

Lisker v Vue Catering, Inc.

2022 NY Slip Op 33077(U)

August 31, 2022

Supreme Court, Kings County

Docket Number: Index No. 505915/20

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No.: 505915/20
Motion Date: 6-27-22
Mot. Seq. No.: 2

-----X
BATYA CHAYA LISKER,

Plaintiff,

-against-

DECISION/ORDER

THE VUE CATERING, INC., and SARA
CATERING, LLC,

Defendants.

-----X
THE VUE CATERING INC.,

Third-Party Plaintiff,

-against-

DANIEL SOSNOWIK A/K/A DANIEL SOSLOVICH
AND VICKI ROTHSCHILD,

Third-Party Defendants.

-----X
The following documents listed by NYSCEF as item numbers 47-61, 64-67 were read on this motion.

In this action to recover damages for personal injuries, third party defendants, DANIEL SOSNOWIK A/K/A DANIEL SOSLOVICH and VICKI ROTHSCHILD, move for an order pursuant to CPLR Sections 3211(a)(7) and 3212 dismissing the third-party complaint and awarding reasonable attorneys' fees.

Background:

Plaintiff Batya Chaya Lisker commenced this action seeking to recover damages for personal injuries she allegedly sustained when she slipped and fell on a rose petal on the dance floor of the Vue Catering Hall located at 3007 Nostrand Avenue, Brooklyn, New York on February 17, 2020, while attending the wedding of third-party defendants, Daniel Sosnowik a/k/a Daniel Soslovich and Vicki Rothschild. After appearing in the action, defendant/third-party

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plaintiff, The Vue Catering Inc., commenced the third party action against Daniel Sosnowik a/k/a Daniel Soslovich and Vicki Rothschild, alleging three causes of action. In the first and second cause of action, third-party plaintiff seeks common law indemnity. In the second cause of action, the third-party plaintiff seeks common law indemnity as well as common law contribution. In the third cause of action, third-party plaintiff alleges that third-party defendants failed to procure a policy of insurance providing liability coverage naming the third-party plaintiff as an insured.

In support of the motion, third-party defendant Daniel Sosnowik A/K/A Daniel Soslovich submitted an affirmation stating:

2) Both myself and my wife, Vicki Rothschild, attended at the VUE catering hall prior to the 17th day of February 2020 to make arrangements for the celebration of our wedding.

3) I do not recall receiving any contract but agreed that the VUE would provide services as detailed in the "summary" that was e-mailed to us for the price contained therein.

...

5) At no time was any discussion held concerning our procuring insurance (which my counsel advises me might not even be possible as we do not have an insurable interest nor were we staging a "dangerous event" for which insurance might be available).

Third party-defendant Vicki Rothschild submitted a similar affirmation.

Also part of the record is the deposition transcript of defendant/third-party plaintiff, The Vue Catering, Inc., by Morris Khalifa, who appeared for the deposition on March 22, 2022. At his deposition, he was shown a document which he testified was the contract between The Vue Catering, Inc. and the third-party defendants concerning the wedding. The contract is not part of the record on this motion.

Discussion:

When a party moves pursuant to CPLR 3211(a)(7) to dismiss an action, the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Sokol v. Leader*, 74 A.D.3d 1180, 1180–1181, 904 N.Y.S.2d 153). In

deciding the motion, the court must accept the facts as alleged by the plaintiff as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v. Martinez*, 84 N.Y.2d 83, 87–88, 614 N.Y.S.2d 972, 638 N.E.2d 511).

While a defendant is permitted to submit evidentiary material in support of a motion to dismiss pursuant to CPLR 3211(a)(7), “[i]f the court considers evidentiary material, the criterion then becomes ‘whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one’ ” (*Sokol v. Leader*, 74 A.D.3d at 1181–1182, 904 N.Y.S.2d 153, quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275, 401 N.Y.S.2d 182, 372 N.E.2d 17). “[A]ffidavits submitted by a defendant ‘will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action’ ” (*Sokol v. Leader*, 74 A.D.3d at 1182, 904 N.Y.S.2d 153, quoting *Lawrence v. Graubard Miller*, 11 N.Y.3d 588, 595, 873 N.Y.S.2d 517, 901 N.E.2d 1268). “Indeed, a motion to dismiss pursuant to CPLR 3211(a)(7) must be denied ‘unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it’ ” (*Sokol v. Leader*, 74 A.D.3d at 1182, 904 N.Y.S.2d 153, quoting *Guggenheimer v. Ginzburg*, 43 N.Y.2d at 275, 401 N.Y.S.2d 182, 372 N.E.2d 17).

Pursuant to CPLR 3212, on a motion for summary judgment, the moving party 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 Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923, 501 N.E.2d 572). “This burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party. Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment. Indeed, the moving party's failure to make a prima facie showing of entitlement to summary judgment requires a denial of the motion, regardless of the sufficiency of the opposing papers” (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v. Rabizadeh*, 22 N.Y.3d 470, 475, 982 N.Y.S.2d 813, 5 N.E.3d 976 [citation and internal quotation marks omitted]; *see Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 942 N.Y.S.2d 13, 965 N.E.2d 240).

With respect to those portions of the first and second causes of action alleged in the third-party complaint which set forth a claim for common law indemnify, the third-party defendants correctly contend that the action is barred by N.Y. Gen. Oblig. Law § 5-322 which provides:

Every covenant, agreement or understanding in or in connection with or collateral to any contract entered into with any caterer or catering establishment exempting the said caterer or catering establishment from liability for damages caused by or resulting from the negligence of the caterer or catering establishment, his agents, servants, employees or patrons at the affair contracted therefor, shall be deemed to be void as against public policy and wholly unenforceable.

Thus, if the third-party plaintiff is found to be negligent, as the plaintiff alleges in her complaint, the third-party defendant is not entitled to common law or contractual indemnity from the third-party defendants.

With respect to the second cause of action, accepting the facts as alleged by the third-party plaintiff as true, and according third-party plaintiff the benefit of every possible favorable inference, the pleading clearly states a claim against the third-party defendants for common law contribution. In this regard, third-party plaintiff's claim that the third-party defendants were negligent in causing and creating the condition which caused the accident and that such negligence was a substantial factor in causing the accident. That branch of the to dismiss the claim for common law contribution pursuant to CPLR 3211(a)(7) is therefore denied.

That branch of the motion to dismiss the claim for common law contribution claim pursuant to CPLR 3212 is also denied. The third-party defendants did not, in the first instance, establish their prima facie entitlement to summary judgment dismissing this cause of action since they did not establish as a matter of law that did not cause or create the condition that caused the accident. Neither of the third-party defendants denied that they caused or created the alleged defective condition.

The third cause of action alleged in the third-party complaint clearly states a cause of action for failure to procure to procure insurance and that branch of the motion to dismiss this cause of action pursuant to CPLR 3211(a)(7) is denied. Further, since there was a apparently a contract between third-party plaintiff and the third-party defendants, which is not part of the

record, the Court cannot determine whether third-party defendants undertook to procure liability insurance for the third-party defendant. Certainly, by failing to submit a copy of this contract, the third-party defendants failed to establish their prima facie entitlement to summary judgment dismissing this cause of action as a matter of law.

For all of the above reasons, it is hereby

ORDERED that the motion is granted solely to the extent that the causes of action alleged in third party complaint for common law indemnity are dismissed. The motion is in other respects denied.

This constitutes the decision and order of the Court.

Dated: August 31, 2022

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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