SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE PART 61

Index Number : 650720/2011
ACE AMERICAN INSURANCE
vs
FREEMAN DECORATING CO.
Sequence Number : 001
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/6/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 61

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ACE AMERICAN INSURANCE COMPANY, as subrogee of Reed Elsevier, Inc.,

Plaintiff,

Index No.: 650720/11

-against-

DECISION

FREEMAN DECORATING CO.,

Defendant.

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HON. ANIL SINGH, J.:

Plaintiff Ace American Insurance Company (Ace) moves, pursuant to CPLR 3212, for summary judgment. Defendant Freeman Decorating Co. (Freeman) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint with prejudice.

BACKGROUND

On or about May 15, 1998, Ace's subrogor, Reed Elsevier, Inc. (Reed), entered into a contract with Freeman for Freeman to provide decorating services for various events conducted by Reed. Motion, Ex. C. According to this contract,

> "Freeman ... will defend, indemnify and hold harmless Reed ..., its employees, agents, officers and directors and their successors and assigns, from and against any claims, including without limitation, judgments, damages, costs or expense, including reasonable attorney's fees, arising out of or occasioned by; (i) a breach by Freeman of any provision of this Agreement; or (ii) the performance by Freeman, or by Freeman's subcontractors or agents or other third parties otherwise acting under the direction of Freeman, of Freeman's obligations hereunder, except for occurrences or accidents caused by the sole

negligence of Reed ... or its successors or assigns." *Id.*

In addition, this agreement provides that Reed will not be liable to employees of Freeman "relating to their relationship with Freeman, including but not limited to liability for wages, benefits, workers' compensation or unemployment compensation." *Id.*

On or about November 3, 2005, Reed entered into a contract with New York Convention Center Operating Corporation (NYCCOC), whereby Reed was granted a license to utilize the Jacob K. Javits Convention Center for the purpose of conducting an event known as the International Vision Expo. Motion, Ex. I. Pursuant to paragraph 29 of this agreement, Reed agreed to defend, hold harmless and indemnify NYCCOC for all claims for any injury to any person arising in any way in connection with Reed's use of the convention center. *Id.*

On April 2, 2006, Dennis Hufford (Hufford) was injured while employed by Freeman and performing work for Freeman at the convention center, pursuant to Freeman's contract with Reed. Hufford brought a personal injury action against NYCCOC in the Supreme Court, New York County, entitled *Hufford v New York Convention Center Operating Corporation et al.*, index number 108846/06. Motion, Ex. F. This action was settled for $1,600,000.00, and Reed fulfilled its contractual indemnity

obligation to NYCCOC by paying Hufford $1,600,000.00. Motion, Ex. J.

Ace had issued a general commercial liability insurance policy to Reed in order to cover Reed's contractual liability to NYCCOC, and now seeks reimbursement from Freeman for the $1,600,000.00, plus the costs of defending NYCCOC in the underlying personal injury action.

According to the deposition testimony of Hufford, he was working for Freeman on the date of the accident and, just prior to the accident, he was getting coffee and cake while waiting for his truck to be unloaded. Motion, Ex. D. Hufford testified that he saw a forklift, which was parallel to him, breaking down stacks of crates approximately 30 feet away. At some point he turned left, and was struck by the forklift. *Id.*

Anthony Monaco (Monaco), the forklift operator, was also deposed in the underlying personal injury action and testified that he is employed by NYCCOC but that, on the day of the occurrence, he signed his time card and gave it to a Freeman employee, that a Freeman employee assigned him to his work for the day, that a Freeman supervisor always told him where to report for work and that, when he reported to the location indicated by the Freeman supervisor, another Freeman supervisor gave him his work assignment. Motion, Ex. E. Monaco stated that, while he was operating the forklift, the blades of the

forklift were stuck under a skid and that he made several attempts to back away from the skid. However, when he finally came out of the skid, he ran over Hufford. *Id.* According to Monaco, the forklift did not have a rearview mirror, which had been removed by NYCCOC, and he did not see Hufford prior to the accident. *Id.*

It is Ace's contention that Hufford's accident occurred while he and Monaco were performing work for Freeman, under the direction of Freeman employees, and, as such, the accident arose out of the performance by Freeman with no negligence attributable to Reed, thereby triggering the contractual indemnity provision of the Reed-Freeman contract.

It is noted that on October 24, 2008, the claims asserted by Hufford as against Reed were dismissed, the court stating that there was no evidence that Reed was in any way negligent with respect to causing Hufford's injuries. Cross motion, Ex. F.

In opposition to Ace's motion, and in support of its cross motion, Freeman argues that, in the court's decision of October 24, 2008, the court did not dismiss NYCCOC's contractual indemnification claims asserted as against Reed because issues of fact existed as to: (1) whether Monaco was NYCCOC's employee and Reed was not obligated to indemnify NYCCOC for its own negligence; and (2) whether a jury could find that the sole proximate cause of Hufford's injuries was NYCCOC's decision to

remove the rearview safety mirror from the forklift. *Id.* Freeman contends that, because of this decision, Ace settled with Hufford, obligating NYCCOC, not Reed, to pay Hufford the $1,600.000.00 because Hufford's claims asserted as against Reed had previously been dismissed. Cross motion, Ex. K.

Freeman asserts that Ace's motion should be summarily dismissed because it is only supported by an attorney's affirmation, not by the affidavit of an individual with personal knowledge. Freeman points out that, in the attorney's affirmation, the attorney states that he is familiar with the facts based on the file maintained by his office, but does not state that he has any personal knowledge of the facts alleged.

Freeman also says that Ace is not entitled to judgment because the contract between Reed and Freeman does not contemplate indemnification for injuries to Freeman's own employees, nor has Ace alleged that Hufford suffered a grave injury, thereby permitting the action to go forward, pursuant to the Worker's Compensation Law.

Freeman contends that its contract with Reed does not obligate Reed to indemnify Freeman for injuries either to one of Freeman's employees or for losses that Reed incurs because of its independent contractual obligations to third parties. Further, Freeman says that it is not obligated to Reed because it has been determined that Reed was not liable for Hufford's injuries and,

therefore, the underlying settlement agreement was not reasonable because Reed was not legally obligated to Hufford.

Freeman also maintains that Ace, which was NYCCOC's primary insurer, is not entitled to apportionment of liability between itself and other parties' coverage.

Lastly, Freeman argues that there is a question of fact as to whether Hufford's injuries were caused by Freeman's negligence, which would preclude granting summary judgment to Ace, since Ace's position is that Reed had to pay NYCCOC to settle with Hufford because of Freeman's negligence.

In reply to Freeman's opposition, and in further support of its motion, Ace states that Freeman does not dispute the authenticity of the two contracts and deposition testimony of Hufford and Monaco provided as support for its motion. Ace says that, since the prior court decision that dismissed Hufford's claims as against Reed declined to dismiss NYCCOC's cross claim asserted as against Reed, Reed's decision to settle with Hufford was based on the possibility that it could be found contractually liable to NYCCOC and, hence, was reasonable under the circumstances.

Freeman argues that the indemnification provision in the agreement entered into between Reed and Freeman obligates Freeman to indemnify Reed for claims arising out of Freeman's performance, which is broad enough to cover claims brought by

Freeman's own employees. Further, even though Monaco was a NYCCOC employee, as his testimony evidenced, all of his work was supervised and controlled by Freeman and, as such, he was a special employee of Freeman at the time of the occurrence. Therefore, the accident could not have been caused solely by the negligence of NYCCOC and, pursuant to its contract with NYCCOC, Reed would remain contractually liable to indemnify NYCCOC.

Ace does not dispute Freeman's contention that, as NYCCOC's primary insurer, it would not be entitled to seek contribution from NYCCOC. However, Ace states that it is not seeking to recover from NYCCOC, but from Freeman, as subrogee of Reed, based on Freeman's indemnity obligation to Reed.

Ace argues that there is overwhelming evidence that Freeman was negligent, thereby causing Hufford's injuries, and that, whereas Freeman says that there are issues of fact regarding its negligence, Freeman fails to indicate what those issues are.

Finally, Ace summarily states that Freeman's cross motion should be denied as being without merit.

The court notes that Freeman has provided a document that it entitles a reply memorandum of law; however, since Ace did not provide opposition papers to Freeman's cross motion, this memorandum constitutes a sur-reply, for which Freeman did not seek leave of court and, therefore, will not be considered.

DISCUSSION

"The 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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); *see Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Ace's motion and Freeman's cross motion are each denied.

At the outset, the court is unpersuaded by Freeman's argument that Ace's motion is procedurally defective because it was not supported by an affidavit of an individual with personal knowledge. "The fact that [Ace]'s supporting proof was placed before the court by way of an attorney's affidavit annexing ... deposition testimony and other proof, rather than affidavits of facts on personal knowledge, does not defeat [Ace's motion summarily]." *Olan v Farrell Lines Incorporated*, 64 NY2d 1092, 1093 (1985).

This court also finds that, at least on the day of the

occurrence, Monaco was the "special employee" of Freeman.

> "While the determination of an employee's status is usually a question of fact, the Court of Appeals has held that 'the determination of special employment status may be made as a matter of law where the particular, undisputed critical facts compel that conclusion and present no triable issue of fact.' Among the various factors considered in determining special employment status, of which no single factor is determinative, 'a significant and weighty feature has emerged that focuses on who controls and directs the manner, details and ultimate result of the employee's work [internal citations omitted]."

Suarez v The Food Emporium, Inc., 16 AD3d 152, 153 (1st Dept 2005).

As detailed above, and not contradicted by Freeman, although Monaco was titularly employed by NYCCOC, he received all of his instructions and supervision from Freeman supervisors and employees and, hence, is deemed, as a matter of law, to have been the special employee of Freeman on the date of Hufford's accident.

The question now arises, which is the crux of these motions, as to whether Freeman, by the terms of its contract with Reed, is required to indemnify Reed for claims asserted by Freeman employees. The court concludes that it is.

> "[I]t is clear that, despite the Workers' Compensation Law shield of employers from liability as joint tortfeasors, a third party may recover against an employer pursuant to contract. Indeed, the statute expressly permits indemnification claims 'based upon a provision in a written contract.' Thus, there is no question that the Workers' Compensation Law allowed [Freeman and Reed] to enter into an agreement that would indemnify [Reed] for any losses it might suffer as a result of a personal

> injury action by a [Freeman] employee [internal citation omitted]."

Rodrigues v N & S Building Contractors, Inc., 5 NY3d 427, 431-432 (2005).

The Court of Appeals went on to say that the determination as to whether the parties had such an agreement involves a two-pronged test: (1) whether there was a written contract with an indemnity provision; and (2) whether the indemnity provision is sufficiently particular to satisfy the requirements of section 11 of the Workers' Compensation Law. In the case at bar, there is no dispute that the parties had a written contract with an indemnification provision, so that the court's inquiry is limited to the issue as to whether that provision encompassed claims made by Freeman employees.

In the *Rodrigues* case, the Court of Appeals decided that the provision under scrutiny was sufficiently specific because the employer agreed to assume responsibility for the safety of its employees, the indemnitee agreed to procure insurance to indemnify the employer in the event of an on-the-job injury and such insurance was actually procured. Such are the facts in the case at bar.

Even though the contract between Reed and Freeman does not specifically state that Freeman would indemnify Reed for claims made by Freeman employees, the indemnity provision states that it covers all claims, without limitation, that Freeman assumes

responsibility for the safety of its employees, and that Reed was obligated to, and did, acquire general commercial liability insurance.

In opposition, Freeman cites to *Vigliarolo v Sea Crest Construction Corp.* (16 AD3d 409 [2d Dept 2005]), a Second Department case decided prior to *Rodrigues*, and a Supreme Court case, *Fenty v City of New York* (2008 WL 2713483, 2008 NY Misc LEXIS 9958 [Sup Ct, NY County 2008], *affd* 71 AD3d 459 [1st Dept 2010]) (citing *Vigliarolo*), wherein that court found that the contract, taken as a whole, did not indicate an intention to indemnify the subcontractor for claims of the other contracting party's employees. This court finds that the instant contract, taken as a whole, falls squarely within the parameters established by the Court of Appeals in *Rodrigues*.

Since the prior decision in Hufford's lawsuit determined that Reed was in no way negligent in causing Hufford's injuries, Reed's freedom from negligence has been established and it may be entitled to indemnification from Freeman, pursuant to the parties' contract. *Priestly v Montefiore Medical Center/Einstein Medical Center,* 10 AD3d 493 (1st Dept 2004).

However, although the court is unpersuaded by Freeman's argument that the settlement entered into in the personal injury action was unreasonable because Reed was not legally liable to Hufford (*see Midura v 740 Corporation, LLC,* 31 AD3d 401 [2d Dept

2006]), since the earlier decision denied that portion of Reed's earlier motion to dismiss the cross claim asserted as against it by NYCCOC, thereby rendering Reed potentially liable to indemnify NYCCOC, the court finds that triable issues of fact remain regarding whether or not NYCCOC was negligent, and thus responsible, in causing Hufford's injuries. If it is determined that NYCCOC's negligence was the sole proximate cause of Hufford's accident, or that NYCCOC was, to some extent, responsible for the occurrence, then Reed would not be obligated to indemnify NYCCOC and would, consequently, not be entitled to indemnification from Freeman. *See generally Hughey v RHM-88, LLC*, 77 AD3d 520 (1st Dept 2010).

Therefore, based on the foregoing, the court cannot grant either party's motion.

The court has considered all of the other arguments proffered by the parties and has found them to lack merit.

CONCLUSION

Accordingly, it is hereby

ORDERED that plaintiff's motion and defendant's cross motion are each denied.

Dated: 12/6/12

ENTER:

HON. ANIL C. SINGH
SUPREME COURT JUSTICE