

Focacci v One E. Riv. Place Realty Co., L.L.C.
2023 NY Slip Op 32522(U)
July 24, 2023
Supreme Court, New York County
Docket Number: Index No. 157599/2016
Judge: Lori S. Sattler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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CLAUDIA FOCACCI,

Plaintiff,

- v -

ONE EAST RIVER PLACE REALTY COMPANY, L.L.C.,
SOLOW MANAGEMENT CORP., EAST RIVER POOL
CLUB, INC., AND IOWA SPORTS MANAGEMENT, INC.,

Defendant.

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ONE EAST RIVER PLACE REALTY COMPANY, L.L.C.,
SOLOW MANAGEMENT CORP., EAST RIVER POOL CLUB,
INC.

Plaintiff,

-against-

HAYNEEDLE, INC., HAYNEEDLE, INC.

Defendant.

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INDEX NO. 157599/2016
MOTION DATE 05/17/2023
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 596047/2017

The following e-filed documents, listed by NYSCEF document number (Motion 003) 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for JUDGMENT - SUMMARY.

In this negligence action, Third-Party Defendant Hayneedle, Inc. (“Hayneedle”) moves for summary judgment dismissing the Third-Party Complaint and all related crossclaims against it pursuant to CPLR 3212. Defendant Iowa Sports Management Inc. (“Iowa Sports”) and Defendants/Third-Party Plaintiffs One East River Place Realty Company, LLC (“One East River Place”), Solow Management Corp. (“Solow”) and East River Pool Club, Inc. (“East River Pool Club”) (collectively “Defendants”) oppose the motion.

According to the Verified Complaint (NYSCEF Doc. 1), this action stems from an accident that occurred on May 24, 2014, when Plaintiff used the roof deck and health club at 525 East 72nd Street (“premises”), where she was a resident. On the date in question, Plaintiff was hit with an umbrella when it purportedly was blown out of its base. She claims to have suffered a traumatic brain injury and complex regional pain syndrome.

One East River Place owned and operated the premises. Solow managed the premises. East River Pool Club was a tenant of the premises and operated and maintained that portion of the premises where the roof deck and health club were located. Iowa Sports was retained by East River Pool Club to supervise, operate, and manage the health club and roof deck of the premises where the incident occurred (NYSCEF Doc. 85). Hayneedle sold the umbrella in question to Solow (NYSCEF Doc. 87).

Plaintiff commenced the main negligence action against Defendants. One East River Place, Solow, and East River Pool Club commenced a third-party action against Hayneedle asserting causes of action for common law indemnification and contribution and contractual indemnification. Iowa Sports, who is not a party in the third-party action, filed crossclaims against Hayneedle for indemnification based on strict products liability.

Hayneedle asserts the Third-Party Complaint and crossclaims must be dismissed. First, it argues there can be no finding of contractual indemnification because there was no contract between the parties. It further argues that there can be no finding of common law indemnification because Defendants/Third-Party Plaintiffs cannot establish that there was no negligence on their part. Lastly, Hayneedle maintains it cannot be found liable under a strict liability cause of action because there is no evidence that the umbrella base or the umbrella was defective.

On a motion for summary judgment, the movant “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. Center*, 64 NY2d 851, 853 [1985], citing *Zuckerman v City of New York*, 39 NY2d 557, 562 [1980]). Failure of the movant to make this showing requires denial of the motion, regardless of the sufficiency of opposing papers (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). If the movant makes this initial showing, the burden shifts to the opposing party which must then produce evidentiary proof in admissible form that establishes the existence of material issues of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

“A contract that provides for indemnification will be enforced as long as the intent to assume such role is ‘sufficiently clear and unambiguous’” (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007], quoting *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]). The Court must determine whether the “intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). “When a party is under no legal duty to indemnify, a contract assuming the obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]).

Hayneedle contends there was no contract providing for indemnification between the parties. In opposition, Iowa Sports relies on a purchase order prepared by Solow and submitted to Hayneedle for the purchase of umbrellas. Attached to the purchase order is a document entitled “TERMS AND CONDITIONS OF THIS ORDER” (NYSCEF Doc. 87). It states, *inter alia*: “To the fullest extent permitted by law, Vendor/Contractor shall indemnify and hold

harmless Purchaser/Owner . . . against any and all (i) claims, liabilities, costs and expenses . . . for injury to or death of any person and for damage or loss of any property occurring in any manner whatsoever by reason of the work hereunder” (*id.*).

Even if a rider annexed by Solow to its own purchase order was found to be a valid contractual agreement, it does not provide for indemnification related to the product being purchased. The rider unambiguously contemplates indemnification in the context of services performed by a vendor. This is further evidenced by the rider’s first sentence, which states: “Vendor/Contractor shall deliver the goods to the Location stated above and shall complete all work on or before the date specified.” When read as a whole, the rider cannot be said to provide indemnification for injuries caused by the merchandise sold by Hayneedle. Accordingly, summary judgment is granted with respect to the first cause of action seeking contractual indemnification.

Hayneedle argues that Defendants likewise cannot establish a claim for common law indemnification. It contends that the claim cannot lie because there is no negligence on its part and Defendants themselves are not free from negligence. Hayneedle’s argument centers around the deposition testimony of Anthony Brucia, an employee of Solow. Brucia testified that there were no prior reports of umbrellas blowing out of the table (NYSCEF Doc.78, Brucia EBT, 95-96). He further testified to having seen the umbrellas and described the mechanism for attached the pole to the base as “a thumb turner. Kind of like a screw thread with a thumb knob on it to turn it tight” (*id.* at 100). Based on this testimony, Hayneedle contends that Iowa Sports, the party purportedly responsible for setting up the umbrellas, should have ensured they were properly fastened and the fact that the umbrella pole lifted out of the base indicates that the umbrella was not properly attached. Hayneedle contends its position is further supported by

Plaintiff's EBT, at which she testified: "I saw the umbrella pole being lifted, striking me in the head" (NYSCEF Doc. 77, Focacci EBT Part 3, 497). Hayneedle further annexes photographs of the warning sign on the base of the umbrella, which states: "WARNING! FOR SAFETY, DO NOT OPEN UMBRELLA IN ANY WINDY CONDITIONS" (NYSCEF Doc. 82). Plaintiff had testified to feeling a "big gust of wind" at the time the incident occurred (NYSCEF Doc. 76, Focacci EBT Part 2, 226-227).

Defendant Iowa Sports opposes, maintaining that Brucia's testimony does not provide support for the contention that the umbrella was improperly fastened to the base at the time of the incident. Specifically, it points to the fact that Brucia testified that he did not know who set up the umbrellas, did not recall seeing the umbrellas on their bases on the date in question, and had no knowledge of who would have attached the umbrella to the base (Brucia EBT, 37, 82, 102). Iowa Sports further claims that Plaintiff's deposition testimony does not support Hayneedle's contention that there were windy conditions and that the umbrella was not properly fastened to the base because Plaintiff did not testify to seeing the umbrella come out of its base and had not observed the umbrella move during the one hour that she sat at the table (Focacci EBT Part 3, 237-238, 226). Plaintiff further testified that the umbrella was already opened at the table where she was sitting and that she did not know who had opened it (*id.* at 222). Iowa Sports therefore argues Hayneedle has not met its prima facie burden because it did not submit evidence showing it was free of negligence.

That branch of Hayneedle's motion seeking summary judgment on the common law indemnification cause of action is denied. Common law indemnification allows the burden of loss to be shifted to the actual wrongdoer, therefore "it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the

doctrine” (*Trustees of Columbia Univ. v Mitchell/Giurgola Assocs.*, 109 AD2d 449, 453 [1st Dept 1985]). Here, issues of fact remain as to why the umbrella came off the base, whether it was fastened correctly, and what the weather conditions were at the time of the incident. These issues preclude the Court from making a determination as to the parties’ negligence, and in turn from addressing summary judgment on the common law indemnification cause of action.

Hayneedle further seeks summary judgment dismissing Iowa Sports’ crossclaim based on strict products liability. Hayneedle claims there is no evidence that the umbrella or the base was defective and argues that Plaintiff’s injury alone is not a basis to infer that the umbrella was defective. It maintains it has never received complaints about its umbrellas. According to Hayneedle, the evidence presented with the motion demonstrates that Iowa Sports failed to abide by the clear warning not to open the umbrella in windy conditions and to ensure that it was secured to the base using the screw thread.

Iowa Sports reiterates its assertion that there is no EBT testimony or any other evidence to support Hayneedle’s position that the umbrella was not properly secured to the base. It argues that Hayneedle’s claim that the umbrella was not properly fastened to the base has not been demonstrated and is the product of conjecture and mere speculation, and therefore Hayneedle cannot succeed on its motion for summary judgment dismissing the strict liability claims.

The Court finds that, as with common law indemnification, Hayneedle does not tender sufficient evidence to eliminate any material issues of fact as to the strict products liability cause of action. Although it does show that there was a warning on the umbrella base regarding use during windy conditions, there was no EBT testimony submitted evidencing continued wind conditions. Plaintiff only testified to feeling a gust of wind just before she was struck. “Credibility determinations, the weighing of the evidence, and the drawing of legitimate

inferences from the facts are jury functions” (*Forrest v Jewish Guild for the Blind*, 3 NY3d 295, 315 [2004], quoting *Anderson v Liberty Lobby, Inc.*, 477 US 242, 255 [1986]). Here, there are competing theories as to how the umbrella left the base. Under the circumstances, a jury is charged with making those determinations of fact.

Accordingly, it is hereby,

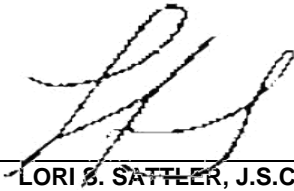
ORDERED that summary judgment is granted as to the cause of action for contractual indemnification contained in the Third-Party Complaint and that cause of action is hereby dismissed; and it is further

ORDERED that the remainder of the motion is denied.

All matters not decided herein are hereby denied.

7/24/2023

DATE



LORI B. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE