

Harris v New York Univ.

2024 NY Slip Op 34910(U)

October 3, 2024

Supreme Court, Bronx County

Docket Number: Index No. 20181/2020E

Judge: Alison Y. Tuitt

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 5**

-----X
BARBARA HARRIS,

Index No. 20181/2020E

Plaintiff,

-against-

Hon. ALISON Y. TUITT

Justice Supreme Court

NEW YORK UNIVERSITY, et al.,

Defendants.

-----X
NEW YORK UNIVERSITY,

Third-Party Plaintiff,

-against-

COLLINS BUILDING SERVICES, INC.,

Third-Party Defendant.

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The following papers were read on this motion (Seq No. 3) for **SUMMARY JUDGMENT** submitted on May 8, 2024.

Notice of Motion – Affirmation and Exhibits	NYSCEF Doc. # 61 – 74
Affirmation in Opposition and Response to Statement of Material Facts	NYSCEF Doc. # 77 – 79
Affirmation in Opposition and Exhibits	NYSCEF Doc. # 83 – 89
Affirmation in Reply and Exhibit	NYSCEF Doc. # 94 – 95

Upon the foregoing papers, third-party defendant COLLINS BUILDING SERVICES (CBS) moves pursuant to CPLR 3212, for summary judgment dismissing third-party plaintiff NEW YORK UNIVERSITY (NYU)'s third-party complaint against it; dismissing Plaintiff BARBARA HARRIS (Harris)'s complaint, and for other relief. This motion is decided in accordance herewith.

Plaintiff's complaint seeks damages for personal injuries arising out of an alleged slip and fall on a raised sidewalk slab near the entrance to the premises, a dormitory owned by NYU and located at 110 East 14th Street, New York County, New York. The incident is alleged to have occurred on September 4, 2019, at which time Plaintiff was employed as a porter at the premises by CBS.

In support of the motion, CBS submits, inter alia, counsel's affirmation; the pleadings; Plaintiff's Bill of Particulars, Plaintiff's deposition transcripts; the deposition transcript of James York ("York"); the deposition transcript of Denis Lestrage; a copy of NYU's contract with CBS and related documents, the Independent

Medical Record Review and Examination Report from Andrew N. Bazos, M.D.; a letter from its insurance carrier to counsel for NYU; and copies of its liability insurance policies.

NYU opposes the motion, submitting, inter alia, counsel's affirmation, photographs from Plaintiff's deposition, an incident report, CBS's certificate of insurance, the Affidavit of James York dated September 21, 2023, and a tender letter.

CBS argues that it is entitled to summary judgment dismissing NYU's third-party complaint against it, averring that the indemnity provision in its contract with NYU (the Contract) is void and unenforceable under General Obligations Law § 5-322.1 and that it met its obligation to procure insurance under the Contract. CBS does not advance any argument for why Plaintiff's complaint should be dismissed, and accordingly, that portion of its motion is denied.

SUMMARY JUDGMENT

To be entitled to the drastic remedy of summary judgment, the moving party 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 (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

DISMISSAL OF THIRD-PARTY COMPLAINT

NYU's third-party complaint sets forth four causes of action: a) for contractual indemnification against CBS; b) for breach of contract against CBS for failure to procure insurance; c) for common law indemnification against CBS; and d) for contribution against CBS.

It is undisputed that Plaintiff was a CBS employee and that she collected workers' compensation benefits for the injuries she sustained due to the incident herein. There is also no triable issue of fact as to whether her injuries amount to a "grave injury" pursuant to Workers Compensation Law § 11. Workers Compensation Law § 11 provides:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such their person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent or total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Workers Compensation Law § 11. Both Plaintiff's Bill of Particulars and the report of Andrew N. Bazos, M.D. indicate that Plaintiff's injuries do not amount to a "grave injury" under the meaning of the statute. In the absence of such a "grave injury," Plaintiff's employer, CBS, cannot be held liable for contribution or common law indemnification to third-party NYU, and thus CBS is entitled to summary judgment as a matter of law dismissing

both NYU's cause of action for contribution and its cause of action for common law indemnification (*see Shala v Park Regis Apartment Corp.*, 192 AD3d 607 [1st Dept 2021]).

NYU and CBS are parties to a contract (the Contract) which purports to contain an indemnification provision (NYSCEF Doc. No. 56). It has not yet been determined whether NYU or CBS were negligent. Such final determinations are necessary to show entitlement to contractual indemnity as a matter of law. Therefore, it would be premature to grant CBS's motion for summary judgment dismissing NYU's claim for contractual indemnification against it (*Pimentel v DE Freight LLC*, 205 AD3d 591 [2d Dept 2022]; *Pena v Intergate Manhattan LLC*, 194 AD3d 576, 578 [1st Dept 2021]). Further, "where a triable issue of fact exists regarding the indemnitee's negligence, a conditional order of summary judgment for contractual indemnification must be denied as premature" (*Jamindar v Uniondale Union Free School Dist.*, 90 A.D.3d 612, 616 [2d Dept 2011]). Here, there is an issue of fact as to what extent, if any, each of the defendants is liable for the hazardous condition that caused plaintiffs' accident (*see Cackett v Gladden Props., LLC*, 183 A.D.3d 419, 422 [1st Dept. 2020]).

NYU's cause of action for breach of contract against CBS alleges that CBS failed to meet its contractual obligation to procure liability insurance in favor of NYU. Paragraph 12 of the Contract obligates CBS to procure and maintain liability insurance for the benefit of NYU (NYSCEF Doc. No. 56, pp. 16-17). Under the terms of the contract, CBS was required to procure general commercial liability insurance with \$5MM per occurrence limits. A party moving for summary judgment to dismiss a cause of action for breach of contract for failure to procure insurance must demonstrate compliance with the terms of the contract to meet its prima facie burden (*see DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). CBS's certificate of insurance names NYU as additional insured but shows only \$2MM per occurrence limits. Consistent with the certificate, the insurance policies proffered by CBS also show insufficient coverage limits. CBS has not satisfied its contractual obligation, and thus CBS cannot meet its prima facie burden in moving for summary judgment to dismiss NYU's cause of action for CBS's failure to procure insurance under the Contract (*see Benedetto v Hyatt Corp.*, 203 AD3d 505 [1st Dept 2022]).

Accordingly, it is hereby

ORDERED that CBS's motion (Mot. Seq. 3) for summary judgment is **GRANTED IN PART**, granting CBS summary judgment dismissing NYU's causes of action for common law indemnification and contribution in its third-party complaint against CBS and **DENIED** in all other respects.

This constitutes the Decision and Order of this Court.

Dated: 10/3/2024

Hon. 
ALISON Y. TUITT, J.S.C.

1. CHECK ONE..... CASE DISPOSED IN ITS ENTIRETY CASE STILL ACTIVE

2. MOTION..... GRANTED DENIED GRANTED IN PART OTHER

3. CHECK IF APPROPRIATE..... SETTLE ORDER SUBMIT ORDER SCHEDULE APPEARANCE