

Napoli v Wright

2003 NY Slip Op 30049(U)

November 17, 2003

Supreme Court, Queens County

Docket Number: 0010538/5382

Judge: Simeon Golar

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE SIMEON GOLAR IA Part 24
Justice

VINCENT NAPOLI, x Index
Number 10538 2001
Plaintiff,
- against - Motion
Date April 8, 2003

MYRA PETERS WRIGHT, BOSWELL WRIGHT Motion
and TRIBOROUGH BRIDGE & TUNNEL AUTHORITY, Cal. Number 25
Defendants.

TRIBOROUGH BRIDGE AND TUNNEL AUTHORITY,
Third-party Plaintiff,
-against-

GRACE INDUSTRIES, INC./EL SOL,
Third-party Defendant.

The following papers numbered 1 to 27 read on this motion by defendant/third-party plaintiff Triborough Bridge and Tunnel Authority ("TBTA") for summary judgment dismissing plaintiff's complaint, and for summary judgment on its contractual indemnification claims against third-party defendant Grace Industries, Inc./El Sol ("Grace Industries"); and on this cross motion by Grace Industries dismissing TBTA's first and second causes of action in the third-party complaint.

	<u>Papers Numbered</u>
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Notice of Cross Motion - Affidavits - Exhibits ...	6 - 10
Answering Affidavits - Exhibits	11 - 20
Reply Affidavits	21 - 27

Upon the foregoing papers it is ordered that the motion is denied and the cross motion is granted to the extent set forth below.

This action arises as a result of a motor vehicle accident on the Throgs Neck Bridge (the "Bridge") on November 5, 2000 between

a truck owned by Grace Industries and operated by plaintiff, and a vehicle owned by defendant Myra Peters Wright and operated by defendant Boswell Wright (hereinafter referred to as the "Wright vehicle" or the "Wright defendants"). At the time of the accident, the Bridge, which is owned by the TBTA, was being renovated. As part of the renovation project, TBTA entered into a contract designated as GFM-378 with Grace Industries as the general contractor to perform paving work on the Bridge. Plaintiff was operating the truck during the course of his employment with Grace Industries when the truck and the Wright vehicle collided causing plaintiff to sustain serious injuries.

Plaintiff commenced this action against the Wright defendants for negligence in the operation of their vehicle and against the TBTA for failing to provide traffic control devices and/or personnel in the construction area. In its answer, the TBTA denies liability, asserts affirmative defenses and interposes a cross claim against the Wright defendants for common-law indemnification and contribution. The TBTA also has commenced a third-party action seeking a judgment declaring that pursuant to contract GFM-378 and a policy of insurance naming TBTA as an additional insured, Grace Industries is obligated to provide a defense and indemnification (first cause of action), and for expenses incurred in defending the underlying action and commencing the third-party action (second cause of action), and for contractual indemnification (third cause of action). In its answer, Grace Industries generally denies the material allegations set forth in the third-party complaint, asserts affirmative defenses and interposes a "cross claim" against the Wright defendants and a counterclaim against the TBTA for common-law indemnification and contribution.

The TBTA now moves for summary judgment dismissing the complaint on the grounds that it cannot be held liable under Labor Law § 200 or common-law negligence principles as it did not supervise or control the work plaintiff was performing at the time of the accident. The TBTA also moves for summary judgment on its claims for contractual indemnification and to recover defense costs against Grace Industries on the grounds that it was not negligent and, thus, can only be held vicariously liable based upon its status as owner under the Labor Law statute.

As an initial matter, the court notes that plaintiff's complaint, as amplified by his bill of particulars, does not specifically make reference to Labor Law § 200. Nevertheless, the TBTA's motion was made and opposed by plaintiff on the assumption that a claim alleging a violation of Labor Law § 200 was properly pleaded. Grace Industries submitted papers in support of that branch of TBTA's motion which seeks summary dismissal of plaintiff's complaint, but argues that this is a motor vehicle accident case and not a workplace or construction accident case.

Plaintiff has not moved to amend his pleadings. However, it is not disputed that the Bridge was being renovated, and that plaintiff was on the Bridge engaged in work related to the renovations at the time of the accident. Therefore, inasmuch as Labor Law § 200 is simply a codification of common-law negligence (Lombardi v Stout, 80 NY2d 290; Allen v Cloutier Constr. Corp., 44 NY2d 290), and plaintiff's allegations are sufficient to state a claim based upon a violation of this safe place to work statute, under the circumstances of this case, and because the parties could stipulate to amend the pleadings, the court will address the motion as if the pleadings had been de facto amended. (See, Sebring v Wheatfield Properties Co., 255 AD2d 927; Murtha v Integral Constr. Corp., 253 AD2d 637; Smith v Hovnanian Co., Inc., 218 AD2d 68.)

Plaintiff alleges that his injuries resulted from a dangerous condition existing at the work site (i.e., the failure of the TBTA to provide traffic control devices and/or personnel in the construction area). Where the injury is allegedly caused by a defect or dangerous condition at the work site, to prevail on a Labor Law § 200 or common-law negligence claim, a plaintiff must show that the defendant created or had actual or constructive notice of the unsafe condition which caused the accident, or exercised supervision and control over the work being performed. (See, Shipkoski v Watch Case Factory Assocs., 292 AD2d 589; Lara v St. John's Univ., 289 AD2d 457; Akins v Baker, 247 AD2d 562; Sprague v Peckham Materials Corp., 240 AD2d 392.) This is distinguishable from the situation where a plaintiff's injuries arise from the manner in which the work was being performed, which requires a plaintiff to show that the owner sought to be held liable "both exercised supervisory control over the operation and had actual or constructive knowledge of the unsafe manner in which the work was being performed." (Lyon v Kuhn, 279 AD2d 760, 761; see, Comes v New York State Elec. & Gas Corp., 82 NY2d 876; Lombardi v Stout, *supra*; Soshinsky v Cornell Univ., 268 AD2d 947.)

Because plaintiff intended to prove that the TBTA had notice of the allegedly defective condition of the work site, and the TBTA did not address this issue in its motion papers, the Labor Law § 200 cause of action remains viable. (See, Shipkoski v Watch Case Factory Assocs., *supra*; Akins v Baker, *supra*; Seaman v Chance Co., 197 AD2d 612, appeal dismissed 83 NY2d 847.) Moreover, even though the manner in which the work was performed may have been a contributing factor in causing plaintiff's injuries, it cannot be said as a matter of law that it was the sole proximate cause. (See, Seaman v Chance Co., *supra*.) Although plaintiff will bear the burden at trial of proving that the TBTA created or had actual or constructive knowledge of the allegedly dangerous condition, on its motion for summary judgment, the TBTA has the burden of establishing its entitlement to judgment as a matter of law (Harper v Austin, 242 AD2d 927). Consequently, because the TBTA has failed to make out its burden of demonstrating that it is not liable to

plaintiff under Labor Law § 200, the motion for summary judgment seeking dismissal of the complaint must be denied. (See, Torres v Serota, 306 AD2d 461.) Hence, the court need not address the sufficiency of the papers submitted in opposition (see, Ayette v Gervasio, 81 NY2d 1062; Alvarez v Prospect Hosp., 68 NY2d 320; Harper v Austin, *supra*).

The court will now address the contractual indemnification and obligations to defend arguments. Grace Industries is not obligated to indemnify the TBTA for its own negligence (see, General Obligations Law § 5-322.1(1); Brasch v Yonkers Constr. Co., 306 AD2d 508). The TBTA has failed to establish that it was not negligent as a matter of law. (Reynolds v County of Westchester, 270 AD2d 473.) Thus, it remains for trial to determine whether Grace Industries will be required to indemnify the TBTA (see, Brasch v Yonkers Constr. Co., *supra*; Kowalska v Board of Educ. of City of New York, 260 AD2d 546). Therefore, that branch of TBTA's motion which seeks summary judgment on its third-party claim for contractual indemnification against Grace Industries must be denied (Brasch v Yonkers Constr. Co., *supra*).

Further, it is premature to direct Grace Industries to provide a defense to the TBTA since Grace Industries is not an insurer and its duty to defend is no broader than its contractual duty to indemnify (see, Brasch v Yonkers Constr. Co., *supra*). Moreover, since Grace Industries is not an insurer, it is inappropriate to require Grace Industries to provide a defense until its obligations to indemnify the TBTA have been determined. (See, id.).

Grace Industries' cross motion to dismiss TBTA's first cause of action in the third-party complaint is granted to the extent that this cause of action seeks a declaratory judgment determining the obligations of Grace Industries' insurance carrier to provide a defense and indemnity. As stated above, Grace Industries is not the insurer. TBTA's rights, if any, against the insurance company are separate and apart from TBTA's rights against Grace Industries (see, Rodriguez v Savoy Boro Park Assocs. Ltd. Partnership, 304 AD2d 738; Cannavale v County of Westchester, 158 AD2d 645). Additionally, Grace Industries correctly points out that the argument regarding its insurance company's obligations to defend and indemnify the TBTA is being presented in the wrong forum. It is well-settled that the merits of this argument must be evaluated in a separate declaratory judgment action against the insurance company (see, Kelly v Yannotti, 4 NY2d 603; Rodrisuez v Savoy Boro Park Assocs. Ltd. Partnership, *supra*; Schorr Bros. Dev. Corp. v Continental Ins. Co., 174 AD2d 722; Schwartz v Woodner & Co., 40 AD2d 1027).

Contrary to Grace Industries' assertions, the second cause of action in the third-party complaint does not seek declaratory relief, but rather seeks recovery of the expenses incurred in

defending the underlying action and commencing the third-party action. Therefore, dismissal on the grounds argued is not warranted.

To summarize, the motion by the TBTA for summary judgment is denied. The cross motion by Grace Industries for summary judgment is granted to the extent of severing and dismissing the first cause of action in the third-party complaint. The cross motion is otherwise denied.

Dated:

NOV 17 2003



J.S.C.