

Bautista v J & K Seafood, Inc.
2017 NY Slip Op 30540(U)
February 8, 2017
Supreme Court, Bronx County
Docket Number: 305509/11
Judge: Wilma Guzman
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

Index No.: 305509/11
Motion Calendar No. 4
Motion Date: 10/17/16

-----x
GUILLERMO BAUTISTA,

Plaintiff,

-against-

J & K SEAFOOD, INC., FIVE STAR SEAFOOD, INC.,
JEFFREY SABBATINO, THE NEW FULTON FISH
MARKET COOPERATIVE AT HUNTS POINT INC.,
THE NEW FULTON FISH MARKET, THE CITY
OF NEW YORK and THE NEW YORK CITY
ECONOMIC DEVELOPMENT CORPORATION,

Defendants.
-----x

DECISION/ ORDER

Present:

Hon. Wilma Guzman
Justice Supreme Court

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THE NEW FULTON FISH MARKET COOPERATIVE
AT HUNTS POINT, INC., and THE NEW FULTON
FISH MARKET,

Third-Party Plaintiffs,

Index No.: 83774/2012

-against-

EMERALD SEAFOOD, INC.,

Third-Party Defendant.
-----x

J & K SEAFOOD, INC. and JEFFREY SABBATINO,

Second Third-Party Plaintiffs,

Index No: 83883/2012

-against-

EMERALD SEAFOOD INC.,

Second Third-Party Defendant.
-----x

THE NEW FULTON FISH MARKET COOPERATIVE
AT HUNT'S POINT, INC., and THE NEW YORK
FULTON FISH MARKET,

Third Third-Party Plaintiffs,

-against-

FIVE STAR SEAFOOD, INC.,

Third Third-Party Defendant.

-----X
 Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the plaintiff's complaint:

<u>Papers</u>	<u>Numbered</u>
Notice of Motion, Affirmation in Support, Exhibits Thereto	1
Affirmation in Opposition	2
Notice of Cross-Motion, Affirmation in Support, Exhibits Thereto.....	3
Affirmation in Opposition to Cross-Motion and in Reply.....	4
Reply Affirmation.....	5

Motions decided as follows: Upon deliberation of the application duly made by Third Third-Party plaintiffs, THE NEW FULTON FISH MARKET COOPERATIVE AT HUNTS POINT INC and THE NEW FULTON FISH MARKET (hereinafter collectively referred to as "FISH MARKET") by **NOTICE OF MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting FISH MARKET summary judgement on their claims for contractual indemnification against Third-Third Party Defendant, FIVE STAR SEAFOOD, INC. (hereinafter "FIVE STAR"), is heretofore denied. Upon deliberation of the application made by Third Third-Party defendant, FIVE STAR, by **NOTICE OF CROSS-MOTION**, and all the papers in connection therewith, for an Order, pursuant to CPLR §3212, granting summary judgement on behalf of FIVE STAR and dismissing the Complaint of Third Third-Party plaintiff FISH MARKET, is heretofore denied.

This action arises from a June 13, 2011 incident where plaintiff was injured in the loading area/parking lot of defendants FISH MARKET, THE CITY OF NEW YORK (hereinafter "CITY"), and THE NEW YORK CITY ECONOMIC DEVELOPMENT CORPORATION (hereinafter "EDC"). Plaintiff was employed as a journeyman laborer for vendor EMERALD SEAFOOD, INC. (hereinafter "EMERALD") and his duties included delivering fish to customers. It is alleged that plaintiff was struck by a forklift while loading in the subject parking lot, which was operated by JEFFREY SABBATINO (hereinafter "SABBATINO") and owned by defendant, J & K SEAFOOD, INC (hereinafter "J & K").

It should be noted from the outset that FISH MARKET does not oppose those portions of the Cross Motion by FIVE STAR seeking to dismiss the claims for common law indemnification, common law contribution, negligence and breach of contract. As such, FIVE STAR's application to dismiss those causes of action are heretofore granted without opposition.

Issues of fact clearly exist as to whether the contractual indemnification clause in question covers the location in question and whether it was triggered by the type of accident that occurred, and as such, both applications for summary judgement with respect to contractual indemnification must be denied.

These applications take into consideration a proprietary sublease that was entered into between F & L FILET CORP. and FISH MARKET on May 4, 2005 for the lease of the premises known as Unit Number 94, 800 Food Center Drive, Bronx, New York 10474. The terms of the lease ran to August 14, 2050. The basis of FISH MARKET's Third Third Party Action against FIVE STAR is that FIVE STAR, as assignee, entered into an Assignment of Proprietary Sublease and Consent to Assignment agreement (hereinafter "Assignment Agreement") of the of the aforementioned proprietary sublease. It is alleged by FISH MARKET that FIVE STAR agreed to undertake and assume the duties and obligations contained in the proprietary sublease. FIVE STAR thereafter subdivided a portion of Unit 94 and leased a portion of it to J & K.

Simply stated, FIVE STAR contends that the contractual indefiniteness clause contained within the Assignment Agreement does not cover this accident as it arises from an accident that occurred "adjacent to" the premises in question. Furthermore, they contend that the accident occurred in a common area that FISH MARKET had a duty to maintain and control. FISH MARKET claims that the assignment agreement in question binds FIVE STAR to contractually indemnify FISH MARKET as the underlying accident grew out of their use and occupancy of location assigned to them in the Assignment Agreement.

This Court is not tasked with interpreting any contract and it will strictly construe a contract as it is written. See RM 14 FK Corp. v. Bank One Trust Co., 37 A.D.3d 272 (1st Dept. 2007). It appears that there is an issue of fact as to whether the indemnification clause in the Assignment Agreement covers the actual occurrence and location in question. This Court will not partake in contract interpretation in order to establish the intent of the parties. Such a practice is better left to a finder of fact.

Furthermore, this Court has considered FIVE STAR's contention that this indemnification clause violated General Obligation Law §5-321, and found it to be without merit. It is clear that the indemnification clause was signed between two sophisticated parties and was followed by an insurance requirement clause, requiring the procurement and maintenance of commercial general liability insurance. See Mendieta v. 333 Fifth Ave. Ass'n, 65 A.D.3d 1097 (2nd Dept. 2009).

Accordingly, it is:

ORDERED that the motion FISH MARKET, for an Order, pursuant to CPLR §3212, granting FISH MARKET summary judgement on their claims for contractual indemnification against Third-Third Party Defendant, FIVE STAR, is heretofore denied. It is further

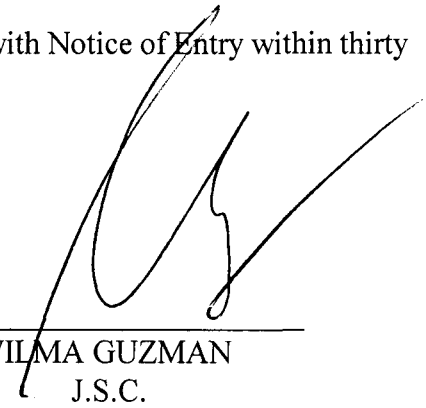
ORDERED that the motion FIVE STAR, for an Order, pursuant to CPLR §3212, granting summary judgement on behalf of FIVE STAR and dismissing the Complaint of Third Third-Party plaintiff

FISH MARKET, is heretofore denied as to the claims for contractual indemnification and granted on the claims for common law indemnification, common law contribution, negligence and breach of contract, without opposition. It is further

ORDERED that FISH MARKET shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated: 2/8/17



WILMA GUZMAN
J.S.C.