

Chox v Mermaid Plaza Assoc., LLC
2022 NY Slip Op 33598(U)
October 19, 2022
Supreme Court, Kings County
Docket Number: Index No. 503660/2019
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

X

MANUEL CHOX,

Plaintiff,

DECISION/ORDER

-against-

Index No. 503660/2019

**MERMAID PLAZA ASSOCIATES, LLC,
TAJ MAHAL CONTRACTING CORP. and
MERMAID CHICKEN, LLC,**

Motion Seq. No. 3

Date Submitted: 9/23/2022

Defendants.

X

MERMAID PLAZA ASSOCIATES, LLC,

Third-Party Plaintiff,

-against-

MERMAID CHICKEN LLC,

Third-Party Defendant.

X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of defendant/third-party plaintiff's motion to dismiss some of plaintiff's claims as against it, and for summary judgment against the third-party defendant

Papers

NYSCEF Doc.

Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>71-81</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>85-88; 89-96</u>
Reply Affirmation.....	<u></u>

Upon the foregoing cited papers, the Decision/Order on this application is as follows:

This is a personal injury action for a workplace accident which took place on January 25, 2019 in Brooklyn, NY. Plaintiff alleges he was injured when he cut his hand while using an electric grinder that did not have a protective cover over the cutting disc. This case is on the trial calendar, and the next appearance in JCP is January 5, 2023.

Defendant/third-party plaintiff Mermaid Plaza Associates LLC was the owner of the property where the work was being performed, a strip-type mall located at 3019 Mermaid

Avenue, Brooklyn, NY. Defendant Mermaid Chicken LLC was the commercial tenant. They entered into a lease with the owner and then hired a contractor to renovate the space for a Popeye's restaurant.

Plaintiff worked for the contractor or a subcontractor. He was approved for Workers' Compensation, Doc 90, which refers to both "Taj Mahal Contracting Corp." and "Kings Ideal Construction Co," and says, "carrier undetermined." On the first page of the letter, it states "Notice of Decision - No Insurance Case." In the text, it states that plaintiff "did not recognize Mohammed Naeem, the owner of Taj Mahal Contracting Corp. The claimant testified that he was picked up as a day laborer at 15 Ave and 65th Street. He does not know the name or address of the person who picked him up. The boss took him to the hospital. The hospital lists the insured as Kingidel in one area and KingDeli in another area. The address listed was investigated by compliance and did not locate a business or individual." Apparently, Taj Mahal had Workers' Compensation Insurance, but plaintiff did not work for this company. During discovery, it was determined that plaintiff worked for King Ideal Construction Co. Mr. Gulraiz Iqbal was deposed [Doc 78] as Mermaid Chicken's representative, and testified that he was involved with Mermaid Chicken, and Bukhari Group, a group of people that [Doc 78 Page 20] "open restaurants, and we operate restaurants." He was confused about the nature of business entities. He testified that he is neither a member of Mermaid Chicken LLC, nor an employee. He testified that Taj Mahal "were the contractor of record who pulled the permits and provided their insurance" [Pages 27-28]. He continued "they are an affiliate, King Ideal . . . and we made the contract with King Ideal. . . So that's what I know" [Page 28]. The "contract" with King Ideal is Doc 81. It states that it is the general contractor, and is signed by someone named Mohammad Ashrafi. Mr. Iqbal said Mr. Ashrafi is known as

“Wahid” [Page 45]. King Ideal was not deposed, it does not seem, and it is not known if they had a Workers’ Compensation policy for their employees.

In Motion Seq. #3, defendant/third-party plaintiff Mermaid Plaza Associates LLC moves, in the first branch of its motion, for summary judgment dismissing the plaintiff’s claims under Labor Law Sections 200, 240(1), 240(2), 240(3) and common law negligence. This would leave only plaintiff’s claim under Labor Law section 241(6) as remaining against this defendant. Plaintiff does not oppose this branch of the motion, and states that with regard to this defendant only, his claim is under Labor Law section 241(6). Accordingly, this branch of the motion is granted.

Defendant/third-party plaintiff Mermaid Plaza Associates LLC next moves, in the second branch of its motion, for summary judgment against defendant/third party defendant Mermaid Chicken LLC for contractual and common law indemnification and for its breach of contract, specifically, the failure to procure insurance; and seeks an order dismissing all cross-claims that have been interposed by the co-defendants Mermaid Chicken and Taj Mahal against Mermaid Plaza Associates LLC.

On a claim for contractual indemnification, the language of the contract's provisions determines the right to contractual indemnity. (see *Carroll v 1156 APF LLC*, 2011 N.Y. Misc. LEXIS 4449, 2011 WL 4443507 (Sup Ct New York County 2011) (citing *Smith v Broadway 110 Devs., LLC*, 80 AD3d 490, 491 [1st Dept 2011])). Additionally, an indemnitee must show that it is free from negligence, but it does not need to show that the proposed indemnitor is negligent. *Id.* (citing *Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002])).

The indemnification provision in the 2018 lease is at Paragraph 37 of Document 80. It is a broad indemnification clause which provides that the tenant shall indemnify the landlord for any injury to persons or property, and hold Landlord harmless from and against

all liabilities, obligations, damages, costs and expenses, including reasonable attorneys' fees incurred or arising from "any act, omission or negligence of Tenant, its contractors, licensees, agents employees, invitees or visitors." The lease contemplates significant alterations, as it provides that no rent need be paid for the first six months, unless the business opens sooner, and has a lengthy provision regarding the alteration work at Paragraph 3.

Plaintiff does not oppose this branch of the motion. Mermaid Chicken opposes the motion, and argues that there are triable issues of fact that preclude the granting of summary judgment. The first of these issues, counsel states, is which contractor the plaintiff was working for. The second ostensible issue of fact averred is "with respect to the rights and responsibilities of Plaza Associates with respect to the subject property, as well as with respect to Plaza Associates' involvement in the renovation project that was taking place at the subject property" [Aff Doc 89 ¶15]. In this regard, counsel states "Mr. Domansky himself was actively and regularly involved in the project, including aspects such as review of plans, architect's review of drawings, proof of insurance coverage, jobsite inspections, preparation and submission of New York City Department of Buildings required forms, the issuance of building permits, required filings for the kitchen fire suppression system, issues involving other tenants' toilets and water not working as a result of the renovation project, and approval of the exterior painting of the façade and storefront of the premises" [Aff ¶21]. The third alleged "issue of fact" is the role of defendant Taj Mahal Contracting Corp. in the renovation.

The court does not find that any of these alleged issues of fact have any bearing on the obligation of defendant Mermaid Chicken to indemnify its landlord for any injuries to any contractors or their employees who were working on the renovation of the restaurant. The

fact that the property owner is required by law to sign the NYC Department of Buildings' applications for permits has no bearing on the issue of which party was doing the work. The commercial tenant was doing the work and had hired the contractors. The inadmissible (unauthenticated) e-mails, letters and NYC forms (28 pages of them) provided at Doc 91 would not change this conclusion, as they only indicate that Mr. Domansky, the owner's representative, was appropriately informed of the plans for the construction. This was not a minor renovation. The owner had its own architect to review the plans, which included installing a 7-ton HVAC unit on the roof, walk in refrigerators, electricity upgrades, and other work. Mr. Domansky wrote to ask for proof of insurance, which is not unusual. What is unusual is the apparent fact that Mermaid Chicken had Taj Mahal file the plans, obtain the permits, and obtain insurance, but hired King Ideal to do the work, which Taj Mahal was anticipating doing. Mr. Naeem of Taj Mahal was deposed, and testified that he did not know that Mr. Bukhari of Mermaid Chicken had signed a contract with King Ideal before he had submitted the application to the NYC Department of Buildings for the permits [Doc 94 Page 53]. When the permit was issued, he contacted Mr. Bukhari and asked for the deposit "and I will start the work" [Page 54] but "he told me that I have to wait." He said he assumed Mr. Bukhari was waiting for the money. His company never did any work at the site. For months, Mr. Bukhari told him to wait when he called. He did not have a written contract for the work. He learned about the work being done by someone else when he was served with this suit. King Ideal is a competitor. He has no relationship with them, he testified.

Therefore, the branch of the motion for summary judgment on Plaza Associates' claim for contractual indemnification and defense is granted. Mermaid Chicken has not raised any issue of fact with regard to whether the owner was free of negligence and that its potential liability (under Labor Law section 241(6)) is solely vicarious. On a claim for

contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability" (see *Winter v ESRT Empire State Bldg., LLC*, 201 AD3d 844, 845 [2d Dept 2022]).

Defendant Mermaid Plaza also moves for summary judgment on their breach of contract for failure to procure liability insurance against Mermaid Chicken. In so moving, defendant Mermaid Plaza notes that, under its lease, Mermaid Chicken agreed to procure the specified insurance, and to listed them as an additional insured. The lease was executed (and acknowledged) on August 15, 2018. The insurance requirements in the lease between movant and Mermaid Chicken are located at Paragraph 9 of Document 80. The quality of the copy is very poor. In pertinent part, in addition to other requirements, such as to obtain Workers' Compensation insurance for its employees, it requires the tenant to:

(a)(i) at Tenant's sole cost and expense, shall obtain, maintain and keep in full force and effect during the Term commercial general liability insurance (with reasonable deductible) in a form approved in New York State (bodily injury, property damage and personal injury including broad form property damage coverages and coverage for contractual liability recognizing the indemnity provisions of this Lease). The limits of liability shall be as reasonably required by Landlord from time to time, but in no event less than Three Million and 00/100 Dollars (\$3,000,000.00) per occurrence, which amount may be satisfied with a primary commercial general liability policy of not less than One Million and 00/100 Dollars (\$1,000,000.00) per occurrence, Three Million and 00/100 Dollars (\$3,000,000.00) general aggregate and excess (or "Umbrella") liability policy affording coverage, at least as broad as that afforded by the primary commercial general liability policy, in an amount not less than the difference between Two Million and 00/100 Dollars (\$2,000,000.00) and the amount of the primary policy. Landlord, its managing agent and any Mortgagee(s) shall be included as additional insureds with respect to the Premises. All said policies of insurance shall be written as "occurrence" policies with general aggregate limit provided on a "per location" basis and such insurance shall be primary and non-contributory with respect to losses occurring within the Premises. Whenever, In Landlord's reasonable judgment, good business practice and changing conditions indicate a need for additional amounts or different types of insurance coverage, Tenant shall, within ten (10) days after Landlord's request, obtain such insurance coverage, at Tenant's expense.

* * * * *

(iii) All policies of insurance shall be: (i) written as primary policy coverage and not contributing with or in excess of any coverage which Landlord or any Lessor may carry; and (ii) issued by reputable and independent insurance companies rated in Best's Insurance Guide or any successor thereto (or, if there is none, an organization having a national reputation), as having a general policyholder rating of "A" and a financial rating of at least "VIII", and which are admitted carriers to do business in the State of New York and shall include a waiver of subrogation in favor of Landlord and Landlord's managing agent. Tenant shall, not later than ten (10) business days prior to the Commencement Date¹, deliver to Landlord the Certificates of insurance (in form reasonably satisfactory to Landlord, including but not limited to an ACORD 28 Form) to be followed by policies and shall thereafter furnish to Landlord, at least thirty (30) days prior to the expiration of any such policies and any renewal thereof, a new Certificate to be followed by policies. Each of said policies shall also contain a provision whereby the insurer agrees not to cancel, fail to renew, diminish or materially modify said insurance policy(ies) without having given Landlord, any Lessors and Mortgagees at least thirty (30) days prior within notice thereof.

Mermaid Plaza's counsel avers that it is entitled to summary judgment, as "CHICKEN has failed to procure such insurance and PLAZA is being defended under its own liability insurance and at its own expense" [Aff Doc 74 ¶ 15].

Mermaid Chicken provides an Insurance Certificate with its opposition papers, at Doc 93. Counsel for Mermaid Chicken avers [Doc 89 ¶28] that he has provided a "Certificate of Liability Insurance is dated 10/16/18, and also lists the insured as "Taj Mahal Contracting Corp." The liability limit per occurrence is \$1,000,000, the policy period is 4/10/18 to 4/10/19, and it lists, as additional insureds, Mermaid Plaza Associates LLC, Mermaid Plaza Associates Inc., Mermaid Holdings LLC."

¹ This is defined in ¶ 1 (A)(v) as "the date which is the later to occur of the date on which a fully executed Lease is delivered to Tenant or Tenant's attorney (which delivery may be by email) and the date Landlord delivers possession of the Premises in accordance with Article 13 of this Lease." It is not the same date as the Rent Commencement Date, defined in ¶ 1 (A)(viii).

A Certificate of Liability Insurance is not evidence of insurance. This Insurance Certificate, which uses standard language, clearly provides at the top of the document in capital letters that:

“THIS CERTIFICATE IS ISSUED AS A MATTER OF INFORMATION ONLY AND CONFERS NO RIGHTS UPON THE CERTIFICATE HOLDER. THIS CERTIFICATE DOES NOT AFFIRMATIVELY OR NEGATIVELY AMEND, EXTEND OR ALTER THE COVERAGE AFFORDED BY THE POLICIES BELOW.”

In the absence of a Declaration Page or insurance policy, no insurance coverage has been established. In addition, without being able to review the exclusions, there is no way to know if the insured's employees, or the additional insured's employees, are covered. The amounts are not what is required in the lease. But, most importantly, this insurance certificate, even if there was an actual policy to back it up, is not what is anticipated and required by the lease. This insurance, obtained by Taj Mahal, is only for the period of the construction work, and only insures the property and the people engaged in the construction work. It has no coverage for the anticipated restaurant employees or customers. Further, since Taj Mahal was not engaged to do the construction work, there is no coverage for plaintiff or any of the workers employed by King Ideal. Presumably, they have long ago disclaimed. Why Mermaid Chicken provides these certificates of insurance obtained by Taj Mahal as insured, in Doc 93, as proof that Mermaid Chicken complied with the lease terms for insurance is a mystery. The court must note that as Mermaid Chicken is apparently still in occupancy and operating the Popeye's Restaurant, at some point the appropriate insurance must have been obtained, but not in time to cover plaintiff's accident.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a

contract provision required that such insurance be procured and that the provision was not complied with" (*Tingling v C.I.N.H. R., Inc.*, 120 AD3d 570, 992 N.Y.S.2d 43 [2d Dept 2014]. quoting *DiBuono v Abbey. LLC.* 83 AD3d 650, 652, 922 N.Y.S.2d 101 [2d Dept 2011]). Movant has made a prima facie case. Mermaid Chicken has not overcome it and produced evidence of insurance which complies with the lease.

The law is well settled that agreements to purchase and maintain insurance are valid and enforceable (See, *Darowski v High Meadow Co Op.*, 239 AD2d 541 [2d Dept 1997]). Where a party fails to comply with a contractual obligation to procure insurance, the party to whom the insurance was to be provided is entitled to recover the expenses resulting from the breach (See, *Lerer v City of New York*, 301 AD2d 577 [2d Dept 2003]). Here, defendant Mermaid Chicken breached the duty to procure insurance for the benefit of Mermaid Plaza. This branch of the motion is therefore granted. The amount of Mermaid Plaza's damages will be determined at the trial of the third-party action, after the plaintiff's jury trial or a settlement of the plaintiff's claims.

Finally, Mermaid Plaza seeks an order dismissing the cross claims asserted in the answers of co-defendants Taj Mahal and Mermaid Chicken. Taj Mahal has not opposed the motion at all. Nor does Taj Mahal assert any cross claims in its answer [Doc 25]. Mermaid Chicken asserts a cross-claim in its answer [Doc 23] against Mermaid Plaza for common law indemnification and one for contribution. These have no merit and movant Mermaid Plaza is entitled to an order dismissing them.

Accordingly, it is hereby

ORDERED that the branch of defendant Mermaid Plaza's motion for summary judgment dismissing the plaintiff's claims solely as against it under Labor Law Sections 200, 240(1), 240(2), 240(3) and common law negligence, but not his claim under Labor Law §241(6), is granted; and it is further

ORDERED that the branch of defendant Mermaid Plaza's motion for summary judgment on its third-party complaint against Mermaid Chicken for contractual indemnification and breach of its contract to procure insurance is granted; and it is further

ORDERED that the branch of defendant Mermaid Plaza's motion to dismiss the cross-claims of defendant Mermaid Chicken asserted against it is granted, and the cross-claims are dismissed.

Any relief requested and not addressed herein is denied.

This constitutes the decision and order of the court.

Dated: October 19, 2022

ENTER :



Hon. Debra Silber, J.S.C.