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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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MARCO BARAHONA and MERCEDES VASQUEZ,

Plaintiffs,

INDEX NO.
113737/08

-against-

DONALD DEUTSCH and CLARK CONSTRUCTION CORPORATION,

Defendants.

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CLARK CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

INDEX NO.
590577/09

-against-

A & R EQUIPMENT, LLC,

Third-Party Defendant.

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JOAN MADDEN, J.:

Third-party defendant A&R Equipment, LLC ("A&R") moves to dismiss the third-party complaint pursuant to CPLR 3211 and 3212.

Plaintiffs brought the underlying Labor Law action to recover for personal injuries allegedly sustained by Marco Barahona ("plaintiff") in the course of his employment for A&R, which had been hired by defendant/third-party plaintiff Clark Construction Corp. ("Clark") to do demolition work on property owned by defendant Donald Deutsch.

Clark, the only party opposing A&R's motion, argues that the motion is premature because discovery has not been completed, and the outstanding discovery may lead to a factual issue that would preclude summary judgment.

The third-party action asserts causes of action for common-law and contractual

indemnification and for breach of contract to procure insurance. A&R argues that these claims cannot be sustained because it never entered into a written indemnification agreement with Clark and plaintiff's injuries do not constitute "grave injuries" under Workers' Compensation Law ("WCL") § 11.

It is undisputed that A&R never executed the proposed indemnification agreement for the project. Clark counters that the motion should be denied as premature since depositions must be held to ascertain the parties' "customary and usual practice" and their intent with respect to indemnification.

"Workers' Compensation Law § 11 permits an owner to bring a third-party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a 'grave injury' or the employer has entered into a written contract to indemnify the owner" (*Flores v Lower East Side Service Center, Inc.*, 4 NY3d 363, 365 [2005]). Since Clark is not claiming that the worker was gravely injured, it "may proceed [with its third-party action] only if [A&R] entered into a written agreement to indemnify [Clark]" (*Auchampaugh v Syracuse University*, 67 AD3d 1164 [3d Dept 2009]).

"Whether the parties did in fact have such an agreement involves a two-part inquiry. First, we consider whether the parties entered into a written contract containing an indemnity provision applicable to the site or job where the injury giving rise to the indemnity claim took place. Second, if so, we examine whether the indemnity provision was sufficiently particular to meet the requirements of section 11" (*Rodrigues v N & S Building Contractors, Inc.*, 5 NY3d 427, 432 [2005]). To meet the second prong of the test, the claim must be "based upon a provision in a written contract entered into prior to the accident or occurrence by which the

employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered" (*Staub v William H. Lane, Inc.*, 58 AD3d 933, 934 [3d Dept 2009], citations omitted).

Assuming, *arguendo*, that the indemnification agreement at the heart of this controversy (Clark's exhibit 4) meets these criteria, the dispositive question is whether that agreement, unsigned, allows Clark to circumvent the bar on employer claims imposed by WCL § 11. Although A&R is the movant herein, Clark, as "[t]he party seeking to enforce a contractual obligation," bears the burden of proof on this issue (*cf. Curtis Properties Corporation v. Greif Companies*, 212 AD2d 259, 265 [1st Dept 1995]).

The statute itself does not literally require that the indemnification agreement be signed, only that it be in writing (see WCL § 11; *Flores, supra*, 4 NY3d at 368, 369). Faced with a written but unsigned indemnification agreement, the court must apply the common-law rule and determine whether that agreement satisfies WCL § 11 by conducting a "review of the course of conduct between the parties to determine whether there was a meeting of minds sufficient to give rise to an enforceable contract" (*id.* at 369-370). "'[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound ..., unless, of course, the parties have agreed that their contract will not be binding until executed by both sides" (*Kowalchuk v Stroup*, 61 AD3d 118, 125 [1st Dept 2009], citing *Flores, supra*; see also *Sabella v Scantek Medical, Inc.*, n.o.r., 2009 WL 3233703, *18 [SDNY 2009]).

Relying on *Flores v Lower East Side Service Center, supra*, Clark argues that the lack of a signed indemnification agreement does not bar its claim for contractual indemnification because it had done business with A&R before, and the custom between them was for A&R to

execute such an agreement. This argument is supported by the affidavit of Clark's senior project manager, Tim Morton ("Morton"), who avers that Clark's projects, including two prior ones with A&R, always contained an indemnification agreement (Morton's affidavit, ¶ 3, at Clark's exhibit A; see *id.*, exhibits 2 and 3), and indeed one had been prepared for A&R to sign (*id.*, exhibit 4) in conjunction with the letter agreement signed for the job on which plaintiff was injured (*id.*, exhibit 1). Morton further avers that both A&R and Clark intended to have A&R indemnify Clark on this project, and the only reason the indemnification clause was not executed was that by mistake on both parts "it was not included" in the agreement (*id.*, ¶ 10).

In reply, A&R discounts Morton's familiarity with the relevant facts since Morton does not claim to have been personally involved in the project, and the agreement at issue (Podell reply affirmation, exhibit 15) was addressed to Clark's Victor Caban rather than to Morton (*id.*, ¶ 4). Furthermore, A&R questions how Morton could give a contradictory version of the facts (*i.e.*, it was a mutual mistake that the indemnification agreement was not signed) without addressing the prior affidavit of A&R's president, Gregg Goldbaum ("Goldbaum"), who stated that Clark had repeatedly submitted the indemnification agreement to A&R and each time A&R purposely refused to sign it (*id.*, ¶¶ 6-7). In his reply affidavit, Goldbaum explicitly states that he is the only person authorized to act on behalf of A&R in this respect, and he never intended to sign the indemnification agreement in question (¶ 4), and his – and A&R's – custom and practice is to avoid signing such indemnification agreements whenever possible (¶ 5-6). As evidence of these facts, Goldbaum avers that despite Clark's current claim that its practice is to require indemnification from its contractors, of the 17 projects A&R has worked on for Clark since 2004, only in two (the two produced by Clark) has A&R signed indemnification agreements

(¶¶ 7-8). The agreements for the 17 projects, annexed as exhibits to Goldbaum's reply affidavit, are consistent with Goldbaum's averments.

Based on the foregoing and the evidence submitted by the parties, including all the writings between them (see *Staub, supra*, 58 AD3d at 934), the court concludes that Clark has failed to raise an issue of fact as to whether A&R intended to sign the indemnification agreement. "'It is well settled that, if the parties to an agreement do not intend it to be binding upon them until it is reduced to writing and signed ..., they are not bound and may not be held liable until it has been written out and signed.'... Under New York law, 'when a party gives forthright, reasonable signals that it means to be bound only by a written agreement,' that intent is honored'" (*Kowalchuk, supra*, 61 AD3d at 122-123, citing *Jordan Panel Sys. Corp. v Turner Construction Co.*, 45 AD3d 165 [1st Dept 2007]).

Accordingly, it is

ORDERED that A&R's motion is to dismiss the third-party complaint is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the third-party complaint; and it is further

ORDERED that the remaining parties shall appear for a status conference on October 28, 2010 at 9:30 am , in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: October 15, 2010

J.S.C.