SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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JERRY HARKER,

Plaintiff,

- against - DECISION AND ORDER

CAULDWELL-WINGATE COMPANY LLC, CAULDWELL-WINGATE COMPANY INC, LEND LEASE (US) CONSTRUCTION INC. FORMERLY KNOWN AS BOVIS LEND LEASE INC., Index No. 151092/2014

MOT SEQ 003

Defendants.

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CAULDWELL-WINGATE COMPANY LLC, CAULDWELL-WINGATE COMPANY INC, LEND LEASE (US) CONSTRUCTION INC. FORMERLY KNOWN AS BOVIS LEND LEASE INC.

Plaintiffs,

Third Third-Party Index No. 595668/2018

-against-

DONALDSON INTERIORS, INC.

Defendant.

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FIVE STAR ELECTRIC CORPORATION

Plaintiff,

-against-

Fourth Third-Party Index No. 595680/2018

DONALDSON INTERIORS, INC.

Defendant.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this personal injury action, the third and fourth third-party defendant Donaldson Interiors, Inc. (Donaldson) moves

pursuant to CPLR 3211(a)(7) and/or CPLR 3212 to dismiss the two third-party complaints as against it. The third third-party plaintiffs Cauldwell-Wingate Company, LLC and Cauldwell-Wingate Company, Inc. (collectively Cauldwell), and Lend Lease (US) Construction Inc. f/k/a Bovis Lend Lease, Inc. (Lend Lease), and fourth third-party plaintiff Five Star Electric Corporation (Five Star) oppose the motion. The motion is granted to the extent discussed herein.

II. BACKGROUND

In the now-discontinued main action, the plaintiff Jerry Harker (Harker) alleged that he suffered injuries while performing construction work in the basement of the Thurgood Marshall Courthouse located at 40 Centre Street in Manhattan. Cauldwell was the general contractor hired by the General Services Administration (GSA). Lend Lease was a subcontractor hired by the GSA to oversee the project as a construction manager. Five Star and Donaldson, respectively, were electrical and carpenter subcontractors that contracted with Cauldwell.

At his deposition, Harker testified that while working for Five Star as an electrical journeyman he was asked to move a dismantled transformer from the basement of the building to the top floor of the courthouse. To do so, he and a co-worker, Wayne McGrath, placed the transformer on a pallet jack and attempted

move the pallet jack up a six-foot long ramp to a nearby elevator. McGrath was pulling the jack up the ramp while Harker was pushing the transformer from behind. While he was pushing the pallet jack up the ramp, Harker testified that the ramp moved causing the transformer to shift and start falling on him. While Harker was pushing the transformer away from him, he heard his back pop and he fell to the ground. After the accident, Harker testified that he remembered seeing that the left-corner of the ramp had moved about half-an-inch to an inch from where it was supposed to be. Harker further testified that to his knowledge the ramp was metal, but that the night prior, Harker had told McGrath that he was going to be attending the deposition and McGrath told him that the ramp was wooden with metal plating on top.

Thomas White, a general foreman for Five Star at the time of the accident testified at his deposition that Five Star was an electrical subcontractor pursuant to a contract with Cauldwell-Wingate. He further testified that there were numerous ramps at the worksite, and that he believed that Donaldson constructed the ramps. He also testified that Five Star did not install any ramps at the project site, and that he did not recall any metal ramps at the worksite.

Raymond Feliciano, a superintendent for Lend Lease at the time of the accident, testified at his deposition that Lend Lease was not the general contractor for the project, but rather acted as the program manager for the GSA. He also testified that while he did not recall whether Donaldson constructed the specific ramp at issue in this action, there were other 'engineered ramps' built by Donaldson in the basement, and that if there was a ramp made of wood, it was installed by Donaldson.

Harker commenced this action on February 6, 2014 against Cauldwell and Lend Lease. On October 29, 2014 Cauldwell commenced a third-party action as against Five Star. On August 15, 2018 Cauldwell and Lend Lease commenced the third third-party action against Donaldson asserting four causes of action for common law indemnification, contractual indemnification, contribution, and failure to procure insurance. On August 20, 2018, Five Star commenced the fourth third-party action asserting a cause of action for contribution. Donaldson answered the third-party complaints and asserted general denials.

Cauldwell, Lend Lease, and Five Star then settled the main action with Harker and filed a stipulation of discontinuance on November 16, 2018. The stipulation discontinued the main action with prejudice but stated that the claims asserted in the third-party actions were not discontinued and were severed.

Donaldson now moves to dismiss the third-party complaints as against it on the grounds that i) Cauldwell, Lend Lease, and Five Star are precluded from seeking contribution from Donaldson pursuant to General Obligations Law (GOL) § 15-108(c), and ii) Donaldson cannot be found to be negligent as it owed no duty to Harker, and any claims that it contributed to Harker's injuries are speculative. Cauldwell, Lend Lease, and Five Star oppose the motion, arguing that the claims are not barred by GOL § 15-108(c) and that Donaldson can be found negligent if it is found that it constructed or installed the ramp improperly.

III. DISCUSSION

A. Dismissal Pursuant to General Obligations Law § 15-108(c)

General Obligations Law (GOL) § 15-108 (c) provides that "[a] tortfeasor who has obtained his own release from liability shall not be entitled to contribution from any other person." Thus, when a defendant settles with a plaintiff for the underlying claims, claims for contribution from third parties are barred. See A & E Stores, Inc. v U.S. Team. Inc., 63 AD3d 486 (1st Dept. 2009); see also Glaser v M. Fortunoff of Westbury Corp., 71 NY2d 643 (1988). A third-party complaint by or against the settling tortfeasor may stand only if it asserts a claim for

indemnity, and not contribution. See McDermott v New York, 50 NY2d 211 (1980).

Here, third third-party complaint's third cause of action for contribution, and the entirety of the fourth third-party complaint assert claims for contribution from Donaldson, warranting dismissal. In opposition, the third-party plaintiffs rely upon Mitchell v New York Hosp., 61 NY2d 208 (1984) for the proposition that parties are free to waive the provisions of GOL § 15-108(c) to permit the settlement of a plaintiff's action and leave the apportionment of fault among the alleged tortfeasors for resolution upon trial. However, as correctly noted by Donaldson, Mitchell is distinguishable. In Mitchell, all of the parties, including the third-party defendants, were present when the stipulation of settlement was read onto the record, and all parties, including the third-party defendants specifically agreed that the settling defendant did not waive any rights to contribution or indemnification by entering into the settlement agreement. Here, Donaldson was not a party to the settlement agreement and did not agree to waive any of the protections afforded by GOL § 15-108. Thus, the claims for contribution in the third and fourth third-party complaints are dismissed.

Donaldson further contends that the remaining causes of action in the third third-party complaint must also be dismissed

pursuant to GOL § 15-108. However, claims for contractual or common-law indemnity are not barred by GOL § 15-108(c) and a settling defendants' right to indemnity will be enforced if it can demonstrate that the entire loss should be borne by another. See Rock v Reed-Prentice Div. of Package Mach. Co., 39 NY2d 34 (1976). Thus, Cauldwell and Lend Lease's first and second causes of action seeking contractual and common-law indemnification are not barred. Moreover, their fourth cause of action for failure to procure insurance is unrelated to GOL § 15-108, and therefore dismissal of that cause of action on such grounds is not warranted.

B. Dismissal Pursuant to CPLR 3211(a)(7)

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-

Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994); Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc., 10 AD3d 267 (1st Dept. 2004); CPLR 3026. As correctly argued by the third-party plaintiffs, Donaldson has not met its burden for dismissal pursuant to CPLR 3211(a)(7).

The third third-party complaint sufficiently alleges, for pleading purposes, its first cause of action for common-law indemnification in that Cauldwell and Lend Lease were wholly free from negligence, and that Donaldson's negligence contributed to the causation of the accident. See Correia v Professional Data Mgt., 259 AD2d 60 (1st Dept. 1999). It also sufficiently alleges its second cause of action for contractual indemnification in that Cauldwell and Lend Lease were free from negligence and there was a clear agreement between the parties intending for Donaldson to indemnify pursuant to its subcontract. See Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774 (1987). The fourth cause of action for failure to procure insurance is also sufficiently pled, in that it is alleged that pursuant to Donaldson's subcontractor agreement, Donaldson was required to procure insurance and name Cauldwell and Lend Lease as additional insured, and that it failed to do so. See Kinney v G.W. Lisk Co., 76 NY2d 215, 219 (1990); Wong v

New York Times Co., 297 AD2d 544 (1st Dept. 2002); McGill v Polytechnic Univ., 235 AD2d 400 (1st Dept. 1997).

C. Dismissal Pursuant to CPLR 3212

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992). Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra.

1. Common-Law Indemnification

A defendant is entitled to summary judgment dismissing a cause of action for common-law indemnification when either 1) the party seeking indemnification was itself negligent, or 2)

the defendant is free from negligence. See Correia v Professional Data Mgt., supra. Donaldson moves for summary judgment dismissing the cause of action for common-law indemnification, arguing that i) it was free from negligence, as it owed no duty to Harker, and ii) even if it were found to have had a duty to Harker, it could not be found negligent as the evidence that Donaldson caused Harker's injuries is speculative. In support of its motion, Donaldson submits, *inter alia*, Harker's deposition where he testified that he believes that he fell on a metal ramp, Thomas White's deposition where he testified that he believes Donaldson constructed the wooden ramps at the worksite, and Raymond Feliciano's deposition where he testified that he does not recall whether Donaldson constructed the ramp that purportedly caused Harker's accident. These submissions are wholly insufficient to demonstrate Donaldson's entitlement to summary judgment.

Contrary to Donaldson's contention, it cannot establish that it did not owe a duty to Harker. "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party." Espinal v Melville Snow Contractors, Inc., 98 NY2d 136, 138 (2002). However, there are three situations in which a party who enters into a service contract may be said to have assumed a duty of care, and thus be potentially liable in tort to third parties: "(1) where the

contracting party, in failing to exercise reasonable care in the performance of his [or her] duties, launches a force or instrument of harm, (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties, and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely." Id. at 140.

Here, Donaldson argues that it did not launch a force or instrument of harm, *i.e.* the improperly installed ramp, at Harker because the ramp at issue was metal, and Donaldson only constructed the wooden ramps at the worksite. However, the only evidence that Donaldson submits to establish that the ramp was metal is Harker's testimony that he recalled the ramp being metal. This is insufficient, particularly in light of Harker's further testimony that despite his recollection, his co-worker who witnessed the accident, McGrath, told him that the ramp was wooden with metal plating on top.

The remainder of Donaldson's argument, that it cannot be found negligent as the evidence that it caused Harker's injuries is speculative is also insufficient to establish entitlement to summary judgment.

Donaldson attacks the inconsistencies in Harker's testimony regarding whether he fell on a metal ramp or not and further alleges that the conclusory claims in White and Feliciano's

depositions that wooden ramps at the worksite were likely constructed by Donaldson cannot establish that Donaldson was negligent. However, it is well settled that "[a] defendant does not establish its entitlement to summary judgment merely by pointing out gaps in the plaintiffs case" (Giaquinto v Town of Hempstead, 106 AD3d 1049 [2nd Dept. 2013]; see Torres v Merrill Lynch Purchasing, Inc., 95 AD3d 741 [1st Dept. 2012]; Sabalza v Salgado, 85 AD3d 436 [1st Dept. 2011]), "but must affirmatively demonstrate the merit of [their] claim or defense." Velasquez v Gomez, 44 AD3d 649, 651 [2nd Dept. 2007]; see Torres v Merrill Lynch Purchasing, supra; Alvarez v 21st Century Renovations Ltd., 66 AD3d 524 [1st Dept. 2009]).

2. Contractual Indemnification

Summary judgment dismissing a cause of action for contractual indemnification is warranted where a defendant establishes that, under the circumstances, indemnification is not contemplated by the terms of the agreement. See Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept. 2014), see also Margolin v New York Life Ins. Co., 32 NY2d 149 (1973).

Here, the subcontract between Donaldson and Cauldwell provides, in relevant part: "[t]o the fullest extent permitted by law, [Donaldson] agrees to indemnify, hold harmless and defend [Cauldwell] and [the Owner], the affiliated companies of

each, and all of their directors, officers, employees, agents and representatives, from...[a]ny claim, demand, cause of action, loss, expense or liability on account of injury to or death of persons...arising directly or indirectly out of the acts or omissions of [Donaldson] or its subcontractors, suppliers or agents, or the employees of any thereof, in the performance of its work..."

Donaldson again argues that summary judgment should be granted as there is insufficient evidence to establish that Harker's injury arose directly or indirectly from its acts or omissions in the performance of its work. However, as discussed herein, Donaldson's arguments regarding the third third-party plaintiffs' ability to establish their case are insufficient to establish entitlement to summary judgment. See Giaquinto v Town of Hempstead, supra; see Torres v Merrill Lynch Purchasing, Inc., supra.

3. Failure to Procure Insurance

Although Donaldson moves in its Notice of Motion to dismiss the entire third third-party complaint as against it, the court notes that Donaldson raises no arguments as to why Cauldwell and Lend Lease's fourth cause of action for failure to procure insurance should be dismissed. As such, Donaldson has failed to establish its *prima facie* entitlement to summary judgment

dismissing that cause of action. See Winegrad v New York Univ. Med. Ctr., supra.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion by the third and fourth third-party defendant Donaldson Interiors, Inc. pursuant to CPLR 3211(a)(7) and CPLR 3212 to dismiss the two third-party complaints as against it is granted to the extent that the third cause of action in the third-party complaint and the entire fourth third-party complaint are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the remaining parties are to contact the court on or before January 29, 2020 to schedule a status conference; and it is further,

ORDERED that the Clerk mark the file accordingly.

Dated: December 15, 2020

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON