

Sims v 200 W. 112 St. Hous. Dev. Fund Corp.

2006 NY Slip Op 30751(U)

June 6, 2006

Supreme Court, New York County

Docket Number: 103714/05

Judge: Walter B. Tolub

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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HOWARD SIMS JR., and REGINA SIMS,

Plaintiffs,

Index No. 103714/05
Mtn Seq. 001 and 002

-against-

200 WEST 112 STREET HOUSING DEVELOPMENT
FUND CORPORATION and CDC CONSTRUCTION
CORPORATION OF NEW YORK,

Defendants.

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COUNTY CLERK'S OFFICE

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WALTER B. TOLUB, J.:

Motion sequence 001 and 002 are consolidated for disposition and disposed of in accordance with the accompanying memoranda decision.

Defendant 200 West 112 Street Housing Development Fund Corporation ("200 West 112 Street"), seeks an order compelling plaintiff Howard Sims to submit to an examination before trial ("EBT"). Defendant seeks information regarding Plaintiff's injuries from an accident which occurred prior to the September 27, 2002 accident, the subject of the instant action, and to produce authorizations and any further discovery that may result from the examination. Plaintiff cross-moves for summary judgment on the issue of liability against the defendant 200 West 112 Street. 200 West 112 Street seeks an order granting summary judgment on the issue of indemnification against CDC Construction Corporation of New York ("CDC").

Facts

Plaintiff, a Verizon technician, was called to 200 West 112 Street to perform repair work. The building was undergoing a renovation project and construction was ongoing. Defendant CDC was the general contractor hired for the renovation project. The project manager at the site instructed the Plaintiff to repair a cable and told him to use any equipment he needed. Plaintiff borrowed a ladder from one of the construction workers and began to repair the cable. In the course of making the repairs Plaintiff fell from the ladder. Plaintiff claims injuries from his fall including a disc bulge and lumbar strain.

During the Plaintiff's December 15, 2005 deposition, he revealed that he had been involved in a prior accident. Plaintiff's counsel advised his client not to answer questions relating to that accident or any injuries sustained.

Discussion

CPLR § 3101 states that there shall be full disclosure for all matters that are material and necessary in the prosecution or defense of an action. "Material and necessary" is liberally construed and requires disclosure of any facts bearing on the controversy which assist in the preparation for trial by sharpening the issues and reducing delay and prolixity. (Allen v. Crowell-Collier Pub. Co., 21 NY2d 403, 406-407 [1968]).

Disclosure is required for all evidence that may contain information "reasonably calculated to lead to relevant evidence." (Cronin v. Gramercy Five Associates, 233 AD2d 263 [1st Dept. 1996]).

Under New York's liberal disclosure rules, Defendants have the right to question Plaintiff about his past accidents, the injuries he sustained as a result of those accidents and a review of any medical records created as a result of those accidents. (Schechter v. 210 E. 90th St. Owners, Inc., 271 AD2d 224 [1st Dept. 2000]). The Plaintiff denied Defendants access to discovery they are entitled to by not answering questions about a prior neck injury and refusing demands for authorizations regarding Plaintiff's prior medical history. It follows that Defendant's motion to compel must be granted.

Plaintiff's motion for summary judgment must be denied as premature since there remains outstanding discovery. A motion for summary judgment is a drastic remedy. New York courts have held that it should only be employed when there is no doubt as to the absence of any triable issue. (Ratner v. Elovitz, 198 AD2d 184 [1st Dept 1993]).

Usually, a motion for summary judgment is made upon the completion of discovery. A summary judgment motion brought before discovery has been completed prejudices the opposing party and must be denied. The opposing party is deprived of the

opportunity to develop essential facts involved in the case necessary to support opposition to the motion. .(Groves v. Land's End Housing Co. Inc., 80 NY2d 978 [1992]). In this case there remains discovery sought by the Defendants including employment records and the additional EBT of the Plaintiff. Since there remains outstanding discovery, Plaintiff's motion must be denied.

Defendant 200 West 112 Street's motion for summary judgment against CDC based on contractual and common law indemnification must be granted. The party making a motion for summary judgment for its entitlement to indemnification as a matter of law, satisfies its initial burden of proof by introducing the contract between the movant and the party from which indemnification is sought. (Farduchi v. United Artists Theatre Circuit, Inc., 23 AD3d 610 [2nd Dept 2005]). Defendant 200 West 112 Street attached the contract it had with CDC in its motion papers. (See Ex. E, F and G). Even though the enforcement of contractual indemnification clauses may be prohibited if the party seeking indemnification was negligent, an alleged violation of Labor Law § 240(1) is not the equivalent of negligence under GOB § 5-322 nor does it give rise to an inference of negligence. (Brown v. Two Exchange Plaza Partners, 76 NY2d 172 [1990]). CDC was the sole cause of any negligent acts or omissions that might have occurred on the premises since 200 West 112 Street had vacated the premises and did not control or supervise the work done at

the worksite. It follows that 200 West 112 Street's motion for summary judgment for contractual and common law indemnification must be granted.

Accordingly it is

ORDERED that Defendants motion for an order compelling Howard Sims to submit to an examination before trial ("EBT") regarding Plaintiff's injuries and to produce authorizations and further discovery that may result from the examination is granted; and it is further

ORDERED that Plaintiff's cross-motion for summary judgment on the issue of liability against the defendant 200 West 112 Street Housing Development Fund Corporation is denied as premature; and it is further

ORDERED that 200 West 112 Street's summary judgment motion on the issue of indemnification against CDC Construction Corporation of New York is granted.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/6/06

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HON. WALTER B. ... J.S.C.
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