

Laguerre v Western Union Servs., Inc.

2014 NY Slip Op 33662(U)

December 9, 2014

Supreme Court, New York County

Docket Number: 113921/2011

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: LUCY BILLINGS
J.S.C.
Justice

PART 46

Index Number : 113921/2011
LAGUERRE, BETHANIE
vs.
WESTERN UNION SERVICES
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

The following papers, numbered 1 to 3, were read on this motion for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2-3
Replying Affidavits _____ | No(s). _____

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

The court denies defendants - third party plaintiffs' motion for summary judgment on their cross-claim against defendant Scarves Collection, Inc., and third party claims against third party defendant Krishna Realty for indemnification, C.P.L.R. § 3212(b), pursuant to the accompanying decision.

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

FILED
DEC 24 2014
NEW YORK
COUNTY CLERKS OFFICE

RECEIVED
DEC 24 2014
GENERAL CLERK'S OFFICE
NYS SUPREME COURT - CIVIL

Dated: 12/9/14

Lucy Billings, J.S.C.

LUCY BILLINGS

- 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 46

-----X

BETHANIE LAGUERRE,

Index No. 113921/2011

Plaintiff

- against -

WESTERN UNION SERVICES, INC., ROSEN
GROUP PROPERTIES, ABRAHAM ROSEN,
JONATHAN ROSEN, MIRIAM ROSEN, and
SCARVES COLLECTION, INC.,

Defendants

-----X
-----X

ROSEN GROUP PROPERTIES and JONATHAN
ROSEN,

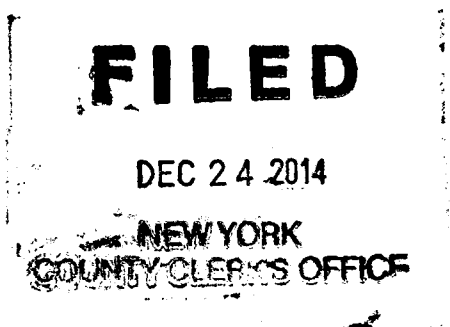
Third Party Plaintiffs

- against -

KRISHNA REALTY,

Third Party Defendant

-----X



DECISION AND ORDER

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained March 29, 2010, when she fell after slipping on cardboard on a wet floor on premises owned by defendants Rosen Group Properties and Jonathan Rosen, leased to third party defendant Krishna Realty, and subleased to defendant Scarves Collection, Inc. Defendants Abraham Rosen and Miriam Rosen are deceased and consequently were never served with the summons and

complaint, nor have any representatives of their estates been served.

Defendants-third party plaintiffs Rosen Group Properties and Rosen move for summary judgment on their cross-claim against defendant Scarves Collection, Inc., and third party claims against third party defendant Krishna Realty for contractual and implied indemnification. C.P.L.R. § 3212(b). For the reasons explained below, the court denies the motion.

II. SUMMARY JUDGMENT STANDARDS

To obtain summary judgment, the Rosen defendants must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence eliminating all material issues of fact. C.P.L.R. § 3212(b); Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012); Smalls v. AJI Indus., Inc., 10 N.Y.3d 733, 735 (2008); JMD Holding Corp. v. Congress Fin. Corp., 4 N.Y.3d 373, 384 (2005); Giuffrida v. Citibank Corp., 100 N.Y.2d 72, 81 (2003). Only if the Rosen defendants satisfy this standard, does the burden shift to the opposing parties to rebut that prima facie showing, by producing evidence, in admissible form, sufficient to require a trial of material factual issues. Morales v. D & A Food Serv., 10 N.Y.3d 911, 913 (2008); Hyman v. Queens County Bancorp, Inc., 3 N.Y.3d 743, 744 (2004). In evaluating the evidence for purposes of the Rosen defendants' motion, the court construes the evidence in the light most favorable to the opponents. Vega v. Restani Constr. Corp., 18 N.Y.3d at 503; Cahill v. Triborough Bridge & Tunnel Auth., 4

N.Y.3d 35, 37 (2004).

III. CONTRACTUAL INDEMNIFICATION CLAIMS

As the parties seeking contractual indemnification, the Rosen defendants must demonstrate an agreement by Scarves Collection and by Krishna Realty to indemnify the Rosen defendants. Susko v. 337 Greenwich LLC, 103 A.D.3d 434, 436 (1st Dep't 2013); De Oleo v. Charis Christian Ministries, Inc., 94 A.D.3d 541, 542 (1st Dep't 2012); Pueng Fung v. 20 W. 37th St. Owners, LLC, 74 A.D.3d 635, 636 (1st Dep't 2010); Temmel v. 1515 Broadway Assoc., L.P., 18 A.D.3d 364, 365-66 (1st Dep't 2005). Presentation and authentication of an executed written contract agreeing to indemnify another party is essential to determine whether any indemnification provision applies to the parties' circumstances. See Aiello v. Burns Intl. Sec. Servs. Corp., 110 A.D.3d 234, 247 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d 1, 11-12 (1st Dep't 2012); Mak v. Silverstein Props., Inc., 81 A.D.3d 520, 521 (1st Dep't 2011).

A. Indemnification by the Subtenant Scarves Collection

The part of Krishna Realty's sublease to Scarves Collection that the Rosen defendants contend contains a provision for their indemnification by Scarves Collection is missing. The testimony of Jayesh Shah, Krishna Realty's owner, at his deposition reciting the contents of the sublease's indemnification provision is hearsay. His recitation of the contract's contents "is not an acceptable substitute" for the document itself, People v. Joseph, 86 N.Y.2d 565, 570 (1995), particularly when he does not indicate

that a complete copy is currently inaccessible. Mastroddi v. WDG Dutchess Assoc. Ltd. Partnership, 52 A.D.3d 341, 342 (1st Dep't 2008); Lapin v. Atlantic Realty Apts. Co., LLC, 48 A.D.3d 337, 338 (1st Dep't 2008); Chubb Natl. Ins. Co. v. Platinum Customcraft Corp., 38 A.D.3d 244, 245 (1st Dep't 2007).

Since the Rosen defendants fail to present the indemnification agreement by Scarves Collection in admissible form, the court may not grant them summary judgment on their contractual indemnification claim against Scarves Collection. Susko v. 337 Greenwich LLC, 103 A.D.3d at 436; De Oleo v. Charis Christian Ministries, Inc., 94 A.D.3d at 542; Temmel v. 1515 Broadway Assoc., L.P., 18 A.D.3d at 365-66. Absent any version of the indemnification agreement by Scarves Collection other than Shah's hearsay recitation, any other issues regarding the admissibility of the sublease to establish Scarves Collection's indemnification agreement or the Rosen defendants' status as third party beneficiaries of that agreement are academic.

B. Indemnification by the Tenant Krishna Realty

At oral argument July 3, 2014, the parties consented to the authenticity and admissibility of the lease and modifications of the lease between the Rosen defendants and third party defendant Krishna Realty for purposes of deciding the current summary judgment motion. Paragraph 8 of the lease requires Krishna Realty to indemnify the Rosen defendants for liabilities, for which the Rosen defendants were not reimbursed by insurance, arising from Krishna Realty's breach of the lease or its

negligence.

The Rosen defendants nowhere identify any lease provision that Krishna Realty breached. Chunn v. New York City Hous. Auth., 83 A.D.3d 416, 418 (1st Dep't 2011). Nor do the Rosen defendants show any negligence by Krishna Realty. Shah's testimony admitting Krishna Realty's assumption of a duty, of an unspecified scope, to perform repairs does not establish its breach of any such duty. Likewise, his reference to Scarves Collection's duty under the sublease to maintain the area of plaintiff's injury, even if this particular provision is authenticated and admissible, does not establish Scarves Collection's breach of any such duty, for which Krishna Realty might be responsible to its landlord. Since the Rosen defendants establish neither Krishna Realty's breach of its lease nor its negligence, they fail to sustain their contractual indemnification claim against Krishna Realty as well. Espinoza v. Federated Dept. Stores, Inc., 73 A.D.3d 599, 600 (1st Dep't 2010). See Naughton v. City of New York, 94 A.D.3d at 11.

The Rosen defendants also fail to present evidence that they received no reimbursement through insurance for any of their losses arising from plaintiff's injury. Assuming the Rosen defendants did not receive reimbursement through the insurance that the lease required Krishna Realty to obtain for them, as otherwise they would not be pursuing indemnification by Krishna Realty, the lease is ambiguous whether it refers to reimbursement only through that insurance or also through their own insurance.

The Rosen defendants fail to establish that Krishna Realty and not they drafted the lease, however, so that the ambiguity might be interpreted in their favor to exclude reimbursement through their own insurance. Cowen & Co. v. Anderson, 76 N.Y.2d 318, 323 (1990); Jacobson v. Sassower, 66 N.Y.2d 991, 993 (1985); Arbeeny v. Kennedy Exec. Search, Inc., 71 A.D.3d 177, 182 (1st Dep't 2010); Burgos v. Metro-North Commuter R.R., 40 A.D.3d 377, 378 (1st Dep't 2007).

IV. IMPLIED INDEMNIFICATION CLAIMS

To recover through implied indemnification, the Rosen defendants must demonstrate that they were not negligent and that the indemnitors, Scarves Collection and Krishna Realty, were negligent. McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 377-78 (2011); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 480 (1st Dep't 2013); Naughton v. City of New York, 94 A.D.3d at 10; Blank Rome, LLP v. Parrish, 92 A.D.3d 444, 445 (1st Dep't 2012). See Chevalier v. 368 E. 148th St. Assoc., LLC, 80 A.D.3d 411, 414 (1st Dep't 2011). Support for the implied indemnification claims falls short, too, because the Rosen defendants claim merely that no evidence demonstrates their own negligence. McCarthy v. Turner Constr., Inc., 17 N.Y.3d at 378; Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d at 479-80; Naughton v. City of New York, 94 A.D.3d at 10. As set forth above, they present no evidence of negligence by Krishna Realty or by Scarves Collection. Susko v. 337 Greenwich LLC, 103 A.D.3d at 436; Muriqi v. Charmer Indus. Inc., 96 A.D.3d 535, 536 (1st

Dep't 2012); Naughton v. City of New York, 94 A.D.3d at 10; Mak v. Silverstein Props., Inc., 81 A.D.3d at 521.

V. CONCLUSION

For all the reasons set forth above, the court denies defendants-third party plaintiffs' motion for summary judgment on their cross-claim against defendant Scarves Collection, Inc., and third party claims against third party defendant Krishna Realty for contractual and implied indemnification. C.P.L.R. § 3212(b). This decision constitutes the court's order.

DATED: December 9, 2014

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

FILED
DEC 24 2014
NEW YORK
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