

Traba v Cres Inc.

2007 NY Slip Op 30886(U)

April 9, 2007

Supreme Court, New York County

Docket Number: 0121239/2003

Judge: Doris Ling-Cohan

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

PRESENT:

PART 36

Index Number : 121239/2003

TRABA, JORGE

vs

CRES

Sequence Number : 002

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 Summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion for summary judgment
by defendant's/third-party plaintiffs Cres Inc & Newmark
Real Estate, Inc. is denied in accordance with the
attached memorandum decision.

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

FILED
APR 24 2007
CLERK OF THE COURT

HON. DORIS LING-COHAN

Dated: 4/19/07 _____ J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 36

-----X
JORGE TRABA,

Plaintiff,

-against-

Index No. 121239/03
Motion seq. # 002

CRES INCORPORATED and NEWMARK &
COMPANY REAL ESTATE, INC.,
Defendants.

-----X

CRES INCORPORATED and NEWMARK &
COMPANY REAL ESTATE, INC.,
Third-Party Plaintiff,

Index No. 590306/05

-against-

HOBO CONSTRUCTION CO., INC.,
Third-Party Defendant.

-----X

DORIS LING-COHAN, J.:

Defendants/third-party plaintiffs Cres Incorporated (Cres) and Newmark & Company Real Estate, Inc. (Newmark) (collectively, defendants) move, pursuant to CPLR 3212, for an order granting summary judgment on their common-law indemnification claim against third-party defendant Hobo Construction Co., Inc. (Hobo).

The main action seeks to recover damages pursuant to Labor Law §§ 200, 240 and 241 (6), for personal injuries suffered by the plaintiff Jorge Traba (Traba), in a work site accident. Traba was nailing a tarpaulin to bricks when a nail broke, ricocheted, and hit him in the eye. Defendant Cres owned the work site. Defendant Newmark was the managing agent. Third-party defendant Hobo was the contractor retained to do the work. Plaintiff Traba was an employee of a sub-contractor who is not a party.

In support of their motion, defendants argue that their liability is purely statutory, and that an owner or contractor is entitled to common-law indemnification from the party that actually controlled the work. In opposition to the motion, third-party defendant Hobo argues that the motion is untimely, that defendants have no liability under the Labor Law, and that it is premature to grant indemnification. In reply, defendants argue that they were not aware of the March 31, 2006 court order shortening the deadline for filing a summary judgment motion, and that they have demonstrated that their liability is purely statutory.

Upon review of the submitted papers, the within motion for summary judgment is denied as it was not timely filed. A note of issue was filed in this case on December 14, 2005. Pursuant to this Part's rules, the parties had 60 days from the filing of the note of issue to move for summary judgment. By order of this Court dated March 31, 2006, however, the parties were granted an extension of time to move for summary judgment. Pursuant to the March 31, 2006 order, defendants were given an additional "60 days after the completion of the [discovery detailed in such order] to move for summary judgment, provided that the motion relies upon this new discovery". [See Exh. A, Hobo's Affidavit in Opposition]. The within motion does not appear to rely upon the discovery detailed in the March 31, 2006 order; nor is it alleged by movants that this motion relies upon such discovery. Movants' reliance on this Court's order dated January 13, 2006, is misplaced, as the March 31, 2006 order (which was mailed to all counsel by the Court), clearly supersedes the January 13, 2006 order. Thus, as the within motion was filed on or about July 21, 2006, well beyond 60 days from the December 14, 2005 filing of the note of issue, and the motion fails to rely upon the discovery outlined in this Court's order dated March 21, 2006, the within motion is not timely.

This matter comes squarely within the principles announced by the Court of Appeals in *Brill v City of New York* (2 NY3d 648 [2004]), to prevent the filing of “eleventh-hour summary judgment motions”, a practice that “ignores statutory law, disrupts trial calendars, and undermines the goals of orderliness and efficiency in state court practice” (id. at 650-651).

In *Brill*, the Court of Appeals concluded that the Supreme Court should not have considered the merits of a summary judgment motion brought by the City of New York almost one year after the filing of the note of issue, as the City gave no explanation for filing the motion after the 120-day limit specified in CPLR 3212 (a). The Court of Appeals stated, “[w]e conclude that ‘good cause’ in CPLR 3212 (a) requires a showing of good cause for the delay in making the motion - a satisfactory explanation for the untimeliness - rather than simply permitting meritorious, nonprejudicial filings, however tardy ... No excuse at all, or a perfunctory excuse, cannot be ‘good cause’” (*Brill v City of New York*, 2 NY3d at 652; see also *Miceli v State Farm Mut. Auto Ins. Co.*, 3 NY3d 725, 726 [2004]; *Perini Corp. v City of New York*, 16 AD3d 37 [1st Dept 2005]).

Here, movants fails to present sufficient cause for its failure to timely move for summary judgment. Accordingly, the Court is constrained to deny the motion as the requisite “good cause” showing has not been established.

Moreover, even if this Court were to consider the merits of the within motion, summary judgment would be denied. The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (*JMD Holding Corp. v Congress Fin. Corp.*, 4 NY3d 373 [2005]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]; *Friends of Animals v*

Associated Fur Mfrs., 46 NY2d 1065, 1067 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which requires a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557, 562 [1980]).

To establish a claim for common-law indemnification, the party seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but also that the proposed indemnitor was guilty of some negligence that contributed to the accident (Priestly v Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493 [1st Dept 2004]; Correia v Professional Data Mgt., 259 AD2d 60, 65 [1st Dept 1999]), or in the absence of any negligence, that the proposed indemnitor had the authority to direct, supervise, and control the work giving rise to the injury (Hernandez v Two E. End Ave. Apt. Corp., 303 AD2d 556, 557 [2d Dept 2003]). Where the proposed indemnitee's liability is purely statutory and vicarious, conditional summary judgment for common-law indemnification against a proposed indemnitor is premature absent proof, as a matter of law, that the proposed indemnitor was either negligent or exclusively supervised and controlled plaintiff's work site (Perri v Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 683[2d Dept 2005]).

Here, defendants' motion must be denied because, although no issues of fact exist as to the purely vicarious nature of their liability, the submitted evidence does not establish, as a matter of law, that the contractor Hobo was either negligent or exclusively supervised and


controlled plaintiff Traba's work site (Reilly v S. DiGiacomo & Son, Inc., 261 AD2d 318 [1st Dept 1999]). Further, since it has not yet been determined whether any party's negligence contributed to the accident, a finding of common-law indemnity is premature (Barraco v First Lenox Terrace Associates, 25 AD3d 427 [1st Dept 2006]).

Accordingly, it is

ORDERED that defendant/third-party plaintiffs' motion for summary judgment is denied; it is further

ORDERED that within 30 days of entry of this order, third-party defendant shall serve a copy upon all parties with notice of entry.

Dated: 4/9/07

HON. DORIS LING-COHAN

Hon. Doris Ling-Cohan, J.S.C.
FILED
APR 24 2007
COUNTY CLERK'S OFFICE
NEW YORK