Er Ming Huang v Coca-Cola Enters., Inc.
2013 NY Slip Op 32210(U)
September 12, 2013
Supreme Court, New York County
Docket Number: 117011/09
Judge: Joan M. Kenney
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[* 1]
SCANNED ON 9/19/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY J.S.C. PART 8
Justice

Index Number : 108935/2010
HUANG, ER MING
vs
COCA-COLA ENTERPRISES
Sequence Number : 001
SUMMARY JUDGMENT

INDEX NO. 108935/10
MOTION DATE
MOTION SEQ. NO. 001

The following papers, numbered 1 to 15, were read on this motion to/for SJ

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s). 1-12
Answering Affidavits — Exhibits No(s). 13
Replying Affidavits No(s). 14-15

FILED
SEP 19 2013
NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

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

Dated: 9/12/13

JOAN M. KENNEY, J.S.C.

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: IAS Part 8

----------X

Er Ming Huang and Xiao Fang Huang,

Plaintiffs,

-against-

Coca-Cola Enterprises, Inc.,

Defendants.

----------X

Coca-Cola Refreshments USA, Inc. f/k/a Coca-Cola Enterprises Inc. i/s/h/a Coca-Cola Enterprises, Inc.,

Third-Party Plaintiff,

-against-

All State Transportation of NYC, Inc.,

Third-Party Defendants.

----------X

DECISION AND ORDER
Index Number: 117011/09
Motion Seq. Nos.: 001 and 002

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

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Papers	**Numbered**
Seq. 001	
Notice of Motion, Affirmation, and Exhibits	1-12
Opposition Affirmation	13
Reply Affirmation and Exhibits	14-15
Seq. 002	
Notice of Motion, Affirmation, and Exhibits	1-10
Affirmation in Partial Opposition	11
Opposition Affirmation	12
Reply Affirmation	13

Motion Sequences 001 and 002 are hereby consolidated for disposition.

In this personal injury action, defendant/third-party plaintiff Coca-Cola Refreshments USA, Inc. (Coca-Cola), moves for an Order, pursuant to CPLR 3212, seeking summary judgment on its claims against third-party defendant All State Transportation, Inc. (All State).

Third-party defendant All State moves for an Order, pursuant to CPLR 3212, dismissing on claims against them.

Factual Background

On March 11, 2009, Coca-Cola entered into a broker/shipper agreement with All State for the transportation of its products (the agreement). (Defendant's moving papers, Ex. E, p. 1). All State is required under the agreement to arrange for transportation of Coca-Cola's products using carriers. (*Id.* at 2). Under the terms of the agreement, All State is also required to maintain liability insurance, naming Coca-Cola as an additional insured on both policies of insurance. (*Id.* at 3-4). This agreement also provides that All State:

> "Shall indemnify, defend and hold harmless the shipper...from and against any and all settlements, losses, liabilities, expenses, judgments, actions, damages and costs, relating to or arising in connection with...any breach of any obligations of the Broker or Carrier or their employees, agents or contractors, any services provided by the broker or carrier and any equipment, supplies, items or materials used by a carrier in connection with shipments made, any negligent or willful act or omission of Broker or Carrier, or their employees, or any personal injury or property damage caused by Broker or Carrier, or their employees." (Defendant's Moving Papers, Ex. E, p. 6).

The agreement further provides that All State will not indemnify, defend or hold harmless Coca-Cola from and against any settlement, loss, liability expense, judgment, action damage or cost arising from any gross negligence or intentional misconduct of Coca-Cola. (*Id.*).

On May 22, 2010, on or around 4:00pm, plaintiff Er Ming Huang claimed to have been injured during the course of his employment with All State as a tractor trailer driver while making deliveries to Coca-Cola's Maspeth, Queens, NY facility. In his April 4, 2012 deposition, plaintiff stated that, at the time of the accident, he was directed by his supervisor from Coca-Cola to park the trailer at Number 9 loading dock in the facility. (Defendant's Moving Papers, Ex. A,

p. 45, l. 9). He was not able to back up the trailer all the way to the loading dock because the "dock-lock" did not engage and it was interfering with the bumper. (Defendant's Moving Papers, Ex. A, p. 60, l. 10-17). Plaintiff then got out of the tractor and came around to the back of the truck to observe that the bumper was approximately two feet away from the loading dock. (*Id.* at 60, l. 13-23). Plaintiff did not remember if he set the brakes on the tractor before getting out. (*Id.* at 62, l. 16-25). The hand operated transmission on the tractor was in neutral. (*Id.* at 63, l. 4-18). Plaintiff attempted to pull the trailer out and back in again slowly approximately 8 to 10 times. Each time the bumper would come into contact with the loading dock, but the lock still would not lower into place. (*Id.* at 65-66). Plaintiff referenced a person who was not his supervisor at the time, an employee for Coca-Cola, telling him to step down from the loading dock onto the lock to lower it into place. (*Id.* at 68, 70). Plaintiff stated that he did not pay attention to a warning sign before he stepped on the loading dock. (*Id.* at 74, l. 9-18). Plaintiff was holding onto the trailer with his left hand, and holding onto the loading bridge with his right hand, facing gate number 8, and as the loading dock lowered, the trailer rolled backwards and the bumper pinned his feet to the loading dock (the accident).

Mr. Dorwyn Lewis, a production worker for Coca-Cola, in his April 27, 2012 deposition, stated that at the time of the accident he was "floor loading" by driving a forklift. (Third-party Defendant's Moving Papers, Ex. F, p. 27). Lewis stated that he saw plaintiff banging on the dock lock and waving at him because he could not get it to lock. (*Id.* at 30-31). Lewis then stated that he advised plaintiff to wait, but the plaintiff started climbing on the lock. (*Id.* at 72). After witnessing the accident, Lewis used the forklift he was driving to stop the trailer from rolling and pulled the plaintiff up from the position he was pinned for approximately 30 seconds.

(Defendant's Moving Papers, Ex. E, p. 81, l. 4-22).

Arguments

Coca-Cola contends that they are entitled to summary judgment seeking contractual indemnification pursuant to the terms of the parties' agreements.

All State argues that they are entitled to summary judgment against Coca-Cola because the indemnification clause in question does not trigger a duty to indemnify by the occurrence of an incident that was completely under the control, direction and supervision of Coca-Cola at the Maspeth facility where there were no other employees of All State working.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action of defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "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."

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 AD2d 201 [1st Dept 1999]). Mere conclusions or unsubstantiated allegations unsupported by competent evidence are insufficient to raise a triable issue of fact. (*see Gilbert Frank Corp.*, 70 NY2d 967; *Zuckerman*, 49 NY2d 561).

"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 NY3d 265 [2007]). "Parties can enter into agreements to indemnify one party for his or her negligence and the indemnity clause need not 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 NY Life Ins. Co.*, 32 NY2d 149 [1973]).

Here, the agreement between Coca-Cola and All State provides that All State will not indemnify, defend or hold harmless Coca-Cola from and against any settlement, loss, liability expense, judgment, action, damage or cost arising from any gross negligence or intentional misconduct of Coca-Cola. The express clause of the contract does not lend itself to any interpretation; such as a mixed express implied indemnification agreement. (*see Levine v Shell Oil Co.*, 28 NY2d 205 [1971]).

All State contends that at the time of the accident, plaintiff was under direct supervision of Coca-Cola, and therefore, the indemnification clause does not cover this occurrence. Coca-Cola argues, however, that it is irrelevant who was at fault/negligent because the indemnification clause covers both Coca-Cola and its employees and the express language in the agreement precludes All State from indemnification EXCEPT in the case of gross negligence or intentional

misconduct of Coca-Cola employees.

Neither Coca-Cola nor All State can meet their prima facie entitlement to summary judgment and/or an Order of dismissal at this juncture of the litigation. There is a factual dispute on whether or not Coca-Cola was "directly supervising," or whether the plaintiff in the main action acted on his own and is culpable for his own alleged negligent conduct defeats both motions. Although plaintiff claims that he was told by a person who was not his supervisor but an employee for Coca-Cola to "step down from the loading dock onto the lock to lower it into place," Coca-Cola asserts that plaintiff was instructed by a Coca-Cola employee to wait and plaintiff disregarded the directive and acted on his own accord. Accordingly, it is hereby

ORDERED, that defendant/third-party plaintiff Coca-Cola Enterprise Inc.'s motion, is denied, in its entirety; and it is further

ORDERED, that third-party defendant All State's motion, is denied, in its entirety; and it is further

ORDERED, that the parties proceed to mediation and/or trial, forthwith.

Dated: 9/12/13

ENTER:

Joan M. Kenney, J.S.C.

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