

7-Eleven, Inc. v Amtech Lighting Servs.

2012 NY Slip Op 32387(U)

August 20, 2012

Supreme Court, Suffolk County

Docket Number: 08-42599

Judge: Joseph Farneti

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice Supreme Court

MOTION DATE 3-29-12 (#001)
MOTION DATE 5-10-12 (#002 & #003)
ADJ. DATE 5-31-13
Mot. Seq. # 001 - MotD
 # 002 - XMD
 # 003 - MG

-----X
7-ELEVEN, INC. f/k/a THE SOUTHLAND
CORPORATION,

Plaintiff,

CONGDON, FLAHERTY, O'CALLAGHAN,
REID, DONLON, TRAVIS & FISHLINGER
Attorney for Plaintiff
333 Earle Ovington Boulevard, Suite 502
Uniondale, New York 11553

- against -

JEFFREY SAMEL & PARTNERS
Attorney for Defendant Amtech Lighting
150 Broadway, 20th Floor
New York, New York 10038

AMTECH LIGHTING SERVICES and MIRA
LIGHTING & ELECTRICAL SERVICE, INC.,

Defendants.
-----X

LEWIS JOHS AVALLONE AVILES, LLP
Attorney for Defendant Mira Lighting
425 Broad Hollow Road
Melville, New York 11747

Upon the following papers numbered 1 to 35 read on these motions and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20; 32 - 35 ; Notice of Cross Motion and supporting papers 24 - 26 ; Answering Affidavits and supporting papers 21 - 23; 27 - 29 ; Replying Affidavits and supporting papers 30 - 31 ; Other _____ ; it is,

ORDERED that these motions are hereby consolidated for purposes of this determination; and it is further

ORDERED that this motion by the plaintiff for an Order, pursuant to CPLR 3212, granting summary judgment directing the defendants to reimburse it for the defense costs incurred by the plaintiff in the underlying action is granted as to the defendant Amtech Lighting Services, and is otherwise denied; and it is further

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ORDERED that this cross-motion by the defendant Mira Lighting & Electrical Service, Inc. for an Order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint is denied, and in searching the record, summary judgment is granted to the plaintiff as a matter of law directing the defendant Mira Lighting & Electrical Service, Inc. to reimburse the plaintiff for the defense costs incurred by the plaintiff in the underlying action; and it is further

ORDERED that this unopposed motion (incorrectly designated as a cross-motion) by the defendant Amtech Lighting Services for an Order, pursuant to CPLR 3212, granting summary judgment directing the defendant Mira Lighting & Electrical Service, Inc. to reimburse it for any payment to the plaintiff of the defense costs incurred by the plaintiff in the underlying action, and for its defense costs in the underlying action, is granted.

This is an action for contractual indemnification in which the plaintiff seeks to recover attorneys' fees paid in defending an underlying action, *Daley v 7-Eleven*, Supreme Court, Suffolk County, Index No. 98-11398. The underlying action involves personal injury to an electrician working at a 7-Eleven located on Knapp Street in Brooklyn, New York. The accident allegedly happened when Kevin Daley ("Daley"), an employee of the defendant Mira Lighting & Electrical Service, Inc. ("Mira"), received a severe electrical shock that caused him to lose consciousness and fall from a ladder to the floor.

It is undisputed that the electrical work at the Knapp Street store was conducted pursuant to a written contract between the plaintiff and the defendant Amtech Lighting Services ("Amtech"), and that Mira actually performed the work pursuant to a written subcontract with Amtech. In the underlying action, the Court (Molia, J.), by Order dated October 23, 2006, granted the plaintiff herein summary judgment on its cross-claims for contribution and/or indemnification against Amtech, and granted Amtech summary judgment against Mira for "complete contractual indemnification and attorneys' fees."

The plaintiff commenced the instant action to recover the costs, including fees paid to its attorneys, in defending the underlying action, and it now moves for summary judgment herein. The proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). The burden then shifts to the party opposing the motion which must produce evidentiary proof in admissible form sufficient to require a trial of the material issues of fact (*Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *Rebecchi v Whitmore*, 172 AD2d 600, 568 NYS2d 423 [2d Dept 1991]; *O'Neill v Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]). Furthermore, the parties' competing interest must be viewed "in a light most favorable to the party opposing the motion" (*Marine Midland Bank, N.A. v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610, 563 NYS2d 449 [2d Dept 1990]). However, mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see, Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]; *Rebecchi v Whitmore, supra*).

In support of its motion, the plaintiff submits, among other things, the pleadings, the affirmation of its attorney, a copy of its contract with Amtech, a copy of its affirmation in support of its motion for summary judgment in the underlying action, and the pleadings in the underlying action. In her affirmation in support of the instant motion, the attorney for the plaintiff affirms that the underlying action has been settled, with all proceeds paid by Mira. A review of the contract between 7-Eleven and Amtech indicates that it provides, in pertinent part, as follows:

6. Amtech's Indemnity. Amtech shall indemnify, defend and hold [7-Eleven], its franchisees and its affiliates, and each of [7-Eleven's] and the franchisees' and affiliates' employees, directors and shareholders, harmless from and against any claim or allegation of loss, harm, damage or injury (whether to property or person, including death) to third parties, to [7-Eleven], its franchisees or its affiliates, their employees, directors or shareholders (including any expenses or losses arising therefrom), to the extent same are caused by any of the following: ... (b) the negligence, misconduct, violation of statute, or other fault of Amtech or its subcontractors, or either of their employees or agents in connection herewith; or (c) the presence of, or the performance of the Services by, Amtech or its subcontractors or either of their agents or employees; however, Amtech will not be liable for any loss, harm, damage or injury to the extent caused by [7-Eleven]'s negligence.

The right to contractual indemnification depends upon the specific language of the contract between the parties (*see KIELTY v AJS CONSTR. OF L.I., INC.*, 83 AD3d 1004, 922 NYS2d 467 [2d Dept 2011]; *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807, 888 NYS2d 81 [2d Dept 2009]; *Kader v City of N.Y. Hous. Preserv. & Dev.*, 16 AD3d 461, 791 NYS2d 634 [2d Dept 2005]; *Gillmore v Duke/Fluor Daniel*, 221 AD2d 938, 939, 634 NYS2d 588 [4th Dept 1995]). Thus, "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*LaRosa v Internap Network Servs. Corp.*, 83 AD3d 905, 921 NYS2d 294 [2d Dept 2011] quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930, 878 NYS2d 143 [2d Dept 2009]; *Torres v LPE Land Dev. & Constr. Inc.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; *Canela v TLH 140 Perry St.*, 47 AD3d 743, 849 NYS2d 658 [2d Dept 2008]).

The Court takes judicial notice of the common practice by each party to a construction project to require indemnification from those below it. An owner will obtain indemnification from its general contractor, a general contractor will obtain indemnification from its subcontractor, and a subcontractor will obtain indemnification from its subcontractor. Generally, the subcontractor will indemnify its general contractor and the owner. Thus, subcontracts often include hold harmless and indemnification clauses which hold the subcontractor liable to the contractor and owner for damages suffered by them and to indemnify them from those damages.

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Where, as here, there is a broad indemnity agreement providing for indemnification against any claim or allegation of loss, harm, damage or injury, including any expenses, the indemnitee is entitled to costs, including counsel fees, incurred in the defense of the underlying action even though the provision does not expressly mention attorneys' fees (*Milani v Broadway Mall Properties, Inc.*, 261 AD2d 370, 689 NYS2d 203 [2d Dept 1999]; *State v Rice Mohawk U.S. Const. Co., Ltd.*, 262 AD2d 114, 692 NYS2d 43 [1st Dept 1999]; *Boyd v Bethlehem Steel Corp.*, 247 AD2d 864, 668 NYS2d 817 [4th Dept 1998]; *Merchants Mut. Ins. Co. v Saxon Indus.*, 170 AD2d 654, 566 NYS2d 933 [2d Dept 1991]; *Lavorato v Bethlehem Steel Corp.*, 91 AD2d 1184, 459 NYS2d 170 [4th Dept 1983]).

Here, the plaintiff has established its *prima facie* entitlement to summary judgment against Amtech. However, a review of the plaintiff's submission reveals that it does not contain any allegations directed towards Mira; that it does not include a copy of the contract between Amtech and Mira; and that it fails to establish its entitlement to summary judgment against Mira.

In opposition to the plaintiff's motion, Amtech submits the affirmation of its attorney, and a copy of the Order of the Court dated October 23, 2006, which granted the plaintiff summary judgment on its cross-claims against Amtech. In his affirmation, counsel for Amtech contends that the subject Order resolved the issue of its obligation to the plaintiff by omitting any mention of attorneys' fees, that the omission "could not have been inadvertent," and that the reason for the omission is the difference in the language between the two indemnity clauses at issue herein. A review of the record reveals that these contentions are without merit. In addition, counsel for Amtech contends that, because his client has been found entitled to reimbursement from Mira for attorneys' fees, it cannot be obligated to reimburse the plaintiff for attorneys' fees. Again, this contention is without merit. Amtech has failed to raise an issue of fact requiring a trial in this action.

Accordingly, the plaintiff's motion for summary judgment and an Order directing the defendants to reimburse the defense costs incurred by the plaintiff in the subject underlying action is granted as to the defendant Amtech Lighting Services, and is otherwise denied.

Mira now moves for summary judgment dismissing the complaint on the grounds that the plaintiff only asserted a cross-claim against it for contribution, and that there is no written contract between the plaintiff and Mira. In support of its motion, Mira submits the affirmation of its attorney. In his affirmation, counsel for Mira contends that the plaintiff only made a cross-claim for contribution against Mira in the underlying action, and that, because the plaintiff was granted summary judgment against Daley, the issue is moot. However, a review of the record reveals that the subject cross-claim was for "contribution and/or indemnification." Counsel for Mira further contends that the plaintiff cannot recover for contractual indemnification as there is no written contract between them.

In opposition to Mira's motion, the plaintiff submits, among other things, the contract between Amtech and Mira regarding the work at Knapp Street, which provides in pertinent part:

6. To the full extent permitted by law, [Mira] shall indemnify, defend and hold harmless [Amtech] and its employees and

affiliates and [7-Eleven] and all tenants and agents of the owner of the facility at which the services are performed from all claims, demands, losses, liability, lawsuits, liens and judgments, including all attorneys' fees and expenses incurred, which arise out of or result, directly or indirectly, from or in connection with the performance of the services, providing of materials or products or any action or in action by Subcontractor, or any of its employees, agents or subcontractors, including any caused or alleged to have been caused by the negligence or other fault of any indemnitee hereunder.

The plaintiff contends that it is a third-party beneficiary under the contract between Amtech and Mira. In construction cases, the owner is, in fact, considered a third-party beneficiary of the contract between the contractor and the subcontractor (*Gap, Inc. v Fisher Dev., Inc.*, 27 AD3d 209, 810 NYS2d 456 [1st Dept 2006]; *Rotterdam Sq. v Sear-Brown Assoc.*, 246 AD2d 871, 668 NYS2d 278 [3d Dept 1998]; *Finch, Pruyn & Co. v M. Wilson Control Servs. Inc.*, 239 AD2d 814, 658 NYS2d 496 [3d Dept 1997]). Here, the contract between Amtech and Mira establishes the plaintiff's entitlement to enforce the contractual indemnification provision contained therein. However, "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 Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662, 871 NYS2d 654 [2d Dept 2009], citing General Obligations Law § 5-322.1; see *McAllister v Constr. Consultants L.I., Inc.*, 83 AD3d 1013, 921 NYS2d 556 [2d Dept 2011]; *Reynolds v County of Westchester*, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]). Mira's submission establishes that the plaintiff was free from negligence in this matter. In addition, Mira has failed to address the issue raised by the plaintiff in its motion for summary judgment that Mira was the sole negligent party in the underlying action, as the matter was settled with all proceeds paid by Mira. New York Courts have held that the failure to address arguments proffered by a movant or appellant is equivalent to a concession of the issue (see *Welden v Rivera*, 301 AD2d 934, 754 NYS2d 698 [3d Dept 2003]; *Hajderlli v Wiljohn 59 LLC*, 24 Misc 3d 1242[A], 2009 NY Slip Op 51849[U] [Sup Ct, Bronx County 2009]).

A court is empowered to search the record and grant summary judgment in favor of a nonmoving party (CPLR 3212 [b]; *1133 Taconic, LLC v Lartrym Serv., Inc.*, 85 AD3d 992, 925 NYS2d 840 [2d Dept 2011]; *Shore Dev. Partners v Board of Assessors*, 82 AD3d 988, 918 NYS2d 566 [2d Dept 2011]; *Masi v Kir Munsey Park 020 LLC*, 76 AD3d 514, 906 NYS2d 88 [2d Dept 2010]). However, this power applies only with respect to a cause of action or issue that is the subject of the motions before the court (*Dunham v Hilco Const. Co.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *Masi v Kir Munsey Park 020 LLC*, *supra*; *Lee v City of Rochester*, 254 AD2d 790, 677 NYS2d 848 [4th Dept 1998]). Upon reviewing the entirety of the records submitted to this Court on Mira's motion for summary judgment, it is determined that the cause of action for contractual indemnification is before the Court, and that the plaintiff is entitled to summary judgment as a matter of law.

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Accordingly, Mira's motion for summary judgment dismissing the complaint is denied, and summary judgment is granted to the plaintiff as a matter of law directing Mira to reimburse the plaintiff for the defense costs incurred by the plaintiff in the subject underlying action.

Amtech now moves for summary judgment against Mira based on its cross-claim for contractual indemnification. The motion is unopposed, and a review of the record reveals that the issues have been resolved in the Order of the Court dated October 23, 2006, which found Mira responsible to Amtech for "complete contractual indemnification and attorneys' fees," in the underlying action. Therefore, while the Court has found Mira directly responsible to the plaintiff for the defense costs incurred by the plaintiff in the underlying action, to the extent that Amtech has previously paid those sums to the plaintiff, or may pay those sums in the future, Amtech is entitled to recover those payments from Mira. In addition, to the extent that Mira has not paid Amtech for the defense costs incurred by Amtech in the underlying action, it is directed to do so in accordance with the decision herein.

Accordingly, Amtech's motion for summary judgment is granted.

The parties are directed to submit appropriate documentation to support the amount of costs and attorneys' fees sought by the respective claimants as reimbursement from another party, along with proposed Orders, within thirty (30) days of the date of service of the instant Order upon plaintiff with notice of entry.

Dated: August 20, 2012



Hon. Joseph Farneti
Acting Justice Supreme Court

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION