| **State of New York v Smith** |
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| 2018 NY Slip Op 31052(U) |
| May 29, 2018 |
| Supreme Court, Wayne County |
| Docket Number: 73609 |
| Judge: John B. Nesbitt |
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STATE OF NEW YORK
SUPREME COURT COUNTY OF WAYNE

**STATE OF NEW YORK,**

Plaintiff

v. ***Index No: 73609***

**ROBERT C. SMITH, et al**

Defendants

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APPEARANCES: OFFICE OF THE ATTORNEY GENERAL
(Richard G. Greene, Esq., of counsel)
*Attorney for Plaintiff*

FORSYTHE, HOWE, O'DWYER, KALB & MURPHY, PC
(Robert B. Koegel, Esq., of counsel)
*Attorney for Defendants Smith/Clawson*

ALAN J. KNAUF, ESQ.
*Attorney for Defendants Datta*

***MEMORANDUM - DECISION***

Action by plaintiff, State of New York, against various defendants, pursuant to the New York Navigation Law, to recoup clean up costs for alleged discharges of petroleum product contamination allegedly occurring from some time "on or before and after January 27, 1992" and continuing "on or before and after June 4, 2007". Paper discovery has been exchanged but no depositions have yet been conducted. The property, used as a gas station and convenience store, was sold on March 19, 1999 by defendant, Smith and Clawson Associates, a New York Partnership, to Ram Datta, an individual. The sale was partially financed by a mortgage in the amount of $258,000 given by Ram Datta to Smith and Clawson Associates.

**Smith/Clawson motion for partial summary judgment and dismissing cross-claims**

Defendants, Robert C. Smith ("Smith"), Smith and Clawson Associates, and Patricia M. Clawson )" (collectively, the "Smith/Clawson defendants"), seeking indemnification for the claims of plaintiff, New York State, move for partial summary judgment against defendants, Ram Datta and

Datta Holdings Co., LLC, successor in interest to Ram Datta (together, the "Datta defendants"), on their third cross claim for contractual indemnification based on the language in paragraph 10 of the Mortgage, and also move to dismiss the cross claims asserted by the Datta Defendants against the Smith/Clawson defendants.

Paragraph 10 of the Mortgage provides that the mortgagor, Ram Datta, will keep the mortgaged premises free of hazardous materials, remove all hazardous materials and indemnify and defend mortgagee, Smith and Clawson Associates, from any claims relating to the discharge of hazardous materials. However, paragraph 10 makes no reference to the temporal periods of the discharges contemplated by the document. Movant, Smith/Clawson, argues that the broad language of paragraph 10 should be interpreted to include pre-closing discharges, which by definition, would have occurred during the period of possession by Smith/Clawson.

Initially, the Court notes that the drafter of the mortgage document is not identified. The Court is aware that, as a general practice, mortgage documents are prepared by the party providing the financing and, indeed, the subject mortgage is notarized by the attorney for the seller. It is, of course, settled law that an ambiguity in the language of a written contract "must be construed most strongly against the party who prepared it and favorably to a party who had no voice in the selection of its language (4 Williston, Contracts, §621; 10 NY Jur, Contracts, §223)." *67 Wall Street Company v. Franklin National Bank*, 37 N.Y.2d 245, 249 (1975).

Smith/Clawson further argue that any representations made by Smith/Clawson denying any discharges are not defenses to their claims, as Datta had opportunity for due diligence which would have revealed the discharges. In support, Smith/Clawson rely primarily upon the mortgage document. There is no confirming evidence as to the intent of the parties. In this respect, it is noteworthy that the relied-upon language appears only in the mortgage and not in the purchase and sale agreement, arguably implying that the intent of the parties was to protect the mortgagee only for discharges that occurred until the mortgage was paid. Indeed, the purchase and sale contract only provides indemnification for damages occurring as a result of due diligence (*i.e.*, tests and inspections) by Datta. While the drafter of the mortgage took pains to clearly state that the obligations contained in paragraph 10 would survive payment of the mortgage, the time parameters regarding discharge are not set forth.

In *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989) the Court of Appeals set guidelines for interpreting indemnification clauses. The Court said:

> Words in a contract are to be construed to achieve the apparent purpose of the parties. Although the words might "seem to admit of a larger sense, yet they should be restrained to the particular occasion and to the particular object which the parties had in view" . This is particularly true with indemnity contracts. When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise 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** (*Emphasis added, Citations omitted.*)

Thus, *Hooper* holds that the language of the agreement must clearly reflect the precise nature and intent of the indemnification and that the contract must be examined and construed as a whole, which includes the surrounding facts and circumstances. In the instant case, Smith/Clawson's showing does not meet this standard.

In the absence of evidence as to the intent of the parties relating to the nature and scope of the indemnification construed against the transaction as a whole, Smith/Clawson's motion is denied.

In addition, the suggested scope of the indemnification advocated by Smith/Clawson implicates New York General Obligations Law (GOL) §5-322.1, which provides:

> § 5-322.1. Agreements exempting owners and contractors from liability for negligence void and unenforceable; certain cases. 1. A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavatingconnected therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable; provided that this section shall not affect the validity of any insurance contract, workers' compensation agreement or other agreement issued by an admitted insurer. This subdivision shall not preclude a promisee requiring indemnification for damages arising out of bodily injury to persons or damage to property caused by or resulting from the negligence of a party other than the promisee, whether or not the promisor is partially negligent.

In *Itri Brick v. Aetna*, 89 N.Y.2d 786 (1998), the Court of Appeals construed the statute as "voiding" indemnification agreements that contemplate full indemnification. Although the statute declares such

agreements are against public policy and hence "void" and unenforceable, the Court, consistent with a prior holding in *Brown v. Two Exchange Plaza Partners*, 76 N.Y.2d 172 (1990), ruled implicitly that such indemnification agreements are actually "voidable." That is, to render the agreement void, the offensive language purportedly seeking full indemnification must be coupled with "active" negligence by the indemnitee. *Itri*, *supra*; see also, *Brooks v. Judlau Contracting, Inc.*, 11 N.Y.3d 204 (2008); *Correia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept. 1999). Here, insofar as Smith/Clawson argue that the scope of the indemnification agreement extends back to the period of possession by Smith/Clawson, there is a question of fact as to whether such interpretation would violate New York GOL §5-322.1. However, for the reasons first discussed above, it is not necessary for the Court to further address GOL §5-322.1. Likewise, the Court need not address the fraud, mistake, and nuisance claims at this time. Smith/Clawson's showing on the motions is insufficient to support the relief requested. *Zuckerman v City of New York,* 49 N.Y.2d 557 (1980). The motions are denied without prejudice to renewal subsequent to completion of discovery.

**Datta defendants cross motion for partial summary judgment**

The Datta defendants cross move for partial summary judgment dismissing the cross claims of co-defendant, Patricia Clawson, individually, on the grounds that (1) she is not a party to the indemnification agreement in any individual capacity and (2) some of the discharges may have occurred prior to the formation of the partnership in 1992. Like above, in the absence of evidence as to the intent of the parties relating to the nature and scope of the indemnification construed against the transaction as a whole, this motion is also denied without prejudice to renewal subsequent to completion of discovery.

**All other motions and requests**

Given the dispositions above, it is unnecessary for the Court to address other motions and requests of the parties. All other requests for relief in either the motion or cross motion are deemed denied without prejudice to renewal subsequent to completion of discovery.

As to discovery, the record shows this action was commenced by filing a copy of the summons and complaint in the office of the Wayne County Clerk on November 23, 2011. All parties

are directed to agree to a scheduling Order requiring the completion of discovery within 180 days of this Decision and Order, filing of a note of issue no later than 30 days after completion of discovery and all dispositive motions made no later than 60 days after the note of issue is filed.

The above constitutes the decision and order of this Court.

Dated: May 29, 2018
Lyons, New York

HON. JOHN B. NESBITT
Acting Supreme Court Justice