SUPREME COURT - STATE OF NEW YORK
DUTCHESS COUNTY

Present:

Hon. MARIA G. ROSA

Justice.

URSULA KARVEN-VERES,

Plaintiff,

-against-

SILVER SPRINGS FARM LLC and WINLEY FARM LLC,

Defendants.

WINLEY FARM LLC,

Third-Party Plaintiff,

-against-

VAN WORMER INTERNATIONAL LLC,

Third- Party Defendant.

DECISION AND ORDER

Index No: 50317/2017

The following papers were read and considered on third-party defendant's motion to dismiss:

NOTICE OF MOTION
AFFIRMATION IN SUPPORT
EXHIBIT1
AFFIDAVIT IN SUPPORT
EXHIBIT A
MEMORANDUM OF LAW IN SUPPORT

AFFIRMATION IN OPPOSITION
EXHIBITS A&B

Third-party defendant ("defendant") moves to dismiss the third-party complaint pursuant to CPLR §3211(a)(1) and (7). In considering a motion to dismiss based upon failure to state a cause of action, the court must construe the complaint liberally. ABN AMRO Bank, N.V. v MBIA, Inc., 17 NY3d 208 (211); CPLR §3211(a)(7). The court is only to determine "whether the facts as alleged fit within in any cognizable legal theory," and to ascertain whether the plaintiff has a cause of action, not whether it has stated one. Leon v Martinez, 84 NY2d 83 (1994). The court must accept as true the facts that are alleged in the complaint and submissions in opposition to the motion. Lots 4 Less Stores, Inc. v Integrated Properties, Inc., 152 AD3d 1181 (4th Dep't 2017). A motion to dismiss a complaint pursuant to CPLR §3211(a)(1) on the ground that a defense is founded on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law." 4777 Food Servs. Corp. v Anthony P. Gallo, P.C., 150 AD3d 1054 (2nd Dep't 2017).

The plaintiff in this action alleges she sustained injuries when she fell off of a horse at a horse farm during a film shoot. Winley Farm, LLC was named as a defendant as the owner of the farm. Prior to any filming, Winley Farm, LLC entered into a "Location Agreement" with third-party defendant Van Wormer International, LLC ("Van Wormer") under which Van Wormer leased a portion of the horse farm for a day for filming. That agreement provided, in relevant part, that Van Wormer would obtain "adequate commercial general liability... insurance" naming Winley Farms, LLC as an additional insured and loss payee. Van Wormer also agreed to "indemnify and hold harmless [Winley Farm] free from any and all claims (including, without limitation, third-party claims) for any damage, injury, loss or liability arising from (i) any act or omission of Van Wormer, its agents, employees, guests, invitees, licensees, or contractors" and Van Wormer's use of a horse and/or specified items associated therewith.

Winley Farm's third-party complaint incorporates the facts set forth in plaintiff's complaint and states additional facts about the terms of the location agreement. It asserts causes of action for breach of contract, contractual and common law indemnification, contribution and negligence. Construing the facts in a light most favorable to Winley Farm, the court finds that it has adequately stated cognizable causes of action for breach of contract, contractual indemnification, common law indemnification and contribution. The parties' agreement required Van Wormer to obtain "adequate" commercial general liability insurance naming Winley Farm as an additional insured. Winley Farm has made allegations that the insurance policy Van Wormer obtained was not adequate as the coverage denial letter indicates that the policy did not cover bodily injury resulting from the use of a horse. This allegation is sufficient to state a breach of contract claim. Moreover, Van Wormer's production of the insurance policy does not sustain its motion to dismiss pursuant to CPLR §3211(a)(1) as the policy does not utterly refute Winley Farm's allegation that the insurance was not adequate within the meaning of the parties' agreement.

Winley Farm has further stated a contractual indemnification claim. The parties' agreement required Van Wormer to indemnify and hold Winley Farm harmless for claims asserted against it pertaining to injury arising from Van Wormer's conduct. In the agreement Van Wormer stated that

it was fully satisfied with the condition of any horses being provided and was relying on its own due diligence with the respect to the suitability of such horses. Winley Farm is claiming that Van Wormer's not ensuring the suitability of the horse caused injury and Winley Farm to be named as a defendant in a negligence action, thereby triggering the agreement's indemnification provision.

Common-law indemnification avoids unfairness and unjust enrichment by "recognizing that person who, in whole or in part, has discharged a duty which is owed by him but which as between himself and another should have been discharged by the other is entitled to indemnity." McDermott v City of New York, 50 NY2d 211 (1980). It "requires a showing that the plaintiff and the defendant owed a duty to third parties, and that the plaintiff discharged the duty which, as between the plaintiff and the defendant, should have been discharged by the defendant." Murray Bresky Consultants, Ltd. v New York Comp. Manager's Inc., 106 AD3d 1255 (3rd Dept' 2013). Construing the third-party complaint in a light most favorable to Winley Farm, it is alleged that Van Wormer owed a duty to the plaintiff to ensure the suitability of the horse she was provided. It further asserts that if a third-party was injured based on Van Wormer's breach of that duty, Winley Farm would have no obligation to that third party because Van Wormer contractually assumed all responsibility for vetting the horse used. These facts are sufficient to state claims for common law indemnification and contribution should Winley Farm be held liable in negligence to the plaintiff.

Winley Farm, however, has failed to state a cause of action sounding in negligence against Van Wormer. The elements of a negligence cause of action are a duty owed by the defendant to the plaintiff, a breach of that duty and an injury resulting therefrom. Jiminez v Shahid, 83 AD3d 900 (2nd Dep't 2011). The complaint fails to assert any facts from which it can be deduced that Van Wormer owed it a duty that was breached. The sole source of any duty would derive exclusively from the contract between the parties. Under such circumstances, Winley Farm is precluded from recasting the breach of contract claim as a separate tort. Winley Farm fails to assert a basis for separate tort liability arising from a breach of duty distinct or in addition to the alleged breach of contract and thus fails to state a claim for negligence. See Sommer v Fed. Signal Corp., 79 NY2d 540 (1992).

The court further rejects movant's claim that Winley Farm is precluded from enforcing any indemnification provisions in the contract pursuant to General Obligations Law §5-321. That statute does not preclude enforcement of an indemnification provision in a lease negotiated at arm's length between two sophisticated parties when coupled with an insurance procurement requirement. Karanikolas v Elias Taverna, LLC, 120 AD3d 552 (2nd Dep't 2014). Here, two sophisticated entities negotiated an indemnity clause not for the purpose of exempting Winley Farm from liability for its own negligence but to allocate the risk of liability to third parties between it and Van Wormer.

Based on the foregoing, it is hereby

ORDERED that Van Wormer's motion to dismiss is granted to the extent that the negligence cause of action in the third-party complaint is hereby dismissed. It is further

ORDERED that in all other respects the motion to dismiss is denied.

This constitutes the decision and order of the court.

The parties are reminded that a compliance conference is scheduled for November 14, 2017 at 9:45 a.m.

Dated: November 1, 2017
Poughkeepsie, New York

ENTER:

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Pursuant to CPLR §5513, an appeal as of right must be taken within thirty days after service by a party upon the appellant of a copy of the judgment or order appealed from and written notice of

its entry, except that when the appellant has served a copy of the judgment or order and written notice of its entry, the appeal must be taken within thirty days thereof.