

Calderon v New Water St. Corp.
2007 NY Slip Op 34532(U)
July 10, 2007
Supreme Court, New York County
Docket Number: 103176/2005
Judge: Shirley Werner Kornreich
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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JANET CALDERON and ENRIQUE CALDERON,

Plaintiffs,

Index No.:103176/2005

-against-

**DECISION and
ORDER**

NEW WATER STREET CORPORATION and
NEW YORK ELEVATOR COMPANY, INC.,

Defendants.

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KORNREICH, SHIRLEY WERNER, J.:

FILED
JUL 19 2007
NEW YORK
COUNTY CLERK'S OFFICE

This court's order of June 20, 2007 ("Prior Order") is hereby vacated and recalled, and this decision and order is substituted in its place.

Defendant New Water Street Corporation ("NWSC") moves for summary judgment pursuant to CPLR 3212 on its cross-claim against New York Elevator Company, Inc. ("NYE") and seeks indemnity pursuant to its contract with NYE, including defense costs. NYE opposes NWSC's motion. After the motion was submitted, the court was advised by counsel that the action was settled and the court issued the Prior Order. Plaintiff issued releases to both defendants. During subsequent conference calls with the parties and after examination of the County Clerk's file, the court learned that the stipulation of discontinuance, dated May 15, 2007, was not signed by counsel for NWSC, in violation of C.P.L.R. §3217. Thus, NWSC's contractual indemnification cross-claim for attorneys' fees and costs expended in this action was not discontinued.

I. Movant's Proof

A. Procedural History and Facts

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NWSC's cross-claim derives from this personal injury action brought by Janet Calderon to recover damages arising from an elevator accident that occurred on March 7, 2005. The complaint alleges that plaintiff sustained injuries as a result of NWSC's and NYE's negligence, recklessness and failure to warn when her elevator ("elevator #58") at 55 Water Street, a high-rise commercial building in New York City, fell and/or dropped and shook on June 24, 2003. NWSC, a real estate company which owns 55 Water Street, previously moved for summary judgment for the same relief. The court denied NWSC's former motion on November 3, 2006 with leave to renew upon completion of discovery and allowed NYE to explore whether NWSC had actual or constructive notice of a problem with the elevator and/or failed to timely report it to NYE. NWSC claims its motion is now ripe for review because discovery is complete.

B. The Contract

On the date of the accident, a contract was in effect for the maintenance of the building's elevators by NYE. The contract provided that NYE was to:

[A]ssume the entire responsibility and liability for any and all damage (direct and consequential) and injury (including death), of any kind or nature...to all persons...and to all property...caused by, resulting from, arising out of, or occurring in connection with (I) the Work, (ii) the performance or intended performance of the Work; (iii) the performance or failure to perform [the] Trade Contract; or (iv) any occurrence which happens in or about the area where the Work is...performed by [NYE], either directly or through a subcontractor....

Additionally, the contract required NYE to:

[D]efend, indemnify and hold harmless [NWSC/Indemnatee] ... from and against any and all such damages, injuries, and claims whether just or unjust, and further, from and against any and all other loss, cost, expense, and liability, including without limitation, legal fees and disbursements, that any Indemnatee may directly or indirectly sustain, suffer or incur as a result of such damages, injuries and claims....

II. Defendant's Proof

NYE avers that NWSC has not made a prima facie case entitling it to summary judgment on an indemnification theory. It contends that NWSC's negligence contributed to the accident, as NWSC failed to prove it was not negligent, or that it was only vicariously liable. Furthermore, NYE insists that it needs depositions of ex-Security officers and other party witnesses to whom subpoenas have been issued, and that, therefore, summary judgment should be denied for lack of discovery.

III. *Conclusions of Law*

To prevail on a motion for summary judgment, the movant must establish a prima facie showing of entitlement to judgment as a matter of law by producing sufficient evidence to demonstrate the absence of any material issue of fact. *Giuffrida v. Citibank Corp.*, 790 N.E.2d 772, 778 (2003). Once a prima facie showing is made, the burden then shifts to the non-moving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues that require a trial. *Zuckerman v. New York*, 404 N.E.2d 718 (1980).

The broadly-written maintenance contract between NYE and NWSC requires NYE to defend and indemnify NWSC from all "claims whether just or unjust" and "all other loss, cost, expense, and liability, including without limitation, legal fees and disbursements...." This broad language requires indemnification as long as plaintiff's injuries were not attributable to NWSC's negligence, and NWSC's liability was vicarious and purely statutory. *See Colozzo v. Nat'l Center Found., Inc.*, 30 A.D.3d 251, 252 (1st Dept. 2006); *see also, Hooper Assocs. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491 (1989) (attorneys' fees recoverable when authorized by contract).

Because the issuance of a general release in favor of NWSC eliminates the possibility that

it will ever be found negligent, its cross-motion against NYE for summary judgment for contractual indemnification of defense costs and attorneys' fees should be granted. *See Ruli v. Hiro Enter.*, 298 A.D.2d 256, 258 (1st Dept. 2002); *Brewery Workers Pension Fund v. New York State Teamsters Conference Pension & Retirement Fund*, 55 N.Y.2d 902, 904 (1982); *Emery v. Depot Constr. Co.*, 53 N.Y.2d 971, 971 (1981) (negligent contractor still entitled to contractual indemnification from subcontractor because of contract's indemnification clause). Moreover, in light of the settlement, NYE's basis for seeking disclosure is moot. *Mahoney v. Turner Const. Co.*, 37 A.D.3d 377, 380 (1st Dept. 2007). In addition, the record on the motion contained no proof that NWSC was negligent. Accordingly, it is

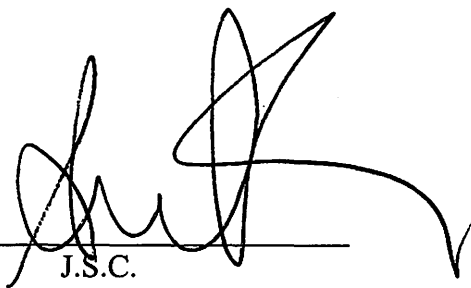
ORDERED that NWSC's cross-motion for summary judgment of indemnification pursuant to CPLR 3212 is granted solely to the extent that NWSC's motion to recover defense costs and attorneys' fees incurred in this action, is granted on liability, and in all other respects the motion is denied as moot; and it is further

ORDERED that the parties are directed to appear for a pre-trial conference on the damages recoverable for defense costs and attorneys' fees on August 9, 2007, at 10:00 a.m., in Part 54, Room 1227, at 111 Centre St., New York, NY 10013.

July 10, 2007

FILED
 JUL 19 2007
 NEW YORK
 COUNTY CLERKS OFFICE

ENTER:



 J.S.C.