SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

----------X
SHERLOCK NICHOLSON,

Plaintiff,

-against-

SABEY DATA CENTER PROPERTIES, LLC, SABEY CONSTRUCTION INC., YOUNG WOO & ASSOC., LLC,

Defendants.

----------X
SABEY CONSTRUCTION INC.,

Third-Party Plaintiff

-against-

ADCO ELECTRICAL, SELECT SAFETY CONSULTING SERVICES, INC., IDEAL INTERIORS GROUP LLC, and W5 GROUP LLC d/b/a WALDORF DEMOLITION,

Third-Party Defendants.

----------X
SELECT SAFETY CONSULTING SERVICES, INC.,

Second Third-Party Plaintiff

-against-

CIROCCO AND OZZIMO, INC.,

Second Third-Party Defendants.

----------X

DECISION & ORDER
Index No. 156351/2012

Mot. Seq. 004

The motion by Cirocco and Ozzimo, Inc. ("Cirocco") to dismiss the second third-party complaint is granted.

Background

This action arises out of injuries allegedly suffered by plaintiff on September 4, 2012 while he was working at 375 Pearl Street, New York, New York for Cirocco. Cirocco was a subcontractor of general contractor Sabey Construction, Inc. ("Sabey") and Select Safety Consulting Services, Inc. ("Select") served as the site safety contractor for the construction site. The site was owned by Sabey Data Center Properties, LLC ("Sabey Data"). Select filed a second third-party complaint on October 6, 2016, which alleges that Select was an agent of Sabey and, therefore, Cirocco is required to indemnify Select pursuant to Cirocco's contract with Sabey.

Cirocco maintains that the second third-party complaint must be dismissed because the documentary evidence refutes Select's first and second causes of action. Cirocco insists that the first cause of action, for contractual indemnification, must be dismissed because there is no evidence that Cirocco intended to indemnify Select. Cirocco argues that the second cause of action, failure to procure insurance for Select, must be dismissed because Select is not an agent of Sabey and Select should not have been included as an additional insured.

Cirocco also insists that Select's common law claims (the third and fourth causes of action) must be dismissed because they fail to state a cause of action. Cirocco argues that because it was plaintiff's employer, Select cannot maintain an action for common law indemnification or contribution unless plaintiff suffered a grave injury. Cirocco concludes that Select has not alleged facts sufficient to establish that plaintiff suffered a grave injury.

In opposition, Select argues that it was an agent of Sabey and, therefore, is entitled to indemnification from Cirocco. Select insists that it had authority to stop Cirocco employees from performing unsafe work. Select contends that this broad authority to ensure that all trades performed their work safely makes them an agent even if they might not be liable as a statutory agent under the Labor Law.

Select agrees that dismissal of the third and fourth causes of action for common law contribution and indemnification are warranted because there has not been evidence presented demonstrating that plaintiff suffered a grave injury. However, Select wants the ability to reassert these causes of action if additional evidence surfaces establishing that plaintiff suffered a grave injury.

In reply, Cirocco argues that its contract with Sabey refers to a site safety management subcontractor, but does not mention Select or indicate that Select is an agent of Sabey.

Discussion

"On a CPLR 3211 motion to dismiss, the court will accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Nonnon v City of New York*, 9 NY3d 825, 827, 842 NYS2d 756 [2007] [internal quotations and citation omitted]). A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

The language of the parties must be clear in order to enforce an obligation to indemnify, and the Court is "unwilling to rewrite the contract and supply a specific obligation the parties themselves did not spell out" (*Tonking v Port Auth. of NY & NJ*, 3 NY3d 486, 490, 787 NYS2d 708 [2004]).

Section 11.1 of the contract between Sabey and Cirocco states that:

> "Subcontractor agrees to indemnify, reimburse and hold harmless Contractor and Owner, their partners, owners, members officers, employees and agents (the "Indemnified Parties") from all claims, liabilities, losses and expenses including . . . those which in whole or in part relate to person injury . . . to the extent caused by the negligence . . . violation of applicable law, or other improper conduct of Subcontractor, it agents, employees, subcontractors and suppliers at any tier or anyone for whose acts Subcontractor is responsible"

(affirmation of Cirocco's counsel, exh E).

Paragraph 19 of Rider A General Addendum in the Cirocco/Sabey contract states that:

> "Subcontractor is aware of the requirements of the Project Site Safety Program on file with the Building Department and the General Contractor's office upon request. There is a Site Safety Management Subcontractor employed by the General Contractor for the project and the Subcontractor shall fully cooperate with same, and comply with the Site Safety Manager's direction"

(*id.*).

The question for this Court is whether Select qualifies as an agent under Section 11.1 of the contract between Cirocco and Sabey. If so, then Select would be entitled to indemnification. The Court finds that Select does not qualify as an agent because Select is indirectly referred to as a subcontractor elsewhere in the Cirocco/Sabey contract as the Site Safety Management Subcontractor (paragraph 19, cited above). [1] If Cirocco and Sabey intended to include Select as

---

[1] The contract between Sabey and Select is dated October 21, 2011 (affirmation of Cirocco's counsel exh C). As stated above, the rider in the Cirocco/Sabey contract (which became effective on August 9, 2012) references a "site safety management contractor."

part of the contractual indemnification provision, then they should have specifically referenced Select or used the term "site safety management subcontractor."

"Under the standard canon of contract construction expressio unius est exclusion alterius, . . . the expression of one thing implies the exclusion of the other" (*Matter of New York City Asbestos Litig.*, 41 AD3d 299, 302, 838 NYS2d 76 [1st Dept 2007]).

Here, the inclusion of the phrase "site safety management subcontractor" (referring to Select) in one section of the contract and its exclusion from the indemnification provision implies that the parties did not intend to include Select. The Court is unable to find that the parties intended to include Select as part of the term 'agent' where another term was used to identify Select.

At the very least, there is ambiguity regarding the intention of the parties, which compels this Court to dismiss the first and second causes of action. The intention to provide for contractual indemnification must be unambiguous (*Tonking*, 3 NY3d at 490).

Accordingly, it is hereby

ORDERED that Cirocco's motion to dismiss the second third-party complaint is granted.

This is the Decision and Order of the Court.

Dated: February 23, 2017
New York, New York

HON. ARLENE P. BLUTH
J.S.C.

ARLENE P. BLUTH, JSC

Therefore, because Select had been working at the construction site for nearly a year, the citation to the "site safety management subcontractor" is clearly a reference to Select.