Weinrauch v Royal Summit Owners, Inc.
2015 NY Slip Op 32397(U)
December 17, 2015
Supreme Court, New York County
Docket Number: 159275/14
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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HELENA WEINRAUCH,

Plaintiff,

Index No. 159275/14

-against-

DECISION/ORDER

ROYAL SUMMIT OWNERS, INC., AKAM ASSOCIATES, INC. and AKAM LIVING SERVICES, INC.,

Defendants,

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ROYAL SUMMIT OWNERS, INC., AKAM ASSOCIATES, INC. and AKAM LIVING SERVICES, INC.,

Third-Party Plaintiffs,

-against-

MERCURY LOCK & DOOR SERVICE, INC. d/b/a CAPITOL FIREPROOF DOOR CO.,

Third-Party Defendant.

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HON. CYNTHIA S. KERN, J.S.C.

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

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Reply Affidavits.....	3
Exhibits.....	4

Plaintiff Helena Weinrauch commenced the instant action against defendants Royal Summit Owners, Inc. ("Royal"), Akam Associates, Inc. ("Associates") and Akam Living Services, Inc. ("Living Services") seeking to recover damages for personal injuries she allegedly sustained when she was struck by a defective entranceway door. Third-party defendant Mercury Lock & Door

Service d/b/a Capitol Fireproof Door Co. ("Mercury") now moves for an Order pursuant to (1) CPLR §§ 3211(a)(1) and (7) dismissing the third-party complaint; or, in the alternative, (2) CPLR § 3012(d) extending Mercury's time to serve its answer to the third-party complaint. Mercury's motion is resolved to the extent set forth below.

The relevant facts and procedural history of the case are as follows. On or about June 18, 2014, plaintiff was allegedly injured when she attempted to open the front door of her apartment building and the door swung forcefully into her body, causing her to fall down a flight of stairs and sustain serious injuries (the "accident"), at the premises located at 310 West 86th Street, New York, New York (the "subject premises"). The subject premises is owned and operated by defendant Royal and is managed by defendants Associates and Living Services. Prior to plaintiff's accident, pursuant to an agreement dated June 11, 2014, defendants hired Mercury to inspect and repair the door at issue in this case. However, it is undisputed that plaintiff's accident occurred before Mercury was able to perform any repair or maintenance work on the door.

Thereafter, plaintiff commenced the instant action in September 2014 and issue was joined in or around October 2014. In or around July 2015, defendants commenced a third-party action against Mercury alleging causes of action for negligence, common law indemnification, contractual indemnification and breach of contract. Thereafter, plaintiff moved to sever the third-party action from the main action, which was denied by this court on the grounds that the main action and the third-party action involve common factual and legal issues and that plaintiff failed to demonstrate prejudice to a substantial right in the absence of severance. Mercury now moves to dismiss the third-party complaint, or, in the alternative, to extend its time to serve an answer.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to

be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (quoting *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956)). However, "conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss." *Godfrey v. Spano*, 13 N.Y.3d 358, 373 (2009). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211(a)(1), the documents relied upon must definitively dispose of plaintiff's claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314 (2002).

As an initial matter, Mercury's motion for an Order pursuant to CPLR §§ 3211(a)(1) and (7) dismissing the third-party complaint's first cause of action for contribution is granted on the ground that it fails to state a claim. Under New York's contribution statute, "two or more persons *who are subject to liability for damages for the same personal injury*...may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CPLR § 1401 (emphasis added). Here, the third-party complaint's first cause of action asserts that to the extent plaintiff was caused to sustain injuries in the manner alleged in the complaint in the main action, then such injuries were caused by the carelessness,

recklessness and negligence of Mercury. However, as the complaint does not allege, and cannot allege, that Mercury owed any duty to plaintiff Weinrauch, Mercury cannot be subject to liability for damages for plaintiff's personal injuries and thus, cannot be liable for contribution.

To the extent the first cause of action asserts a claim for negligence, it must also be dismissed on the ground that it fails to state a claim. To sufficiently plead a claim for negligence, a plaintiff must allege (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York*, 66 N.Y.2d 1026 (1985). Here, the third-party complaint's first cause of action fails to allege any duty owed by Mercury to the third-party plaintiffs and fails to allege any breach thereof. It merely asserts that to the extent plaintiff Weinrauch was injured by the malfunctioning door, such injury was due to the negligence of Mercury. However, such allegations are insufficient to assert a claim for negligence against Mercury.

Additionally, Mercury's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing the third-party complaint's second cause of action for common law indemnification is granted on the ground that it fails to state a claim. To establish a right to common law indemnification, "a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work." *Naughton v. City of New York*, 94 A.D.3d 1, 4 (1st Dept 2012). As plaintiff Weinrauch seeks to hold defendants/third-party plaintiffs liable for their own negligence in the main action and not vicariously liable without proof of negligence, third-party plaintiffs have no right to common law indemnification. Thus, the third-party complaint's second cause of action for common law indemnification must be dismissed.

Further, Mercury's motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the third-party complaint's third cause of action for contractual indemnification is granted on the ground that the documentary evidence provided by Mercury definitively disposes of said claim. A party is only entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Torres v. LPE Land Dev. & Constr., Inc.*, 54 A.D.3d 668 (2d Dept 2008). The third-party complaint's third cause of action asserts a claim for contractual indemnification based on the agreement between Mercury and third-party plaintiffs pursuant to which Mercury allegedly "assumed the obligation to indemnify and hold harmless" the third-party plaintiffs. However, Mercury has provided the agreement at issue which does not contain any provision requiring Mercury to indemnify and hold harmless the third-party plaintiffs. Indeed, the agreement at issue contains no provision whatsoever relating to indemnification. Thus, the third-party complaint's third cause of action for contractual indemnification must be dismissed.

Finally, Mercury's motion for an Order pursuant to CPLR § 3211(a)(1) dismissing the third-party complaint's fourth cause of action for breach of contract is granted on the ground that the documentary evidence provided by Mercury definitively disposes of said claim. The third-party complaint's fourth cause of action asserts a claim for breach of the agreement between Mercury and third-party defendants, namely, that the agreement required Mercury, at its own expense, to maintain insurance on its own behalf and to name third-party plaintiffs as additional insureds with said insurance policy providing for comprehensive general liability insurance. The third-party complaint further alleges that Mercury breached the agreement by failing to procure such insurance. However, Mercury has provided the agreement at issue which does not contain any provision

requiring Mercury to procure such insurance. Rather, regarding insurance, the agreement only states that "[c]ertificates of insurance are available upon written request." Thus, the third-party complaint's fourth cause of action for breach of the agreement must be dismissed.

Accordingly, Mercury's motion to dismiss the third-party complaint is granted. It is hereby ORDERED that the third-party complaint is dismissed in its entirety. This constitutes the decision and order of the court.

Dated: 12/17/15

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.