

Erey v Stresscon Industries

2005 NY Slip Op 30324(U)

February 7, 2005

Supreme Court, New York County

Docket Number: 124828/02

Judge: Saralee Evans

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

PRESENT: Saralee Evans
Justice

PART 51

0124828/2002

EREY, SELMA
VS
STRESSCON INDUSTRIES

EX NO. _____

FILED DATE _____

SEQ 7

FILED SEQ. NO. _____

SUMMARY JUDGMENT

FILED 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 ...

1, 2, 3

Answering Affidavits — Exhibits _____

4, 5

Replying Affidavits _____

6, 7

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

FEB -9 2005

The motion and cross-motions are decided in accordance with the Court's decision and order dated February 7, 2005.

NEW YORK COUNTY CLERK'S OFFICE

Dated: 2/7/05

Saralee Evans
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION MADE TO TEST COURT BEET REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 51

-----X

SELMA EREY,

Plaintiff,

-against-

STRESSCON INDUSTRIES, OLD CASTLE PRECAST, INC., JEM ERECTORS, JBF CONSTRUCTION CORP., LLC., TERRA FIRMA CONSTRUCTION MANAGEMENT, PARK WEST APARTMENTS, LLC., TARTER FAMILY L.P., SHAYA B. WEST, LLC., A CERTAIN TRUST UNDER THE LAST WILL AND TESTAMENT OF LEON IGEL, AS PART OWNER OF THE PROPERTY LOCATED AT 323 W. 96TH STREET, NEW YORK, NEW YORK, JESSE D. WOLFF, ANTHONY IGEL AND GEORGE IGEL, AS TRUSTEES OF A CERTAIN TRUST UNDER THE LAST WILL AND TESTAMENT OF LEON IGEL, WHICH IS PART OWNER OF THE PROPERTY LOCATED AT 323 W. 96TH STREET, NEW YORK, NEW YORK,

Defendants.

-----X

SARALEE EVANS, JSC

Index No. 124828/02

DECISION AND ORDER

FILED

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NEW YORK
COUNTY OF NEW YORK

Recitation, as required by CPLR § 2219[a], of the papers considered in review of this motion and cross motions for partial summary judgment.

Papers	Numbered
Notice of Motion, Affirmation, Affidavit and Exhibits (Terra Firma) . . .	1
Affirmation in Opposition & Exhibits.	2
Affirmation in Reply	3
Notice of Cross Motion, Affirmation, Affidavit & Exhibits (West)	4
Notice of Cross Motion Affirmation and Exhibits (Tartar)	5
Affirmation in Opposition & Exhibit	6
Affirmation in Reply .(R & R)	7

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

Movant Terra Firma Construction Management (Terra Firma) entered into a construction

contract with Shaya B West, LLC, (West) lessee of property at 323 W. 96th Street under a 99 year ground lease, the property being owned by co-defendants the Tarter Family and trusts created under the will of Leon Igel(hereafter the owners). Pursuant to the contract with West, which is identified as "Owner", Terra Firma was engaged as Contractor to demolish the building on the property and construct a new one.

The contract between Terra Firma and West (the prime contract) provides that Terra Firma will retain defendant JBF Construction Corp. LLC., as the general trades contractor. The prime contract reflects that JBF will staff the project, and be responsible for all scheduling, coordination, means and methods, permitting, dumpsters, rental trailers and other general conditions as well as labor cleanup, and further that, "This shall not diminish Terra Firma's obligations as Contractor." Terra Firma contracted to "provide consulting services and act as a mentor to JBF, providing one full time Senior Project Manager..." Terra Firma thus contracted to supervise and direct to the work, and to be responsible to the owner for the acts and omission of its employees, subcontractors, and their employees.

Terra Firma then contracted with JBF, agreeing that JBF shall provide the "services in connection with the general conditions set forth in the Prime Contract", including all work necessary to complete the project. Terra Firma undertook to act as mentor, and JBF agreed to provide all labor, supervision and materials for the performance of the work.

In the Prime Contract, Terra Firma fully indemnifies the owners. JBF indemnifies both the owners and Terra Firma for losses arising out of performance of its work "or resulting from the performance of any authorised subcontractor on the project" in the subcontract. JBF's contract further provides, however, that JBF's indemnification "shall not be construed to

negate, abridge, or otherwise reduce other rights, or obligations of indemnity which would otherwise exists[sic] as to a party or person described herein.” (Contract para. 12.3).

Plaintiff is a carpenter who was injured while employed at the site as a carpenter, when she was hit by a concrete plank that gave way and fell on her. Plaintiff alleges causes of action for common law negligence and under Labor Law §240 and 241, stating in the bill of particulars that the plank was defectively made, improperly installed and unsecured, and that the workplace was rendered unsafe. The movants and cross movants were sued, along with the defendant companies that manufactured and installed the plank, both of which were subcontracted by Terra Firma.

Terra Firma now seeks common law and contractual indemnification from JBF. The owners and ground tenant Shaya B West, LLC seek indemnification from both Terra Firma and JBF. Terra Firma opposes the owners’ cross motions, urging that they must look solely to JBF for indemnification. JBF does not oppose the owners’ cross motions but does oppose Terra Firma’s motion.

Terra Firma’s motion is denied. With respect to its’ claim for contractual indemnification, its contract with JBF provides in relevant part that Terra Firma is indemnified against liability for any of JBF’s work or that of any of its subcontractors. It further provides that JBF shall be responsible for all costs of defending any action relating to its’ acts or omissions or of their authorized subcontractors or suppliers. The offending plank is alleged to have been manufactured and installed, however, not by subcontractors hired by JBF but by companies retained by Terra Firma. Their work would not therefore be covered by the contractual indemnification.

Nor is Terra Firma entitled to common law indemnification by JBF. Common law indemnification involves the shifting of liability from a vicariously liable non-negligent party to one whose active negligence or failure to supervise proximately caused the accident. *Taeschner v. M & M Restorations, Ltd.*, 295 AD2d 598, 600 (2d Dept. 2002); *c.f.*, *Franciosa v. 145 South Fifth Corp.*, 256 AD2d 1 (1st Dept 1998). Here, the negligence is alleged to have been not JBF's but that of one or more of the subcontractors hired by Terra Firma. Moreover, review of the prime contract between West and Terra Firma reveals that Terra Firma undertook to supervise and direct the project, and had control over construction means, methods and techniques. While the prime contract recognizes that Terra Firma is to retain the services of JBF, it also expressly provides that Terra Firma is "fully and solely responsible for jobsite safety" and can stop the work to insure safety. It is thus a question of fact as to whether Terra Firma failed to adequately fulfill its duty to inspect materials or supervise the workplace. Common law indemnification is therefore unavailable.

With respect to Terra Firma's assertion that the owners should look solely to JBF for indemnification, it has presented no legal basis for this contention. In the contract between it and West, Terra Firma indemnified the Owner for all claims arising out of the work, unless caused by the owner's negligence. Terra Firma's contract with JBF expressly states that JBF's indemnification obligation "shall not be construed to negate, abridge or otherwise reduce rights or obligations of indemnity" with respect to other parties.

Given the comprehensive responsibility assumed by Terra Firma, it cannot claim that it is merely a construction manager with limited responsibility and only statutory liability. Cf., *Buccini v. 1568 Broadway Assoc. Inc.*, 250 AD2d 466 (1st Dept. 1998). Terra Firma may have

hired the subcontractors that provided and installed the offending plank. It contracted to maintain a full time supervisor for the project and had the authority to stop work if unsafe conditions were observed. Under these circumstances, it is neither entitled to indemnification by JBF nor is it absolved of its obligation to indemnify the owners.

For the foregoing reasons, Terra Firma's motion is denied, and the cross motions of the owners and ground tenant are granted. It is therefore

ORDERED that summary judgment is granted to defendant Shaya B. West, LLP for contractual and common law indemnification from Terra Firma Construction Management and JBF Construction Corp, and it is further

ORDERED that the cross motions are granted and summary judgment is granted to defendant Tartar Family, a certain Trust under the Last Will and Testament of Leon Igel, as part owner of the property located at 323 W. 96th Street New York, New York, Jesse D. Wolff, Anthony Igel and George Igel, as Trustees of a certain trust under the Last Will and Testament of Leon Igel, as part owner of the Property Located at 323 W. 96th Street, New York, New York, for contractual and common law indemnification from Terra Firma Construction Management and from JBF Construction Corp., and it is further

ORDERED that the balance of the action shall continue.

Dated: February 7, 2005
New York, NY

Saralee Evans
/ Saralee Evans, J.S.C.

FILED

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