

Olivieri v Barnes & Noble, Inc.
2021 NY Slip Op 33002(U)
November 12, 2021
Supreme Court, Erie County
Docket Number: Index No. 813297/2015
Judge: Diane Y. Devlin
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At a Special Term of the Supreme Court held in and for the County of Erie, State of New York, located at Part 6, Buffalo, NY, on the 14th day of October 2021

PRESENT: HON. DIANE Y. DEVLIN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : : COUNTY OF ERIE
LORI J. OLIVIERI

Plaintiff

AMENDED
DECISION and ORDER

-vs-

Index No.: 813297/2015

BARNES & NOBLE, INC., and
STOLTZ REAL ESTATE PARTNERS

Defendants

BARNES & NOBLE, INC.

Third-Party Plaintiff

vs

NATIONAL JANITORIAL SOLUTIONS INCORPORATED,
ANTHONY CHES TLC CLEANING and
ANTHONY CHES INDIVIDUALLY

Third-Party Defendants

NATIONAL JANITORIAL SOLUTIONS INCORPORATED

Second Third-Party Plaintiff

vs

RJS JANITORIAL, LLC

Second Third-Party Defendant

Upon the foregoing papers, it is ordered that the motion is GRANTED and cross motion is DENIED.

The following papers were read on this Motion for Summary Judgment and Cross Motion for Summary Judgment.

- Notice of Motion–Affirmation–Exhibits, Docket Numbers 163-189
- Notice of Cross Motion–Exhibits, Docket Numbers 191-214
- Replying Affirmation–Exhibits, Docket Numbers 215-220
- Replying Affirmation, Docket Numbers 221-222

Plaintiff in this action filed a negligence cause of action against Defendant Barnes and Noble as a result of a fall on a reading stage at its store. Barnes and Noble then commenced a Third-Party Complaint against National Janitorial Solutions Inc (“NJS”) and Anthony Ches TLC Cleaning and Anthony Ches. National Janitorial Solutions then commenced a Second Third-Party action against RJS Janitorial (“RJS”)

All parties agreed to bifurcate discovery between liability and damages. Plaintiff’s Complaint was dismissed by Decision and Order filed January 4, 2021 (incorrectly dated January 4, 2020) following the liability-only discovery. Thereafter Barnes and Noble filed a Motion for Summary Judgment for Contractual Indemnification against NJS. Defendant’s motion was granted by Decision and Order filed on March 11, 2021.

Third-Party Defendant and Second-Party Plaintiff NJS now files a Motion for Summary Judgment for Contractual Indemnification against RJS. NJS relies on its Master Service Agreement that states that “Contractor shall remain liable for all actions and/or omissions of said Subcontractor.” There is general hold harmless language in the agreement. RJS states that it is free from negligence based on affidavits submitted in the litigation.

RJS files a Cross Motion for Summary Judgment to Dismiss the Second Third-Party

Complaint because Plaintiff's alleged accident did not arise out of any act or omission of its performance. RJS also argues that attorney fees are not authorized by the Master Service Agreement since they are not referenced in it. RJS relies partly on New York State Thruway v Ketco, 195 AD 3d 630 (2d Dept. 2021).

The indemnification clause of the Master Service Agreement states that RJS is to hold harmless NJS for all liabilities, claims, actions, lawsuits, demands, costs, losses, damages, and expenses" arising out of acts/omissions of Contractor.

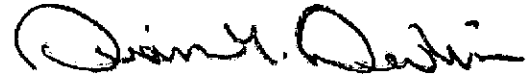
RJS states that New York State Thruway v Ketco, *supra* is authority for dismissal when it has been determined that negligence or plaintiff's injuries do not arise from third-party defendant. However, in that case, a motion for summary judgment that resulted in a dismissal was affirmed by the Second Department. Presently the Decision and Order granting dismissal is pending review before the Fourth Department.

RJS also argues that it is not responsible for attorneys's fees because the hold harmless clause at issue is silent as to attorney's fees. NJS acknowledges that the clause does not mention attorney's fee specifically, but argues that since it references lawsuits, it follows that attorney's fee are related to lawsuits.

A review of the complete agreement at issue reveals that attorney's fees were contemplated by the parties to the contract in general because attorney's fees are referenced in paragraph 28 relating to the enforcement of the terms of the agreement. In a transaction involving securities sales in which a guaranty agreement only referenced expenses, the Court stated that the language "costs and expenses" was broad enough to be interpreted to encompass attorney's fees." Nigri v Liberty Apparel Company, 76 AD 3d 842 (1st Dept. 2010).

The Court GRANTS Third-Party Defendant NJS's Motion for Summary Judgment

subject to an INQUEST on damages and DENIES Second Third-Party Defendant RJS's Cross
Motion to Dismiss.



DIANE Y. DEVLIN, J.S.C.

DATED: November 12, 2021