

SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
SECOND JUDICIAL DEPARTMENT

Selis v. Town of North Hempstead

2023 NY Slip Op 00890 (App. Div. 2023) · No. 2019-08585 · Decided February 15, 2023

SUMMARY

The Appellate Division, Second Department dismissed as academic the appeal concerning summary judgment dismissing the personal-injury complaint because judgment had been entered after trial. It affirmed the denial of Jewish Association for Services for the Aged's motion for summary judgment dismissing the Town of North Hempstead's contractual indemnification claim, holding that the indemnification provision could apply because the injury occurred while the plaintiff was performing work for JASA.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Second Judicial Department
WRITING FOR THE COURT	Reinaldo E. Rivera, J.P.; Joseph J. Maltese, J.; William G. Ford, J.; Janice A. Taylor, J.
JURISDICTION	New York
DECIDED	February 15, 2023
DOCKET	2019-08585
DISPOSITION	dismissed
PROCEDURAL POSTURE	JASA appealed from an order denying its motion for summary judgment dismissing the personal-injury complaint and the Town's third-party contractual-indemnification claim. During the appeal, judgment was entered for the plaintiff against the Town after trial.
STANDARD OF REVIEW	Summary judgment requires the movant to make a prima facie showing of entitlement to judgment as a matter of law; a party seeking dismissal of a contractual-indemnification claim must show prima facie that it was not contractually obligated to indemnify the claimant.
PRECEDENTIAL VALUE	published
PARTIES	Jewish Association for Services for the Aged v. Gail Selis, Town of North Hempstead

TOPICS

appellate procedure

mootness

contracts

personal injury

municipal law

PRACTICE AREAS

appellate procedure

contractual indemnification

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municipal liability

QUESTIONS PRESENTED

1. Whether the appeal from denial of summary judgment dismissing the personal-injury complaint should be dismissed after entry of a final judgment following trial.
2. Whether JASA established prima facie entitlement to summary judgment dismissing the Town's contractual-indemnification claim.
3. Whether General Obligations Law § 5-322.1 barred enforcement of the contractual-indemnification provision.

HOLDINGS

1. The appeal from the portion of the order denying JASA's motion for summary judgment dismissing the complaint was dismissed because a judgment had subsequently been entered after trial.
2. JASA was not entitled to summary judgment because it failed to make a prima facie showing that it was not contractually obligated to indemnify the Town.
3. General Obligations Law § 5-322.1 was inapplicable because the JASA-Town contract was unrelated to the construction, alteration, repair, or maintenance of a building.

KEY QUOTATIONS

"The right to contractual indemnification depends upon the specific language of the contract" ([*1])

"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" ([*1])

"A party that moves for summary judgment dismissing a claim for contractual indemnification must make a prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim" ([*1])

"The phrase 'arising out of' means 'originating from, incident to, or having connection with, and requires only that there be some causal relationship between the injury and the risk for which coverage is provided'" ([*1])

FACTUAL BACKGROUND

Selis, an employee of JASA, allegedly tripped and fell on a torn section of carpeting covered with duct tape after plugging in a space heater while working at a building owned and maintained by the Town of North Hempstead. The Town had contracted with JASA to provide social work services to the Town's aging residents. The contract

required JASA to indemnify the Town for liabilities and expenses arising out of or connected with the agreement.

PROCEDURAL HISTORY

Gail Selis sued, among others, the Town of North Hempstead for injuries allegedly sustained in a fall at a Town-owned building. The Town brought a third-party action against JASA seeking, among other relief, contractual indemnification. The Supreme Court, Nassau County, denied JASA's motion for summary judgment. After entry of a judgment in favor of Selis against the Town, the Appellate Division dismissed the portion of JASA's appeal concerning dismissal of the complaint and affirmed the order insofar as reviewed regarding contractual indemnification.

DISPOSITION

dismissed

CASES CITED

- Bonczar v American Multi-Cinema, Inc., 38 NY3d 1023, 1025
- Matter of Aho, 39 NY2d 241
- Burgos v 14 E. 44 St., LLC, 203 AD3d 688, 689
- O'Donnell v A.R. Fuels, Inc., 155 AD3d 644, 645
- George v Marshalls of MA, Inc., 61 AD3d 925, 930
- Assevero v Hamilton & Church Props., LLC, 131 AD3d 553, 558
- Tolpa v One Astoria Sq., LLC, 125 AD3d 755, 756
- Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 415
- Regal Constr. Corp. v National Union Fire Ins. Co. of Pittsburgh, PA, 15 NY3d 34, 38
- Mack-Cali Realty Corp. v NGM Ins. Co., 119 AD3d 905, 906
- Skerrett v LIC Site B2 Owner, LLC, 199 AD3d 956, 959

OPINION

PER CURIAM.

Selis v Town of N. Hempstead (2023 NY Slip Op 00890) Selis v Town of N. Hempstead 2023 NY Slip Op 00890 Decided on February 15, 2023 Appellate Division, Second Department Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. This opinion is uncorrected and subject to revision before publication in the Official Reports. Decided on February 15, 2023 SUPREME COURT OF THE STATE OF NEW YORK Appellate Division, Second Judicial Department REINALDO E. RIVERA, J.P.

JOSEPH J. MALTESE WILLIAM G. FORD JANICE A. TAYLOR, JJ. 2019-08585 (Index No. 9751/15) [*1]Gail Selis, respondent, vTown of North Hempstead, defendant third-party plaintiff,

et al., defendant; Jewish Association for Services for the Aged, third-party defendant-appellant. Ahmuty, Demers & McManus, Albertson, NY (Glenn A. Kaminska and Nicholas Venante of counsel), for third-party defendant-appellant.

Mullany & Gjelaj, PLLC (Michael H. Zhu, Esq., P.C., New York, NY, of counsel), for respondent. Leonard G. Kapsalis, Town Attorney, Manhasset, NY (Lorienton N.A. Palmer of counsel), for defendant third-party plaintiff. DECISION & ORDER In an action to recover damages for personal injuries, and a third-party action, inter alia, for indemnification, the third-party defendant appeals from an order of the Supreme Court, Nassau County (Anthony L. Parga, J.), entered June 10, 2019.

The order, insofar as appealed from, denied those branches of the third-party defendant's motion which were for summary judgment dismissing the complaint and the third-party cause of action for contractual indemnification. ORDERED that the appeal from so much of the order as denied that branch of the third-party defendant's motion which was for summary judgment dismissing the complaint is dismissed; and it is further, ORDERED that the order is affirmed insofar as reviewed; and it is further, ORDERED that one bill of costs is awarded to the plaintiff.

The plaintiff allegedly was injured when she tripped and fell on a torn section of carpeting that was covered with duct tape, after plugging in a space heater while she was at work. The plaintiff commenced this action to recover damages for personal injuries against, among others, the Town of North Hempstead, which owned and maintained the building where the plaintiff's accident occurred.

The Town contracted with the Jewish Association for Services for the Aged (hereinafter JASA), which was the plaintiff's employer, to provide social work services to the Town's aging residents. The Town commenced a third-party action against JASA, inter alia, for contractual indemnification. JASA moved, among other things, for summary judgment dismissing the complaint and the third-party cause of action for contractual indemnification.

By order entered June 10, 2019, the Supreme Court, inter alia, denied those branches of JASA's motion. JASA appeals. As an initial matter, the appeal from so much of the order as denied that branch of JASA's motion which was for summary judgment dismissing the complaint is dismissed, in light of the entry of a judgment in this action on June 13, 2022, in favor of the plaintiff and against the Town awarding damages, following a trial (see *Bonczar v American Multi-Cinema, Inc.*, 38 NY3d 1023, 1025; *Matter of Aho*, 39 NY2d 241).

"The right to contractual indemnification depends upon the specific language of the contract" (*Burgos v 14 E. 44 St., LLC*, 203 AD3d 688, 689 [internal quotation marks omitted]; see *O'Donnell v A.R. Fuels, Inc.*, 155 AD3d 644, 645). "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" (Burgos v 14 E. 44 St., LLC, 203 AD3d at 689, quoting George v Marshalls of MA, Inc., 61 AD3d 925, 930).

"A party that moves for summary judgment dismissing a claim for contractual indemnification must make a prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim" (Burgos v 14 E. 44 St., LLC, 203 AD3d at 689; see Assevero v Hamilton & Church Props., LLC, 131 AD3d 553, 558). "This may be accomplished by showing that, under the circumstances, an indemnification clause in a contract between the parties either was not triggered or was otherwise inapplicable" (Burgos v 14 E. 44 St., LLC, 203 AD3d at 689; see Tolpa v One Astoria Sq., LLC, 125 AD3d 755, 756).

Under the contract between JASA and the Town, JASA was required to indemnify the Town "[t]o the fullest extent permitted by law... from and against any and all liabilities, losses, costs, expenses... arising out of or in connection with this Agreement."

The phrase "arising out of" means "originating from, incident to, or having connection with, and requires only that there be some causal relationship between the injury and the risk for which coverage is provided" (Worth Constr. Co., Inc. v Admiral Ins. Co., 10 NY3d 411, 415 [citations and internal quotation marks omitted]; see Regal Constr. Corp. v National Union Fire Ins.

Co. of Pittsburgh, PA, 15 NY3d 34, 38; Mack-Cali Realty Corp. v NGM Ins. Co., 119 AD3d 905, 906). The evidence established that the plaintiff was at her place of work doing her job for JASA when she tripped and fell after plugging in a space heater, as a result, JASA failed to make a prima facie showing that it was not contractually obligated to indemnify the Town.

Contrary to JASA's contention, General Obligations Law § 5-322.1 is inapplicable to this case, as its contract with the Town was unrelated to "the construction, alteration, repair or maintenance of a building" (see Skerrett v LIC Site B2 Owner, LLC, 199 AD3d 956, 959).

Accordingly, the Supreme Court properly denied that branch of JASA's motion which was for summary judgment dismissing the third-party cause of action for contractual indemnification. RIVERA, J.P., MALTESE, FORD and TAYLOR, JJ., concur. ENTER: Maria T. Fasulo Clerk of the Court