

At a Term of Supreme Court held in
and for the County of Jefferson
in the City of Watertown, New York
on the 29th day of June, 2017.

PRESENT: HONORABLE HUGH A. GILBERT
Supreme Court Justice

STATE OF NEW YORK

SUPREME COURT COUNTY OF JEFFERSON

DUSTIN M. MAROLF, as Administrator of the Estate
of DEBBIE A. CRUMP, deceased,

Plaintiff,

MEMORANDUM
DECISION AND ORDER

-vs-

Index No. 2016-1620
RJl No. 22-17-0391

RAPID RESPONSE MONITORING SERVICES
INCORPORATED, THE LIGHTSTONE GROUP,
LLC, CURTIS APARTMENTS ASSOCIATES, CITY
RENEWAL MANAGEMENT CORP. and FIRE
DETECTION SYSTEMS, INC.,

Defendants.

Plaintiff Dustin Marolf commenced this negligence and wrongful death action to recover damages for the death of his mother, Debbie Ann Crump, on September 28, 2015 while she was a resident of Curtis Apartments. Ms. Crump activated the emergency pull cord in her apartment to summon help for a bleeding condition. Plaintiff alleges that the Defendants either ignored the alert, failed to respond

and/or neglected to notify the proper authorities and Ms. Crump bled to death in her apartment.

H
Plaintiff named the Lightstone Group, LLC, Curtis Apartment Associates, LP, Curtis Apartment Associates and City Renewal Management Corp. (collectively "Curtis") as Defendants, presumably because one or more of them owned and/or operated the apartment building where Ms. Crump resided. Defendant Rapid Response Monitoring System ("RRMS") is in the business of operating and maintaining a central station for the receipt of voice communication and electronic signals from intrusion, fire and medical alert alarms and then giving notice to the proper authorities. Defendant Fire Detection Systems, Inc. ("FDS") is in the business of installing and servicing alarm systems in Central and Northern New York.

G
There are two motions pending before the Court. Defendant RRMS moved for an Order granting it summary judgment against FDS on its claim for contractual indemnification and directing FDS to defend and indemnify it from any damages awarded against it, together with a directive that FDS reimburse it for attorneys' fees and expenses incurred to date. Defendant Curtis seeks summary judgment against FDS on its claim for breach of contract and requests a conditional order of indemnification with an award of counsel fees and costs incurred as a result of the

breach. Plaintiff and FDS have opposed both motions. We will highlight the pertinent contractual clauses first.

RRMS and FDS entered into an "Agreement for Central Services" and an Addendum on July 13, 2006 ("Agreement"). Paragraph 17 provides:

"Dealer [FDS] agrees to protect, indemnify, defend and hold harmless company [RRMS] and business from and against and pay (without any condition or obligation that company or business first pay) for all claims, demands, suits, liabilities, damages, judgments, losses and expenses, including, without limitation, attorney's fees, which may be asserted against or incurred by company or business by or due to any person not a party to this agreement, including dealer's insurance or bonding company, for any expense, loss or damage including, without limitation, statutory civil damages, personal injury, death or property damage, real or personal, arising to of or from, in connection with, as a result of, related to or as a consequence of the service, failure or improper dispatch of persons to the premises, monitoring, remote programming services, verification services, recording of communications, operation or non-operation of the central station facilities, whether to the active or passive sole, joint or several negligence (including negligence per se) of business or company or its suppliers or subcontractors, breach of contract, express or implied, breach of warranty, express or implied, product or strict liability, or any claim for contribution or indemnification, whether in contract, tort or equity".

On September 15, 2016, RRMS submitted a letter to FDS tendering the defense of this action pursuant to the above provision. By letter dated November 22, 2016, counsel for FDS advised that FDS would not be accepting the defense and indemnification of RRMS on the grounds that the request is premature, FDS'

scope of services did not include monitoring of the alarm system, and the above provision does not provide for indemnification in the case of gross negligence.

Curtis and FDS executed an "Annual Monitoring Service Agreement" ("Monitoring Agreement") which Curtis asserts obligated FDS to monitor the fire alarm system and all emergency alert devices at the property. With respect to indemnification, the Monitoring Agreement provided at Paragraph 2.1:

"Indemnification by Contractor. To the fullest extent permitted by law, the Contractor [FDS] agrees to indemnify, defend and hold harmless the Owner as well as all parties listed as Additional Insureds/Indemnitees in "Exhibit A", [Curtis] and their respective officers, directors, agents, affiliates, employees, partners and lenders (hereafter collectively "Contractor Indemnified Parties") from any and all claims, suits, damages, liabilities, professional fees, including attorneys' fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage (including loss of use thereof) brought against any of the Contractor Indemnified Parties by any person or entity, arising or alleged to be arising out of or in connection with or as a result or consequence of the performance of the Work of [FDS], as well as any additional work, extra work or add-on work, whether or not caused in whole or in part by [FDS] or any person or entity employed, either directly or indirectly by [FDS] including any subcontractors thereof and their employees. The parties expressly agree that this indemnification agreement contemplates (i) full indemnity in the event of liability imposed against Contractor Indemnified Parties without negligence; and (ii) partial indemnity in the event of any actual negligence on the part of Contractor Indemnified Parties either causing or contributing to the underlying claim which negligence is expressly excepted from [FDS] obligation to indemnify. Attorneys' fees, court costs, expenses and disbursements shall be defined without limit to include those fees, costs, etc. incurred in defending the underlying claim and those fees, costs, etc. incurred in connection with the enforcement of this

Contract Agreement. Indemnification under this Agreement shall operate whether or not [FDS] has placed and maintained the insurance required under this agreement. [FDS] shall cause all subcontract agreements it enters into to include this indemnification clause so as to ensure that [FDS] and all Contractor Indemnified Parties hereunder shall have the same protection from subcontractors of all tiers as is afforded by [FDS] hereunder".

As noted, FDS was also obligated to require that all subcontracts it entered into, such as the subcontract with RRMS, include this indemnification clause monitoring so as to provide protection to Curtis. The Insurance Requirement provisions of the Monitoring Agreement between FDS and Curtis provided:

"[FDS] shall cause all subcontractor agreements it engages in to include the insurance procurement obligations set forth herein so as to ensure that [Curtis and FDS] shall have the same protection from subcontractors of any tier as is afforded by [FDS] hereunder".

It is undisputed that the RRMS subcontract with FDS did not contain the insurance provisions in favor of Curtis. By letter dated August 12, 2016, Curtis tendered the defense and indemnification to FDS. The insurance carrier for FDS declined the tender on the grounds that "the alleged cause of death was not within the scope of our insured's contract with Curtis Apartments".

Defendant RRMS contends that the Court is required to enforce the terms of its Agreement with FDS. It asserts that the contractual indemnity provisions are clear and unambiguous and do not violate public policy. Consequently, FDS must assume all liability arising out of or in connection with RRMS' performance under

the Agreement, whether RRMS was negligent or not.

H
A
G
Defendant Curtis contends that FDS assumed the obligation that it would be protected from any claims arising out of the monitoring and performance of the alarm system. It further contends that FDS was bound to ensure that its subcontractors, such as RRMS, also assume the contractual obligation to protect Curtis from any claims. Curtis seeks a conditional order of indemnity based upon both the indemnification clause of the Monitoring Agreement with FDS and its failure to require that the subcontract with RRMS include the indemnification clause.

Plaintiff's primary contention in opposition is that discovery is not complete and therefore the motions are premature. Plaintiff focuses the opposition on the denial letter from Cincinnati Insurance Companies refusing to accept Curtis' tender on the grounds that the "cause of death was not within the scope" of the FDS contract with Curtis. Plaintiff suggests that this now requires specific findings as to the underlying facts of the Plaintiff's claims rather than whether contractual indemnification is owed as a matter of law based upon the terms of the pertinent agreements.

Defendant FDS has outlined the chronology which has been revealed

I
through the discovery exchanged to date. It suggests that the information disclosed to date demonstrates that material questions of fact exist regarding the liability of Curtis and RRMS and, therefore, the motions should be denied as premature. FDS also contends that RRMS was an independent contractor and therefore FDS is not liable for its negligent acts. It asserts that questions of fact exist as to whether RRMS was grossly negligent. Finally, FDS claims that a question of fact exists as to whether RRMS breached its Agreement with FDS.

V
We note at the outset that FDS did not address Curtis' arguments concerning the rights and responsibilities in the Monitoring Agreement. Therefore, we would concur with Curtis that summary judgment would be appropriate. Nevertheless, and to the extent that FDS intended to raise the same arguments in opposition to both motions, we will consider the assertions as to both Defendants.

Q
We respectfully disagree with Plaintiff that the position taken by FDS' insurance carrier changes the complexion of the case and requires factual determinations that are premature to make. As to Curtis, it is evident that RRMS was FDS' subcontractor and FDS failed to include the insurance and indemnification provisions in the subcontract. The circumstances of this tragic incident have no bearing on that omission and cannot alter FDS' responsibility and resulting breach of contract.

H
A
6
We likewise disagree with both Plaintiff and Defendant that summary judgment is not appropriate because discovery is ongoing. Neither Plaintiff nor FDS have specified the facts in the exclusive possession of either RRMS or Curtis that could be obtained in discovery to oppose these motions. The motions require an interpretation and consideration of contractual provisions regarding indemnification and insurance procurement. Since determination of the issues presented in Defendants's motions are based solely on the language of the agreements, we cannot conclude that further discovery is needed to render a decision. In short, FDS' contractual obligations are not affected or determined by the underlying factual scenario or the ultimate liability issues.

The remaining issues raised by FDS likewise do not bar summary judgment. We are unpersuaded that FDS should not be bound by the express terms of the indemnity provision of its contract with RRMS because it was an "independent contractor". Rather, we are compelled to enforce the terms of the contract executed by these parties, requiring FDS to indemnify RRMS under the circumstances herein and regardless of the nature of their relationship.

FDS also suggests that questions of fact exist regarding whether RRMS was grossly negligent precluding summary judgment. We concur with RRMS that FDS incorrectly relied on law relating to exculpatory clauses which attempt to insulate a

party from damages caused by gross negligence. FDS is correct in asserting that exculpatory clauses are not enforceable against allegations of gross negligence. Abacus Federal Savings Bank vs. ADT Security Systems, Inc., 18 NY3d 675 (2012). Here, however, we are asked to enforce the terms of an indemnification agreement, not an exculpatory clause. As stated by the Court of Appeals in Austro vs. Niagara Mohawk Power Corp., 66 NY2d 674, 676 (1985), "indemnification agreements are unenforceable as violative of public policy only to the extent that they purport to indemnify a party for damages flowing from the intentional causation of injury", not gross negligence. Therefore, the indemnity provision may be enforced even if RRMS is found to have been grossly negligent. There being no allegations or facts to support a claim that RRMS intentionally caused injury, the provision shifting the source of compensation from RRMS to FDS is enforceable.

Finally, we disagree with FDS that a question of fact exists as to whether RRMS breached its Agreement with FDS. Citing the detailed Affidavit of Ryan Cobb, FDS suggests that unresolved questions exist regarding whether RRMS failed to perform one aspect of the contract which was its sole responsibility, namely notifying the proper authorities. We concur with RRMS that the holding in One Beacon Ins. Co. vs. Orange & Rockland Util., Inc., 361 F. Supp 2d 331 (2005) resolves this issue. Here, as in One Beacon, the language of the indemnification provision is broad, imposing the duty of indemnification on FDS "without limitation"

H
and including instances of "breach of contract, express or implied". A purported breach of contract claim does not preclude enforcement of the indemnification provision on summary judgment.

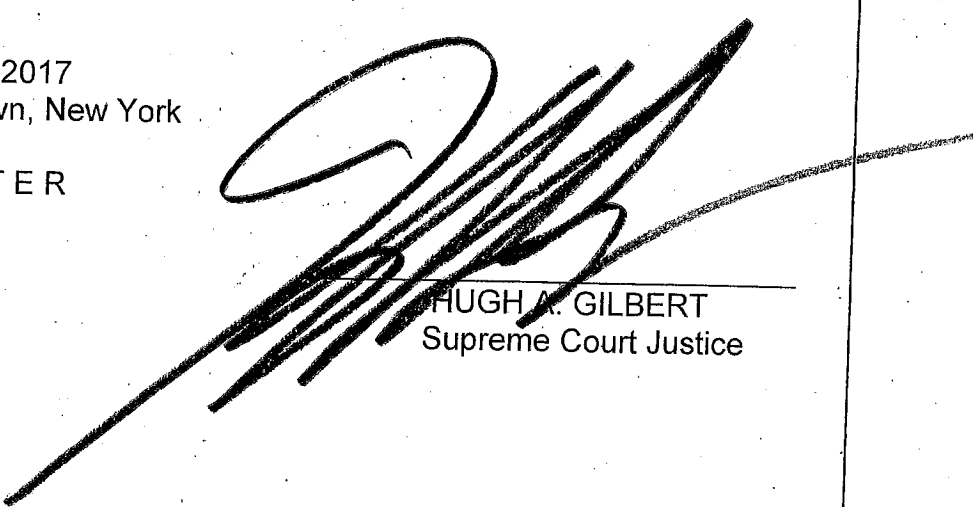
THEREFORE, it is

A
ORDERED, ADJUDGED AND DECREED that the motion of RRMS for summary judgment against Defendant FDS for indemnification is granted in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED that the motion by the Curtis Defendants for partial summary judgment against Defendant FDS for indemnification is granted in its entirety.

G
Dated: August 21, 2017
at Watertown, New York

ENTER



HUGH A. GILBERT
Supreme Court Justice