

Heller v 124 Assoc., Inc.
2020 NY Slip Op 35077(U)
December 11, 2020
Supreme Court, Nassau County
Docket Number: Index No: 613611/2018
Judge: Arthur M. Diamond
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SUPREME COURT - STATE OF NEW YORK

Present:

HON. ARTHUR M. DIAMOND
Justice Supreme Court

-----X
WARREN HELLER,

Plaintiff,

-against-

124 ASSOCIATES, INC.,

Defendant.

-----X
124 ASSOCIATES, INC.,

Third-Party Plaintiff,

-against-

GRACEY SERVICES, LLC, PICTURES PLUS, and
LIVING LEGENDS MEMORABILIA AND
COLLECTIBLES, INC.

Third-Party Defendant.

-----X
The following papers having been read on this motion:

Notice of Motion 1

Third-Party Defendant Living Legends moves this Court for an order, pursuant to CPLR §3212, to dismiss the third-party complaint and any cross-claims asserted against it in their entirety. At the time of submission, the motion was unopposed, and such remains the case to date. Based upon the following, the motion for summary judgment is granted and the third-party complaint is dismissed against Third-Party Defendant Living Legend, only.

The within action was commenced by Plaintiff following a slip-and-fall on ice outside 124 Long Beach Road, Rockville Centre, Nassau County, New York. As a result of this incident, Plaintiff alleges that he sustained injuries to his ribcage, which required surgery, and other associated injuries. The subject address was owned by Defendant/Third-Party Plaintiff and split into two storefronts, one which was occupied by Third-Party Defendant Picture Plus and the other by Third-Party Defendant Living Legends. In between these two storefronts was a gutter

with a spout at the end that allowed water to exit onto the sidewalk. According to the sworn testimony of Plaintiff, it was this area, which had frozen over, where he slipped and fell causing his injuries.

Third-Party Defendant Living Legends, as a tenant at the subject premises, had a valid lease agreement with Defendant/Third-Party Plaintiff when the incident took place on January 5, 2018, having executed a three-year contract on August 1, 2016. In the rider to that agreement, in paragraph 27, Third-Party Defendant Living Legends agreed to pay one-third of the cost for snow removal and agreed to indemnify Defendant/Third-Party Plaintiff for any damages incurred for its failure to remove the snow. The agreement was silent as to any obligation on the part of Third-Party Defendant Living Legend to remediate other conditions on the sidewalk in front of its store, including ice.

The proponent of a summary judgment motion 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. Alvarez v. Prospect Hospital, 68 NY2d 320, 508 NYS2d 923 (1986). To make a prima facie showing, the motion must be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. Id. Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Id.; *see also* Zuckerman v. City of New York, 49 NY2d 557, 427 NYS2d 595 (1980).

To establish a claim for common law indemnification, a third-party plaintiff is required to prove not only that it was not negligent, but also that the proposed indemnitor was responsible for the negligence that contributed to the accident, or in the absence of any such negligence, had the authority to direct, supervise, and control the work giving rise to the injury." Bellefleur v. Newark Beth Israel Medical Center, 66 AD3d 807, 888 NYS2d 81 (2nd Dept., 2009). A party's right to contractual indemnification depends upon the specific language of the relevant contract." Castillo v. Port Authority of New York & New Jersey, 159 AD3d 792, 72 NYS3d 582 (2018). The 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 circumstances." Morris v. Home Depot USA, 152 AD3d 669, 59 NYS3d 92 (2nd Dept., 2017).

To sustain a third-party cause of action for contribution, a third-party plaintiff is required to show that a duty was owed to the plaintiffs as injured parties and that a breach of that duty contributed to the alleged injuries. Eisman v. Village of East Hills, 149 AD3d 806, 52 NYS3d 115 (2nd Dept., 2017). The critical requirement is that the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought. Id at 808-809, 118.

In support of the motion, Third-Party Defendant Living Legends has submitted a deposition transcript from Plaintiff, who is also its principal, as well as testimony submitted during two separate hearings conducted pursuant to General Municipal Law §50-h; additionally, it has submitted photographs, a copy of a lease agreement between Defendant/Third-Party Plaintiff and Third-Party Defendant Living Legends, and a receipt for snow removal services performed by Third-Party Defendant Gracey, all of which were authenticated by Plaintiff during his deposition. That document, which was authenticated by Plaintiff at his deposition, indicates that Third-Party Defendant Gracey performed snow removal services at the behest of Defendant/Third-Party Plaintiff; thus, Third-Party Defendant Living Legends was not actively negligent in creating the condition that caused Plaintiff's injury. Moreover, Plaintiff's testimony was very clear that he slipped on ice that had accumulated and not on snow.

Based upon the aforementioned evidence submitted in support of the motion, the Court is satisfied that Third-Party Defendant Living Legends does not bear any responsibility for the happening of this accident and has satisfied its burden on the motion. Therefore, in the absence of any opposition to demonstrate that a triable issue of fact still exists in the case, it is entitled to judgment as a matter of law and the application by Third-Party Defendants is granted in its entirety.

Third-Party Defendant Living Legend shall file and serve a copy of the within order with notice of entry upon all parties served with the motion within thirty (30) days from the date of this order. Thereafter, the remaining parties shall appear as scheduled in the DCM Pretrial Part of Supreme Court, Nassau County, on January 27, 2021.

Given the dismissal directed herein, the caption is hereby amended to read as follows: "WARREN HELLER, Plaintiff, against 124 ASSOCIATES, INC., Defendant. 124 ASSOCIATES, INC., Third-Party Plaintiff, against GRACEY SERVICES, LLC, and

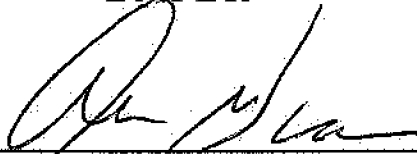
PICTURES PLUS, Third-Party Defendants.”

Finally, in reviewing the NYSCEF system following the submission of the instant motion, it appears as if Defendant/Third-Party Plaintiff has attempted to file a second third-party complaint, brining in yet another party to this action. However, it appears that this filing, NYSCEF Document Number 44, was rejected by the clerk’s office and has yet to be corrected. Thus, the proposed second-third party complaint currently is inapplicable, and the proposed Second Third-Party Defendant is not yet a party to this action.

This hereby constitutes the decision and order of this Court.

DATED: December 11, 2020

ENTER



**HON. ARTHUR M. DIAMOND
J.S.C.**

ENTERED

Dec 17 2020

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**