Merendino v Costco Wholesale Corp.
2017 NY Slip Op 32708(U)
December 20, 2017
Supreme Court, New York County
Docket Number: 154010/12
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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FRANK MERENDINO,

Plaintiff,

-against-

COSTCO WHOLESALE CORP., E.W. HOWELL CO., LLC, AND MERENDINO CORP.,

Defendants.

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Index No. 154010/12
Motion Seq. 007

DECISION & ORDER
ARLENE P. BLUTH, JSC

E.W. HOWELL CO., LLC,

Third Party Plaintiff,

-against-

MERENDINO CORP.,

Third Party Defendant.

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COSTCO WHOLESALE CORPORATION

Fourth Party Plaintiff

-against-

E.W. HOWELL CO., LLC and MERENDINO CORP.,

Fourth Party Defendants.

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COSTCO WHOLESALE CORPORATION

Fifth Party Plaintiff,,

-against-

STARR INDEMNITY AND LIABILITY COMPANY and ZURICH AMERICAN INSURANCE COMPANY,

Fifth Party Defendants.

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The motion by defendant Costco Wholesale Corp., ("Costco") for summary judgment

against fourth-party defendants E.W. Howell Co. LLC ("Howell") and Merendino Corp., ("Corp") is granted to the extent described below. The cross-motions by Corp and Zurich American Insurance Company ("Zurich") are denied. The cross-motion by Howell is granted only to the extent that the request for leave to reargue is granted and, upon reargument, Howell is entitled to contractual indemnification from Corp.

Background

This action arises out of alleged injuries suffered by plaintiff while he was working on a renovation job at a Costco facility located in Staten Island, NY on December 1, 2011. Plaintiff claims that he was working on a scaffold when he fell and suffered serious injuries.

Defendant Costco is the property owner where the alleged injury occurred and contracted with defendant Howell (the general contractor) to oversee the renovation. Howell then entered into a contract with sub-contractor Corp, who then purportedly entered into an oral contract with Merendino Industries (a company run by plaintiff) to handle certain tasks, including demolition.

This Court previously dismissed plaintiff's complaint on the ground that plaintiff was the sole proximate cause of his accident, in part, because plaintiff testified that he fell while constructing a scaffold by himself and that he chose not to wear a harness despite the fact that one was available in his truck (NYSCEF Doc. No. 376).

Costco moves for summary judgment on its claims for contractual indemnification against Howell and Corp. Costco cites to the indemnification provisions in its contract with Howell and in Howell's contract with Corp.

Corp claims that this motion is merely Costco's third attempt to get contractual indemnity from Howell and Corp despite the fact that this Court has already rejected Costco's previous

attempts. Corp argues that the indemnity provision of its subcontract with Howell is not triggered because plaintiff's injury was not caused by an act or omission by Corp– it was plaintiff's actions.

Howell contends that Costco's argument about how the insurers (Zurich and Starr) might cover Costco's claims is irrelevant because Costco has only moved for summary judgment for contractual indemnification against Howell and Corp. Howell argues that Merendino Industries (plaintiff's employer) cannot be viewed as an entity employed by Corp, which would trigger the indemnification provision. Howell argues that the indemnity provision in its contract with Coscto was not triggered but that the indemnity provision in its contract with Corp was– and, therefore, both Howell and Costco are entitled to contractual indemnity. Howell also argues that Costco failed to substantiate its claims for $60,077.72 in attorneys' fees with legal bills or other documentation. Howell claims that Costco's motion should be denied or, at the very least, there should be a hearing to determine the reasonableness of Costco's fees.

Discussion

To be entitled to the 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 Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]). Once a movant meets its initial burden, the burden shifts to the

opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee*, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

"The right to contractual indemnification depends upon the specific language of the contract. A promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstance" (*Dos Santos v Power Auth. of State of New York*, 85 AD3d 718, 722, 924 NYS2d 556 [2d Dept 2011] [internal quotations and citation omitted]).

As an initial matter, the Court observes that despite the arguments from Howell and Corp, this Court *has not* ruled on Costco's entitlement to contractual indemnification from Howell and Corp. This Court previously found that those claims were premature (*see* NYSCEF Doc. No. 168). In that decision, the Court dealt with allegations in the fifth-party complaint relating to Costco's tender to certain insurance companies (Zurich and Starr) (*id.*) and did not make a

definitive ruling on the issue of contractual indemnification.

Here, the Court must consider whether the indemnity provisions contained in the Costco-Howell and the Howell-Corp contracts provide for indemnification where a sub-subcontractor's employee, Merendino Industries' employee, was the sole proximate cause of his injuries.

The Costco-Howell contract contains an indemnity provision, which provides that:

> "To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, provided that such claim, damage, loss or expenses is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in party by a party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity that would otherwise exist ast o a party or person described in this Section 3.18" (NYSCEF Doc. No. 359).

Under a plain reading of this provision, Costco is entitled to contractual indemnification for its expenses, including attorneys' fees, from Howell (the Contractor). Plaintiff's claim arose out of his performance of the work– the renovation of the Costco– and involved injuries plaintiff claims he suffered while trying to complete his work. Plaintiff qualifies as someone indirectly employed by Howell, or as someone for whose acts Howell might be liable, because plaintiff worked for Merendino Industries, a subcontractor hired by another subcontractor (Corp, who was hired by Howell). And this Court has already found that plaintiff committed a negligent act– plaintiff fell while constructing a scaffold without using a readily-available harness. The purpose of this agreement is clearly to negate the need for Costco to expend its own resources to defend a claim for bodily injuries arising out of the renovation work at this Costco store. The fact that

plaintiff was the sole proximate cause of his own accident does not foreclose Costco's ability to recover because this Court must rely on the specific language in the contract.

This is not a case, such as *DeStefano v Kmart Corp. Intern.* (89 AD3d 459, 459, 931 NYS2d 875 (Mem) [1st Dept 2011]), where the First Department dismissed a defendant's cross-claim for contractual indemnification against an elevator repair company because the evidence "showed that no malfunction of the subject elevator occurred and that plaintiff's negligence was the sole cause of her accident." Unlike *DeStefano*– where the plaintiff, a customer at a Kmart store, was injured while riding down an escalator– Mr. Merendino's injuries happened during the course of construction. There is no question that plaintiff was hired to do work at the job site and was allegedly hurt while purportedly trying to do that work.

The applicable provision in the Howell-Corp contract provides, in part, that:

> "To the maximum extent permitted by law, Subcontractor assumes entire responsibility and liability (which includes the indemnification of Contractor and all indemnities) for any and all damages and expenses or injury of any kind or nature whatsoever (including death resulting therefrom) to all persons, whether employees of the Subcontractor whose injuries occurred while working at the jobsite or otherwise, and to all property, caused by, resulting from, arising out of, or in any way occurring directly or indirectly or in any manner connected with Subcontractors Work or that of its sub-subcontractors, vendors, suppliers and materialmen, the design and execution of the Work, or the Subcontractor's failure to perform any of his obligations under the Pre Contract and/or Subcontract Documents provided for in this Subcontract, including delegable and nondelegable duties implied by law. If any person, including Subcontractor's employees, shall make a claim for any damage, costs or injury (including death resulting therefrom and property damage) as herein described above, or upon any alleged breach of any statutory duty or obligation on the party of the Owner or the Contract, the Subcontractor agrees to indemnify and save harmless the **Owner** and the Contractor, all additional insured and indemnities, their agents, servants, and employees from and against any and all loss, expense judgment, (including court costs, attorneys' fees, investigative and discovery costs, legal costs for appeal and all costs incurred in the enforcement of this indemnification provision) damage, or injury that the Owner or the Contractor or the other additional insured may sustain as a result of such claim, but only to the extent

> that such claim, damage or loss is not caused by the negligence of the Owner and/or Contractor. . . . Subcontractor agrees to assume on behalf of the Owner and the Contractor and all additional insureds, and indemnities the defense of any action at law or in equity, which may be brought against the Owner, Contractor, the additional insureds and the indemnities and upon such claim, waives any denial of Subcontractor's obligation to do so and to pay, on behalf of the Owner, Contractor the additional insureds and indemnities upon their demand, the amount of any judgment that may be entered against them in any such action" (NYSCEF Doc. No. 360 [emphasis added]).

This provision establishes that even if Costco was not entitled to contractual indemnification from Howell, it would be entitled to contractual indemnification pursuant to Howell's contract with Corp. This agreement contemplates that the subcontractor (Corp) would indemnify both Howell and Coscto for expenses "in any manner connected" with the work of a sub-subcontractor. Here, plaintiff was injured while working for Merendino Industries, a sub-subcontractor.

Contrary to Corp's contention, the indemnification provision does not limit the availability of contractual indemnification to only those situations where Corp is found to have caused the injuries. The contractual provision reaches a broader set of acts. It does not say, for instance, that Corp has to indemnify Howell and Costco only if there is a judgment or finding of liability. This contractual indemnification provision specifically states that it applies to any *claims*.

To find that plaintiff's claim is not connected in any manner to the work of Merendino Industries (the sub-subcontractor) strains the plain meaning of this provision. The fact that plaintiff was sole proximate cause of his accident means that Corp is not liable for plaintiff's claimed damages– because there are no damages. It does not forego Corp's responsibility to pick up Costco's attorneys' fees. The precise amount of reasonable attorneys' fees owed is to be

determined at a hearing before a special referee.

Costco's motion is granted and the branches of the cross-motions by Howell and Corp to dismiss Costco's contractual indemnification provision are denied.

Howell's Cross-Motion

Howell also seeks leave to reargue this Court's decision dated January 25, 2017 in which the Court granted Corp's cross-motion to dismiss Howell's third-party complaint against Corp. Howell claims that this Court misapprehended the relief Howell sought.

Howell claims that this Court misconstrued Howell's requested relief as a demand for alternative relief and that it sought both a dismissal of the complaint *and* summary judgment against Corp on Howell's indemnity claim. Howell attaches a copy of its cross-motion for Mot Seq 003 in which Howell asks for dismissal of the complaint *and* judgment over Corp (NYSCEF Doc. No. 167).

Contrary to Howell's argument, this Court did not misapprehend Howell's requested relief. The Court relied upon the 'wherefore clause' in Howell's reply which states that Howell sought summary judgment dismissing plaintiff's complaint "*or in the alternative*, awarding summary judgment to [Howell] and its indemnities, on Howell's claim seeking contractual indemnity from third-party defendant Merendino Corp" (NYSCEF Doc. No. 272 at 11 [emphasis added]). Although Howell may not have meant to ask for relief in the alternative, the Court did not misapprehend this wherefore clause and it is not the Court's role to determine which 'wherefore clause', either in the moving papers or the reply, is the actual requested relief. The Court could not assume that a party made a simple mistake, if that is the case here, and pick which relief was in fact desired. For some reason, Howell did not immediately make a motion to

reargue the Court's decision, dated January 27, 2017, and admit that it made a typo. Certainly, mistakes happen.

And as Corp argues in opposition, the time for its motion to reargue expired 30 days after service of the notice of entry of the January 25, 2017 decision. This cross-motion was filed nearly five months after the notice of entry (*compare* NYSCEF Doc. No. 283 with NYSCEF Doc. No. 383 [filed on July 26, 2017]).

Despite this tortured procedural posture, the Court grants the branch of Howell's cross-motion seeking leave to reargue and upon rearguement, Howell is entitled to summary judgment on its contractual indemnification claim against Corp. The fact is that the provision in Howell's contract with Corp, as explored above, establishes a right to contractual indemnification for both Howell and Costco from Corp. It would inequitable to deny Howell this relief simply because Howell's counsel did not realize it filed inconsistent 'wherefore clauses.'

Zurich's Motion to Strike

Fifth-Party defendant Zurich American Insurance Company ("Zurich") cross-moves to strike the affirmation of Costco's counsel because this affirmation purportedly references settlement discussions Zurich had with Costco. As an initial matter, the Court observes that the issue of who might ultimately pay the contractual indemnification owed to Coscto is not currently before the Court– it is not included in Costco's requested relief. Costco's counsel acknowledges in reply that "Costco's motion seeks summary judgment against Howell and Merendino, not Zurich" (NYSCEF Doc. No. 398 at 3). And, of course, statements made in an effort to settle this matter cannot be used to establish Coscto's entitlement to contractual

indemnification.

Although the Court does not understand why Costco's counsel references conversations that he had with Zurich's counsel, there is no basis to strike the affirmation of Costco's counsel. These statements played no role in the Court's decision because they are irrelevant to granting relief against Howell and Corp.

Summary

The instant motion asks this Court to consider whether contractual indemnification is available to an owner where the plaintiff is found to the sole proximate cause of his accident. In this scenario, the Court must look to the indemnification provisions contained in the contracts between the owner and the general contractor, and the general contractor and the subcontractor. The contracts at issue here clearly contemplate that the purpose of both agreements is to indemnify Costco for any claims arising out of the work at the job site. Notably, these provisions do not limit Costco's ability to seek indemnity in situations where there has been a finding of liability or a judgment in favor of an injured plaintiff. The provisions apply to claims, damages, losses and expenses.

Costco, as owner of the property, and Howell, as general contractor, were found to have no liability in this action. Therefore, both parties are entitled to attorneys' fees and expenses based on the indemnification provisions cited above. There is no reason that Costco or Howell should have cover its own expenses simply because plaintiff was the sole proximate cause of the accident. Of course, that does not mean that Costco or Howell will be entitled to all the expenses sought. But Costco is entitled to contractual indemnification from Howell and Corp, and Howell is entitled to contractual indemnification from Corp.

Accordingly, it is hereby

ORDERED that the motion by Costco for summary judgment on its contractual indemnification claim against E.W. Howell Co., LLC and Merendino Corp. is granted; and it is further

ORDERED that the cross-motion by E.W. Howell Co., LLC for leave to reargue is granted, and upon reargument, it is entitled to summary judgment on its claim for contractual indemnification against Merendino Corp., and it is further

ORDERED that the cross-motions by Merendino Corp. and Zurich American Insurance Company are denied; and it is further

ORDERED that issue of the amount of fees owed to Costco and Howell is referred to a special reference to hear and report. Counsel for Costco shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, and any forms necessary upon the Special Referee Clerk in the Motion Support Office in Room 119 at 60 Centre Street. The Clerk is respectfully requested to place this matter on the calendar of the Special Referee's Part upon service of this order.

This is the Decision and Order of the Court.

Dated: December 20, 2017
New York, New York

HON. ARLENE P. BLUTH, JSC

HON. ARLENE P. BLUTH