

**Acevedo v Bonanza Elecs. LLC**

2024 NY Slip Op 34698(U)

April 4, 2024

Supreme Court, Bronx County

Docket Number: Index No. 25937/2017E

Judge: Kim Adair Wilson

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This opinion is uncorrected and not selected for official publication.

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, NEW YORK: Part IA-12

-----X  
MARGARITA ACEVEDO,

Plaintiff,

-against-

BONANZA ELECTRONICS LLC and C.S. REALTY  
ASSOCIATES LLC,

Defendants.  
-----X

**DECISION AND ORDER**  
**Index No. 25937/2017E**  
**Motion Seq. #: 003**

**HON. KIM ADAIR WILSON**  
**J.S.C**

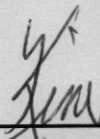
The following papers NYSCEF Doc No. (1, 5, 8, 10, 12, 14, 17, 36, 40, 42, 54 - 68, 75 - 91), read on this SUMMARY JUDGMENT MOTION, (Seq. No. 3). Noticed on 3/29/2022 and duly submitted as NYSCEF Doc. No. 54.

	NYSCEF Doc. No.
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	
Answering Affidavit and Exhibits	
Replying Affidavit and Exhibits	
Other: Stipulation	

Upon the foregoing papers,

This motion is decided in accordance with the annexed Decision and Order.

Dated: April 4, 2024

Hon.   
KIM ADAIR WILSON, J.S.C.

- 1. CHECK ONE.....
- 2. MOTION IS.....
- 3. CHECK IF APPROPRIATE.....

- CASE DISPOSED IN ITS ENTIRETY     CASE STILL ACTIVE
- GRANTED     DENIED     GRANTED IN PART     OTHER
- SETTLE ORDER     SUBMIT ORDER     SCHEDULE APPEARANCE
- FIDUCIARY APPOINTMENT     REFEREE APPOINTMENT
- NEXT APPEARANCE DATE: \_\_\_\_\_

Motion is Respectfully Referred to Justice:  
Dated: \_\_\_\_\_



SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX, NEW YORK: Part IA-12

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MARGARITA ACEVEDO,  
Plaintiff,

**-against-**

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ASSOCIATES LLC,  
Defendants.

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**Kim Adair Wilson, J.:**

**DECISION AND ORDER**  
**Index No. 25937/2017E**  
**Motion Seq. #: 003**

**HON. KIM ADAIR WILSON**  
**J.S.C**

**“NOTICE OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, C.S. REALTY ASSOCIATES LLC, AGAINST DEFENDANT, BONANZA ELECTRONICS LLC”** (NYSCEF Doc 54), dated and filed March 29, 2022, respectively, and signed by one David S. Huberman, Esq., counsel for defendant C.S. Realty Associates LLC (“C.S. Realty”), seeking an Order, “[p]ursuant to CPLR Rule 3212 granting summary judgment to Defendant, C.S. Realty Associates LLC against Defendant, Bonanza Electronics, LLC and declaring, as a matter of law, that Defendant Bonanza must indemnify Defendant C.S. Realty Associates for the costs incurred by C.S. Realty for its settlement with Plaintiff Margarita Acevedo, for its reasonable attorney’s fees and for its costs of litigating both its defense and its cross-claim for indemnity from Bonanza” is decided as set forth below.

The instant matter was commenced on June 30, 2017, by the filing of plaintiff’s Verified Complaint, seeking monetary damages for personal injuries allegedly sustained on or about March 13, 2017, when it is alleged that plaintiff “was caused to slip and fall due to a dangerous condition,” while traversing the premises known as 54 East 170<sup>th</sup> Street, Bronx, New York, allegedly owned and controlled by then-defendant Studio Audio & Camera Inc. (“Studio”), and defendant C.S. Realty. On July 24, 2017, defendant C.S. Realty filed its “VERIFIED ANSWER WITH CROSS CLAIMS” (NYSCEF Doc 5). The parties subsequently stipulated (see NYSCEF Docs 8 and 12) to substitute then-defendant Studio with defendant Bonanza Electronics LLC (“Bonanza”), Studio’s successor-in-interest. Plaintiff thereafter amended its Complaint twice (See NYSCEF Docs 10 and 31), asserting two causes of action for negligence against defendants C.S. Realty and Bonanza, and reflecting plaintiff Acevedo

contention that she “tripped and fell as opposed to slipped and fell.” On December 14, 2018, defendant Bonanza subsequently filed a Verified Answer to plaintiff’s amended Verified Complaint, again pleading a general denial of the allegations, and asserting nine affirmative defenses as well as the four previous crossclaims against co-defendant C.S. Realty. C.S. Realty also filed its Verified Answer to the Amended Complaint on January 9, 2019, asserting eleven affirmative defenses and four crossclaims against Bonanza, for breach of contract, indemnity, contribution and apportionment of liability. Bonanza filed its “REPLY TO CROSS-CLAIM” (NYSCEF Doc 42), on January 11, 2019, denying alleged crossclaims. Plaintiff has since settled her claims with both defendants, dismissing the action with prejudice, in exchange for consideration in the amount of \$25,000.00 from defendant C.S. Realty (see NYSCEF Docs 50 and 65), and in the amount of \$85,000.00 from defendant Bonanza (see NYSCEF Doc 82 at p.8). Therefore, the only remaining unresolved issues in this action are the crossclaims asserted by each co-defendant against the other.

In the instant motion, defendant C.S. Realty seeks summary judgment, pursuant to CPLR 3212, that defendant Bonanza must indemnify C.S. Realty for the costs incurred by its settlement with plaintiff, and for reasonably attorney’s fees and costs associated with the litigation. In support, C.S. Realty submits the “AFFIRMATION OF DAVID S. HUBERMAN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY DEFENDANT, C.S. REALTY ASSOCIATES LLC AGAINST DEFENDANT, BONANZA ELECTRONICS LLC” (NYSCEF Doc 55); copies of the Lease Agreements between C.S. Realty and Studio (NYSCEF Docs 57 – 59); an Assignment of Lease from Studio to Bonanza (NYSCEF Doc 60); and a letter from Zurich North America, C.S. Realty’s insurer, to Bonanza dated January 12, 2017 (NYSCEF Doc 61); a second letter from Zurich to Bonanza dated January 3, 2018 (NYSCEF Doc 64); an Release and Indemnification Agreement signed by plaintiff Acevedo (NYSCEF Doc 65); a letter from Kookmin Best Insurance Company, Ltd. (“KBIC”) to Zurich dated September 28, 2021 (NYSCEF Doc 67); a Statement Of Material Facts (NYSCEF Doc 83); and a Response to Bonanza’s Statement of Additional Material Facts (NYSCEF Doc 87).

C.S. Realty, in its Affirmation signed by David S. Huberman, Esq. (NYSCEF Doc 55), contends that, pursuant to the indemnification clauses featured in the Lease Agreements and Riders thereto, as well as in the Assignment of Lease, Bonanza is contractually obligated to

indemnify C.S. Realty for all costs, expenses and attorney's fees arising from the litigation, including the \$25,000.00 paid to plaintiff Acevedo to release C.S. Realty from all further liability arising from the underlying incident (See NYSCEF Docs 50 and 65). Counsel also refutes arguments raised in KBIC's letter to Zurich (NYSCEF Doc 67) that Bonanza has no obligation to indemnify C.S. Realty where C.S. Realty incurred liability through its own negligence, contending that KBIC fails to address the provisions set forth in Sections 44 of the Rider to Lease (See NYSCEF Doc 57 at p.9) that require the tenant, namely Bonanza, to maintain a policy of insurance on C.S. Realty's behalf. Further, counsel contends that section 53(A) of the Rider, which conditions Bonanza's indemnification of C.S. Realty on the absence of the latter's negligence, does not govern Bonanza's obligations with respect to the underlying incident, which instead falls within the ambit of section 53(D), which requires Bonanza to indemnify C.S. Realty irrespective of the apportionment of liability.

In opposition, defendant Bonanza submits its "AFFIRMATION IN OPPOSITION" (NYSCEF Doc 75); the transcript of plaintiff Acevedo's deposition dated September 6, 2019 (NYSCEF Doc 80); the transcript of Ron Cohen dated February 24, 2020 (NYSCEF Doc 81); a copy of the General Release signed by plaintiff (NYSCEF Doc 82 at p.8); and a Response to C.S. Realty's Statement of Material Facts/Statement of Additional Material Facts (NYSCEF Doc 87).

In the Affirmation (NYSCEF Doc 75), signed by Paul B. Josephs, Esq. (Hannum Feretic Prendergrast & Merlino, LLC), counsel for defendant Bonanza, counsel contends that, even if the indemnification clauses are valid and applicable, the issue cannot be decided on summary judgment until a determination is made that the indemnitee is free from negligence. Further, counsel insists, an indemnification clause that holds the indemnitee harmless even in the event of the indemnitee's negligence is unenforceable, pursuant to General Obligations Law § 5-321. Moreover, counsel insists, Roy Cohen, the principal of defendant Bonanza, is "not a sophisticated business entity who knowingly took on the contractual obligation to hold the landlord harmless for its own negligence."

In reply, C.S. Realty's counsel contends that "statutory prohibitions on the indemnification for an indemnitee's negligence such as General Obligations Law § 5-321 are

immaterial to “a commercial lease negotiated between two sophisticated parties who included a broad indemnification provision, coupled with an insurance procurement requirement.” Further, counsel argues that Bonanza offers no evidence to substantiate either Bonanza’s or Ron Cohen’s alleged unsophistication, and that mere inequality of bargaining power does not a render an agreement a contract of adhesion, particularly where the subject purchase can be made elsewhere.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100N Y2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. *Great N. Ins. Co. v. Interior Const. Corp.*, 7 N.Y.3d 412, 414 (2006); *Hooper Assocs., Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491–92 (1989). 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. *Cava Const. Co. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662 (2d Dept. 2009); also see *Brown v. Two Exch. Plaza Partners*, 76 N.Y.2d 172, 175 (1990); General Obligations Law § 5–322.1. Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an “unmistakable intent” to indemnify. *Great N. Ins. Co. v. Interior Const. Corp.*, *supra* at 417.

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movant, defendant C.S. Realty, has not met its *prima facie* burden to establish entitlement to summary judgment for indemnity

against co-defendant Bonanza. Section 53(A) of the Rider (See NYSCEF Doc 57 at p.13 – 14) stipulates that:

**“Tenant shall indemnify the Landlord and hold Landlord harmless against any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property . . . caused by a happening in connection with the demised premises (including adjacent sidewalks or driveways) . . . unless arising out of Landlord’s negligence or willful misconduct.”**

Taken as a whole, the plain language of the Rider does not evince an unmistakable intent of the parties to indemnify C.S. Realty for liabilities arising of its own negligence (see NYSCEF Doc 57 at p.13 – 14). It was therefore incumbent upon movant C.S. Realty to establish that it was free from negligence, which it has not done. Hence, although the agreement is not rendered unenforceable pursuant to General Obligations Law § 5-322.1, movant C.S. Realty has nonetheless failed to sustain its burden of demonstrating entitlement to indemnity as a matter of law. In light of the foregoing, defendant C.S. Realty’s motion for summary judgment is **DENIED**.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.


Accordingly, it is hereby,

**ORDERED that defendant C.S. Realty Associates LLC’s motion for summary judgment, declaring, as a matter of law, that Defendant Bonanza must indemnify Defendant C.S. Realty Associates for the costs incurred by C.S. Realty for its settlement with Plaintiff Margarita Acevedo, for its reasonable attorney’s fees and for its costs of litigating both its defense and its cross-claim for indemnity from Bonanza, is DENIED.**

Movant C.S. Realty Associates LLC is directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and file proof of service with the Court.

This constitutes the Decision and Order of this Court.

**Dated: April 4, 2024  
Bronx, New York**

  
\_\_\_\_\_  
**Hon. Kim Adair Wilson, J.S.C.**