SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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JOSE ANTONIO PEREIRA a/k/a ANGEL MARTINEZ,

Plaintiff,

Index No. 159765/2016
Motion Seq. No. 001

-against-

DECISION AND ORDER

55 KENNEDY DRIVE REALTY LLC and NEW YORK JOB DEVELOPMENT AUTHORITY,

Defendants.

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55 KENNEDY DRIVE REALTY LLC and NEW YORK JOB DEVELOPMENT AUTHORITY,

Third-party Plaintiffs,

-against-

CASPERT MANAGEMENT CO., INC. and TD BANK, N.A.

Third-party Defendants.

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CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, Third-party defendant TD Bank, N.A. ("TD Bank") moves, pursuant to CPLR 3211, to dismiss the third-party complaint as against TD Bank.

BACKGROUND

This is a Labor Law action. On October 1, 2015, plaintiff, a construction worker, was performing demolition work consisting of the dismantling of shelving when he fell from an elevation in a building located at 55 Kennedy Drive, Hauppauge, New York ("the subject premises") (Complaint, ¶ 16, NYSCEF doc No. 1). On the date of the accident, the subject premises were owned by defendant New York Job Development Authority ("JDA") (*id.* at ¶ 10). Defendant 55 Kennedy Drive Realty LLC ("55 Kennedy") had assumed a lease purchase

agreement for the subject premises, making it, plaintiff alleges, the *de facto* owner on the date of the accident for the purposes of Labor Law Sections 200, 240(1), and 241(6) (*id.* at ¶ 12-14). As a result of the accident, plaintiff claims to have suffered serious and permanent physical injuries, along with mental anguish and loss of earning capacity (*id.* at ¶ 17). Plaintiff filed the complaint in this action on November 18, 2016, alleging that defendants failed to provide a safe work environment on the subject premises and are liable under Labor Law §§ 200, 240, and 241, as well as under common-law negligence.

On June 1, 2018, 55 Kennedy and JDA filed a third-party complaint against third-party defendants TD Bank and Caspert Management Co., Inc. ("Caspert") (together, "third-party defendants"), claiming that third-party defendants are obligated to indemnify 55 Kennedy and JDA for any judgment rendered in favor of plaintiff. The third-party complaint alleges that third-party defendants are liable due to an auction agreement ("the agreement") that was entered into between 55 Kennedy and Third-party defendants. (NYSCEF doc No. 14). The agreement, which was in full effect on the date of the accident, sets forth the details of an auction Caspert was to conduct on the subject premises on behalf of Venus Pharmaceuticals International, Inc. ("Venus"), a client of TD Bank. (*id.*) The auction involved the sale of equipment Venus had purchased under a loan from TD Bank. (*id.*) Plaintiff was injured while working at the auction in question. (NYSCEF doc No. 1, ¶ 16). TD submits the agreement, which is the sole piece of evidence offered by either party in this motion, which provides in relevant part:

> "Auctioneer (Caspert) and any contractors employed by TD (Bank) shall provide Owner with appropriate certificates of insurance naming Owner as an additional insured for all activity occurring in connection with the transactions described herein, including, without limitation, any and all claims that may arise in connection with the auction and removal process, for personal injury, or other causes of action from all visitors to the Premises or from Auctioneer or any other contractors it engages to fulfill its obligations hereunder."

(NYSCEF Doc No. 14, ¶ 4).

This clause is the only provision of the agreement that refers to the insurance obligations of any party. According to the third-party complaint, third-party defendants were required under the agreement to obtain general liability insurance with third-party plaintiffs named as additional insureds, and third-party defendants breached the terms of the agreement by failing to procure insurance (NYSCEF doc No. 12 at ¶ 21) (*id.* at ¶ 27-30). Third-party plaintiffs also argue that third-party defendants are liable under an implied, or common law theory of indemnification for any negligence that caused plaintiff's injuries. (NYSCEF doc No. 12, ¶ 17-18).

TD Bank timely filed a motion to dismiss the third-party complaint as against TD Bank on July 27, 2018. In this motion, TD Bank argues that the third-party complaint should be dismissed pursuant to CPLR 3211(a)(7) as it fails to state a cause of action. The motion also contends that dismissal is warranted under CPLR 3211 (a)(1) because unequivocal documentary evidence establishes that no viable claim against TD Bank exists. In opposition, third-party plaintiffs argue that TD Bank's motion does not meet the standards required for dismissal under CPLR 3211(a)(1) and (a)(7).

DISCUSSION

It is well settled that when considering a motion to dismiss under CPLR 3211(a)(7), the Court must evaluate "whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*African Diaspora Maritime Corp. v Golden Gate Yacht Club*, 109 AD3d 204, 968 NYS2d 459 [1st Dept 2013]). Generally, the Court must accept the facts in plaintiff's complaint as being true, and "accord plaintiffs the benefit of every possible favorable inference" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internal quotations and citations omitted]). Once the Court accepts the facts of the complaint as

true, the Court must determine whether "plaintiff can succeed upon any reasonable view of the facts stated" (*Campaign for Fiscal Equity, Inc. v State*, 86 NY2d 307, 318, 655 NE2d 661, 667 [1995]). However, "allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not" accepted as true or accorded every favorable inference (*David v Hack*, 97 AD3d 437, 948 NYS2d 583 [1st Dept 2012]). In such situations, the question for the Court becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275, 401 NYS2d 182 [1977]).

Under a motion to dismiss pursuant to CPLR 3211(a)(1), a party may dismiss a claim on the basis that "a defense is founded upon documentary evidence." A motion to dismiss on the basis of such a defense may be granted "only where the documentary evidence utterly refutes [the complaint's] factual allegations" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]; *Mill Financial, LLC v. Gillett*, 122 AD3d 98, 992 NYS2d 20 [1st Dept 2014]). In granting the dismissal, the Court must determine that "the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Mill Financial*, *supra*, citing *Art and Fashion Group Corp. v. Cyclops Production, Inc.*, 120 AD3d 436, 992 NYS2d 7 [1st Dept 2014]). To prevail on a motion pursuant to CPLR 3211(a)(1), the evidence offered by the moving party must be "unambiguous and of undisputed authenticity." (*Fontanetta v Doe*, 73 AD3d 78, 86, 898 NYS2d 569, 575 [2d Dept 2010]).

I. Claim for Breach of Contract for Failure to Procure Insurance

Third-party plaintiffs claim that TD Bank was obligated to provide insurance under the agreement it entered with Caspert regarding the auction that took place on the subject premises. In its motion to dismiss, TD Bank argues that it was merely the lender of the equipment sold at

the auction, and nothing in the agreement suggests it had any further involvement with the auction or agreed to procure any sort of insurance. (NYSCEF Doc. No. 21). When interpreting insurance provisions in contracts, courts generally adhere to the settled rule of contract interpretation that unambiguous provisions are afforded their plain and ordinary meaning. *Gilbane Bldg. Co./TDX Const. Corp. v. St. Paul Fire & Marine Ins. Co.,* 143 AD3d 146, 151, 38 NYS3d 1, 5 (N.Y. App. Div. 2016), *quoting* Broad St. LLC v Gulf Ins. Co., 37 AD3d 126, 130-131, 832 NYS2d 1 (1st Dept. 2006). Provisions are deemed ambiguous if they are subject to differing reasonable interpretations but are considered unambiguous "if the language has a definite and precise meaning, unattended by danger of misconception in the purport of the [agreement] itself, and concerning which there is no reasonable basis for a difference of opinion." (*id.* [citations and internal quotations and marks omitted]). When a court determines that language is unambiguous, other means of interpretation are unnecessary and parol evidence of parties' intentions will not be considered. *CCG Assocs. I v. Riverside Assocs.*, 157 AD2d 435, 440, 556 NYS2d 859, 862 (1990).

Here, TD Bank argues that a plain reading of the agreement indicates that only Caspert was obligated to procure insurance naming 55 Kennedy as an additional insured. While the provision also states any contractors employed by TD Bank must provide insurance, nothing in the record suggests that TD Bank hired any contractors, or that the auction was supervised by any party other than Caspert. In their opposition, Third-party plaintiffs concede that there is no provision explicitly obligating TD Bank to procure insurance but maintain that because TD Bank was a party to the agreement and received profits from the auction, there is a viable claim that TD Bank owed a duty to provide insurance (NYSCEF Doc. No. 34). However, Third-party plaintiffs cite no legal authority for this proposition. The fact that TD Bank was a party to the

agreement and reaped a material benefit from the auction does not alter the fact that the agreement explicitly requires only Caspert to procure insurance and name 55 Kennedy as the additional insured. The agreement also meets the requirements of documentary evidence under CPLR 3211(a)(1) because it offers a clear, unambiguous defense to Third-party plaintiffs' claim that TD Bank was contractually obligated to provide insurance. If the parties had intended the provision to read that Caspert and TD Bank would procure insurance, they could have easily modified it as such. Likewise, if any documentation submitted by the parties suggested TD Bank sent representatives to work at the auction, the Court, in viewing the facts in the light most favorable to Third-party plaintiffs, would have to evaluate whether TD Bank hired "contractors" for the purposes of the agreement. However, as it stands, nothing in the four corners of the agreement suggests that dismissal of the third-party complaint against TD Bank should not be granted. Accordingly, third-party plaintiff's claim for breach of contract for failure to procure insurance must be dismissed as against TD Bank.

II. Implied or Common-Law Indemnification

In their opposition to TD Bank's motion, Third-party plaintiffs contend that regardless of whether the agreement facially obligates TD Bank to procure insurance, TD Bank had an implied, or common-law duty to indemnify them for any damages owed to plaintiff. (NYSCEF Doc. No. 34). Implied indemnification is an equitable remedy that is "based upon the law's notion of what is fair and proper as between the parties" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374-75, 953 NE2d 794, 798–99 [2011]), quoting *Mas v Two Bridges Assoc.*, 75 NY2d 680, 690, 554 NE2d 1257 (1990). It permits loss shifting so as to avoid "the unjust enrichment of one party at the expense of the other" (*Id.*, citing *McDermott v. City of New York*, 150 NY2d 211, 216-17, 407 NE2d 460 [1980]). Therefore, common-law indemnification is

generally only available when one party is "actively at fault in bringing about the injury" and must indemnify another party that "is held responsible solely by operation of law because of [its] relation to the actual wrongdoer" (*id.*, [internal quoting marks and citation omitted]). Courts must look to the relationship between the indemnitor and the indemnitee and determine whether the indemnitor owes a duty to the indemnitee for any actions caused by its own wrongdoing (*Konsky v. Escada Hair Salon, Inc.*, 11 AD3d 656, 657 [2d Dept 2014]).

Here, the parties agree that TD Bank did not negligently supervise the construction work performed at the auction, but third-party plaintiffs argue that TD Bank nevertheless has an implied duty to indemnify because it "implicitly assumed responsibility" for any accidents that occurred simply by entering into the agreement (NYSCEF doc No. 34, ¶ 10). Third-party plaintiffs argue that because a promise to indemnify can sometimes be inferred by "the purpose of the agreement and the surrounding circumstances," TD Bank had an implied duty under the agreement to maintain a safe work environment, particularly because the auction was held for its benefit (*Konsky*, 11 AD3d at 658). However, third-party plaintiffs point to no facts or case law supporting the notion that TD Bank had authority under the agreement to supervise the subject premises. The agreement makes it clear that Caspert was conducting the auction and therefore only supports the inference that Caspert was responsible for any obligations to indemnify the building owners. Similarly, nothing in the record supports the notion that because a party benefitted from the sale of an auction, it assumes liability for all incidents that occur at the auction site.

In their opposition, third-party plaintiffs further contend that TD Bank has an implied duty to indemnify because it was a third-party beneficiary to the agreement (NYSCEF doc No. 34, ¶ 11). Third-party plaintiffs correctly state that to define an entity as a third-party beneficiary,

one must establish "(1) the existence of a valid and binding contract between the other parties, (2) that the contract was intended for [their] benefit and (3) that the benefit to (them) is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate (them) if the benefit is lost" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 336, 451 NE2d 459 (1983). However, given that the majority of the third-party plaintiff complaint revolves around the contention that TD Bank is liable because it was a signatory to the agreement, it is unclear what legal or factual basis third-party plaintiffs have for this argument. As TD Bank points out in its reply brief, it cannot be liable to third-party plaintiffs both because it is a party to the agreement and because it is simultaneously a third-party beneficiary, which is defined as an entity not party to an agreement (NYSCEF Doc. No. 38). Furthermore, even assuming TD Bank is somehow a third-party beneficiary of the agreement, third-party plaintiffs point to no case law supporting the legal conclusion that TD Bank owes an implied duty to indemnify because of its third-party beneficiary status. As there is no viable basis for this argument, the court rejects it as a basis for denying TD Bank's motion.

Given that TD Bank had no explicit or implied obligation in the agreement to procure insurance or indemnify third-Party plaintiffs, it follows that TD Bank could only have a common-law duty to indemnify because it was actively at fault due to its own negligence. In their opposition, Third-Party plaintiffs argue that although TD Bank did not negligently supervise the auction, it retained Caspert to do so and therefore has a non-delegable duty to indemnify based on the law's notion of fairness between the parties (NYSCEF Doc. No. 34, ¶ 10, citing *McCarthy*, 17 NY3d at 374-75). It is true that while common-law indemnification is generally only imposed on parties who actually negligently supervise the work, courts have occasionally held that parties may be obligated to indemnify simply because of their contractual

authority to supervise, regardless of whether they opted to exercise said authority (*McCarthy*, 17 NY3d at 375-77). This caselaw breaks away from the generally held notion that parties must actually be at fault to be liable for common-law indemnification. However, even in these cases, parties who have contractual authority to supervise work are still not held liable when there is evidence that another party, acting within its authority, supervised the injury-inducing work (*Id.*). Courts come to these conclusions so as to stay consistent with the equitable origins of common-law indemnification, which dictate that only parties actively at fault should face liability (*Id.*).

Here, while third-party plaintiffs argue that while the agreement did not require TD Bank to supervise the subject premises, they are nevertheless vicariously liable for however Caspert conducted the auction based on principles of equity and fairness. Assuming Caspert was at fault for the accident, third-party plaintiffs have likely established a viable claim for implied indemnification against Caspert, but the same does not extend to TD Bank. Even if the agreement were to be interpreted to read that TD Bank had authority to supervise Caspert, common-law indemnification would still not apply. Courts have been clear that "if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone" (*McCarthy,* 17 NY3d at 377-78). Therefore, even the most generous reading of the agreement does not lend itself to third-party plaintiffs' contention that TD Bank is liable to them under equitable principles of fairness. Third-party plaintiffs broadly state that they have a valid-claim for common-law indemnification, but do not articulate how TD Bank was at fault for plaintiff's injury. Thus, third-party plaintiffs do not state or have a cause of action

against TD Bank for either contractual or implied indemnification, and the motion seeking dismissal must be granted.

CONCLUSION

Accordingly, it is

ORDERED that third-party defendant TD Bank's motion to dismiss the third-party complaint as against TD Bank is granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly, and the third-party action is severed and continues as against remaining third-party defendant; and it is further

ORDERED that counsel for TD Bank is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: December 11, 2018

ENTER:

HON. CAROL R. EDMEAD
Hon. CAROL R. EDMEAD, J.S.C.