

Liberty Ins. Corp. v National Grid USA Serv. Co., Inc.
2026 NY Slip Op 31309(U)
March 30, 2026
Supreme Court, New York County
Docket Number: Index No. 653465/2024
Judge: Kathleen Waterman-Marshall
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHLEEN WATERMAN-MARSHALL PART 31

Justice

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LIBERTY INSURANCE CORPORATION, AS SUBROGEE OF PRIME POWER RENTAL, LLC, EMPLOYERS INSURANCE COMPANY OF WAUSAU, AS SUBROGEE OF PRIME POWER RENTAL, LLC

Plaintiff,

- v -

NATIONAL GRID USA SERVICE COMPANY, INC.,

Defendant.

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INDEX NO. 653465/2024

MOTION DATE 09/16/2024

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 25, 26

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion by National Grid USA Service Company, Inc. ("National Grid") to dismiss the complaint is granted.

Background

This insurance subrogation action arises from a wrongful death lawsuit in Massachusetts (the "Underlying Action") brought against Prime Power Rental LLC ("Prime Power"). Pursuant to a Master Equipment Rental Agreement (the "Agreement"), Prime Power provided certain electrical power generating equipment to National Grid. The Agreement provided, in relevant parts:

9. Liability Insurance. For the period that Rentee [National Grid] rents the Equipment, Rentee shall keep the equipment insured against all risks of loss or damage from every cause whatsoever for not less than the replacement value of the Equipment. Rentee shall also carry public liability insurance covering both personal injury and property damage caused by the Equipment and shall name Rentor [Prime Power] and its parent and affiliate companies as additional insured and a loss payee.

10. Indemnification.

(a). To the extent permitted by law, Rentee shall hold harmless, indemnify and defend Rentor and their officers, directors, employees, agents and representatives (collectively, the "Rentor Indemnified Parties") from and against any and all liabilities, penalties, losses, costs, damages, claims, expenses, reasonable

attorneys' fees, reasonable expenses of litigations, suits, judgments, liens and encumbrances (collectively the "Claims") arising out of or in any way connected with this Agreement, whenever made or incurred, including any and all liability imposed by law, and/or contract, and/or custom upon the Rentor Indemnified Parties, **provided** and only to the extent, that such Claims are the result, directly or indirectly, of Rentor's acts or omissions in connection with this Agreement. The Rentor Indemnified Parties shall have the right to demand that Rentee undertake to defend any and all suits and to investigate, and defend any and all claims whether justified or not, **provided** that such Claims shall be against the Rentor Indemnified Parties. Rentor agrees to provide prompt notification of any suit or claim, to cooperate with Rentee to defend such suit or claim, and to provide Rentee with prompt access to Rentor documents and information relevant to such suit or claim.

(b) To the extent permitted by law, Rentor shall hold harmless, indemnify and defend the Agent and Rentee and its parent, subsidiaries, and affiliate companies, and each of their officers, directors, employees, agents and representatives (collectively, the "Rentee Indemnified Parties") from and against any and all liabilities, penalties, losses costs, damages, claims, expenses, reasonable attorneys' fees, reasonable expenses of litigations, suits, judgments, liens and encumbrances (collectively, the "Claims") arising out of or in any way connected with this Agreement, whenever made or incurred, including any and all liability imposed by law, and/or contract, and/or custom upon the Rentee Indemnified Parties, **provided**, and only to the extent, that such Claims are the result, directly or indirectly, of Rentee's acts or omissions in connection with this Agreement, The Rentee Indemnified Parties shall have the right to demand that Rentor undertake to defend any and all suits and to investigate, and defend any and all claims whether justified or not, **provided** that such Claims shall be against the Rentee Indemnified Parties. Rentee agrees to provide prompt notification of any suit or claim, to cooperate with Rentor to defend such suit or claim, and to provide Rentor with prompt access to Rentee documents and information relevant to such suit or claim.

[...]

24. Governing Law. This Agreement, schedules and attachments, and all rights and obligations of the Parties hereunder shall be governed by, and construed and enforced in accordance with the domestic laws of the State of New York without giving effect to any choice or conflict of law provision or rule (whether of the State of New York or any other jurisdiction) that would cause the application

of the laws of any jurisdiction other than the State of New York. The Parties hereby agree to submit to the jurisdiction of the State and Federal Courts located in the State of New York for any action in connection with this Agreement.

(NYSCEF Doc. No. 6 [emphasis in original]).

As relevant here, the Underlying Action alleged that while Matthew Rourke (“Mr. Rourke”) was working for National Grid on an electrical transformer in Massachusetts, he was killed when a generator supplied by Prime Power caused uncontrolled electrical charges and fire (NYSCEF Doc. No. 7). The Underlying Action alleged, *inter alia*, that Prime Power was responsible to train and supervise generator operators, that Prime Power was negligent in those duties, and that its negligence wrongfully caused the death of Mr. Rourke. The underlying action further alleged, *inter alia*, that Prime Power failed to limit excessive overtime of its employees, its employee was asleep instead of monitoring the generator, Prime Power trained, encouraged, and allowed its employees to disobey safety rules and regulations to benefit productivity, and this gross negligence caused Mr. Rourke’s death. Prime Power settled the Underlying Action shortly after it was filed, and before Prime Power submitted an answer.

Notably, the Underlying Action named Prime Power as the sole defendant; no other party was impleaded nor was a third-party action filed. Plaintiffs, as the alleged insurers of Prime Power, claim to have issued the settlement proceeds and to have borne the costs associated with the defense in the Underlying Action.

In this action, Plaintiffs assert claims for contractual indemnification pursuant to the equipment rental agreement and unfair dealing in violation of Massachusetts General Law Chapter 93A. National Grid moves to dismiss this action in its entirety, arguing that the contractual indemnification relied on by Plaintiffs relates to liability caused by National Grid’s actions in the use of Prime Power’s generator, not Prime Power’s own negligence. National Grid further argues that Plaintiff’s may not maintain claims under Massachusetts law, as the rental agreement contains a choice of law provision applying New York substantive law.

Discussion

On a motion to dismiss, the complaint should be liberally construed, the facts presumed to be true, and the pleading accorded the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]). “Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law” (*id.* at 88 citing *Heaney v Purdy*, 29 NY2d 157 [1971]). “When evidentiary material is considered, the criterion is whether the [plaintiff] has a cause of action, not whether [they] have stated one” (*Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). On a motion to dismiss under CPLR 3211(a)(7) for failure to state a claim, the motion must be denied if, from the four corners of the pleadings, “factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001] [internal quotation omitted]). A complaint should not be dismissed so long as, “when the plaintiff’s allegations are given the benefit of every possible inference, a cause of action exists,” and a plaintiff may cure potential deficiencies in its pleading through affidavits and other evidence (*R.H. Sanbar Projects v Gruzen Partnership*, 148 AD2d 316, 318 [1st Dept 1989]).

However, bare legal conclusions and factual allegations which are inherently incredible or contradicted by documentary evidence are not presumed to be true (*Mark Hampton, Inc. v Bergreen*, 173 AD2d 220 [1st Dept 1991]).

I. Indemnification

General Obligation Law (GOL) § 5-322.1 provides that a party may not be indemnified for its own negligence (*see e.g. Sullivan v New York Athletic Club of City of New York*, 162 AD3d 950 [2d Dept 2018]).

The Underlying Action alleged negligence only against Prime Power. No allegations were made respecting National Grid. As National Grid was not a defendant in the underlying action, there could be no finding of liability as against it. Thus, at the time Prime Power settled the underlying action, the only party that could have been found liable was Prime Power, the sole defendant.¹ Accordingly, by seeking indemnification from National Grid in an action in which only Prime Power was alleged to have been negligent, Prime Power seeks indemnification for its own negligence, which is impermissible, and the claim is dismissed on that basis (GOL § 5-322.1; *Sullivan*, 162 AD3d 950).

Furthermore, the language of the indemnification provision in the Agreement runs afoul of GOL § 5-322.1. Paragraph 10(a) of the Agreement provides that National Grid will indemnify Prime Power “**provided**, and only to the extent” that liability arose from Prime Power’s acts or omissions (emphasis in original). It appears that the parties combine both “hold harmless” and “indemnification” provisions into a single paragraph for each party (paragraph 10[a] for National Grid and paragraph 10[b] for Prime Power), which has the effect of requiring National Grid to indemnify Prime Power for Prime Power’s negligence and Prime Power to indemnify National Grid for National Grid’s negligence. The inclusion of “to the extent permitted by law” in each paragraph does not serve to save the indemnification, because both paragraphs are entirely premised upon indemnification of each party’s own negligence. Accordingly, the indemnification claim is dismissed on that basis (GOL § 5-322.1).

Finally, assuming that Prime Power was not seeking indemnification for its own negligence, the complaint does not allege conduct on behalf of Prime Power which would trigger National Grid’s obligation to indemnify Prime Power under the Agreement. The complaint in this action alleges that Prime Power’s liability in the Underlying Action was the result of National Grid’s acts or omissions. However, paragraph 10(a) of the Agreement provides that Prime Power is entitled to indemnification from National Grid only for Prime Power’s acts or omissions. Having failed to allege any act or omission by Prime Power, paragraph 10(a) is not triggered. Thus, Prime Power’s claim for contractual indemnification must be dismissed as not triggered by the plain language of the contract.

II. Massachusetts General Law Chapter 93A §§ 2 & 11

The Rental Agreement provides that New York law applies to “all rights and obligations of the Parties”. Consequently, plaintiffs’ second cause of action for a violation of Massachusetts’

¹ Contrary to Prime Power’s assertion, there is no evidence on this motion that it denied the allegations in the Underlying Action, as it was settled prior to Prime Power filing an answer.

consumer fraud statute (Massachusetts General Law Chapter 93A §§ 2 & 11) must fail because Massachusetts law does not apply. “When parties include a choice-of-law provision in a contract, they intend application of only that state’s substantive law” (*Royal Park Invs. SA/NV v Stanley*, 165 AD3d 460, 461 [1st Dept 2018] quoting *Ministers & Missionaries Benefit Bd. v Snow*, 26 NY3d 466, 474 [2015]). Having chosen to have their contract governed by New York substantive law, plaintiffs cannot seek to apply Massachusetts’ substantive law.

III. Leave to Amend Pleading

Plaintiffs’ request in their opposition papers for leave to amend their complaint is denied. CPLR 2215 requires that such relief be brought by cross-motion. In the absence of a proper cross-motion, the Court, in its discretion, declines to consider the improper request (*Fried v Jacob Holding, Inc.*, 110 AD3d 56, 64-65 [2d Dept 2013] [“a party in compliance with CPLR 2215 is entitled to have its cross motion considered; a party not in compliance with the statute must hope that the court opts, in the exercise of its discretion, to entertain the request”])

Furthermore, assuming *arguendo* that the relief was brought by cross-motion, or that a cross-motion was not required, the request for leave to amend the complaint is nevertheless defective because it fails to provide the proposed amended complaint. A motion to amend the pleading “shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading” (CPLR 3025)

Accordingly, it is

ORDERED that the motion to dismiss is granted and the matter is disposed.

3/30/2026

DATE

KATHLEEN WATERMAN-MARSHALL, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE