Rodriguez v 61 E. 72nd St. Corp.
2010 NY Slip Op 33931(U)
November 22, 2010
Supreme Court, Bronx County
Docket Number: 16219/06
Judge: Mary Ann Brigantti-Hughes
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX

Present: Hon. Mary Ann Brigantti-Hughes

ANGEL RODRIGUEZ

Decision and Order

Plaintiff,

-against- Index No.: 16219/06

61 EAST 72nd STREET CORPORATION,

Defendants.

61 EAST 72nd STREET CORPORATION,

Third-Party Plaintiff,

-against- Index No.: 85682/06

ELEANOR PROPP AND RODNEY PROPP,

Third-Party Defendants.

ELEANOR PROPP AND RODNEY PROPP,

Second Third-Party Plaintiff,

-against- Index No.: 85976/07

THE I. GRACE COMPANY, COMISSION PRIVATE RESIDENCES, LLC.,

Second Third-Party Defendants.

61 EAST 72nd STREET CORPORATION,

Third Third-Party Plaintiff,

-against- Index No.: 83826/09

National Mechanical Services, LLC.,

Third Third-Party Defendants.

The following papers numbered 1 to 9 read on the below motions noticed on November 13, 2009, ~~2010~~ and duly submitted on the Part IA15 Motion calendar of August 2, 2010:

MK

Papers Submitted	Numbered
TP Def. Propp's Affirmation, Exhibits in Support of Motion for Summary Judgment, dismissing claims of 61 E. 72nd St., or Summary Judgment as to Propp's claims against The I. Grace Co.	1
TP Pl. 61 E. 72nd St.'s Affirmation in Opposition to Propp's Motion for Summary Judgment, Exhibits.	2
Def. Propp's Affirmation in Reply	3
TP Def. Nat'l Mech. Services' Affirmation in Opposition to Propp's Motion for Summary Judgment,	4
TP Def. I. Grace Co.'s Affirmation in Support of Cross-Motion for Summary Judgment dismissing Def. Propp's Claims.	5
TP Def. Nat'l Mech Services' Affirmation in Opposition to I. Grace Co.'s Motion.	6
Def./TP Pl. 61 E. 72nd St.'s Affirmation in Support of Motion for Summary Judgment as to their claims against TP Def. Propp., Exhibits.	7
TP Def. Propp's Affirmation in Opposition to 61 E. 72nd St.'s Motion.	8
Def./TP Pl. 61 E. 72nd St.'s Affirmation in Reply.	9

Third-Party Defendants, Eleanor Heyman Propp and Rodney Propp ("Propp")., moves for an Order, pursuant to CPLR §3212, granting summary judgment against Third-Party Plaintiff 61 E. 72nd St. Corporation ("61 E. 72nd St."), dismissing their Complaint, together with all cross-claims, with prejudice; and such other and further relief the Court deems just and proper. In the alternative, Propp seeks summary judgment as to their own claims against the Second Third-Party Defendants, The I. Grace Company, Commission Private Residences, LLC ("Grace"). This motion is opposed by 61 E. 72nd St. and Third Third-Party Defendant, National Mechanical Services, LLC. ("Nat'l Mech.").

Second Third-Party Defendant, Grace, cross-moves for an Order, pursuant to CPLR §3212, granting summary judgment against Propp dismissing Propp's Second Third-Party Complaint, together with all cross-claims, with prejudice; and for such other and further relief the Court may deem just and proper. This motion is opposed by Propp and Nat'l Mech.

Defendant/Third-Party Plaintiff 61 E. 72nd St. moves for an Order, pursuant to CPLR 3212, granting summary judgment as to their claims against Propp. Propp opposes this motion.

In the interest of judicial economy, the aforementioned motions and cross-motions have been consolidated by the Court and are disposed of in the following Decision and Order.

I. Factual Background and Procedural History

The herein action, involves a claim by Plaintiff, Angel Rodriguez (hereinafter "Plaintiff"), for personal injuries sustained on July 21, 2004. On that date, Plaintiff was an employee of Grace, a company that performs, among other things, home renovations. Grace was hired by the Propps' to conduct renovations on their apartment, located on the 9th floor of 760 Park Avenue, New York, New York. Part of Plaintiff's duties included removing waste and debris from the apartment and bringing it down to the back of the building, which required him to walk through the building's basement floor. On that same date, laborers of Nat'l Mech. were doing welding work in the basement, causing flames and sparks to occasionally spray in Plaintiff's walking path. Nat'l Mech. was hired by 61 E. 72nd St.,

the building's Management Company, and this welding was not associated with the Propp's apartment renovation.

On the date of the incident, Plaintiff was making his eight trip through the basement to dispose of refuse from the Propp apartment. During this trip, Plaintiff was startled when sparks and flames were sprayed into his path from the welding work. As a result, Plaintiff stumbled and his leg went through a hole in the floor, causing injury. Plaintiff brought an action against 61 E. 72nd St., who in turn sued the Propp's pursuant to the parties' Alteration Agreement. 61 E.72nd St. claimed that this agreement specified that the Propps' would indemnify 61 E.72nd St. for any damages sustained as a result of work performed on their apartment. The Propps' brought an action against Plaintiff's employer, Grace, pursuant to an agreement between those two parties which indemnified the Propps' for damages incurred as a result of work performed on the property. 61 E. 72nd St. also sued, pursuant to a Third Third-Party Complaint, Nat'l Mech., who was hired by 61 E. 72nd St. to perform welding work on the property site.

I. Summary Judgment Legal Standard of Review

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of the opposing papers." *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). There is no requirement that the proof for said motion be submitted in affidavit form, rather, the requirement is that the evidence proffered be in admissible form. *Muniz v. Bacchus*, 282 A.D.2d 387 (1st Dept. 2001). Accordingly, affirmations from attorneys having no personal knowledge of the facts are not evidence and offer nothing more than hearsay. *Reuben Israelson v. Sidney Rubin*, 20 A.D.2d 668 (2nd Dept. 1964); *Erin Federico v. City of Mechanicville*, 141 A.D.2d 1002 (3rd Dept. 1988).

Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into ore resolve issues of credibility. *Knepka v. Tallman*, 278 A.D.2d 811 (4th Dept. 2000)

Lastly, because summary judgment is such a drastic remedy, it should never be granted when there is any doubt as to the existence of a triable issue of fact. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223 (1978). When the existence of an issue of fact is even debatable, summary judgment should be denied. *Stone v. Goodson*, 8 N.Y.2d 8 (1960).

II. Propp and 61 E.72nd St. Motions for Summary Judgment

Both Propp and 61 E. 72nd St. argue that they are entitled to summary judgment based on the parties' Alteration Agreement. Accordingly, these motions shall be analyzed first.

The primary issue to be decided is whether the terms of the Aleration Agreement, when applied to the facts of this matter, required the Propp's to indemnify 61 E. 72nd St. for Plaintiff's injuries.

It is well-settled that words in a contract are to be construed to achieve the apparent purpose of the parties. *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487 (1989). Although words may seem to

admit of a larger sense, they should be restrained to the particular occasion and to the particular object which the parties had in view. *Id.* citing *Robertson v. Ongley Elec. Co.*, 146 N.Y. 20, 23 (_____). Indemnification contracts must be strictly construed to avoid imposing a duty which the parties did not intend. *Baginsky v. Queens Grand Realty*, 21 Misc. 3d 1110A (N.Y.Sup. Ct. 2008). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances. *Id.*, citing *Eldoh v. Astoria Generating Co., LP.*, 57 A.D.3d 603, 604 (2d Dept. 2008). *See also Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487 (1989). Not every indemnity agreement uses the same language or requires the same factual predicates to trigger the duty to indemnify. For example, in *Keohane v. Littlepark House Corp.*, 290 A.D. 2d 382 (1st Dept. 2002), the clause was triggered for subcontractor work "only to the extent caused in whole or in part by negligent acts or omissions...[of the subcontractor]." In that matter, the court determined that the clause was not triggered, as the indemnitor's negligence was not established. *Id.*

In this matter, 61 E. 72nd St. seeks to enforce the following provision of their Alteration Agreement with the Propps:

4. Indemnification and Reimbursement of Loss

> ...I agree to indemnify and hold you, the Board, the shareholders or owners, the tenants and occupants of the Building, the Agent and your architects, engineers and attorneys harmless from and against any and all losses, liabilities, costs and expenses (including, without limitation reasonable attorney's fees and disbursements) suffered by reason of any injuries or damage to persons or property ***as a result of the work and any fault or defect therein or created thereby***, whether or not caused by negligence.
> (Emphasis supplied.)

A plain reading of this provision allows the interpretation that the indemnification provision triggers where (1) damages occur as a result of work performed on the property *and* as a result of (2) any faulty or defective condition surrounding that work or created by the work. Further, it must be assumed that the parties intended "the work" to mean the renovation project occurring on the 9th floor of the building, as the Alteration Agreement is titled "Alteration Agreement - 9th Floor."

In this matter, Plaintiff testified that he was in the process of removing trash and debris from the Propps' 9th floor apartment, down through the building's basement. Laborers from Nat'l Mech. happened to be doing welding work in the basement that day. On his way back up to the apartment, the Plaintiff, now empty-handed, was startled when sparks and flames from Nat'l Mech's work came into his walking path. Plaintiff stumbled and injured his knee in a hole in the basement floor. Nat'l Mech. was not performing work for the Propps', and the welding work had nothing to do with the 9th floor renovations.

While it is true that the Plaintiffs' injuries occurred while performing work specified in the Alteration Agreement, it is also clear that the injuries occurred solely because of the intervening welding work and hazardous condition in the building's basement. This is not a situation where the work performed on the 9th floor caused a hazardous condition or was otherwise defective, thus resulting in Plaintiff's injuries. Indeed, the indemnification clause at issue was not so broadly drafted

as to include any possible injury occurring by any means. Rather, the clause is limited to trigger only where an injury occurred as a result of a defect within the work, or condition caused by the work. Here, Plaintiff was returning to the 9th floor and encountered a hazardous situation completely unrelated to his work. The parties did not anticipate triggered indemnification as a result of an injury anywhere in the building, due to any expected or unexpected hazard. Accordingly, we hold that the indemnification clause found in the parties' Alteration Agreement has not been triggered as a result of this incident.

Third Third-Party Defendant Nat'l Mech. has opposed the motion filed by Propp, as well as the motion filed by Grace which has been rendered moot as a result of our holding above. In opposing both of these motions, Nat'l Mech. argues that they have only recently been added in litigation, and have not yet had an opportunity to conduct meaningful discovery on Propp or Grace. In this matter, however, the fact that discovery remains will not prevent entry of summary judgment. Completion of discovery is not a prerequisite before a court may grant a summary judgment motion. *Chemical Bank v. PIC Motors Corp.*, 58 N.Y. 2d 1023 (1983). Further, "the mere hope that evidence sufficient to defeat the motion may be uncovered during the discovery process is insufficient." *Naryaev v. Solon*, 6 A.D.3d 510 (2d Dep't 2004). A party opposing summary judgment on the basis of requiring discovery must prove that he is "not merely seeking a fishing expedition." *Kaltsas v. Solow*, 15 Misc.3d 1124(A) (Westchester Cty. S.Ct. 2007). Nat'l Mech. has not submitted competent proof that anything relevant will be uncovered in discovery that would create an issue of fact regarding the triggering of the Alteration Agreement's indemnification provision. Without such an evidentiary showing by the opposing party, "mere speculation or conjecture" is insufficient to prevent entry of summary judgment. *Pank v. Village of Canajoharie*, 275 A.D.2d 508, 509 (3d Dep't 2000).

Summary judgment is therefore granted as to Propp, dismissing the complaint of 61 E. 72nd St. Accordingly, the summary judgment cross-motion filed by Grace is likewise granted, as Propps' Complaint has been rendered moot and Nat'l Mech.'s opposition has been disposed of as reasoned above. Finally, the summary judgment motion filed by 61 E. 72nd St. is denied.

III. Conclusion

Accordingly, it is hereby

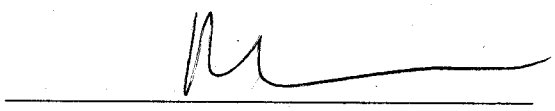
ORDERED, that Third-Party Defendants, Eleanor Heyman Propp and Rodney Propp's motion for an Order, pursuant to CPLR §3212, granting summary judgment, dismissing Third-Party Plaintiff 61 E. 72nd Street Corporation's Complaint, together with all cross-claims, with prejudices is GRANTED, and it is further

ORDERED, that Second Third-Party Defendant, I. Grace Company, Commission Private Residences, LLC.'s motion for an Order, pursuant to CPLR §3212, granting summary judgment, dismissing Second Third-Party Plaintiff Eleanor Heyman Propp and Rodney Propp's Complaint, together with all cross-claims, with prejudices is GRANTED , and it is further

ORDERED, that Defendant/Third-Party Plaintiff 61 E. 72nd Street Corporation's motion for an Order, pursuant to CPLR Sec. 3212, granting summary judgment as to their claims against Third-Party Defendant Eleanor Heyman Propp and Rodney Propp, is hereby DENIED.

The above constitutes the Decision and Order of this Court.

Dated: November 22, 2010



Hon. Mary Ann Brigantti-Hughes, J.S.C.