

Weber v Baccarat, Inc.
2012 NY Slip Op 30687(U)
March 16, 2012
Supreme Court, New York County
Docket Number: 120164/2002
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT

PART 19

Index Number : 120164/2002

WEBER, ARTHUR

vs
BACCARAT

Sequence Number : 014

MODIFY ORDER/JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with the
accompanying Decision.

Settle order

RECEIVED
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NYS SUPREME COURT - CIVIL

Dated: 3/16/12

SALIANN SCARPULLA
S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 19

-----X
Arthur Weber and Margaret Weber,

Plaintiffs,

-against-

Baccarat, Inc., Baccarat Real Estate, Inc., 625
Madison Avenue Associates, IDI Construction
Company, Inc., Related Management Corp. and
King Freeze Mechanical Corp.,

Defendants.

-----X
King Freeze Mechanical Corp.,

Third-Party Plaintiff,

-against-

Cool Wind Ventilation Corp.,

Third-Party Defendant.

-----X
King Freeze Mechanical Corp.,

Second Third-Party Plaintiff,

-against-

York Ladder, Inc., Werner Ladder, Inc. and Werner Co.,

Second Third-Party Defendants.

-----X

Index No.: 120164/2002
Submission Date: 11/30/11

DECISION

Baccarat, Inc. and Baccarat Real Estate, Inc.,

Third Third-Party Plaintiffs,

-against-

York Ladder Inc., Werner Ladder, Inc. and Werner Co.,

Third Third-Party Defendants.

-----X

For Plaintiffs:
Sheindlin & Sullivan, LLP
350 Broadway, 10th Floor
New York, NY 10013

For Defendants Baccarat, Inc.:
Leahey & Johnson, P.C.
120 Wall Street, Suite 2220
New York, NY 10005

For Defendant IDI Construction Corp:
L'Abbate, Balkan, Colvita & Contini, L.L.P.
1001 Franklin Avenue, 3rd Floor
Garden City, NY 11530

Papers considered in review of this cross motion to renew:

- Notice of Motion 1
- Aff in Support 2
- Aff in Opp 3
- Aff in Opp 4
- Reply Aff 5

HON. SALIANN SCARPULLA, J.:

Baccarat, Inc. (“Baccarat”) moves, pursuant to CPLR 2221, for renewal of the portion of the Court’s July 25, 2008 order (Justice E. Lehner) (the “July 2008 Order”) which severed the action against IDI Construction Company, Inc. (“IDI”). Baccarat premises its motion on the February 17, 2011 order of Hon. Sean Lane, United States Bankruptcy Court, Southern District of New York (the “Bankruptcy Court Order”) in the action entitled “*In Re IDI Construction Company, Inc.*,” case number 17881/04 (the

“Bankruptcy Action”). Baccarat seeks, upon renewal, to rejoin IDI as a party defendant, to be permitted to pursue its claims against IDI to the extent of IDI’s insurance coverage, and for summary judgment on its cross claims against IDI for contractual and common-law indemnity to the extent of IDI’s insurance coverage.

Parties and Procedural Background

The underlying facts have been set forth in greater detail in the Court’s orders dated January 18, 2011 (the “January 2011 Order”) and October 13, 2011 (the “October 2011 Order”) and, therefore, will not be repeated at length here.

On December 23, 2000, plaintiff Arthur Weber (“Weber”) was injured in a fall from an A-frame ladder while installing a heating, ventilation and air conditioning (“HVAC”) system in a ceiling in a building located at 625 Madison Avenue, New York, New York (the “building”). Baccarat occupied the basement, ground and second floors (the “premises”) of the building, and it entered into a contract (the “contract”) with IDI as construction manager for renovation (the “project”). IDI entered into a subcontract with King Freeze Mechanical Corp. (“King Freeze”) for HVAC work on the project.

In 2004, IDI commenced the Bankruptcy Action and, in July 2008, the Court (Justice Lehner) granted plaintiff summary judgment on liability on his Labor Law § 240 (1) claim against Baccarat and 625 Madison Avenue Associates (“625 Madison”), denied summary judgment against King Freeze and severed the action against IDI, due to the pendency of the Bankruptcy Action. In 2010, the Appellate Division, First Department

affirmed the grant of summary judgment against Baccarat and 625 Madison, affirmed the severance of the action against IDI, due to the pendency of the Bankruptcy Action and modified the order to grant plaintiff summary judgment on liability on his Labor Law § 240 (1) claim against King Freeze, holding that King Freeze was a statutory agent of IDI. *Weber v Baccarat*, 70 A.D.3d 487 (1st Dep't 2010).

In January 2011, I denied Baccarat, 625 Madison and Related Management, L.P. ("Related") summary judgment on contractual and common-law indemnity against King Freeze, because there was no determination of negligence and the liability finding was statutory.

On February 17, 2011, the Bankruptcy Court lifted the stay to permit Baccarat to prosecute this action to the extent of insurance coverage only. The Bankruptcy Court further held that there was no prohibition on a party suing a debtor for the limited purpose of recovering against a debtor's insurance carrier.

Renewal

CPLR 2221 (e) provides that a motion for leave to renew "shall be based upon new facts not offered on the prior motion that would change the prior determination . . . [and] reasonable justification for the failure to present such facts."

The Bankruptcy Court Order, which permitted Baccarat to proceed, was issued three years after the July 2008 Order and, hence, is a new fact that could not have been previously presented.

IDI argues opposed Baccarat's motion, arguing that it is seeking to renew a motion made by a different party.¹ IDI further argues that if it Baccarat is allowed to bring IDI back into the action, IDI that should have the opportunity to complete discovery, retain experts, strike the note of issue stricken and refile its motion for summary judgment. However, it has not identified any specific discovery needed, aside from retaining expert witnesses, which it may do pursuant to CPLR 3101 (d). Baccarat has stated that it is "willing to provide access to the entire non-privileged file to [IDI's] counsel for copying of any document not in [IDI's] files, at IDI's cost."

In light of the extensive discovery already completed in this action, and the fact that the accident occurred more than eleven years ago, the Court declines to strike this case from the calendar. I will, however, order Baccarat to provide IDI's counsel access to Baccarat's entire non-privileged file, for copying, at IDI's expense, of any documents not already within IDI's files, within 30 days after service of an order settled upon this decision.

IDI also asserts that only the claims by Baccarat should be reinstated against it. However, the Bankruptcy Court Order held that there was no prohibition on a party

¹ Baccarat is, in fact, seeking to renew plaintiff's motion dated December 20, 2007, pertaining to the portion which resulted in the order severing IDI from this action. Plaintiffs, in an attorney affirmation styled "in opposition" state that they do not oppose Baccarat's motion, but rather they oppose the relief requested by IDI, specifically striking the note of issue.

“suing the Debtor only for the purpose of recovering against the Debtor’s insurance carrier.”

The new fact of the Bankruptcy Court Order warrants granting renewal and, upon renewal, permitting rejoinder of the action against IDI and permitting prosecution of the action against IDI, to the extent of IDI’s insurance coverage.

Contractual Provisions

The Contract contains an indemnification provision, Article 3:18, (the “Indemnification Provision”) which provides:

To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner . . . from and against claims, damages, losses and expenses including but not limited to attorneys’ fees arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury ..., but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

The Contract also has a provision, Article 3.3, regarding supervision (the “Supervision Provision”) which provides:

The Contractor shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract.

Contractual Indemnity

“The right to contractual indemnification depends upon the specific language of the contract.” *Lesisz v. Salvation Army*, 40 A.D.3d 1050, 1051 (2d Dept 2007) (quoting *Kader v. City of N.Y. Hous. Preserv. & Dev.*, 16 A.D.3d 461, 463 (2005)). Moreover, “a contract assuming [the duty to indemnify] ... must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed.” *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 (1989). A party’s right to contractual indemnity “depends on the intent of the parties and the manner in which that intent is expressed in the contract.” *Suazo v. Maple Ridge Assoc., L.L.C.*, 85 A.D.3d 459, 460 (1st Dep’t 2011).

Reading the Indemnification Provision “according to the plain meaning of its terms,” *Greenfield v. Philles Records*, 98 N.Y.2d 562, 569 (2002), it limits indemnification to “negligent acts or omissions” by the Contractor, a subcontractor or anyone employed by them. There has been no finding of negligence against IDI or any other party. Rather, liability against Baccarat, 625 Madison and King Freeze was based upon their status as an owner or a statutory agent under Labor Law § 240 (1). In essence, the Indemnification Provision follows common-law indemnity.

Common-Law Indemnity

Generally, common-law indemnity is a “restitution concept which permits shifting the loss” from a party held liable by virtue of its status to a party at fault. *Mas v. Two Bridges Assoc.*, 75 N.Y.2d 680, 690 (1990). Merely having the authority to direct, control

or supervise the work is “not consistent with the equitable purpose underlying common-law indemnification . . . [but, rather] the obligation to indemnify [is] on parties who were actively at fault in bringing about the injury.” *McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 374, 377 (2011).

Baccarat contends that IDI inadequately supervised plaintiff’s work, breached its duty under the Supervision Provision and failed to properly inspect the ladder and that these failures amount to negligent conduct. However, generally, summary judgment is inappropriate in negligence cases, because whether a party acted reasonably under the circumstances is usually a question of fact. *Ugarriza v. Schneider*, 46 N.Y.2d 471, 475-476 (1979); *Andre v Pomeroy*, 35 N.Y.2d 361, 364 (1974).

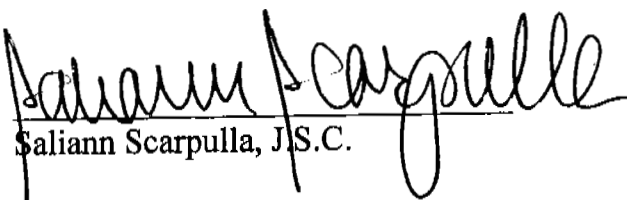
In this case, there has been no determination of negligence against any party. Moreover, in the October 2011 Order, I determined that there is an issue as to whether responsibility for the ladder’s condition lies with its manufacturer or distributor. In the January 2011 Order, I denied the motion by Baccarat, 625 Madison and Related for summary judgment on contractual indemnity under a similar contractual provision and on common-law indemnity against King Freeze, IDI’s statutory agent.

Therefore, the portion of Baccarat's motion that seeks summary judgment on contractual and common-law indemnity against IDI is denied.

Settle order.

Dated: New York, New York
March 16, 2012

ENTER:


Saliann Scarpulla, J.S.C.