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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. SHERRY KLEIN HEITLER
Justice

PART 30

Index Number : 190309/2010
FORMICA, GAETANO
VS.
BYRON JACKSON PUMPS
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. 190309/10

MOTION DATE _____

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the memorandum decision dated 6.1.12

FILED

JUN 14 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 6.1.12

_____, J.S.C.
HON. SHERRY KLEIN HEITLER

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

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GAETANO FORMICA and GIUSEPPA FORMICA,

Index No. 190309/10
Motion Seq. No. 001

Plaintiffs,

-against-

BYRON JACKSON PUMPS., et al.,

Defendants.

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THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Index No. 590915/11

Plaintiff,

-against-

DECISION AND ORDER

ADT SECURITY SERVICES, INC.

Defendant.

----------X

SHERRY KLEIN HEITLER, J.:

Third-party defendant ADT Security Services, Inc. ("ADT") moves pursuant to CPLR 3211(a)(7) to dismiss third-party plaintiff The Port Authority of New York and New Jersey's ("Port Authority") complaint in this action for failure to state a cause of action. The Port Authority opposes ADT's motion and cross-moves pursuant to CPLR 3025(b) for leave to amend and/or supplement the third-party complaint. For the reasons set forth below, ADT's motion to dismiss is denied in its entirety and the Port Authority's motion to amend the pleadings is denied as moot.

BACKGROUND

On October 6, 2010, Plaintiffs Gaetano Formica and Giuseppa Formica commenced the underlying action against the Port Authority, among others, to recover for personal injuries caused by Mr. Formica's alleged exposure to asbestos while he worked at the World Trade Center ("WTC") as a computer analyst for ADT. Mr. Formica was deposed on November 17, 2010.[1] He testified that he began working for ADT in 1973. Around that time, ADT leased space from the Port Authority on the 91st and 92nd floors of the building then located at One WTC. ADT transferred Mr. Formica to this location in 1974 after the company promoted him to senior programmer. ADT occupied that space, and Mr. Formica continued in such employment, through 1984, when ADT moved its offices to Parsippany, New Jersey.

On November 1, 2011 the Port Authority commenced the within third-party action against ADT for indemnification and contribution. ADT now moves to dismiss the third-party action on the ground that the Port Authority has not sufficiently alleged a cause of action. It seeks dismissal of the third-party complaint on the grounds that: (1) All of the claims therein are barred by New York's Workers' Compensation Law ("WCL"); (2) The Port Authority cannot produce the lease at issue, nor the purported indemnification provision; and (3) Mr. Formica's deposition transcript contradicts the allegations in the third-party complaint regarding ADT's liability alleged herein.

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[1] Mr. Formica's deposition transcript was submitted as Exhibit G to the third-party complaint.

DISCUSSION

The allegations in a pleading "shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense." CPLR 3013. "On a motion to dismiss pursuant to CPLR 3211, the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." *Ladenburg Thalmann & Co. v Tim's Amusements, Inc.*, 275 AD2d 243, 246 (1st Dept 2000); *see also 344 E. 72 Ltd Partnership v Dragatt*, 188 AD2d 324 (1st Dept 1992); CPLR 3026. "[T]he court's role in a motion to dismiss is limited to determining whether a cause of action is stated within the four corners of the complaint, and not whether there is evidentiary support for the complaint." *Frank v Daimler Chrysler Corp.*, 292 AD2d 118, 121 (1st Dept 2002). Those "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration." *Skillgames, LLC v Brody*, 1 AD3d 247, 250 (1st Dept 2003).

The court notes that ADT has not included with its moving papers a copy of the third-party complaint. This omission in and of itself precludes dismissal, *see 344 E. 72 Ltd. Partnership v Dragatt, supra,* and on this ground alone ADT's motion to dismiss should be denied.

That being said, the court also finds the claims at issue herein are not barred by the WCL. In this regard, the court recognizes that the WCL limits the remedies available against an employer when an employee is injured during the course of his or her employment, *see* WCL

§11, and that it provides the sole exclusive remedy against the employer "in place of any other liability whatsoever, to such employee, his or her personal representatives, spouse, parents, dependents, distributees, or any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury or death or liability arising therefrom . . . ." *Id.* For purposes of the WCL, however, "the terms 'indemnity' and 'contribution' shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered." *Id.* In other words, an injured party's employer may be impleaded by a third-party where the employer has previously consented to such action in writing.

The Port Authority produced the third-party verified complaint in opposition to this motion. It provides, in relevant part (Affirmation of Simone Nicholson, Esq., dated January 23, 2012, Exhibit 2):

> 14. In or before 1974, American District Telegraph, its predecessors, or successors, n/k/a ADT, leased office space ("ADT leasehold") on the 91st and 92nd floors of the World Trade Center, Tower 1. . . .
>
> 16. The lease or leases entered into between . . . ADT and the Port Authority required that, as the tenant, ADT purchase and maintain liability insurance naming the Port Authority as an additional insured . . . .
>
> 19. A copy or copies of said lease is in the possession of ADT.
>
> 20. Plaintiff Gaetano Formica . . . was employed by . . . ADT between the years 1974 and 1984 during the time that construction, renovation, alteration, or repairs contracted for by ADT or its predecessors were performed on/in the ADT Leasehold at 1 World Trade Center. . . .
>
> 28. That by an agreement/contract/lease between . . . ADT and The Port Authority, which was in full force and effect, at all times of exposure alleged in Plaintiffs' Complaint, ADT, among other responsibilities was required to repair, replace,

keep in safe working and operating condition, its office spaces located within 1 World Trade Center.

29. If Plaintiffs sustained injuries and damages in the time, place, and manner set forth in the Complaint, such damages and injuries were caused by Third-Party Defendant's failure to perform or to properly, responsibly and safely have said work performed pursuant to the terms and conditions provided for in the written lease agreement, and the Port Authority will have been damaged, and will be entitled to full indemnification by . . . ADT. . . .

35. That if the Plaintiffs recover damages as against the Port Authority, The Port Authority will be damaged thereby and will be entitled to be defended, indemnified, and therefore be held harmless therefrom by . . . ADT, as the party primarily responsible for any and all loss or damage as the Plaintiffs may suffer, or for such proportionate part thereof as is attributable to this breach of contract, breach of warranty, negligence and/or strict liability in tort. . . .

39. That if there is any negligence on the part of the Port Authority, which is denied, will be only passive [sic] or secondary in nature, while the negligence of . . . ADT will be active, primary, and affirmative. . . .

40. That by reason of the foregoing . . . ADT will be liable to the Port Authority, and will be bound to indemnify the Port Authority in the amount of any recovery obtained by the Plaintiffs against the Port Authority, and will be bound to pay the Port Authority the amount of any such verdict or recovery, as well as any and all attorneys' fees, costs, and disbursements. . . .

Whether the Port Authority has alleged sufficient facts to demonstrate that the parties entered into an express agreement such that its claims against ADT are not *prima facie* barred by the Workers' Compensation Law generally requires a two-part inquiry: (1) "whether the partes entered into a written contract containing an indemnity provision applicable to the site or job where the injury giving rise to the indemnity claim took place;" and (2) if there is a written contract, "whether the indemnity provision was sufficiently particular to meet the requirements of section 11." *Rodrigues v N & S Bldg. Constrs. Inc.*, 5 NY3d 427, 432 (2005). ADT argues that the Port Authority cannot demonstrate the existence of a written agreement under the first prong of the *Rodrigues* test, and, *a fortiori*, that it cannot demonstrate its purported terms under the second prong.

In *Flores v Lower E. Side Serv. Ctr.*, 4 NY3d 363 (2005), relied on by ADT, the Court of Appeals determined that a contractor was bound by an unsigned contract because it had, among other things, acted in conformity with the contracts' terms and requirements. In so holding, the court reiterated the common-law rule which "authorizes review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract--governs the validity of a written indemnification agreement under Workers' Compensation Law § 11." *Id.* at 370. ADT argues that it cannot be similarly bound because here there is no evidence to demonstrate the lease's existence or its terms.

ADT compares this case to *Bush v Mechanicville Warehouse Corp.*, 79 AD3d 1327 (3d Dept 2010). In that case, the plaintiff employee suffered a brain injury during the course of his employment when he fell from a ladder in the owner's warehouse. After the employee commenced an action alleging negligence and violations of Labor Law § 200 against the owner, the owner brought a third-party action against the employer for indemnification based upon an indemnity provision in an expired lease between the third-party plaintiff and an entity related to the third-party defendant. The Appellate Division dismissed the complaint because there was no written express indemnity agreement between the owner and the employer. *Id.* at 1330. Among other things, the court noted that because the "relevant portions of Workers' Compensation Law § 11 were enacted to abrogate employers' liability to third parties for injury to their employees except in the most limited circumstances, the exception '[r]equiring the indemnification contract to be clear and express furthers the spirit of the legislation.'" *Id.* (quoting *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]).

Both *Flores*, *supra* and *Bush, supra* involved appeals from summary judgment motions.

The motion at bar, on the other hand, is a pre-answer CPLR 3211(a) motion to dismiss on the pleadings. Giving the third-party plaintiff all favorable inferences, *see 344 E. 72 Ltd. Partnership v Dragatt, supra*, the Port Authority has alleged sufficient facts to proceed with this action.[2] Accordingly, the Port Authority should be allowed to, among other things, proceed with discovery through the vehicles provided for by Article 31 of the CPLR.

In light of the court's ruling, the Port Authority's cross-motion is denied as moot. The court wishes to note, however, that the Port Authority's application to amend its pleading does not comply with the requirements of the CPLR insofar as its cross-motion is not "accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." CPLR 3025(b).

Accordingly, and in light of the foregoing, it is hereby

ORDERED that ADT Security Services, Inc's motion to dismiss is denied in its entirety; and it is further

ORDERED that the Port Authority of New York and New Jersey's cross-motion to amend the pleadings is denied as moot.

This constitutes the decision and order of the court.

DATED: 6. 1. 12

SHERRY KLEIN HEITLER
J.S.C.

[2] The deposition testimony does not so refute the allegations of the complaint as to rise to the level of a complete documentary defense. *Cf.* CPLR 3211(a)(1).