SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

DEC 17 2014

PEDRO CONCEPCION,

DECISION/ORDER

Plaintiff,

-against-

Index No.: 303700/10

HARLORN, LLC. and WESTERN BEEF PROPERTIES, INC.,

Defendants.

HARLORN LLC.,

Third-Party Plaintiff,

-against-

ISIDORO GONCALVES d/b/a KEEP IZZY BUSY and
ISIDORO GONCALVES, individually,

Third-Party Defendants.

The following papers numbered 1 to 6 read on the below motion noticed on September 19, 2014 and duly submitted on the Part IA15 Motion calendar of **October 10, 2014**:

Papers Submitted	Numbered
Izzy's Affirmation in support of motion, exhibits	1,2
Western Beef's Aff. In Opp., exhibits	3,4
Harlorn's Aff. in Opp.	5
Izzy's Aff. In Reply	6

Upon the foregoing papers, third-party defendants Isidoro Goncalves d/b/a Keep Izzy Busy and Isidoro Goncalves, Individually (collectively, "Izzy") move for summary judgment, dismissing the third-party complaint of the defendant/third-party plaintiff Harlorn, LLC

("Harlorn"). The motion is opposed by Harlorn and its co-defendant in the main action, Western Beef Properties, Inc. ("Western Beef").

I. Background

This matter arises out of an alleged trip and fall accident that occurred on November 17, 2009, on a newly-constructed sidewalk located near property owned by Harlorn and occupied by Western Beef. Harlorn had hired the movant Izzy to replace a portion of a sidewalk and curb.

Izzy argues that the motion must be granted since the evidence confirms that Izzy properly installed the sidewalk, and inspections performed by Corey Shanus of Harlorn and John Fraschilla of Western Beef found no defective condition when the work was completed, a day before this accident. Representatives from Harlorn executed a "release" after inspecting the sidewalk, indicating that the work was performed in a satisfactory manner.

In opposition to the motion, Harlorn argues that Izzy has not satisfied its initial burden, as they have not provided expert testimony indicating that the sidewalk was properly installed. The inspections performed by lay-persons were insufficient to carry their initial burden. Harlorn also argues that the very fact that the sidewalk developed a defect one day after it was built is fatal to this application. Moreover, there was language in the parties' agreement indicating that Izzy would remain liable for any defective work, and therefore dismissal of Harlorn's contractual indemnification claim is not warranted. Defendant Western Beef also opposes the motion, arguing that there is conflicting testimony as to whether a proper concrete inspection was conducted here. The owner of Izzy testified that concrete requires 24 hours to dry, however an inspection of the sidewalk was performed before 24 hours had elapsed.

In reply, Izzy contends *inter alia* that it has established prima facie entitlement to judgment as a matter of law through its owner's testimony as to how the sidewalk was installed, and that he in fact waited extra time for it to dry before allowing the other parties to perform their inspection.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). 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 or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Izzy contends that there was no defective condition on the sidewalk when it completed its work, the day before this accident, and argues that it properly performed the sidewalk installation. The owner of Izzy testified that he would have observed the chip as depicted in the photograph had it been present when he made his inspection. A representative from Harlorn signed a "release" indicating that the work was done in a satisfactory manner, and representatives from Harlorn and Western Beef indicate they inspected the premises and found no defect the day before the accident. According to the plaintiff Pedro Concepcion ("Plaintiff"), however, there was a missing piece of cement in the sidewalk at the time of his accident, that caused him to fall. Photographs identified by Plaintiff at his deposition depict such a condition in the sidewalk,

which appears to be a chipped section of cement near the sidewalk curb, described by Mr. Shanus as a "discontinuity." There is therefore an issue of fact as to whether Izzy created this allegedly defective condition (see *Villa v. Cablevision of NYC*, 28 A.D.3d 248 [1st Dept. 2006]; *Field v. City of New York*, 302 A.D.2d 223 [1st Dept. 2003]). The fact that the work was performed to Harlorn's approval does not by itself absolve Izzy from liability in this matter (*see Corprew v. City of New York*, 106 A.D.3d 524 [1st Dept. 2013]). Here, unlike in *Cullen v. Hicksville Free Public Library*, 236 A.D.2d 357 (2nd Dept. 1997), the movant did not conclusively establish that the sidewalk was properly constructed.

Izzy also seeks dismissal of Harlorn's claims for contractual indemnification, since the agreement between Izzy and Harlorn had no indemnification clause. Harlorn notes that on the signature page of the parties' agreement, however, it states "nothing in this document shall release Keep-Izzy-Busy from liability for defective work." It is settled that no agreement to indemnify will be found unless it is clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487 [1989]; *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774 [1987])). A court will, accordingly, not impose a contractual duty to indemnify unless the intention to do so is unmistakably clear from the language of the promise (*Hooper Assoc., supra,* at 492). Here, the handwritten language on the release reveals no intention that Izzy be contractually obligated to indemnify Harlorn under these circumstances. Accordingly, that branch of Izzy's motion for summary judgment is granted. That branch of the motion seeking dismissal of Harlorn's claims that Izzy failed to procure insurance is also granted. Izzy has established that no such agreement to provide insurance existed between the parties. Harlorn does not address this branch of the motion in opposition papers, and therefore has failed to raise a genuine issue of fact.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that the branches of Izzy's motion for summary judgment, dismissing Harlem's claim for contractual indemnification, and breach of contract for failure to procure insurance, are granted, and those claims is dismissed with prejudice, and it is further,

ORDERED, that the remaining branches of Izzy's motion for summary judgment are denied.

This constitutes the Decision and Order of this Court.

Dated: 12/15, 2014

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