

Shamaeva v Park Ave. Properties Assocs.

2002 NY Slip Op 30080(U)

March 27, 2002

Supreme Court, New York County

Docket Number: 0101495/2001

Judge: Shirley Werner Kornreich

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Kornreich
Justice

PART 28

Margarita Shamaeva

INDEX NO. 101495/01

MOTION DATE 3/5/02

MOTION SEQ. NO. 002

MOTION CAL. NO. 88

- v -

Park Ave Prop.

Park Ave Properties Assoc. V. Lamb Holdings, Inc.
The following papers, numbered 1 to 3 were read on this motion to/for denial

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits _____

2

Replying Affidavits _____

3

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

RECORDED
APR 06 2002

Dated: 3/27/02

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
MARGARITA SHAMAEVA & AVNER SHAMEAV,

Plaintiffs,

-against-

DECISION & ORDER
: INDEX NO.: 101495/01

PARK AVE. PROPERTIES ASSOCS.,

Defendant.

..... X
PARK AVE. PROPERTIES ASSOCS.,

Third-party Plaintiff,

-against-

LAMB HOLDINGS, INC. & DARABIN, LTD. OF
PARK AVE., INC.,

Third-Party Defendants.

-----X

HON. SHIRLEY WERNER KORNREICH:

This is a personal injury action brought by plaintiffs for injuries suffered by plaintiff- Margarita Shamaeva when she fell on premises owned by third-party plaintiff and leased by third-party defendant. Plaintiffs had commenced a separate action against third-party defendant- Darabin, Ltd., which action was settled for \$140,000. By general release, Ms. Shamaeva, in consideration for the \$140,000, "release[d] and discharge[d], DARABIN, LTD. and PROVIDENCE WASHINGTON INSURANCE COMPANY, the releasee, releasee's heirs, executors, administrators, successors, and assigns from all actions..."

The instant action was commenced against landlord, third-party plaintiff, subsequent to settlement. Landlord, then, started the third-party action against Lamb Holdings, Inc. and

002

Darabin, Ltd. Third-party defendants now move to dismiss (CPLR §3211(a)(5)), contending that the suit is barred against them pursuant to GOL §15-108, which relieves an entity from liability for contribution when it has received a good faith release from the tortfeasor.

Defendant third-party plaintiff opposes the motion. Although it concedes that GOL §15-108 bars it from seeking contribution from third-party defendant, it argues it is not seeking contribution but, rather, indemnification which it contends defendant is obligated to provide under the lease. Specifically, the lease states:

Landlord or its agents shall not be liable for ...any injury or damage to persons or property resulting from any cause of whatsoever nature, unless caused by or due to the negligence of Landlord. Tenant agrees, at tenant's sole cost and expense to maintain general public liability insurance in standard form in favor of Landlord and Tenant against claims for bodily injury...in or upon the demised premises..

* * *

Tenant covenants and agrees to indemnify and save harmless, Landlord...from and against any liability (statutory or otherwise), claims, suits, demands, damages, judgments, costs, interest and expenses...to which they may be subject or which they may suffer by reason of, or by reason of any claim for, any injury ...arising from or in connection with the occupancy or use of or from any work, installation or thing whatsoever done in, at or about the demised premises...or arising from any condition of the demised premises...or from any act, omission or negligence of tenant ...

Tenant covenants and agrees, at its sole cost and expense, to obtain and, at all times during the Term, keep in force...comprehensive general liability insurance...Said policies shall be in the name of Landlord and Tenant...and shall name as additional insureds Landlord...

Tenant, in reply, argues that landlord, in effect, is seeking contribution under the guise of indemnification. It contends that public policy prohibits indemnification for landlord's negligence. It further argues that the defect which allegedly caused plaintiffs injury, concededly on tenant's premises, was structural, that tenant was obligated under the lease to obtain insurance only for its

own negligence and for non-structural defects and that, thus, no indemnification is owed here.

Judge Titone, in Rosado v. Proctor, 66 N.Y.2d 21, 23 (1985), set forth the distinction between contribution and indemnification:

in contribution the loss is distributed among tort-feasors, by **requiring** joint tort-feasors to pay a proportionate share of the loss to one who has discharged their joint liability, while in indemnity the party legally liable shifts the entire loss to another. [citations omitted]

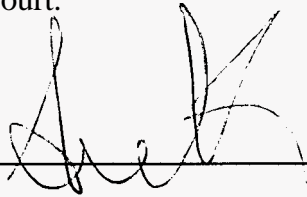
Judge Titone explained that contribution arises without agreement, whereas indemnification arises from express contract or by implication in order “ ‘to prevent a result which is regarded as unjust or unsatisfactory.’ ” [citations omitted] Id. at 24. In the context of GOL §15-108, Judge Titone notes that indemnification may occur only when the party seeking such relief is not responsible in any degree for the injury. Id. at 24-25. See Williams v. N.Y.C. Health and Hospital Corp., 262 A.D.2d 231,232 (1st Dept. 1999)(GOL §15-108 does not extinguish party’s right to seek common law indemnification). A party **seeking** exemption from GOL §15-108, therefore, must establish that it was not responsible for the tort in any degree. Rosado. id. at 25.

The instant action **arises** from injuries allegedly sustained by a fall on the premises rented by third-party defendant from third-party plaintiff. Pursuant to the lease between the parties, tenant agreed to maintain liability insurance naming landlord **as an insured** and to indemnify landlord for any vicarious liability. Third-party plaintiff brings its action pursuant to these provisions of the lease. Should landlord, third-party plaintiff, prove that tenant failed to procure the required insurance under the lease, landlord, if self-insured, would be fully indemnified by tenant, See Kinney v. Lisk, 76 N.Y.2d 215,219 (1990). If landlord is insured, breach of the procurement agreement would result in reimbursement of the cost of the landlord’s liability

insurance. See Inchaustegui v. 666 5th Ave Ltd., 96 N.Y.2d 111 (2001). Should landlord's liability be vicarious, again, it would succeed **on** an indemnification claim. See Rosado, supra; Williams, supra. Accordingly, the third-party action is a contractual one for indemnification. *As* such, it is not **barred** by GOL§15-108. Third-party tenant's motion to dismiss, therefore, is denied.

This shall constitute the decision and order of the Court.

DATED: March 27, 2002

A handwritten signature in black ink, appearing to be 'J. K.', is written over a solid horizontal line.

Judge, Civil Court