

Athena-Lliberty Lofts, LP v Burgess Steel, LLC

2007 NY Slip Op 30496(U)

March 30, 2007

Supreme Court, New York County

Docket Number: 0700436/2003

Judge: Shirley W. Kornreich

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SCANNED ON 4/3/2007
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT:

PART 54

Index Number : 700436/2003

ATHENA-LIBERTY LOFTS

vs

BURGESS STEEL, LLC

Sequence Number : 003

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 11/30/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 15 were read on this motion to/for Summary

Judgment + papers on Motion Sequence
002, 004 & 014

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3 + exhibits

4-14

FILED

APR 03 2007

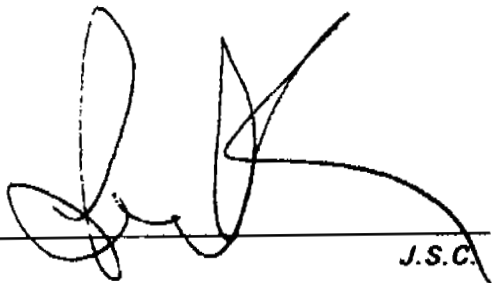
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 3/30/07



J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

MOTION: IS READ FULLY READ FILED TO JUDGE FOR THE FILING REASON (S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
ATHENA-LIBERTY LOFTS, LP,

DECISION & ORDER

Third-Party- Plaintiff,

Index No. 590971/04

-against-

BURGESS STEEL, LLC, ON PAR CONTRACTING
CORP. and SEASONS CONTRACTING CORP.,

Third-Party Defendants.

-----X
ATHENA-LIBERTY LOFTS, LP,

Second Third-Party- Plaintiff,

Index No. 591129/04

-against-

HP ELECTRICAL DESIGNS, INC.,

Second Third-Party Defendant.

-----X
ON PAR CONTRACTING CORP.,

Third Third-Party Plaintiff,

Index No. 590968/05

-against-

RC DOLNER, INC.,

Third Third-Party Defendant.

-----X

FILED
APR 03 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HP ELECTRICAL DESIGNS, INC.,

Fourth Third-Party Plaintiff, Index No. 591049/05

-against-

RC DOLNER, INC.,

Fourth Third-Party Defendant.

-----X
BURGESS STEEL, LLC.,

Fifth Third-Party Plaintiff, Index No. 590477/06

-against-

ATHENA CONSTRUCTION, LLC, ATHENA-
LIBERTY LOFTS, LP, THE ATHENA GROUP, LLC,
and RCDOLNER, LLC,

Fifth Third-Party Defendants.

-----X
KORNREICH, SHIRLEY WERNER, J.:

Motion sequences 002, 003, 004 and 014 are hereby consolidated for disposition.

Athena Liberty Lofts, LP (“Athena Lofts”) and Athena Liberty Group, LLC (“Athena Group”) move in motion sequence 002 for: 1) summary judgment based on common law and contractual indemnification against On Par Contracting Corp. (“On Par”), Seasons Contracting, Corp. (“Seasons”), and HP Electrical Designs, Inc. (“HP”); 2) summary judgment based upon contractual indemnification against Burgess Steel, LLC (“Burgess”); 3) dismissal of all cross-claims and counterclaims against Athena Lofts; and 4) dismissal of the third party action by Burgess against Athena Group and Athena Lofts. Seasons cross-moves in motion sequence 002 for dismissal of Athena Lofts’ claims and any cross-claims against Seasons.

Athena Construction, LLC (“Athena Construction”), and RC Dolner, LLC (“Dolner”) move in motions sequence 003 to dismiss the following claims against them: 1) the third party claims for common law indemnification by HP and Burgess; 2) Season’s cross-claim for common law indemnification; 3) the third party action by Burgess. Burgess cross-moves to dismiss the counterclaims of Athena Group and Athena Construction.

Burgess moves in motion sequence 004 to extend its time to reply to the counterclaims of Athena Lofts, Athena Group and Athena Construction, or to compel those entities to accept replies previously served.

HP moves in motion sequence 014 for summary judgment on its third party action against Dolner¹ and to dismiss as against HP all cross-claims and all the third party actions against it by Athena Lofts.

Factual Background

These actions arise out of a construction accident, which injured plaintiff, Bruce Schirmer (“plaintiff”), an iron worker employed by Burgess.² The accident occurred on the morning of December 23, 2002, when plaintiff fell through an opening on the ninth floor of a construction site located at 43 West 64th Street, New York, New York (“premises”).

Athena Lofts owned the premises, a warehouse which was being converted to residential lofts and commercial space. It is undisputed that Athena Group wholly owns Athena Construction and Athena Lofts, which are holding companies that were formed to finance and

¹Dolner is erroneously named as RC Dolner, Inc., instead of RC Dolner, LLC.

²The action by the plaintiff, which was brought in this court under Index No. 100436/03 was severed and has been settled.

the contract required Seasons to protect and maintain protection for holes that it created, notify Dolner when it had completed an area and “fully cooperate in determining the proper procedures for protecting and securing finished prices[sic]”. HP’s contract obligated it to provide and maintain temporary lighting for the project.

The accident happened on the ninth floor of the premises while plaintiff was pulling welding cables, which easily break, from the west side of the building to the east. The Burgess foreman, plaintiff’s supervisor, Joe Gill (“Gill”), was on the east side of the premises holding the other end of the cables. Plaintiff testified that he walked around a pile of debris, took a step backwards and then fell through the hole as he was taking a second backwards step. Plaintiff testified that he did not know if debris blocked his view of the hole. He also testified that it was a rainy, overcast day and that the bulbs for the temporary lighting were broken, except for a few bulbs, although there was natural light from a center atrium and two windows. He did not know whether debris blocked him from seeing the hole because he was walking backwards at the time he fell into the hole. Plaintiff’s EBT, p. 89. Plaintiff described walking around the debris and facing east, the direction of the hole, at one spot. Plaintiff’s EBT, pp. 87-88. Plaintiff testified that only Gill and another Burgess supervisor, Charles Daniels, gave him instructions. *Id.* at 46. Gill’s affidavit states that “neither of us saw this hole prior to the accident as it as [sic] not readily observable due to the piles of demolition debris in the immediate vicinity and the poor lighting conditions on the 9th floor.” Affidavit of Joseph Gill, sworn to on September 14, 2006, ¶10, annexed as Exh. A to Affirmation of Thomas J. Hall, dated October 18, 2006 in opposition to Seasons cross-motion. The other eye-witness to the accident was Anthony Roman (“Roman”), a carpenter employed by Exterior Erecting Services, a non-party, who testified that he was the

nearest person to plaintiff when the accident occurred. Roman estimated that he was ten feet from plaintiff and said that there was no debris near the hole, or between plaintiff and the hole and that there was lighting.

There is a factual dispute as to whether the hole was protected early in the day, prior to plaintiff's fall. Roman's version of the events was that there was no hole protection in the eight months to a year that he was working on the site prior to plaintiff's accident and that there was nothing protecting the hole on either the day of the accident or the previous day. Dolner's on site supervisor, Michael DiGiacomo ("DiGiacomo"), testified that a little more than an hour before the accident he was on the ninth floor and the hole was protected by guardrails made of forty-two inch two by fours with rails on the bottom, middle and top, which he referred to as "vertical protection." DiGiacomo EBT, pp. 93-98. He admitted that the "safety netting might not have been on." *Id.* at 97. He further testified that after the accident, the protection on the hole had been destroyed and thrown into a pile. He also stated that Burgess was the only trade working in that area that day and that throughout the project he had experienced problems with Burgess because their workers removed protection and did not replace it. In addition, Roman testified that he was working in the area when the accident occurred, which contradicts Dolner's statement that only Burgess was working there. Plaintiff and Gill also deny that the hole was protected when plaintiff fell.

With respect to the obligation for protection of holes during the work, the evidence is equally conflicting. On Par testified that it never replaced temporary protection that was disturbed by another trade, whereas Dolner's representatives, who were on the site, DiGiacomo and Kamran Mirfakhraie ("Mirfakhraie"), testified that On Par was obligated to and did maintain

and replace temporary protection removed by other contractors. Mirfakhraie testified that Seasons was responsible for protection when demolition was ongoing, but that after demolition was completed in an area, it became the responsibility of On Par. Mirfakhraie EBT, pp. 33-37. Seasons' contract requires it to both protect and maintain openings with safety planking and barriers. There is testimony in the record that Seasons created the hole. There is conflicting evidence as to whether Seasons finished the demolition in the summer of 2002, or whether it was doing demolition on the tenth floor on the day of the accident. Burgess' contract also requires it to provide planking to protect openings.

It is undisputed that Dolner was on site and charged with correcting safety issues. Their witnesses admitted walking through the site on a daily basis, including the day of the accident, coordinating safety issues and holding regular meetings during which safety issues were discussed. Davis and Kenya Smith, who were employed by Athena Group, admitted at their depositions that they walked the site on a regular basis. Davis admitted that he was the sole person who acted for Athena Construction, the nominal general contractor, and that he was on site two to three times a week. Davis EBT, pp. 34 & 54. However, Davis testified that he dealt with Dolner more as an employee of Athena Group. Davis EBT, p. 37. He stated that Athena Lofts had no employees and that it was the practice of the Athena Group to set up an entity to own each Athena Group development project. *Id.* at 13 & 15. Mirfakhraie, Dolner's witness, testified that if during inspections at the site an Athena representative saw an opening without a barricade, Athena would insist that it be protected and come back later the same day to make sure it was covered. Mirfakhraie EBT, pp. 29-30. The contract between Dolner and Athena Construction required Dolner to "[r]eview and make recommendations regarding the

establishment and implementation by Trade Contractors of all required safety...measures and programs” and to “coordinate with any safety representatives designated by General Contractor [Athena Construction].”

A. Motion Sequence 002

Where the indemnitee's negligence remains unresolved, summary judgment in favor of the indemnitee on a claim for contractual indemnification is inappropriate. *Pardo v. Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 A.D.3d 298, 302 (1st Dept. 2004), citing *Crespo v Triad, Inc.*, 294 A.D.2d 145, 147 (1st Dept. 2002) and *Correia v Professional Data Mgt., Inc.*, 259 A.D.2d 60, 65 (1999). The predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee and it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine. *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449, 453 (1st Dept. 1985).

Although the Athena entities argue that Athena Lofts is only vicariously liable under Labor Law §240(1), and therefore could never be actively negligent, Athena Group is clearly the agent of both Athena Lofts and Athena Construction, as Athena Group controlled and directed all three Athena entities. Legal entities, such as Athena Lofts and Athena Construction, can only act through individuals. It would subvert the purpose of General Obligations Law §5-322.1, which prohibits indemnification of owners and contractors who are partly at fault, to allow Athena Lofts or Athena Construction to ascribe the actions of the individuals who acted for them to other Athena entities in order to avoid the operation of the statute. See *Brown v. Two Exchange Plaza*, 76 N.Y.2d 172, 180-181 (1990). There are issues of fact raised by the testimony of Athena's own witnesses as to whether the Athena representatives on the site were acting for Athena

Construction or Athena Group. The fact that Athena Lofts had no employees is undisputed, but it does not follow, as claimed by Athena Lofts, that it could not supervise or control the other Athena entities. In reality, the same individuals would have to supervise or control themselves, which is merely an expedient legal fiction.

With respect to the branch of the motion by Athena Lofts and Athena Group for contractual indemnification against Seasons, On Par and HP, the motion is denied due to questions of fact as to whether the accident was caused by the failure of these subcontractors to remove debris, protect the hole or maintain the lighting, as well as because there are questions of fact as to whether the Athena entities were actually negligent. The cross-motion by Seasons is denied for the same reason.

Although the accident clearly arose from Burgess' work, the motion for contractual indemnification is denied with respect to it for the reason that there is some evidence that the Athena entities were actively negligent.

The issues of fact include, but are not limited to, whether On Par failed to maintain temporary protection around the hole, whether Burgess removed it on the day of the accident, whether Seasons left debris that obscured the hole from view, whether HP failed to maintain the lighting so that Gill and plaintiff could see the hole, whether the Athena entities were involved in insuring protection for openings on the site, and whether Dolner, whose witness DiGiacomo admitted that he was on the ninth floor slightly more than an hour prior to the accident, failed to instruct anyone to protect the hole. In addition, the testimony of Roman creates an issue of fact as to whether the Athena Group and Lofts, as owners of the property, had notice of a continuing failure to keep the premises in a safe condition by allowing holes to remain uncovered, as

DiGiacomo testified that Athena regularly inspected the premises for safety and Athena Construction was obligated by contract to coordinate safety with Dolner. A landowner has a duty to keep its property in good repair. *Gilson v. Metropolitan Opera*, 5 N.Y.3d 574, 579 (2005); *cf Kinirons v. Teachers Ins. Annuity Assoc.*, 34 A.D.3d 237 (1st Dept. 2006)(common law negligence claim against owner and general contractor dismissed absent evidence of actual or constructive notice of alleged hazardous condition). Here, if a jury believes Roman's version of events, the Athena entities had at least constructive notice of the failure to protect openings on the site. Common law indemnification is premature because the Athena entities have not proven as a matter of law that they were without fault, or that HP, On Par and Seasons were negligent, due to the proliferation of factual issues.

However, the court notes that the Athena entities do not dispute that the anti-subrogation rule would limit its recovery against Burgess to \$1,900,000, because its insurer paid \$1,000,000 of the settlement. *See Pennsylvania General Ins. Co. v. Austin Powder Co.*, 68 N.Y.2d 465 (1986); *Valentin v. City of N.Y.*, 187 A.D.2d 343 (1st Dept. 1992). In addition, the court rejects the claims by Seasons, Burgess, HP and On Par that the amount of the settlement was not reasonable. The court was actively involved in settling the case and the potential damages exceeded the settlement, as is borne out by the evidence submitted by the Athena entities on this motion. The evidence demonstrates that plaintiff has a permanent injury that prevents him from resuming his trade and that his economic loss alone will be greater than the amount paid by Athena Lofts.

Athena Lofts and Athena Group also move for dismissal of Burgess' fifth third-party action, which seeks contribution, common law indemnification, and a declaration that Athena

Lofts is estopped from seeking indemnification from Burgess. The motion is granted to the extent of dismissing all claims except for Burgess' claim for contribution against Athena Group. Burgess is not entitled to common law indemnification from either entity, or contribution from Athena Lofts. Burgess is not entitled to common law indemnification because it was at least partially at fault, as it was on site and directing plaintiff's work. Contribution does not lie as against the settling tortfeasor, Athena Lofts. General Obligations Law §15-108(b). There is no legal authority to support the claim that Athena Lofts cannot seek indemnification solely because it paid the settlement and obtained a release by the plaintiff of Dolner. The factual issues relating to Athena entities' culpability are preserved by this court's decision that there are issues of fact as to whether the Athena entities may have been actively negligent.

Motion Sequence 003

The motion by Athena Construction and Dolner to dismiss the third party claims against them for common law indemnification by HP and Burgess, as well as the cross-claim by Seasons for common law indemnification, are granted with respect to Burgess and denied with respect to HP and Seasons. With respect to Burgess, as noted above, it cannot prove that it was without fault. With respect to Burgess' claims for contribution, the motion is denied because of factual issues relating to the active negligence of Dolner and Athena Construction, which acted through its agent, Athena Group. The motion is granted to the extent that it seeks dismissal of Burgess' claim that Athena Construction and Dolner are estopped from seeking indemnification from Burgess.

Burgess' cross-motion to dismiss the counterclaims of Athena Group and Athena Construction for contractual indemnity is denied, as the accident clearly arose out of Burgess'

work. The court is authorized to consider a late cross-motion for summary judgment where it is “limited to those causes of action or issues that are the subject of the timely motion,” as is the case here. *Filannino v. Triborough Bridge & Tunnel Auth.*, 2006 NY Slip Op 8169, 2 (1st Dept. 2006).

Motion Sequence 004

Burgess’ motion to permit it to serve a late reply to the counterclaims of the Athena entities, is granted as law office failure is excusable and there has been no prejudice to any party from its failure to serve a timely reply. However, the defenses and claims in the new reply shall not include claims and defenses dismissed by this decision and order.

Motion Sequence 014

HP’s motion for summary judgment on its third party action against Dolner and to dismiss as against HP all cross-claims and all the third party actions by Athena Lofts is denied based on the aforementioned issues of fact relating to lighting at the time of the accident.

Accordingly, it is

ORDERED that the motions and cross-motions are granted solely to the following extent and in all other respects are denied:

1. Athena Lofts may not seek indemnification against Burgess in excess of \$1,900,000.00;
2. On Par, HP, Seasons and Burgess are precluded from challenging the reasonableness of the amount of the settlement;
3. Athena Lofts’ is entitled to dismissal of Burgess’ fifth third-party action against it for contribution, common law indemnification, and a declaration that Athena Lofts is estopped from

seeking indemnification from Burgess;

4. Athena Group is entitled to dismissal of Burgess' fifth third-party action for common law indemnification;

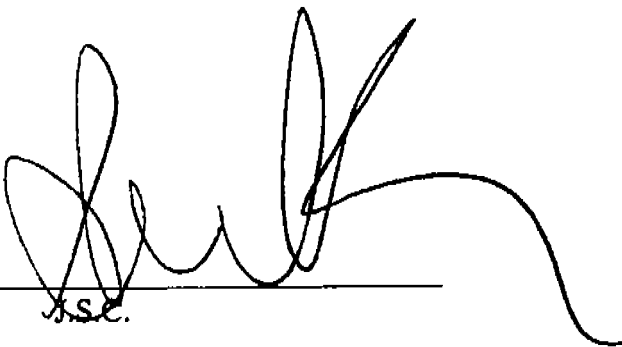
5. Athena Construction and Dolner are entitled to dismissal of Burgess' fifth third-party action against them for common law indemnification and a declaration of estoppel;

6. Burgess may serve a reply to the counterclaims of the Athena entities in the fifth third-party action within twenty days of service upon Burgess of a copy of this order with notice of entry, but the reply may not include defenses or claims inconsistent with this decision and order; and it is further

ORDERED that the parties shall appear for a pre-trial conference on April 19, 2007 in Part 54, Room 1227 at 111 Centre Street, New York, NY, at 11:00 a.m.; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: March 30, 2007



J.S.C.

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