

Sustr v Massaro Electric Corp.

2005 NY Slip Op 30076(U)

March 29, 2005

Supreme Court, Queens County

Docket Number: 0007696/7696

Judge: Patricia P. Satterfield

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

conditional summary judgment on their cross claim for contractual indemnification against defendant Massaro Electric Corp. (Massaro).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-6
Answering Affidavits - Exhibits	7-9
Reply Affidavits	10-11

Upon the foregoing papers it is ordered that the motion is decided as follows:

Plaintiff commenced this action against defendants for personal injuries allegedly sustained on October 25, 2000 while working on a construction project at 770 Nesconset Highway in Long Island (the premises). Shurgard is the owner of the premises and contracted with Omni Construction to serve as the general contractor on the project. Omni Construction hired Massaro as the subcontractor to perform electrical work. Third-party defendant/fourth-party plaintiff A.L.S. Construction, Inc. (ALS), was also hired as a subcontractor to perform work on the construction project. At the time of his accident, plaintiff was employed by ALS as a carpenter.

Plaintiff testified during his examination before trial that he was standing on an 8-foot ladder at about the fifth rung to work on an acoustical tile ceiling. He pushed back fiberglass insulation to install a tile and as he did so he received an electric shock which caused him to jerk back, lose his balance and fall to the ground. Plaintiff testified that before he felt the electric shock he did not see any live wires in the ceiling. However, plaintiff testified that after he fell he saw a BX cable with two wires coming from it hanging out of the ceiling.

Plaintiff commenced this action against defendants alleging violations of the Labor Law and for common-law negligence. In their respective answers, defendants deny liability, interpose several affirmative defenses and assert cross claims against each other for, among other things, indemnification and contribution. Thereafter, Omni Construction assumed the defense of Shurgard.

Omni Construction now seeks conditional summary judgment on its and Shurgard's contractual indemnification cross claims against Massaro. Omni Construction also seeks costs and expenses, including attorney's fees, incurred in defending this action and a declaration that Massaro is contractually obligated to assume its defense. In opposition, Massaro argues that the indemnification

provision is triggered only if it is found negligent and, thus, the motion is premature as liability for plaintiff's accident has yet to be determined. In response, Omni Construction asserts that the indemnification provision is implicated when a claim is made against Shurgard and/or Omni Construction which arises out of the work performed by Massaro, regardless of whether or not the claim is caused in part by Shurgard or Omni Construction.

Where an owner or general contractor is held liable to an injured plaintiff based solely on statutory liability under the Labor Law, and there is no factual showing that it was negligent, the owner or general contractor is entitled to indemnification where such a provision is contained in a contract (Velez v Tishman Foley Partners, 245 AD2d 155 [1997]; see also Dzrewinski v Atlantic Scaffold & Ladder Co., Inc., 70 NY2d 774 [1987]). Thus, if the party seeking to be indemnified is not negligent, nor had the authority to supervise, direct or control the work that caused the injury (see Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990]; Naranjo v Star Corrugated Box Co., Inc., 11 AD3d 436 [2004]), "a court may render a conditional judgment on the issue of indemnity pending determination in the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (Masciotta v Morse-Diesel Intl., Inc., 303 AD2d 309, 310 [2003]; State v Syracuse Rigging Co., Inc., 249 AD2d 758 [1998]). This is true even if the contract language purports to indemnify an entity for its own negligence (see Brown v Two Exch. Plaza Partners, *supra*; see also Delaney v Spiegel Assocs., 225 AD2d 1102 [1996]). Nevertheless, General Obligations Law § 5-322.1 prohibits the enforcement of an indemnification provision which seeks to exempt indemnitees, here, Shurgard and Omni Construction, from liability for their own negligence (see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 [1997]; Gomez v National Ctr. for Disability Servs., Inc., 306 AD2d 103 [2003]).

The contractual indemnification provision relied on herein, provides that Massaro is obligated to indemnify and hold harmless Shurgard and Omni Construction

from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract...attributable to bodily injury...but only to the extent caused by the negligent acts or omissions of the Subcontractor...regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Thus, contrary to the arguments by Omni Construction, the plain and unambiguous terms of this provision condition Massaro's duty to indemnify on a finding that Massaro was negligent and that such negligence was a proximate cause of plaintiff's injuries (see Rivera v Urban Health Plan, Inc., 9 AD3d 322 [2004]; Crimi v Neves Assocs., 306 AD2d 152 [2003]; cf. Barnes v New York Mercantile Exch., Inc., 7 AD3d 304 [2004]). Moreover, a question of fact exists as to whether Omni Construction had previous notice of the allegedly dangerous condition which caused plaintiff's injuries. The evidence before the court includes, among other things, a facsimile transmission dated October 23, 2000, from Omni Construction to Massaro. This document lists the outstanding items that had yet to be completed by Massaro. Included on the list are electrical boxes left open with exposed wires. Omni Construction and Massaro acknowledge that the referenced boxes and wires were in the area where plaintiff's accident occurred. Hence, it is premature to grant Omni Construction summary judgment on its contractual indemnification cross claim against Massaro (see Marano v Commander Elec., Inc., 12 AD3d 571 [2004]; Gomez v National Ctr. for Disability Servs., Inc., supra).

Furthermore, it is premature to direct Massaro to provide a defense to Omni Construction since Massaro is not an insurer and its duty to defend is no broader than its contractual duty to indemnify (see Brasch v Yonkers Constr. Co., 306 AD2d 508 [2003]). Additionally, since Massaro is not an insurer, it is inappropriate to require it to provide a defense until its obligation to indemnify Omni Construction has been determined (see id.).

On the other hand, there is no issue of fact as to the liability of Shurgard for the injuries alleged, other than on a theory of vicarious liability (see Pope v Supreme-K.R.W. Constr. Corp., 261 AD2d 523 [1999]). Therefore, Shurgard is entitled to summary judgment on its contractual indemnification claim against Massaro, conditioned on a finding of negligence on the part of Massaro (see Rivera v Urban Health Plan, Inc., supra; Crimi v Neves Assocs., supra).

Accordingly, the motion is granted only to the extent of awarding conditional summary judgment in favor of Shurgard on its cross claim for contractual indemnification against Massaro.

 Dated: March 29, 2005



J.S.C.