

Rutkowski v 455 Cent. Park W.

2007 NY Slip Op 31438(U)

May 29, 2007

Supreme Court, New York County

Docket Number: 0120156/2003

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 120156/2003

RUTKOWSKI, DANIEL

vs

455 CENTRAL PARK WEST

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

120156/03

MOTION DATE

MOTION SEQ. NO.

001

MOTION 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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

JUN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/29/07


BARBARA R. KAPNICK
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

-----X
DANIEL RUTKOWSKI,

Plaintiff,

-against-

455 CENTRAL PARK WEST, LLC and
BOVIS LEND LEASE LMB, INC.,

Defendants.

-----X
455 CENTRAL PARK WEST, LLC and
BOVIS LEND LEASE LMB, INC.,

Third-Party Plaintiffs,

-against-

SAFEWAY ENVIRONMENTAL CORP.,

Third-Party Defendant.

-----X
455 CENTRAL PARK WEST, LLC and
BOVIS LEND LEASE LMB, INC.,

Second Third-Party Plaintiffs,

-against-

BIG APPLE WRECKING AND CONSTRUCTION CORP.,

Second Third-Party Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 120156/03
Motion Sequence No. 001

Third-Party
Index No. 591208/04

Second Third-Party
Index No. 590928/05

FILED

JUN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff Daniel Rutkowski seeks to recover damages for personal injuries he sustained when he fell off a scaffold during the construction of the building at 455 Central Park West. Plaintiff claims that the planks on which he was working were wet. It is alleged that power washing was ongoing on the exterior of the building on the date of plaintiff's accident.

Defendant/third-party plaintiff/second third-party plaintiff 455 Central Park West, LLC ("455 CPW") is the owner of the building. Defendant/third-party plaintiff/second third-party plaintiff Bovis Lend Lease LMB, Inc. ("Bovis") was the construction manager of the project.

Bovis subcontracted with second third-party defendant Big Apple Wrecking & Construction Corp. ("Big Apple") to perform demolition work at the project, but defendants/third-party plaintiffs contend that Big Apple used workers, including plaintiff, from a "related company", third-party defendant Safeway Environmental Corp. ("Safeway"), which has not served an answer or appear in this action, to perform the actual work.

Pursuant to Article 12 of its subcontractor agreement, Big Apple agreed to defend, indemnify and save harmless 455 CPW and Bovis for claims

caused by, arising out of, resulting from, or occurring in connection with the performance of the Work by Subcontractor [i.e., Big Apple], its subcontractors and suppliers, or their agents, servants, or employees, whether or not caused in part by the active or passive negligence or other fault of a party indemnified hereunder; provided, however, Subcontractor's duty hereunder shall not arise if such injury, ... is caused by the sole negligence of a party indemnified hereunder.

Defendants/second third-party plaintiffs now move for summary judgment against second third-party defendant Big Apple for

contractual indemnity and payment of attorneys' fees on the grounds that plaintiff's claim for personal injuries arose out of Big Apple's work, and that there is no issue of fact as to Bovis' own negligence since it did not direct or control plaintiff's work.

Big Apple argues in opposition that the indemnification provision in the contract was not triggered because plaintiff was not employed by Big Apple.

However, under the terms of the indemnification provision, Big Apple was required to indemnify 455 CPW and Bovis for a claim arising out of Big Apple's work or that of one of its subcontractors or agents; i.e., Safeway. Therefore, this Court finds that the contractual provision was triggered in this case.

Big Apple alternatively argues that the motion must be denied because there are triable issues of fact as to whether Bovis was actively negligent in failing to properly coordinate the work of the contractors. Specifically, Big Apple contends that a jury might find that the planking on the scaffold became wet because Bovis permitted another subcontractor, Carlton Facade Restoration ("Carlton") to perform power washing of the exterior of the building, even though the area inside the building in which plaintiff was working had no roof on it and the walls surrounding

the plaintiff's work area contained openings due to the removal of windows.¹

However, no testimony or evidence has been offered showing that either Carlton or any other contractor was performing power washing at the job site at the time of plaintiff's accident. Therefore, this Court finds that Big Apple has failed to make an evidentiary showing that plaintiff's injury was caused in whole or in part by Bovis' negligence.

Accordingly, based on the papers submitted and the oral argument held on the record on January 31, 2007, this motion by defendants/third-party plaintiffs for summary judgment against second third-party defendant Big Apple for contractual indemnity and payment of attorneys' fees is granted.

This constitutes the decision and order of this Court.

Date:

May 29, 2007

FILED

JUN 04 2007

NEW YORK
COUNTY CLERK'S OFFICE



Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

¹ Big Apple's expert, Howard Edelson, is of the opinion that "[i]t was negligent for the BOVIS defendants to fail to properly schedule and coordinate the work of the trades in that area", and that "such lack of coordination of the trades, in allowing power washers to be operated in the vicinity of a scaffold is a violation of" Section 23-1.7 of the Industrial Code.