SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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WILLIAM MCCANN,

Plaintiff,

- against -

HLT NY HILTON, LLC, LEGAL TECH, INC., ALM MEDIA, INC., RAV SECURITY SERVICES, LTD., AND PLUMB DOOR OF NEW YORK CITY, INC.,

Defendants.

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HLT NY HILTON, LLC,

Third-Party Plaintiff,

- against -

FREEMAN DECORATING SERVICES, INC.,

Third-Party Defendant.

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HLT NY HILTON, LLC,

Second Third-Party Plaintiff,

- against –

LEGALTECH, INC. and ALM MEDIA, INC.,

Second Third-Party Defendants.

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Index No. 150888/2014

DECISION/ORDER

Motion Seq. 003

HON. CAROL R. EDMEAD, J.S.C.:

MEMORANDUM DECISION

This is an action for personal injury. Third-party defendant, Freeman Decorating Services, Inc. ("Freeman"), now moves pursuant to CPLR §§ 3211(a)(1) and (7) to dismiss the First, Second, Third, Fifth and Sixth Causes of Action contained in third-party plaintiff, HLT NY Hilton, LLC's ("Hilton"), third-party complaint ("Third-Party Complaint").

Factual Background

Primary plaintiff, William McCann ("Plaintiff"), was employed by Freeman on the date he was injured while on Hilton's property ("underlying incident"). Plaintiff subsequently filed a personal injury action against Hilton. Hilton thereafter filed the Third-Party Complaint[1] against Freeman alleging: breach of contract (First Cause of Action);[2] common law indemnification and/or contribution claims for Freeman's negligence and/or breach of contract (Second Cause of Action); and contribution for Freeman's negligence (Third Cause of Action); contractual indemnification based on Freeman's negligence (Fourth Cause of Action); breach of contract for Freeman's failure to procure insurance (Fifth Cause of Action); and enforcing the contractual indemnification and defense clause of the parties agreement (Sixth Cause of Action).

Freeman's Motion

Freeman argues that the Second and Third Causes of Action for indemnification and contribution are prohibited by Workers' Compensation Law § 11. Further, Hilton's Fifth Cause of Action alleging a failure to procure insurance pursuant to a Vendor Services Agreement between Freeman and Hilton ("Agreement") fails, since Freeman procured an insurance policy from the Insurance Company of the State of Pennsylvania ("ICSOP") (the "Policy") and Hilton's response to Freeman's Notice to Admit concedes that Freeman is insured and has been receiving its defense coverage under the Policy. Moreover, Hilton's Sixth Cause of Action for contractual

[1] Freeman's motion refers to the original Third-Party Complaint, pointing out that Hilton never served its proposed Amended Third-Party Complaint (Memorandum of Law, fn. 4, p. 4).

[2] Hilton concedes that its First Cause of Action for breach of contract fails to state a claim and consents to its dismissal.

indemnification fails to state a claim because it fails to seek relief and, like the first cause of action for breach of contract, is duplicative of the fourth or fifth causes of action.

In opposition, Hilton argues that Freeman waived its ability to seek dismissal pursuant to CPLR § 3211(a)(1), since it failed to assert that relief in or prior to its answer. Next, Hilton agrees that no grave injury exists to overcome the Workers' Compensation bar, but that plaintiff's bill of particulars indicates serious and permanent injuries.[3]

Next, Hilton's Sixth Cause of Action for contractual indemnification is not duplicative of the Fourth Cause of Action which seeks damages pursuant to Freeman's negligent actions resulting in a breach of the Agreement. Based upon that breach, Freeman must indemnify Hilton. Thus, these causes of action are separate and distinct and appropriate. Further, in support of the Fifth Cause of Action, Hilton states that the Agreement contains no provision permitting Freeman to self insure the insurance requirement either by an self-insured retention or by utilizing a "fronting policy," in which the "coverage" being provided is actually Freeman's own money. Such policy "coverage" obtained is not an actual policy of insurance but coverage provided by Freeman itself and raises an issue as to whether Freeman breached the insurance procurement clause.

In reply, Freeman argues that it did not waive its right to move under CPLR § 3211(a)(1), because it moved prior to its time to answer the amended third-party complaint expired.[4] Since

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[3] Hilton asserts that if the Court orders that "no grave injury can or may exist in this litigation and that plaintiff is precluded from offering evidence of injuries that would constitute a grave injury, and that such determination becomes law in this case . . . .," Hilton will consent to the dismissal of the Second and Third Causes of Action (Opp., at ¶9). Hilton also agrees to amend the common indemnification and contribution claims to limit recovery thereunder to amounts not reimbursed via the insurance policy being provided by third party defendant.

[4] According to the New York State Courts Electronic Filing ("NYSCEF"), neither the "amended third-party complaint" nor affidavit of service were filed with the Court. An unsigned copy of the "Proposed Amended Third-

Hilton has yet to serve the amended third party complaint upon Freeman, Freeman's motion is timely.

Further, Hilton's common law indemnification and/or contribution claims are unsupported, in that neither Hilton's Third-Party Complaint, nor its proposed amended third party complaint alleges that Plaintiff incurred a "grave injury" pursuant to Workers' Comp. Law § 11. In fact, Hilton admits that "no grave injury exists" (Opp., at ¶9). Moreover, Plaintiff's Bill of Particulars do not claim that his "cognitive deficits" caused a "permanent total disability" (Reply, at ¶13).[5]

Moreover, Hilton's failure to procure insurance claim (Fifth Cause of Action) fails because, first, Hilton's defense costs are covered by the Policy, second, Hilton's counsel's "theory of what [Hilton] contracted for is not based on personal knowledge and is inadmissible speculation" (Reply, at ¶21), and third, Freeman's purported breach was waived by Hilton's acceptance of defense and coverage under the Policy. And, in any event, the Court should limit Hilton's damages to the costs associated with procuring its own coverage which Hilton admitted was applicable to this action. Hilton has also failed to mitigate its damages.

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footnote 4 cont'd.

Party Complaint" only appears as an exhibit to Hilton's Opposition. NYSCEF, Index No. 150888/2014, accessed March 16, 2017.

[5] Freeman's additional argument, that Hilton's common law indemnification and/or contribution claims are also barred by the anti-subrogation rule, raised for the first time in reply is not considered (*see Alrobaia ex rel. Severs v. Park Lane Mosholu Corp.*, 74 A.D.3d 403, 902 N.Y.S.2d 63 [1st Dept 2010]; *Wal-Mart Stores, Inc. v. U.S. Fidelity and Guar. Co.*, 11 A.D.3d 300, 784 N.Y.S.2d 25 [1st Dept. 2004]).

Further, the Fifth and Sixth Causes of Action fail to allege any damages. And, the Fourth and Sixth Causes of Action are duplicative, and in any event, improper in that Hilton cannot seek to both enforce and seek damages for breach of the same contract.

Discussion

At the outset, the Court finds that Hilton did not waive its defense "founded upon documentary evidence" under CPLR § 3211(a)(1). CPLR § 3211(e) sets forth the time within which a CPLR § 3211(a)(1) motion must be made to avoid waiving such defense:

> (e) . . . At any time *before service of the responsive pleading is required, a party may move* on one or more of the grounds set forth in subdivision (a), and no more than one such motion shall be permitted. *Any objection or defense based upon a ground set forth in paragraphs one . . .* is *waived unless raised either by such motion or in the responsive pleading.* A motion based upon a ground specified in paragraph . . . seven . . . of subdivision (a) may be made *at any subsequent time or in a later pleading*, if one is permitted.

The time to serve a responsive pleading is governed by CPLR § 3025(d):

> Except where otherwise prescribed by law or order of the court, there shall be an answer or reply to an amended or supplemental pleading if an answer or reply is required to the pleading being amended or supplemented. *Service of such an answer or reply shall be made within twenty days after service of the amended or supplemental pleading to which it responds.*

Based on CPLR § 3025(d), Freeman's time to serve its answer to the amended complaint begins to run upon service of the amended complaint. Consequently, any motion by Freeman pursuant to CPLR § 3211(a)(1) must be made before service of its answer to the amended complaint or it shall be deemed waived.

Inasmuch as Hilton has yet to serve the amended complaint, Freeman's time to answer the amended complaint has not yet triggered, and Freeman's concomitant time to move pursuant to CPLR § 3211(a)(1) has not expired. Therefore, it cannot be said that Freeman waived its defense premised upon CPLR § 3211(a)(1).

Pursuant to CPLR § 3211(a)(1), judgment dismissing one or more causes of action asserted may be granted on the ground that "a defense is founded upon documentary evidence" where "the documentary evidence utterly refutes [the complaint's] factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 A.D.3d 98, 992 N.Y.S.2d 20 [1st Dept 2014]).

And, as to dismissal pursuant to CPLR § 3211(a)(7), the standard is whether a pleading states a cause of action (*African Diaspora Maritime Corp. v. Golden Gate Yacht Club*, 109 A.D.3d 204, 968 N.Y.S.2d 459 [1st Dept 2013]). A pleading states a cause of action if factual allegations are discerned from its four corners which, taken together, manifest any cause of action cognizable at law (*id.*). If a cognizable cause of action is found, a motion to dismiss pursuant to CPLR § 3211(a)(7) will fail (*id.*). In performing this analysis, the court must "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 into any cognizable legal theory" (*Siegmund Strauss, Inc. v. East 149th Realty Corp.*, 104 A.D.3d 401 [1st Dept 2013]; *Nonnon v. City of N.Y.*, 9 N.Y.3d 825 [2007]; *Leon v. Martinez*, 84 N.Y.2d 83, 87-88, 614 N.Y.S.2d 972 [1994]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" presumed to be true or

accorded every favorable inference (*David v. Hack,* 97 A.D.3d 437, 948 N.Y.S.2d 583 [1st Dept 2012]; *Biondi v. Beekman Hill House Apt. Corp.*, 257 A.D.2d 76, 81, 692 N.Y.S.2d 304 [1st Dept 1999], *affd* 94 N.Y.2d 659, 709 N.Y.S.2d 861, 731 N.E.2d 577 [2000]).

Common Law Claims (Second and Third Causes of Action)

Workers' Compensation Law § 11 provides that "[t]he liability of an employer prescribed by the [Workers' Compensation Law] shall be exclusive and in place of any other liability whatsoever, to such employee . . . 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." However, section 11 permits a third-party action for common-law indemnification or contribution against an employer in the case where, *inter alia*, the employee has sustained a grave injury (*see Fleming v. Graham,* 10 N.Y.3d 296, 299–300, 857 N.Y.S.2d 8, 886 N.E.2d 769 [2008]; *Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408, 415, 788 N.Y.S.2d 292, 821 N.E.2d 530 [2004]; *Bovis v. Crab Meadow Enters., Ltd.*, 67 A.D.3d 846, 889 N.Y.S.2d 634 [2d Dept 2009]).

Hilton fails to state common law indemnification and contribution claims against Freeman. Based on the undisputed Workers' Compensation records, it is undisputed that on the date of the underlying incident Plaintiff was Freeman's employee, who received workers' compensation related to the underlying incident. More importantly, Hilton fails to allege that Plaintiff suffered a grave injury. Hilton merely alleges that Plaintiff "suffered personal injuries" (Opp., at ¶7). Nor does Hilton sufficiently assert in opposition that Plaintiff suffered a "grave injury." As such, Hilton does not have a common law claim against Freeman for indemnification, contribution, and/or apportionment against Freemen.

Thus, Freeman's motion to dismiss Hilton's claims for common law indemnification and contribution (Second and Third Causes of Action), pursuant to CPLR § 3211(a)(7), is granted, without prejudice.[6]

Breach of Contract (Fifth Cause of Action)

As to Hilton's breach of contract claim premised on the alleged failure to procure insurance, the elements of a claim for breach of contract are (1) the existence of a contract, (2) due performance of the contract by claimant, (3) breach of the contract by the other party, and (4) damages resulting from the breach (*US Bank Nat. Ass'n v. Lieberman*, 98 A.D.3d 422, 950 N.Y.S.2d 127 [1st Dept 2012]; *Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425, 426, 913 N.Y.S.2d 161 [1st Dept 2010]). The essential terms of the parties' Agreement, including the specific provisions of the contract upon which liability is predicated, must be alleged (*Gateway II LLC v. The Hartford Fire Ins. Co.*, 2014 WL 4787288 [Sup. Ct., N.Y. County 2014]; *Volt Delta Resources LLC v. Soleo Communications Inc.*, 11 Misc. 3d 1071(A), 816 N.Y.S.2d 702 [Sup. Ct., N.Y. County 2006], citing *Sud v. Sud*, 211 A.D.2d 423, 424 [1st Dept 1995]; and *Caniglia v. Chicago Tribune-New York News Syndicate Inc.*, 204 A.D.2d 233, 234 [1st Dept 1994]).

Paragraph D of the Agreement, which contains the insurance procurement clause, states as follows:

> [Freeman] shall procure and maintain at its expense during the term hereof policies of insurance of the types and in amounts no less than the minimum coverages specified below, with responsible insurance companies, and upon terms, satisfactory to [Hilton] . . . . Each such insurance policy (except Workers' Compensation and Employer's

[6]It is noted that given that the motion was not aimed at Plaintiff's claims directly, the Court declines to determine, at this juncture, that Plaintiff did not suffer a grave injury as a matter of law.

> Liability) shall name the Indemnitees, as defined in the STANDARD TERMS AND CONDITIONS and each of them, as additional insureds and shall by specific endorsement acknowledge the insuring of the contractual liabilities assumed by Contractor hereunder in Paragraph 14 of the Standard Terms and Conditions . . . .

Freeman submitted evidence that it complied with its contractual obligation to procure insurance coverage for Hilton pursuant to the Agreement.

The Policy contains a blanket additional insured endorsement pursuant to which Hilton would be entitled to coverage as an additional insured. Specifically, the additional insured provision includes:

> ANY PERSON OR ORGANIZATION TO WHOM YOU BECOME OBLIGATED TO INCLUDE AS AN ADDITIONAL INSURED UNDER THE POLICY AS A RESULT OF ANY CONTRACT OR AGREEMENT YOU ENTER INTO.
> (Tisman Aff., Ex. 5, Policy, at p.29).

" 'Additional insured' is a recognized term in insurance contracts and the well-understood meaning of the term is an entity enjoying the same protection as the named insured" (*Mecca Contracting, Inc. v. Scottsdale Ins. Co.*, 140 A.D.3d 714, 716, 33 N.Y.S.3d 364, 366 [2d Dept 2016] [internal quotation marks omitted], quoting *Pecker Iron Works of N.Y., Inc. v. Traveler's Ins. Co.*, 99 N.Y.2d 391, 786 N.E.2d 863 [2003]).

Further, Hilton does not dispute that the Policy conforms to the coverage amounts identified in the Agreement. It is also undisputed that the Policy provides defense and indemnification in favor of Freeman. In fact, Hilton concedes that its defense costs are paid by the Policy, and that Hilton "was told that we will likewise be indemnified [by the Policy]" (Opp., at ¶13).

While Hilton argues that the "[i]nsurance provision contains no language permitting Freeman to self insure the insurance requirement either by an[sic] self insured retention or by utilizing a fronting policy" (Opp., at ¶13), it fails to direct the Court to any language in the Agreement prohibiting such type of "fronting" insurance policy.[7]

As the documentary evidence establishes that Hilton does not have a claim for breach of contract for failure to procure insurance (Fifth Cause of Action), Freeman's motion to dismiss such Cause of Action pursuant to CPLR § 3211(a)(1) and (a)(7), is granted.

Breach of Contract (Sixth Cause of Action), Duty to Defend and Indemnify

Freeman's contention that the Sixth Cause of Action fails to state a claim lacks merit.

"A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (*Campos v. 68 East 86th Street Owners Corp.*, 117 A.D.3d 593, 595, 988 N.Y.S.2d 1 [1st Dept 2014], quoting *Drzewinski v. Atl. Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777, 515 N.E.2d 902, 904 [1987]); *Torres v. 63 Perry Realty, LLC*, 2014 WL 7180935 [2d Dept 2014]).

The Sixth Cause of Action for breach of contractual duty to provide a defence and indemnification alleges that Hilton entered into a contract with Freeman for labor and services to be performed "whereby [Freeman] would indemnify, defend and save [Hilton] . . . from any and all claims, demands, causes of action, . . . damages . . . judgments, orders, personal injury costs and expenses . . . sustained or incurred by or asserted against [Hilton] . . . arising from or in any

[7]According to Hilton, "fronting" policies are where "[a]ll monies being paid from these policies are actually being paid by Freeman which funds the insurer, the Insurance Company of the State of Pennsylvania (AIG)" (Opp., at ¶13).

way attributable to the . . . .obligations of [Freeman]" (¶30). The preceding paragraph "repeats, reiterate and realleges each and every allegation contained in the paragraphs numbered '1' through '29'" above. Inasmuch as the preceding allegations in the Third-Party Complaint allege that any damages Hilton suffers results from Freeman's "breach of third-party defendant's obligations pursuant to contracts and agreements entered into between third-party plaintiff and third-party defendant" (¶23), it cannot be said that Freeman fails to state a claim for contractual defense and indemnification.

It is noted that Paragraph 14 of the Agreement explicitly requires Freeman to indemnify Hilton against any and all allegations and damages arising out of or in any way connected with the Agreement (Tisman Aff. Ex 4, at ¶14).

However, to the extent the Sixth Cause of Action seeks damages for breach of contractual duty to provide indemnification, such allegation is duplicative of the Fourth Cause of Action for breach of contract, which likewise seeks damages in the form of "full contractual indemnity for all such judgment or settlement" recovered by plaintiff from Hilton.

Therefore, Freeman's motion to dismiss Hilton's contractual defense and indemnification claim (Sixth Cause of Action) pursuant to CPLR § 3211(a)(7) is granted solely to the extent that the allegations in the Sixth Cause of Action regarding contractual indemnification are stricken.

CONCLUSION

Accordingly, it is

ORDERED that the branch of Third-Party Defendant, Freeman Decorating Services, Inc.'s motion to dismiss primary Defendant/third-party Plaintiff, HLT NY Hilton, LLC's First Cause of Action pursuant to CPLR § 3211(a)(1) is granted, on consent; and it is further

ORDERED that the branch of Third-Party Defendant, Freeman Decorating Services, Inc.'s motion to dismiss primary Defendant/third-party Plaintiff, HLT NY Hilton, LLC's Second and Third Causes of Action pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted pursuant to CPLR § 3211(a)(7), without prejudice; and it is further

ORDERED that the branch of Third-Party Defendant, Freeman Decorating Services, Inc.'s motion to dismiss primary Defendant/third-party Plaintiff, HLT NY Hilton, LLC's Fifth Cause of Action for breach of contract for failure to procure insurance pursuant to CPLR §§ 3211(a)(1) and (a)(7) is granted; and it is further

ORDERED that the branch of Third-Party Defendant, Freeman Decorating Services, Inc.'s motion to dismiss primary Defendant/third-party Plaintiff, HLT NY Hilton, LLC's Sixth Causes of Action for contractual defense and indemnification pursuant to CPLR § 3211(a)(7), is granted solely to the extent that the allegations in the Sixth Cause of Action regarding contractual indemnification are stricken; and it is further

ORDERED that Freeman shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 31, 2017

ENTER:

HON. CAROL R. EDMEAD, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.