

Hernandez v Ten Ten Company

2004 NY Slip Op 30171(U)

October 7, 2004

Supreme Court, New York County

Docket Number: 0125067/2000

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

LOUIS B. YORK

PRESENT: _____

PART 2

0125067/2000

HERNANDEZ, DANIEL

VS

TEN TEN COMPANY

SEQ 8

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

FILED

OCT 14 2004

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

~~motion is decided in accordance
with accompanying memorandum decision.~~

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 10/7/04

[Signature]
LOUIS B. YORK

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST **LOUIS B. YORK**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
DANIEL HERNANDEZ and ROSALINA PICHARDO,

Plaintiffs,

-against-

Index No. 125067/00

TEN TEN COMPANY a/k/a 1010 COMPANY, 1010
COMPANY, PRUDENTIAL SECURITIES, INC.,
SCHMERGEL CONSTRUCTION CORP., and USA
ILLUMINATIONS, INC.,

Defendants.

-----X

THE 1010 COMPANY, L.P., i/s/h/a TEN TEN
COMPANY a/k/a 1010 COMPANY and 1010
COMPANY,

Third-Party Plaintiff,

-against-

PRUDENTIAL SECURITIES, INC.,

Third-Party Defendant.

-----X

SCHMERGEL CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

ROLAND'S ELECTRIC,

Second Third-Party Defendant.

-----X

LOUIS B. YORK, J.:

Motions with sequence numbers 008 and 009 are hereby
consolidated for disposition.

In motion sequence number 008, defendant Prudential

FILED

JUL 14 2024

COUNTY CLERK

Securities, Inc. (Prudential) moves, pursuant to CPLR 3212: (1) for summary judgment dismissing the complaint, the third-party complaint, and all cross claims asserted as against it; and (2) for summary judgment in its favor on its contractual indemnification claim against Schmergel Construction Corp.

(Schmergel). Defendant USA Illuminations, Inc. (USA) cross-moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it. Defendant Schmergel also cross-moves: (1) pursuant to CPLR 3215, for a default judgment against second third-party defendant Roland's Electric (Roland's); and (2) pursuant to CPLR 3212, for summary judgment dismissing the complaint as against it.

In motion sequence number 009, defendant/third-party plaintiff Ten Ten Company a/k/a 1010 Company, 1010 Company, The 1010 Company, L.P. (1010) moves, pursuant to CPLR 3212: (1) for summary judgment dismissing the complaint as against it; and (2) for summary judgment in its favor against Prudential in the third-party action.

BACKGROUND

On July 21, 2000, plaintiff Daniel Hernandez (plaintiff), an electrician, fell from a ladder after receiving an electrical shock. At the time of his accident, he had been in the process of replacing the emergency ballast in a lighting fixture on the second floor of 1010's building located at 1010

Northern Boulevard, Great Neck, New York, a commercial office building. Prudential was the lessee of a wing of the second floor, and, pursuant to the lease between Prudential and 1010, had had substantial renovations performed to the space so that it would conform to Prudential's specifications and needs.

Schmergel was the general contractor/construction manager for the renovations, and had retained Roland's as the electrical subcontractor. Roland's installed all the electrical wiring and lighting fixtures. At some point after their installation, it was discovered that three of the fixtures, which also had emergency backup lights, were not working. Roland's contacted USA, which had manufactured the lights, and USA hired non-party Knight Electrical Services Corp. (Knight), plaintiff's employer, to repair the defective fixtures. A few days before his accident, plaintiff went to the premises to inspect the fixtures to see what was needed for them to work properly. On the day of his accident, he brought replacement parts, including ballasts, a tool box, and a wooden, six-foot, A-frame ladder that belonged to Knight. Plaintiff chose to work on the fixtures without having the power to them cut, because he felt that such action was unnecessary. While he was working on the fixture, he sustained a "severe" shock, which caused him to fall from the fourth rung of the ladder, suffering injury. Prudential had taken occupancy of the space on June 16, 2000, a little more than a month prior to

plaintiff's accident, and was conducting business in its offices at the time of plaintiff's accident.

THE PLEADINGS

Plaintiffs' initial complaint alleged three causes of action: (1) plaintiff's claim in negligence; (2) plaintiff's claim for violations of Labor Law §§ 240 (1) and 241 (6); and (3) plaintiff's wife's derivative claim for loss of consortium. Plaintiffs' amended complaint alleges the same three causes of action, but adds Prudential as a defendant.

1010's answer to the amended complaint alleges four cross claims: the first two, as against Prudential, Schmergel, and USA, for contribution or common-law indemnification; and the second two, as against Prudential alone, for contractual indemnification and breach of contract by failure to procure insurance.

1010's third-party complaint against Prudential asserts the same claims of common-law indemnification or contribution, contractual indemnification, and breach of contract by failure to procure insurance.

Prudential, in its answer to the amended complaint, and in its answer to the third-party complaint, asserts four cross claims/counterclaims: the first two, as against 1010, Schmergel, and USA, for contribution or common-law indemnification; the third, allegedly as against 1010, Schmergel, and USA (but in

*6] .
actuality appears to be as against Schmergel alone), for contractual indemnification; and the fourth, as against Schmergel alone, for breach of contract by failure to procure insurance.

Schmergel's answer to the amended complaint alleges one cross claim as against 1010, Prudential, and USA, for contribution, common-law indemnification, and contractual indemnification.

Schmergel's second third-party complaint against Roland's alleges two causes of action: (1) for negligence, violations of Labor Law §§ 200, 240 (1), 241 (6); and (2) for contractual indemnification.

DISCUSSION

Plaintiff's causes of action allege claims that could arise from an accident which occurred at a construction site. However, the facts of this matter make it clear that Prudential's premises were a functioning office at the time that plaintiff went to fix the non-functional light fixtures, and that no construction was ongoing at that time. The few punch list items that remained to be completed were so minor and so few that they did not constitute "construction" within the usual intendment of that word, and, in any event, none of the punch list items were being worked on on the day of plaintiff's accident. Thus, plaintiff's claims, and his wife's derivative claim, fail to state a cause of action, and the complaint is dismissed.

Since plaintiffs' complaint is dismissed, no finding of fault may be made against any defendant. Thus, all cross claims and counterclaims sounding in common-law indemnification or contribution, as against any defendant, are dismissed. In as much as defendants' claims for contractual indemnification and breach of contract seek attorney's fees and other costs related to this litigation, these cross claims and counterclaims remain.

USA's Cross Motion (motion sequence number 008)

USA's cross motion to dismiss the complaint is unopposed, and, in any event, as discussed above, is granted. As a result thereof, the cross claims and counterclaims for contribution and common-law indemnification asserted as against it are dismissed.

That part of Schmergel's cross claim which seeks contractual indemnification from USA is denied. There was no contractual relationship between Schmergel and USA.

Schmergel's Cross Motion (motion sequence number 008)

For a Default Judgment Against Roland's

While Schmergel contends that Roland's was served by personal service on February 4, 2004 (Nieves 3/26/04 Affirm., ¶ 8), no proof of such service has been provided. Therefore, this part of Schmergel's cross motion, for a default judgment against Roland's, is denied.

For Summary Judgment Dismissing the Complaint as Against It

This part of Schmergel's cross motion is granted.

Prudential's Motion (motion sequence number 008)

The part of this motion which seeks summary judgment dismissing the complaint is granted. As a result, the third-party action asserted against Prudential is also dismissed (see e.g. *Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]).

"A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] provided that the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances" (internal citations omitted)" (*Masciotta v Morse-Diesel International*, 303 AD2d 309, 310 [1st Dept 2003], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence" (*Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]; see also *De La Rosa v Philip Morris Management Corp.*, 303 AD2d 190, 193 [1st Dept 2003]).

Both 1010 and Schmergel bring cross claims against Prudential for contractual indemnification.

Paragraph 8 of the Lease between 1010 and Prudential provides that Prudential will indemnify and hold harmless 1010

from any liabilities and damages incurred "as a result of any breach of [Prudential] ... of any covenant or condition of this lease, or the carelessness, negligence or improper conduct of [Prudential]." As set forth above, no finding of negligence can be made against Prudential for plaintiff's injuries.

Paragraph 44 of the Addendum to the Lease provides, in relevant part:

Tenant [Prudential] agrees to carry, at the expense solely of Tenant, general public liability insurance [covering personal injury]. ... Owner [1010] shall be named as an additional insured on such policy. ... In addition, Tenant agrees to indemnify and hold harmless Owner from any and all claims, loss, liability, damage and expense (including without limitation reasonable legal fees) that may arise by reason of this Lease or of Tenant's occupancy or use of the Premises.

If Prudential failed to procure the requisite insurance coverage naming 1010 as an additional insured, it would have breached a "covenant or condition of this lease," and would thereby be obligated to indemnify 1010 pursuant to both paragraph 8 and paragraph 44 of the Lease. However, no evidence whatsoever has been proffered concerning whether Prudential obtained the insurance, named 1010 as an additional insured, or breached the Lease.

Therefore, that part of Prudential's motion which seeks summary judgment dismissing 1010's cross claims sounding in contractual indemnification and breach of the lease is denied.

With respect to Schmergel's cross claim against Prudential for contractual indemnification, the construction management agreement between Prudential and Schmergel provides, in paragraph 10.1.4.1, in relevant part:

Contractor [Schmergel] hereby agrees to indemnify and hold harmless Owner [Prudential] ... from and against any and all damage, loss, liability or expense including, but not limited to, attorneys' fees and legal costs suffered by same directly or by reason of any claim, suit or judgment brought by ... any person ... due to bodily injury ... sustained by such person[] which arises out of, is occasioned by or in any way attributable to the services contracted for herein of [sic] otherwise, the acts or omissions of Contractor

Since the indemnification provision obligates Schmergel, not Prudential, to indemnify, Schmergel's cross claim for contractual indemnification against Prudential is dismissed.

The last part of Prudential's motion seeks summary judgment in Prudential's favor on its contractual indemnification cross claim against Schmergel. This part of the motion must be denied, since plaintiff's injuries and claims did not arise out of, were not occasioned by, or were in any way attributable to Schmergel's services, its acts or omissions.

1010's Motion (motion sequence number 009)

Since both the complaint and third-party complaint have been dismissed, 1010's motion is denied as moot.

CONCLUSION

Accordingly, it is

ORDERED that the cross motion brought by USA Illuminations, Inc. for summary judgment is granted, and the complaint is severed and dismissed as against defendant USA Illuminations, Inc., and the Clerk is directed to enter judgment in favor of this defendant, with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that the part of the cross motion brought by Schmergel Construction Corp. which seeks summary judgment dismissing the complaint is granted, and the complaint is severed and dismissed as against Schmergel Construction Corp., but the part of the cross motion which seeks a default judgment against Roland's Electric is denied; and it is further

ORDERED that the parts of the motion brought by Prudential Securities, Inc. for summary judgment dismissing the complaint and third-party complaint are granted; and it is further

ORDERED that the part of Prudential Securities, Inc.'s motion which seeks summary judgment dismissing all cross claims asserted as against it is granted with respect to cross claims brought against Prudential Securities, Inc. for common-law indemnification or contribution, and Schmergel Construction


* 12] .
Corp.'s cross claim for contractual indemnification; but is denied with respect to The 1010 Company, L.P.'s cross claims sounding in contractual indemnification and breach of the Lease; and it is further

ORDERED that the part of Prudential Securities, Inc.'s motion which seeks summary judgment in Prudential Securities, Inc.'s favor on its contractual indemnification claim against Schmergel Construction Corp. is denied; and it is further

ORDERED that The 1010 Company, L.P.'s motion is denied as moot.

Dated: 10/1/04

ENTER:



J.S.C.
LOUIS B. YORK

FILED
OCT 14 2004
NEW YORK
COUNTY CLERK'S OFFICE