a duty of reasonable care independent of its contractual obligations, . . . or that a duty was owed to the plaintiff[] as injured part[y] and that a breach of that duty contributed to the alleged injuries." (*Santoro v Poughkeepsie Crossings, LLC*, 180 AD3d 12, 17 [2d Dept 2019] [internal quotations marks and citations omitted].)

"[T]he predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, [therefore,] it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine." (*Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985] [internal citation omitted].)

"Subrogation is the equitable doctrine that allows an insurer to stand in the shoes of its insured and seek indemnification from third parties whose wrongdoing has caused a loss for which the insurer is bound to reimburse." (*Duane Reade v Reva Holding Corp.*, 30 AD3d 229, 232 [1st Dept 2006] [internal quotation marks and citations omitted].) "[T]he parties to a commercial transaction are free to allocate the risk of liability to third parties through insurance and deployment of a waiver of subrogation clause." (*Gap, Inc. v Red Apple Cos.*, 282 AD2d 119, 124 [1st Dept 2001] [internal citations omitted].) Importantly, "[a] waiver of subrogation clause implies that the parties are insured. If the parties are not insured, there is no need to waive subrogation claims, which are brought by the parties' insurers." (*Duane Reade*, 30 AD3d at 232-233

[internal quotation marks and citations omitted].) Accordingly, "a waiver of subrogation clause in an agreement does not bar one party from suing the other to recover for a loss to the extent that such loss is not required by the parties' agreement to be covered—and, in fact, is not covered—by insurance." (*Id.* at 233.)

Here, the court has already determined that the allegations against Security are sufficient to state a claim for negligence and that "whether [Security] had a duty to the other plaintiffs" (i.e. whether the *Espinal* exceptions apply) raises "issues of fact for the jury." (NYSCEF 273, 05/31/2023 tr at 48:25-49:14.) Therefore, Security's motion for summary judgment with respect to Contact and 221's cross-claims for common law indemnification and contribution must be denied. (*See Vitucci v Durst Pyramid LLC*, 205 AD3d 441, 444 [1st Dept 2022] [explaining that, because the defendant "could be held liable to plaintiffs, it (could not) be heard to argue that it was free of negligence as a matter of law; thus, it (was) not entitled to dismissal of (codefendants') common-law indemnification and contribution cross claims"].)

Security's argument, that it cannot be held liable in the absence of gross negligence, is meritless as to Contact and 221. The Service Agreement was between OTL and Security only. (S*ee* NYSCEF 165, Service Agreement.) While an exculpatory clause may limit a party's "*liability*" to instances of gross negligence only, that party, nonetheless, has a "*duty* . . . to avoid ordinary negligence." (*Sommer v Federal Signal Corp.* (79 NY2d 540, 558 [1992].) Thus, "[u]pon breach of that duty, fairness requires that [Security] contribute to the judgment in proportion to its culpability. Indeed, it would be patently unfair to abrogate [Contact and 221's] right to contribution based on an exculpatory clause to which they were not a party." (*Id.* [internal citation omitted]).

Notably, Security makes the same argument as to plaintiffs' negligence claims, arguing that "claims against Security USA for ordinary negligence must . . . be dismissed because Security USA's liability under its Service Agreement is expressly limited to loss or damage that is the direct result of its gross negligence." (NYSCEF 176, Security's brief at 14.) Security also points out that "[n]one of the Plaintiffs in Actions # 2 – 5 dispute the fact that Security USA cannot be held liable for ordinary negligence because Security USA's liability under its Service Agreement is expressly limited to loss or damage that is the direct result of its gross negligence." (Index No. 159207/2018, NYSCEF 227, Security's reply in Action 4 at 8.) However, as with the cross-claims, Security cannot abrogate plaintiffs' right to recovery "based on an exculpatory clause to which they were not a party." (*Sommer*, 79 NY2d at 558 [internal citation omitted].) While Security cites to cases enforcing similar exculpatory clauses (*see* NYSCEF 176, Security's brief at 14-15), those cases are all between parties to the contract containing the clause. As Security cannot demonstrate, prima facie, that plaintiffs were bound by the Service Agreement's exculpation clause, Security is not entitled to summary judgment dismissing the negligence claims. (*Alvarez*, 68 NY2d at 324 [internal citation omitted].)

As for OTL, pursuant to the Service Agreement, its right to contribution and indemnification is triggered only upon a finding of Security's gross negligence. (*See Sommer*, 79 NY2d at 559-560 [finding that the right to contribution was triggered upon a finding of gross negligence because of an exculpatory clause between the parties].) However, as the court has already determined that whether Security was grossly negligent constitutes an issue of fact (*see* NYSCEF 273, 05/31/2023 tr at 48:3-16),

Security is not entitled to summary judgment dismissing OTL's cross-claims on this ground. (See *Vitucci*, 205 AD3d at 444.)

Nonetheless, to the extent that OTL's damages are covered by its insurers, Security is entitled to summary judgment dismissing OTL's cross-claims. The Service Agreement provides that, "[e]ach party hereto, on its behalf and on behalf of its insurers, waives all rights of subrogation." (NYSCEF 165, Service Agreement, ¶ 18.) "[A] written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms." (*Donohue v Cuomo*, 38 NY3d 1, 13 [2022] [internal quotation marks and citation omitted].) In addition, "courts must construe contracts in a manner which gives effect to each and every part, so as not to render any provision meaningless or without force or effect." (*Western & Southern Life Ins. Co. v U.S. Bank N.A.*, 209 AD3d 6, 13 [1st Dept 2022] [internal quotation marks and citations omitted].) Here, OTL's argument, that the waiver of subrogation clause is invalid, because "[t]here is no clear and unequivocal expression of the parties[']intent" (see NYSCEF 195, OTL's brief in opposition at 8), is unpersuasive and at odds with the rules of contract construction.

While the waiver of subrogation clause does not mention "what specific claims are being waived" (*see* NYSCEF 195, OTL's brief in opposition at 8), that is because the clause is intentionally broad, with each of the parties waiving "*all rights* of subrogation" on "*its behalf,*" as well as "on behalf of its insurers." (NYSCEF 165, Service Agreement, ¶ 18 [emphasis added].) Moreover, OTL clearly understands that paragraph 18 of the Service Agreement is a "waiver of subrogation" (*see* NYSCEF 195, OTL's brief in opposition at 8) and that such provisions "reflect the parties' allocation of the risk of

liability 'whereby liability is shifted to the insurance carriers of the parties to the agreement.'" (*Id.* at 7, quoting *Liberty Mut. Ins. Co. v Perfect Knowledge*, 299 AD2d 524, 526 [2d Dept 2002].) Here, pursuant to the broad language of the Service Agreement's waiver of subrogation clause, OTL agreed to allocate all risk of liability to its insurers.

Nor is it problematic that the Service Agreement does not require OTL to obtain insurance to cover losses stemming from Security's gross negligence. OTL's reliance on *Abacus Fed. Sav. Bank v ADT Sec. Servs, Inc.* (18 NY3d 675 [2012]) for a contrary proposition is misplaced. (*See* NYSCEF 195, OTL's brief in opposition at 7-8.) There, the court held that, while the exculpation clause in the parties' agreement limited ADT's liability to Abacus, Abacus could, nonetheless, maintain its breach of contract claim to the extent the breach was caused by ADT's gross negligence, because: (1) "the contract between Abacus and ADT did not require Abacus to obtain insurance to cover losses stemming from ADT's gross negligence"; and (2) "the contract did not contain an express waiver by Abacus to waive all rights for damages covered by insurance it may have obtained as against ADT." (*Abacus Fed. Sav. Bank*, 18 NY3d at 684.) However, this determination was based on the fact that the agreement between ADT and Abacus did not contain a waiver of subrogation clause. "Instead, their contract merely provided 'that insurance, if any, covering personal injury and property loss or damage' was Abacus' responsibility to obtain." (*Id.* at 681.) Here, on the contrary, there is a broad waiver of subrogation clause. While there is no requirement that OTL obtain any insurance, this does not render the waiver of subrogation unenforceable. It merely means that the clause "does not bar one party from suing the other to recover for a loss

to the extent that such loss is not required by the parties' agreement to be covered—and, in fact, is not covered—by insurance." (*Duane Reade*, 30 AD3d at 233.)

As OTL has insurance coverage from various insurers (*see* NYSCEF 173, OTL's response to demands at 7 [listing insurance coverage available to OTL in response to "Demand for Insurance Information"), Security is entitled to summary judgment dismissing OTL's cross-claims to the extent OTL's damages will be covered by such insurance.

Accordingly, it is hereby

ORDERED that the motion sequence 004 of defendant Security USA, Inc. is granted to the extent of dismissing the cross-claims of defendant OTL Enterprises, LLC to the extent its damages are covered by insurance and otherwise denied.

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6/29/2024
DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE