

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

LEMORGE BATTLE, <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- against -</p> ZAFFUTO CONSTRUCTION CO., INC., <p style="text-align: center;">Defendant.</p>	x x	Index Number <u>20308</u> 2004 Motion Dates <u>February 28,</u> 2007 Motion Cal. Numbers <u>4</u> Motion Seq. Nos. <u>2 & 3</u>
--	--	---

The following papers numbered 1 to 38 read on this motion by Zaffuto Construction Co., Inc. to dismiss the complaint and for summary judgment in its favor on its third-party claims for contractual and common law indemnification, motion by plaintiff to amend the complaint and caption to add third-party defendants to the main action, and cross motion by Zaffuto to vacate the note of issue and strike the action from the trial calendar.

	<u>Papers Numbered</u>
Notices of Motions - Affidavits - Exhibits	1-4, 5-8
Notice of Cross Motion - Affidavits-Exhibits ...	9-16
Answering Affidavits - Exhibits	17-27
Reply Affidavits	28-38

Upon the foregoing papers it is ordered that the motions and cross motions are decided as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on April 15, 2003, at 434 Beach 54th Street, in Far Rockaway, New York ("the premises"). At the time of the accident, plaintiff was employed as a caretaker for the New York City Housing Authority ("NYCHA"), and was assigned to work at the premises, also known as the "Edgemere Houses." It is alleged that plaintiff was carrying garbage when he fell while

walking on a public walkway in the "Edgemere Houses" complex. Plaintiff claims that he tripped and fell on debris that was being deposited on the walkway by workmen doing brick repair or renovation work on scaffolds above the walkway. Zaffuto was the general contractor on the job, hired by NYCHA. Zaffuto hired Drillco, a subcontractor, to perform the actual work, which consisted of refacing the front of the buildings. Plaintiff sued Zaffuto and Zaffuto instituted a third-party action against Drillco Equipment Company, Inc. ("Drillco"), and Bovis Lend Lease LMB, Inc., ("Bovis"). The first and fifth causes of action contained in Zaffuto's third-party complaint are for common law contribution and common law indemnification against Drillco. Plaintiff claims that Zaffuto was negligent in its ownership, possession, operation, maintenance, supervision and control of the premises. Zaffuto contends that all of the workmen were employees of Drillco, that Zaffuto did not create the alleged dangerous condition, and further that Zaffuto was not the owner, tenant or occupier of the premises and thus owed no duty of care to plaintiff.

To prevail on their motion Zaffuto must submit competent evidence which establishes that they neither created the allegedly dangerous condition nor had actual or constructive notice of it (see Gordon v Am. Museum of Natural History, 67 NY2d 836 [1986]; GTF Mktg. v Colonial Aluminum Sales, 66 NY2d 965 [1985]; Dapp v Larson, 240 AD2d 918 [1997]; Bernard v Waldbaum Inc., 232 AD2d 596 [1996]). Zaffuto failed to establish the lack of existence of any triable issue of fact concerning whether Zaffuto bore any responsibility for the safety of the area where plaintiff fell and whether it had notice of the alleged dangerous condition (see Gilbert Frank Corp. v Federal Ins. Co., 70 NY2d 966 [1988]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). While the deposition testimony of Toby Caputi, Zaffuto's project manager, indicates that Drillco was hired to perform the actual work, the subcontract submitted by Zaffuto also indicates that Zaffuto was to have a site safety manager whose duties included the monitoring of the site "on a regular basis" for safety concerns, and that the site safety manager was to maintain a site safety log and conduct safety meetings. Significantly, while Zaffuto contends that it had no responsibility for the cleanup of the area where plaintiff fell and had no notice of the same, there is evidence that a superintendent employed by Zaffuto was actively supervising the exterior brick renovation work at and before the time of plaintiff's injury.

Moreover, an award of summary judgment in favor of Zaffuto would be premature, since substantial discovery remains

outstanding (see CPLR 3212[f]; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]; Brown v County of Nassau, 226 AD2d 492 [1996]; Yu v Forero, 184 AD2d 506 [1992]). Therefore, the branch of Zaffuto's motion which is to dismiss the complaint is denied.

Zaffuto also seeks summary judgment on its claims for contractual and common law indemnification from Drillco. Since Zaffuto failed to establish as a matter of law that it was free from any negligence with regard to the plaintiff's accident, summary judgment on its third-party cause of action for contractual indemnification is premature (see Gil v Manufacturers Hanover Trust Co., 2007 NY Slip Op. 03267; Watters v R.D. Branch Assoc., LP, 30 AD3d 408 [2006]).

Further, to establish a claim for common-law indemnification, the "one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Correia v Professional Data Mgt., 259 AD2d 60, 65 [1999]; accord Priestly v Montefiore Med. Ctr., Einstein Med. Ctr., 10 AD3d 493 [2004]), or "in the absence of any negligence" that the proposed indemnitor "had the authority to direct, supervise, and control the work giving rise to the injury" (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 [2003]). Where the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor "was either negligent or exclusively supervised and controlled plaintiff's work site" (Reilly v DiGiacomo & Son, 261 AD2d 318 [1999]; see Hernandez v Two E. End Ave. Apt. Corp., supra at 558). Therefore, the branch of the motion which seeks summary judgment on its claims for contractual and common law indemnification against Drillco, is denied.

Plaintiff's Motion

Plaintiff seeks leave to amend the complaint and the caption to add the third-party defendants Drillco and Bovis as direct defendants to the complaint, and amend the caption accordingly. Originally, plaintiff commenced this action against Zaffuto, only. Zaffuto then commenced a third-party action against both Drillco and Bovis, alleging that it was responsible for the condition that caused plaintiff's injury. Defendants oppose the motion on the

ground that the application is being made after the expiration of the statute of limitations.

Where, as here, the third-party complaint and the proposed amended complaint are based on the same transaction or occurrence, plaintiff's direct claim against the third-party defendants, which is asserted in the proposed amended complaint relates back to the date of service of the third-party complaint for purposes of the Statute of Limitations, pursuant to CPLR 203(e) (see Duffy v Horton Memorial Hospital, 66 NY2d 473 [1984]). Where, within the statutory period, a potential defendant is fully aware that a claim is being made against him with respect to the transaction or occurrence involved in the suit, and is, in fact, a participant in the litigation, permitting an amendment to relate back would not necessarily be at odds with the policies underlying the Statute of Limitations (id.). In such cases, there is room for the exercise of sound judicial discretion to determine whether, on the facts, there is any operative prejudice precluding a retroactive amendment (see Loomis v Corinno Constr. Corp., 54 NY2d 18 [1981]). It is evident that when a third-party has been served with the third-party complaint, and all prior pleadings in the action as required by CPLR 1007, the third-party defendant has actual notice of the plaintiff's potential claim at that time. The third-party defendant must gather evidence and vigorously prepare a defense. There is no temporal repose. Consequently, an amendment of the complaint may be permitted, in the court's discretion, and a direct claim asserted against the third-party defendant which, for the purposes of computing the Statute of Limitations period, relates back to the date of service of the third-party complaint (see, McLaughlin, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, C203:11, p 124; Siegel, NY Prac § 49, at 17-18 [1985 Supp]; 6 Wright and Miller, Federal Practice & Procedure § 1498). It is also noted in this case that depositions have not been completed, and discovery on the third-party action has been delayed. Therefore under the circumstances, the motion to amend the complaint and the caption to add the third-party defendants Drillco and Bovis as direct defendants to the complaint, and amend the caption accordingly, is granted.

Cross Motion

Plaintiffs served and filed a Note of Issue and Statement of Readiness certifying all disclosure has been completed while these motions were pending. Consequently, defendants third-party plaintiff cross-moves to strike that note of issue to allow completion of discovery in the third-party action. The motion to strike plaintiff's Note of Issue and Statement of Readiness is

granted only to the extent of directing completion of discovery within 90 days from service upon plaintiff of a copy of this order with notice of entry (see Rogers v U-Haul, Co., 161 AD2d 214 [1990]; Power Test Petroleum Distributors, Inc. v Northville Industries Corp., 114 AD2d 405 [1985]). In light of this extension of time during which discovery may be conducted, the case need not be stricken from the Trial Calendar.

Conclusion

The motion by Zaffuto to dismiss the complaint and for summary judgment on its third-party claim for contractual and common-law indemnification, is denied as premature.

The motion by plaintiff to amend the complaint and the caption to add the third-party defendants to the main action is granted.

The cross motion by Zaffuto to vacate the Note of Issue and Statement of Readiness and strike the case from the trial calendar is granted only to the extent of directing completion of discovery within 90 days from service upon plaintiff of a copy of this order with notice of entry.

Date:

J.S.C.