Muboyayi v A/R Retail LLC
2014 NY Slip Op 34046(U)
December 18, 2014
Supreme Court, Bronx County
Docket Number: 23075/2013E
Judge: Mary Ann Brigantti

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

Present: Hon. Mary Ann Brigantti-Hughes

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DIEUDONNE MUBOYAYI,

DECISION/ORDER

Plaintiff,

-against- Index No.: 23075/2013E

A/R RETAIL LLC, AOL TIME WARNER REALTY INC., THE BOARD OF MANAGERS OF TIME WARNER CENTER CONDOMINIUM, THE RELATED COMPANIES, L.P., TIME WARNER CENTER CONDOMINIUM, and TIME WARNER REALTY, INC., and WHOLE FOODS MARKET GROUP, INC.,

Defendants.

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The following papers numbered 1 to 11 read on the below motion noticed on **July 25, 2014** and duly submitted on the Part IA15 Motion calendar of **August 25, 2014**:

Papers Submitted	Numbered
Whole Foods Motion, Memo of Law, Exh.,	1,2,3
Time Warner Aff. In Opp., Exh.	5,6
A/R Retail Aff. In Opp., Exh.	7,8
Whole Foods Aff. In Reply, Memo of Law, Exh.	9,10,11

Upon the foregoing papers, defendant Whole Foods Market Group, Inc. ("Whole Foods") moves to dismiss the First, Second, and Third cross-claims of third-party plaintiffs Time Warner Realty Inc., s/h/a AOL Time Warner Realty Inc., and Time Warner Realty Inc. (collectively, the "TWR Defendants"), and to dismiss the First, Second, Third, and Fifth Cross-Claims of A/R Retail LLC. ("A/R Retail"), the Related Companies, L.P., Time Warner Center Condominium, and the Board of Managers (the "Related Defendants"), pursuant to CPLR 3211(a)(1) and (7). The motion is opposed by the TWR Defendants and the Related Defendants.

I. Background

Plaintiff is a former employee of Whole Foods who was injured within the scope of his employment as a member of the receiving department at a Whole Foods store located at 10 Columbus Circle, New York, New York. Whole Foods leases the space from defendant A/R Retail. By Order dated May 23, 2014, this Court granted Whole Foods' motion to dismiss Plaintiff's complaint with prejudice, holding, among other things, that the Complaint was barred by New York's Workers' Compensation Law ("WCL"). Although the direct action was dismissed, the TWR Defendants and Related Defendants have asserted cross-claims against Whole Foods for contribution, indemnification, and breach of contract for failure to procure insurance coverage.

Whole Foods argues that they are entitled to dismissal of the TWR Defendants' cross-claims sounding in contractual indemnification/ contribution, because no such agreement existed between the parties. In the absence of a written indemnification contract, Whole Foods argues that Section 11 of the WCL precludes the TWR Defendants' cross-claims for common law indemnity and contribution, because they cannot show that Plaintiff suffered a "grave injury." To the extent that TWR's indemnification and contribution claims are predicated upon negligence or gross negligence theories, these claims are barred because they are "duplicative" of the TWR Defendants' other cross-claims and moreover, fail to allege a duty on the part of Whole Foods that is separate an independent from their purported contract. Whole Foods also notes that the TWR Defendants are asserting that their cross-claims are rooted in Section 12.9.1 of the By-Laws of AOL Time Warner Center Condominium, which do contain an indemnification provision. Whole Foods, however, contends that the By-Laws do not apply to it, since Whole Foods is not a "Unit Holder" or "record owner" of the premises, but rather, a lessee. Whole Foods, moreover, is not a party to any agreement with the TWR Defendants to procure insurance coverage on its behalf, thus requiring dismissal of this cross-claim as well.

As for the Related Defendants, Whole Foods contend that their cross-claim are "similarly without merit." Whole Foods notes that the cross-claims are based upon contribution, indemnification, and insurance agreements contained in the lease between the Related Defendants and Whole Foods. Whole Foods contends, however, that in this matter, it was the

landlord A/R Retail, and not Whole Foods, that had the clear responsibility and duty to maintain and repair the allegedly "defective" elevator that injured Plaintiff. Under these circumstances, it is A/R's responsibility to indemnify and hold Whole Foods harmless for Plaintiff's claims, and not the other way around. For these reasons, the Related Defendants cannot rely on the lease language as a basis for their indemnification and contribution cross-claims. Without the written contract, the Related Defendants' common-law claims for contribution and indemnification are barred pursuant WCL §11. Whole Foods argues that the breach of contract claim must be dismissed because Whole Foods had in place at the premises all required insurance policies.

In opposition to the motion, the Related Defendants argue that their cross-claims seeking contractual indemnification and/or contribution are properly based on the controlling lease agreement, since this accident occurred during the course of Plaintiff's employment with Whole Foods, and the Related Defendants qualify as indemnfied parties under the terms of the lease. Further, the claim that Plaintiff's accident arose from a defect in the elevator at issue remains unsubstantiated at this point. The Related Defendants' breach of contract claim, moreover, should not be dismissed, since they have yet to receive any coverage, proceeds, or defense from any policy purchased by Whole Foods with respect to Plaintiff's claims. With respect to the common law claims, the Related Defendants argue that the motion is premature since it is unknown whether Plaintiff has sustained a "grave injury." The Related Defendants, further, are not required to demonstrate their own lack of negligence to maintain their cross-claims for common law indemnification in order to survive a motion to dismiss pursuant to CPLR 3211.

The TWR Defendants argue in opposition that the motion is an improper attempt to "reargue" this Court's previous Decision and Order, which declined to dismiss the subject cross-claims. Substantively, the TWR Defendants contend that there are factual issues to be resolved before Whole Foods' obligation to indemnify is resolved. The TWR Defendants argue that they were not a party to the lease between Whole Foods and A/R Retail, and therefore cannot identify whether there are other "relevant documents" without discovery. In addition, discovery is needed to understand the intentions of the parties to the lease, including whether the subject indemnification provision was intended to cover entities such as the TWR Defendants.

Whole Foods submitted an Affirmation and Memorandum of Law in reply to the above

opposition, and in further support of their motion.

II. Standard of Review

In determining a motion to dismiss, the Court's role is ordinarily limited to determining whether the complaint states a cause of action (*Frank v. DaimlerChrysler Corp.*, 292 A.D.2d 118 [1st Dept. 2002]). In other words, the determination is not whether the party has artfully drafted the pleading, but whether deeming the pleading to allege whatever can be reasonably implied from its statements, a cause of action can be sustained (*See Stendig, Inc. v. Thom Rock Realty Co.*, 163 A.D.2d 46 [1st Dept. 1990]; *Leviton Manufacturing Co., Inc. v. Blumberg*, 242 A.D.2d 205 [1st Dept. 1997][on a motion for dismissal for failure to state a cause of action, the court must accept factual allegations as true]). When considering a motion to dismiss for failure to state a cause of action, the pleadings must be liberally construed (*see, CPLR* 3026). The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit into any cognizable legal theory"(*Leon v. Martinez*, 84 N.Y.2d 83, 87-88 [1994]). The motion should be denied if, from the pleading's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (*McGill v. Parker*, 179 A.D.2d 98 [1st Dept. 1992]).

Factual allegations normally presumed to be true on a motion pursuant to *CPLR* 3211 (a)(7) may properly be negated by affidavits and documentary evidence (CPLR 3211[a][1], *Wilhemlina Models, Inc. v. Fleisher*, 19 A.D.3d 267 [1st Dept. 2005]). Indeed, such a motion may be granted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law *(Id.*, citing *Leon v. Martinez., supra.*) Evidentiary material may also be considered on a motion to dismiss for failure to state a cause of action to remedy defects in a complaint (*Beyer v. DaimlerChrysler Corp.*, 286 A.D.2d 103 [2nd Dept. 2001]). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7) (*Ackerman v.*

Vertical Club Corp., 94 A.D.2d 665 [1st Dept. 1983]).

III. Applicable Law and Analysis

The TWR Defendants initially argue that the motion must be denied because it is an attempt to reargue the previous decision "which ruled that Time Warner Realty's cross-claims should not be dismissed." TWR Defendants contend that the "viability of Time Warner Realty's cross-claims was previously adjudicated by this Court." That Order, however, expressly found that the cross-claims were not subject to dismissal because Whole Foods did not seek such relief in its moving papers. The current motion, therefore, is not seeking a "second bite at the apple" and the viability of the various cross-claims asserted against Whole Foods was never adjudicated.

The Court also notes that Whole Foods initially asserted that the TWR Defendants did not re-serve their answer and cross-claims by the Court's deadline imposed in the previous Order. That Order, however, was later amended, removing the directives amending caption and ordering re-service of the pleadings.

A. The TWR Defendants' and the Related Defendants' cross-claims for Common Law Contribution and Indemnification

Workers' Compensation Law § 11, as amended by the Omnibus Workers' Compensation Reform Act of 1996 (L 1996, ch 635, § 2), prohibits most third-party claims for contribution or indemnification against an employer for injuries sustained by an employee acting within the scope of employment. There are two exceptions to this provision: the employer may be impleaded when (1) the employee has sustained a "grave injury" or (2) when there is a "written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant" (Workers' Compensation Law § 11; *see New York Hosp. Medical Center of Queens v. Microtech Contracting Corp.*, 22 N.Y.3d 501 [2014]).

In this matter, Whole Foods is not entitled to dismissal of any cross-claims for common law indemnification or contribution because they failed to demonstrate, through competent admissible evidence, that Plaintiff's injuries are not "grave" within the meaning of Workers'

Compensation Law. The incident report drafted at the scene, without any accompanying medical documentation or other admissible evidence, does not satisfy Whole Foods' initial burden of proof (*see Altonen v. Toyota Motor Credit Corp.*, 32 A.D.3d 342 [1st Dept. 2006][defendants' reliance on amended bill of particulars and deposition testimony, alone, insufficient to demonstrate prima facie absence of a "grave injury"]), especially when viewing the record in the context of a motion to dismiss pursuant to CPLR 3211(a)(1).

Whole Foods relies in part on this Court's previous Decision and Order, which noted that Plaintiff had not alleged that he sustained a "grave injury" in opposition to the motion to dismiss his direct action pursuant to the Workers' Compensation exclusivity provision. This notation did not conclusively resolve the issue, and contrary to Whole Foods' contention in reply papers, is not the "law of the case." The issue of whether Plaintiff had sustained a "grave injury" was not determinative of his direct action against Whole Foods, and this Court's reference to Plaintiff's allegations were therefore obiter dicta and non-binding (*see Serino v. Lipper,* 123 A.D.3d 34 [1st Dept. 2014], citing *Friedman v. Connecticut Gen. Life Ins. Co.*, 30 A.D.3d 349 [1st Dept. 2006]).

Accordingly, the motion to dismiss the cross-claims of both the Related Defendants and the TWR Defendants, sounding in common law indemnification and contribution, is denied.

B. The Related Defendants' Cross-Claims for Contractual Indemnification and Breach of Contract

With respect to the Related Defendants, the documentary evidence submitted does not conclusively establish the appropriate application of the indemnification provisions in the subject lease, so as to constitute a complete defense to the claims asserted against Whole Foods. The controlling lease provides that Whole Foods is obligated to indemnify the Related Defendants for claims arising out of any act/omission or negligence of Tenant or its employees, ... or arising from any accident or damage occuring outside the premises but within the shoping center, where such accident results or is claimed to have resulted from an act or omission on the part of the tenant or tenant's agents or employees. The specifics as to how this accident occurred, however, are unknown at this point, beyond the allegations in the complaint. The "incident report"

annexed to the moving papers does not constitute "documentary evidence" in the context of a motion to dismiss, and therefore cannot be considered (*see Correa v. Orient-Express Hotels, Inc.*, 84 A.D.3d 651 [1st Dept. 2011], *Weil, Gotshal & Manges, LLP. v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267, 271 [1st Dept. 2004]; *see also Granada Condominium III Ass'n v. Palomino*, 78 A.D.3d 996 [2nd Dept. 2010][neither affidavits, deposition testimony, or letters are considered "documentary evidence" within the intendment of CPLR 3211(a)(1)]). Even if the court were to consider the report, its bare description of the accident does not "utterly refute" the allegations contained in the Related Defendants' cross-claim for contractual indemnification, so as to conclusively establish Whole Foods' defense as a matter of law (*Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 [2002]; *Leon v. Martinez*, 84 N.Y.2d 83, 997-88 [1994]). Overall, the documentary evidence submitted fails to establish whether A/R was negligent or otherwise responsible for the condition that resulted in this accident, and also fails to conclusively establish that Whole Foods was not. At this juncture, the precise nature and mechanics of the alleged accident have not been developed. For these reasons, the Related Defendants' cross-claims sounding in contractual indemnification and contribution should not be dismissed. Moreover, the Related Defendants are not required, at this procedural posture, to demonstrate their own lack of negligence in order to maintain their causes of action for common law indemnification.

In light of the foregoing, the record and documentary evidence submitted also does not conclusively establish a defense to the Related Defendants' cross-claims predicated on Whole Foods' alleged failure to provide "coverage, proceeds, or defense" from its insurance policy against Plaintiff's claims (*see generally AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y.3d 582, 591 [2005]). Whole Foods' motion to dismiss this cross-claim is therefore denied.

C: The TWR Defendants' Cross-Claims for Contractual Indemnification and Breach of Contract

Whole Foods argues that TWR's claims of contractual indemnification and contribution must be dismissed because Whole Foods and the TWR Defendants are not parties to an indemnification agreement regarding the premises.

After review of the papers, Whole Foods has established its entitlement to dismissal of TWR Defendants' cross-claims for contractual indemnification. While the cross-claim is adequately pled (CPLR 3211[a][7]), it is nevertheless subject to dismissal since there was no contractual relationship between Whole Foods and the TWR Defendants (*see Galvin Bros., Inc. v. Town of Babylon*, 91 A.D.3d 715 [2nd Dept. 2012]), and that the condominium "by-laws" purportedly relied upon by the TWR Defendants do not apply to Whole Foods, who is a lessee and not a "Unit Holder." Moreover, Whole Foods has demonstrated entitlement to dismissal of the TWR Defendants' cross-claim for breach of contract for failure to provide insurance coverage, as Whole Foods never agreed to provide such coverage to the TWR Defendants.

In response, The TWR Defendants argue that the motion must be denied because it is premature, and that TWR cannot identify whether relevant documents exist to refute Whole Foods' contentions, since TWR was not a party to the lease negotiations. In addition, discovery is needed to understand the intentions of the parties to the lease. For example, there is an issue of whether the Lease's indemnity provision includes an obligation that Whole Foods indemnify "Columbus." "Columbus" may include "the Columbus Centre condo board." In reply, Whole Foods notes that "Columbus" has indeed been defined in the subject lease as "Columbus Centre, LLC," the fee simple holder of the land where the premises is located, and did not include the TWR Defendant entities. "When the terms of a written contract are clear and unambiguous, the intent of the parties must be found within the four corners of the contract, giving practical interpretation to the language employed and the parties' reasonable expectations" (*Hedgepeth v. Christensen*, 119 A.D.3d 898 [2nd Dept. 2014][internal quotations omitted]; see also *Goldman Sachs Group, Inc. v. Almah LLC*, 85 A.D.3d 424 [1st Dept. 2011]). In this matter, a plain

reading of the lease indemnity provisions does not reveal any indemnification agreement between Whole Foods and the TWR Defendants. An agreement pursuant to which an obligation to indemnify is imposed "should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Tonking v. Port Authority of New York and New Jersey*, 2 A.D.3d 213 [1st Dept. 2003]; *Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487 [1989]). Here, the lease provides no express or implied agreement that Whole Foods indemnify the TWR Defendants, and "Columbus" is clearly defined. Moreover, the TWR Defendants do not challenge whether the subject By-Laws only apply to "Unit Holders," and not lessees such as Whole Foods. Similarly, TWR Defendants have failed to refute Whole Foods' prima facie showing that they had no written obligation to procure liability insurance in the TWR Defendants' favor to cover this alleged loss.

Moreover, TWR Defendants have not demonstrated that documents revealing a contractual relationship between TWR and Whole Foods exist, but are solely within the possession of Whole Foods, so as to warrant denial of the motion for want of discovery (CPLR 3211[d]). Accordingly, the TWR Defendants cross-claims sounding in contractual indemnification and / or contribution, as well as breach of contract for failure to procure insurance coverage, as asserted against Whole Foods, are dismissed.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Whole Foods' motion to dismiss the TWR Defendants and the Related Defendants' cross-claims sounding in common law indemnification and/or contribution, pursuant to CPLR 3211(a)(1) and (7), is denied, and it is further,

ORDERED, that Whole Foods' motion to dismiss the Related Defendants' cross-claims sounding in contractual indemnification and/or contribution, and breach of contract, pursuant to CPLR 3211(a)(1) and (7), is denied, and it is further,

ORDERED, that Whole Foods' motion to dismiss the TWR Defendants' cross-claims sounding in contractual indemnification and/or contribution, and breach of contract, pursuant to CPLR 3211(a)(1) and (7), is granted, and those cross-claims as asserted against Whole Foods are dismissed.

This constitutes the Decision and Order of this Court.

Dated: 12/18/14

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