Legnetti v Camp America
2012 NY Slip Op 33270(U)
November 29, 2012
Sup Ct, Nassau County
Docket Number: 1113/09
Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

CORY LEGNETTI,

Plaintiff,

- against -

CAMP AMERICA, CAMP CHIPINAW RECREATION CORP., CAMP CHIPINAW REALTY CO., LLC, CAMP CHIPINAW RECREATION CO., LLC., and PETER EVANS,

Defendant.

TRIAL / IAS PART 29
NASSAU COUNTY

Index No. 1113/09

Motion Sequence No. 008

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendants Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC move pursuant to CPLR 3211(a)(7) to dismiss the cross claims of the codefendant Peter Evans. The defendants contend Evans fails to state a cause of action. The defendants also move for summary judgment pursuant to CPLR 3212 to dismiss the Evans' cross claims because there is no triable issue of fact.

Evans opposes the motion. Evans points out the last day for filing summary judgment

motions was July 2, 2012, that is 90 days after the filing date of the note of issue, which was filed on April 1, 2012. Evans notes the instant motion is the second attempt to obtain summary judgment by the other defendants to dismiss the cross claim. Evans also states, while the other defendants' motion to dismiss for a failure to state a cause of action is the first such attempt, the codefendant exercise his right to amend the cross claim as of right pursuant to CPLR 3025(a) on August 28, 2012. Evans contends that branch of the instant motion is thus moot, and leaves the other defendants with the opportunity to respond to the amended cross claim.

Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC reply to Evans' opposition. They contend the motion is not untimely because there was no deadline to file a CPLR 3211(a)(7) motion. These defendants assert Evans fails to address the legal authority cited by them which holds indemnification is only available where they bear vicarious responsibility based solely upon their relationship with the actual wrongdoer. Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC aver Evans' amended cross claims suffer from two fatal defects, that is it fails to state a cause of action; it is untimely; and it is served without court leave. Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC maintain the first cross claim for contribution and common law indemnity was extinguished by the July 23, 2012 stipulation of discontinuance and settlement among the plaintiff and Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co.,

LLC and Camp Chipinaw Recreation Co., LLC where Evans is the active tortfeasor. The movants insist the second cross claim, for some sort of implied contract or a contract of insurance between them and Evans requiring them to defend and indemnify Evans, fails to allege any facts which would establish consideration, mutual assent, legal capacity and legal subject matter. Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC contend the third cross claim alleging they breached an insurance contract when they failed to defend and indemnify Evans. The movants assert Evans fails to allege they issued an insurance policy to Evans, and add Chipinaw is a summer camp not an insurance company. The movants aver they are prejudiced by Evans' delay in bringing his claims after their settlement with the plaintiff, and beyond the time set in CPLR 3025(a). The movants aver the cross claims do not contain a demand for an answer hence the cross claim is deemed denied under CPLR 3011.

The first claim for contribution and common law indemnification is dismissed under CPLR 3211(a)(7). A motion to dismiss pursuant to CPLR 3211[a][7], for failure to state a cause of action, requires a review of the pleadings to ascertain whether a legally recognizable cause of action can be identified and it is properly pled (***Leon v. Martinez***, 84 N.Y.2d 83, 614 N.Y.S.2d 972, 638 N.E.2d 511 [1994]). The Appellate Division holds:

> The Supreme Court erred in denying those branches of the motion of the defendant Martinez Cleaning Company (hereinafter Martinez) which were to dismiss the cross claims for contribution and contractual indemnification insofar as asserted against it pursuant to CPLR 3211(a)(7) (*see* CPLR 3211[e])...Martinez filed with the Supreme Court a stipulation of discontinuance wherein the plaintiff and Martinez agreed that this action would be discontinued "with prejudice" insofar as asserted against Martinez. This stipulation constituted a release within the meaning of General

> Obligations Law § 15-108 since it was intended to release Martinez from the action and served to relieve it "from liability to any other person for contribution as provided in article fourteen of the civil practice law and rules" (General Obligations Law § 15-108[b]; ***see Tereshchenko v. Lynn***, 36 A.D.3d 684, 685-686, 828 N.Y.S.2d 185). Accordingly, OLP may not recover on the cross claim for contribution

Boeke v. Our Lady of Pompei School, 73 A.D.3d 825, 827.

Here, the plaintiff agreed to discontinue with prejudice the claims against Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC. That written agreement is silent concerning liability by the movants. The Court determines the Evans' first cross claim of contribution must be dismissed under CPLR 3211(a)(7) because of the stipulation of discontinuance and settlement among the plaintiff and Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC.

> Mere use of the term "indemnification" is insufficient to evade the bar of subdivision (b) of section 15-108 of the General Obligations Law (***Siffin v. Rambuski***, 87 AD2d 979). A proper basis for the claim must be stated. If there is actual wrongdoing by the person seeking to assert an indemnification claim, that claim is not viable

County of Westchester v Welton Becket Assoc., 102 A.D.2d 34, 47; ***see also Barry v. Hildreth***, 9 A.D.3d 341.

Evans' potential liability to the plaintiff, if any, would be as a joint tortfeasor. Thus, Evans cannot obtain common-law indemnification from Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC. The Court determines Evans' first cross claim for common law indemnification must be dismissed under CPLR 3211(a)(7) because of the stipulation of discontinuance and settlement among the plaintiff and Camp America, Camp Chipinaw Recreation Corp., Camp

Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC.

> "The right to contractual indemnification depends upon the specific language of the contract" (***George v. Marshalls of MA, Inc.***, 61 A.D.3d 925, 930, 878 N.Y.S.2d 143; see Canela v. TLH 140 Perry St., LLC, 47 A.D.3d 743, 849 N.Y.S.2d 658). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (***Hooper Assocs. v. AGS Computers***, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 548 N.E.2d 903). Further, " 'contracts will not be construed to indemnify a person against his own negligence unless such intention is expressed in unequivocal terms' " (***Kurek v. Port Chester Hous. Auth.***, 18 N.Y.2d 450, 455, 276 N.Y.S.2d 612, 223 N.E.2d 25, quoting ***Thompson-Starrett Co. v. Otis El. Co.***, 271 N.Y. 36, 41, 2 N.E.2d 35). "That is not to say that the indemnity clause must contain express language referring to the negligence of the indemnitee, but merely that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances" (***Margolin v. New York Life Ins. Co.***, 32 N.Y.2d 149, 153, 344 N.Y.S.2d 336, 297 N.E.2d 80). "When the intent is clear, an indemnification agreement will be enforced even if it provides indemnity for one's own or a third party's negligence" (***Bradley v. Earl B. Feiden, Inc.***, 8 N.Y.3d 265, 274-275, 832 N.Y.S.2d 470, 864 N.E.2d 600).

Sherry v. Wal-Mart Stores East, L.P., 67 A.D.3d 992, 994-995.

Evans' second cross claim for express or implied contractual indemnification must be dismissed. The Court determines the movants show the second cross claim does not state a cause of action under CPLR 3211(a)(7) . This Court finds the movants are not obligated pursuant to contract to indemnify Evans against liabilities arising out of the action (***see Richards Plumbing & Heating Co., Inc. v. Washington Group Intern., Inc.***, 59 A.D.3d 311). In opposition, Evans fails to show there is written contract between him and the movants nor any intention to indemnify by any other defendant clearly implied from any oral or written agreement among them (***see Cortes v. Town of Brookhaven***, 78 A.D.3d 642).

Evans' third cross claim for breach of contract is dismissed regarding an express or

implied contract between Evans and the other defendants for insurance coverage to defend and indemnify Evans against any liability. The Court determines the movants show this cross claim does not state a cause of action under CPLR 3211(a)(7). This Court finds the movants show there is no such contract either expressed nor implied. In opposition, Evans fails to show any such breach of oral or written contract (***see Lugo v. Austin-Forest Associates***, 99 A.D.3d 865).

Camp America, Camp Chipinaw Recreation Corp., Camp Chipinaw Realty Co., LLC and Camp Chipinaw Recreation Co., LLC establishes its prima facie entitlement to judgment as a matter of law under CPLR 3212 on the cross claims by Evans. This Court determines there are no triable issues of fact concerning the degree of fault attributable to the movants based upon the stipulation discontinuing against them with prejudice. In opposition, Evans fails to show a triable issue of fact on any of the cross claims (***see Aragundi v. Tishman Realty & Const. Co., Inc.***, 68 A.D.3d 1027)

Accordingly, the motion is granted.

So ordered.

Dated: **November 29, 2012**

ENTER:

NON FINAL DISPOSITION