Acosta v 41 W. 34th St., LLC
2016 NY Slip Op 32353(U)
November 30, 2016
Supreme Court, New York County
Docket Number: 151307/2013
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 32

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JUAN C. ACOSTA,

Plaintiff,

-against-

41 WEST 34th STREET, LLC and 34th STREET COMMERCIAL PROPERTIES, LLC,

Defendants.

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41 WEST 34th STREET, LLC and 34th STREET COMMERCIAL PROPERTIES, LLC,

Third-Party Plaintiffs,

-against-

KRAS INTERIOR CONSTRUCTION CORP.,

Third-Party Defendant.

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Index No. 151307/2013
Motion Seq: 005 & 006

DECISION & ORDER

HON. ARLENE P. BLUTH

Motion Sequence Numbers 005 and 006 are consolidated for disposition.

The motion by defendants/third-party plaintiffs for summary judgment granting complete contractual indemnity, including reimbursements for costs, attorney's fees and for indemnity with regard to the settlement proceeds advanced to plaintiff is denied.

The motion by third-party defendant for summary judgment dismissing the third-party complaint is granted only to the extent that defendants' claim for common law indemnity is

severed and dismissed.

Background

This action arises out of plaintiff's alleged injuries suffered on November 10, 2012, while he was working to remove an interior wall at defendants' premises located at 45 West 34th Street, New York, NY. Third-party defendant (Kras) served as contractor for renovation work on the 9th floor of defendants' premises. Plaintiff, an employee of Kras, settled his claims after all parties attended a meditation.

Defendants move for summary judgment for contractual indemnity citing a purchase order between defendants and Kras (Purchase Order) that allegedly obligates Kras to indemnify and hold harmless defendants from all liability. Defendants further insist that the deposition of Kras' principal (Mr. Krasniqi) shows that the demolition of the wall was part of the work Kras was contracted to perform. Defendants also rely on a decision from Justice Rakower in a declaratory judgment suit between the parties' insurance carriers where the Purchase Order was found to be a legally binding and enforceable document.

Defendants further argue that the indemnity provision in the Purchase Order includes the phrase "arising out of," which is broad enough to cover the demolition work done in this matter.

In opposition, Kras claims that there is no written contract or agreement that requires Kras to indemnify defendants. Kras further claims that demolition work was specifically excluded from its proposal regarding the renovation work to be completed on the 9th floor of defendants' building. Kras insists that the subsequent Purchase Order (dated October 11, 2012) was generated in response to Kras' proposal and that it never received the second page of the Purchase Order, which contains the alleged indemnity provision.

In support of its own motion for summary judgment dismissing defendants' third-party complaint, Kras asserts that this claim is barred by Workers' Compensation Law § 11. Kras claims that because plaintiff did not suffer a grave injury, defendants must show a written contract whereby Kras agreed to indemnify defendants for the alleged demolition work. Kras further argues that the Purchase Order does not identify the defendants and instead specifies the Owner as 45 West 34th Street. Kras claims this ambiguity prevents summary judgment in favor of defendants and compels the Court to dismiss the third-party complaint.

Finally, Kras contends that because the Purchase Order signified that Kras was to perform the work done in its proposal, the Purchase Order's indemnification agreement does not apply to the work performed by plaintiff. Kras insists that the demolition work was the result of a phone call and an oral agreement reached after the Purchase Order was generated. Kras argues that the hold harmless agreement between the parties was signed after plaintiff's accident and was not intended to apply retroactively. Kras contends that Justice Rakower's decision is inapplicable because it was not a party in that proceeding and the issue is different. Therefore, issue preclusion does not apply.

In reply, defendants assert they have no objection to dismissal of the cause of action for common law indemnity because it is undisputed that plaintiff did not suffer a grave injury as defined by Workers Compensation Law § 11. Defendants claim that the Purchase Order required Kras to indemnify the owner, but acknowledge that the owner is not specifically identified in the Purchase Order. Defendants insist that Kras knew the identity of the ownership entity.

In reply to its cross-motion, Kras insists that there is no agreement to indemnify defendants and that the Purchase Order was never executed by Kras.

Discussion

To be entitled to the 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"[W]here, as here, interpretation of contract terms or provisions are susceptible to at least two reasonable interpretations, and intent must be gleaned from disputed evidence or from inferences outside the written words, it becomes an issue of fact that must be resolved by trial" (*Yanuck v Simon Paston & Sons Agency, Inc.*, 209 AD2d 207, 208, 618 NYS2d 295 [1st Dept 1994]).

As an initial matter, the Court finds that Justice Rakower's decision in the declaratory judgment action between other parties is not binding on this action. "In order for res judicata to come into play, it is necessary that the party opposing preclusion must have had a full and fair opportunity to litigate the claim in the prior proceeding" (*Marinelli Assoc. v Helmsley-Noyes Co., Inc.*, 265 AD2d 1, 7, 705 NYS2d 571 [1st Dept 2000] [internal quotations and citation omitted]). The declaratory judgment action involves the parties' insurance carriers rather than the parties in this action.

The parties raise three distinct issues: 1) Did the parties intend the Purchase Order to apply to defendants (as Owner) and Kras? 2) Did the Purchase Order's indemnity provision cover the work that led to plaintiff's injury? 3) Does the hold harmless agreement obligate Kras to indemnify defendants for plaintiff's injuries?

Here, paragraph 8 of the Purchase Order states that:

> "Vendor shall to the fullest extent permitted by law at it's own cost and expense, indemnify, defend and hold harmless Owner and Agent and their affiliates, partners, members, managers principals, officers, directors, shareholders, trustees, employees and agents of the foregoing, from and against all liabilities, damages, penalties and liabilities, including reasonable legal and professional costs and fees, arising out of, or in connection with any act, negligence omission or breach of any of the terms of this Agreement by Vendor, its agents, servants, employees, sub-contractors or independent contractors (except for losses arising from grossly negligent actions of Owner)."

The Purchase Order was issued by Newmark Grubb (an agent of the Owner) and the Owner is identified as 45 West 34th Street. Obviously, the Owner specified on the bottom of the first page is different from the defendants in the instant action. This raises an issue of fact

regarding the applicability of the Purchase Order to defendants.[1] Although defendants maintain that Kras was aware that the Owner referred to the owner of the building where they were contracted to perform work, that claim is not sufficient to grant defendants summary judgment because it requires the Court to look outside the terms of the Purchase Order.

Kras is also not entitled to summary judgment because the documents and depositions raise issues of fact regarding which party was to be indemnified pursuant to the Purchase Order. The Court declines to embrace Kras' argument that the presence of another entity listed under Owner on the Purchase Order (45 West 34th Street) should grant Kras summary judgment absolving it of any indemnification obligation. The Owner referenced may have been a typo and 45 West 34th Street is simply an incomplete building address of the Owner rather than the identity of the entity that owned the building. In fact, defendants claim that the building was commonly known as 41-45 West 34th Street. Further, the proposal between the parties also contains the address 45 West 34th and references the Purchase Order number (27413). The Court is unable to grant Kras summary judgment where the proposal it cites contains the same address as the Purchase Order. There are clearly issues of fact regarding whether the parties intended to be bound by the Purchase Order and, consequently, whether the indemnification provision is applicable.

Kras' argument that it did not execute the Purchase Order does not prevent the Court from denying its summary judgment motion. "[A]n unsigned contract may be enforceable,

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[1]Mr. Krasniqi of Kras testified that he never saw the second page of the Purchase Order, which contains the indemnity provision. This claim does not raise an issue of fact because the bottom of the first page of the Purchase Order states "This Purchase Order is subject to all terms and conditions printed on both sides of the order."

provided there is objective evidence establishing that the parties intended to be bound" *(Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 369, 795 NYS2d 491 [2005]). "[W]here a finding of whether an intent to contract is dependent as well on other evidence from which difference inferences may be drawn, a question of fact arises" (*Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 400, 393 NYS2d 350 [1977]). Here, defendants claim, based on evidence other than the Purchase Order, that the parties entered into the Purchase Order and then Kras began work at the premises. Kras denies it entered into the Purchase Order. Therefore, there is a question of fact.

Even if the Purchase Order required Kras to indemnify defendants, there is an additional issue of fact regarding the scope of the work performed. The description of the work in the Purchase Order references "pre-builts 9th FL install" and "spinkler [sic] services perfromed [sic] mechanical services per plan" (affirmation of defendant's counsel, exh G). The mention of a plan could refer to the proposal between Kras and defendants or some other agreement. Under either scenario, the Purchase Order references something outside the four corners of the Purchase Order. Therefore, the Court must look to other evidence, including the proposal, to determine whether the work performed that led to plaintiff's injury was excluded from work Kras was required to perform.

The proposal between the parties states that demolition is excluded (affirmation of Kras' counsel exh P). However, the parties disagree regarding whether the removing of the interior wall constitutes demolition, a term which is not defined in the proposal or in the Purchase Order. Differing testimony from the parties is cited regarding the destruction of this wall. Therefore, a jury must decide whether the removal of the interior wall constituted demolition.

The hold harmless agreement also does not compel the Court to grant summary judgment for either party. The document is not dated and Mr. Mohabir (manager of multiple buildings for defendants' agent Newmark) testified that this document was signed after plaintiff's accident, although Mr. Mohabir could not provide an exact date for the agreement (*see* Mohabir's further deposition tr at 12-16). Neither party demonstrated that it is entitled to summary judgment based on the hold harmless agreement because the Court is unable to conclusively determine when it was signed. If the hold harmless agreement was, in fact, signed after plaintiff's accident, then there is an issue of fact regarding whether the parties intended the hold harmless agreement to apply retroactively.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is denied; and it is further

ORDERED that Kras' motion is granted only to the extent that defendants' claim for common law indemnity is severed and dismissed; and it is further

ORDERED that the remaining portions of Kras' motion are denied.

This is the Decision of the Court.

ARLENE P. BLUTH
J.S.C.

Dated: November 30, 2016
New York, New York

ARLENE P. BLUTH, JSC