Rizo v TDX Constr. Corp.

2007 NY Slip Op 31775(U)

June 13, 2007

Supreme Court, New York County

Docket Number: 0113011/2002

Judge: Edward H. Lehner

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SCANNED ON 6/22/2007

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

PRESENT: EDWARD H. LEHNER PART 19

Index Number : 113011/2002

RIZO, NAKO

vs

TDX CONSTRUCTION

Sequence Number : 005

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 ____

	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 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: JUN 13 2007

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

---X

NAKO RIZO and SOSE RIZO,

Plaintiffs,

Index No. 113011/02

-against-

TDX CONSTRUCTION CORPORATION, and
INVENSYS BUILDING SYSTEMS, INC., f/k/a
SIEBE ENVIRONMENTAL CONTROLS, A
Division of Barber-Colman Company,

Defendants.

---X

TDX CONSTRUCTION CORPORATION,

Third-Party Plaintiff,

Index No.
590076/03

-against-

INVENSYS BUILDING SYSTEMS, INC., f/k/a
SIEBE ENVIRONMENTAL CONTROLS,
A Division of Barber-Coleman Company,

Third-Party Defendant.

---X

INVENSYS BUILDING SYSTEMS, INC.,
f/k/a SIEBE ENVIRONMENTAL CONTROLS,
A Division of Barber-Coleman Company,

Second Third-Party Plaintiff,

Index No.
590593/03

-against-

MEZZ ELECTRIC INC.,

Second Third-Party Defendant.

---X

MEZZ ELECTRIC INC.,

Third Third-Party Plaintiff,

-against-

UNIVERSAL/M.M.E.C. LTD., and MICHAEL MAZZEO ELECTRIC CORP.,

Third Third-Party Defendants.
--X

EDWARD H. LEHNER, J.:

Second third-party defendant/third third-party plaintiff Mezz Electric Inc. (Mezz) moves, pursuant to CPLR 3212, (1) for summary judgment dismissing all claims, counterclaims and cross-claims asserted as against it; (2) for summary judgment in favor of third-party defendant/second third-party plaintiff Invensys Building Systems, Inc., f/k/a Siebe Environmental Controls, A Division of Barber-Coleman Company (Invensys), dismissing all claims and counterclaims asserted as against it; and (3) granting summary judgment in its favor against defendant TDX Construction Corporation (TDX) for common-law indemnification.

Third third-party defendants Universal/M.M.E.C. Ltd. (Universal) and Michael Mazzeo Electric Corp. (MME) (jointly hereinafter referred to as Mazzeo) cross-move (1) for summary judgment dismissing the third third-party complaint and all cross claims alleged against them; (2) for summary judgment in favor of Invensys, dismissing all claims and counterclaims asserted as against it; and (3) granting summary judgment in favor of Mezz against TDX based on common-law indemnification.

It is not explicitly clear what exactly Invensys and TDX are seeking in their cross-motion, other than that they want to amend the second third-party complaint. Since it appears that the application is one to amend the second third-party complaint to add TDX as a second third-party plaintiff and thereby assert all of Invensys's claims, including the contractual claims, on behalf of TDX against Mezz, the court will address it as such.

BACKGROUND

On May 15, 2001, plaintiff Nako Rizo (plaintiff) was working as an electrician on the basement 1 level at Baruch College in Manhattan, installing permanent lighting in a mechanical room. The mechanical room was approximately four or five feet higher than the rest of the basement 1 level, so plaintiff had to climb the four or five steps of a temporary wooden staircase to access it. This staircase was the only means of access to the mechanical room. Plaintiff used the staircase multiple times on the day of his accident without a problem, but one time, as he was descending it, the staircase collapsed and detached from the wall, causing him to fall and be injured.

Non-party Dormitory Authority of the State of New York (DASNY) is the owner of the property on which Baruch College stands. In order to have certain renovations performed at the property, DASNY hired TDX as the construction manager for the project. DASNY also hired Siebe (now known as Invensys) as the HVAC contractor. Invensys in turn retained Mezz to do the electrical work related to the HVAC part of the project, and Mezz subcontracted that work to Universal, which was to perform the actual physical

electrical work at the site. Plaintiff was an employee of MME.[1]

According to John Mattera, who was TDX's general foreman for carpentry work at the site, carpenters employed by TDX constructed and installed the temporary staircase in order to provide access for other trades to the mechanical room (Mattera deposition at 14). TDX's carpenters first built the staircase on site, and then attached it to the wall (*id.* at 30, 55, 62). After the accident, Mattera sent two TDX carpenters to repair the stairs (*id.* at 35-37).

PLEADINGS

The amended complaint asserts claims for common-law negligence and violations of the Labor Law against TDX and Invensys.

The first third-party action has been discontinued (tr. p. 3), both parties to that action being represented by the same counsel.

In the second third-party complaint, Invensys alleges claims for common-law and contractual indemnification, contribution, and breach of contract by failure to procure insurance. Mezz's second third-party answer asserts a counterclaim/cross claim against TDX and Invensys for common-law indemnification.

Mezz's third third-party complaint alleges three causes of action against Mazzeo: (1) common-law indemnification/contribution; (2) contractual indemnification; and (3) breach

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[1]It has not been made clear what the relationship is between Universal and MME. The only indications before the court are that they are represented by the same counsel, and that there is a March 24, 1999 letter from Mezz to Siebe (Invensys) wherein Mezz informed Siebe (Invensys) that "Universal/Mazzeo Electric" would provide the manpower for the project.

of contract by failure to procure insurance, asserting that it is a third-party beneficiary of the contract between Universal and MME.[2] In the third third-party answer, Mazzeo asserts a claim for common-law indemnification against TDX, Invensys, and Mezz. Invensys further asserts several cross claims against Mazzeo, sounding in common-law indemnification and contribution.

DISCUSSION

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, "[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial" (*Dallas-Stephenson*, 39 AD3d at 306, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). "The court's role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues" (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v*

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[2]No contract between Universal and MME has been submitted to the court on these motions.

Twentieth Century- Fox Film Corp., 3 NY2d 395, 404 [1957]).

Invensys/TDX's Cross Motion

To Amend the Second Third-Party Complaint

Invensys seeks to add TDX as a second third-party plaintiff on the basis that "it was mere oversight that TDX was not added as a third party plaintiff when the defense of that entity was taken over by this office" (Hannum 11/13/06 Reply Affirm., ¶ 3). When, exactly, current counsel for TDX took over its representation is not clear, but it appears that it was some time between service of the second third-party complaint (served on the Secretary of State on May 12, 2003) and April 23, 2004, when counsel informed the parties, by letter of that date, of the transfer. Counsel's affirmation in support of this cross motion is dated September 26, 2006, more than two years after present counsel began representing TDX, and five months after the note of issue and certificate of readiness were filed on April 27, 2006.

"Leave to amend a pleading should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, and will not prejudice or surprise the opposing party" (*Trataros Construction v New York City Housing Authority*, 34 AD3d 451, 452-453 [2d Dept 2006]; *see also Santori v Met Life*, 11 AD3d 597, 598 [2d Dept 2004]). "Leave to amend a pleading is within the sound discretion of the trial court and an amendment need not be granted where the proposed amendment clearly lacks merit" (*Vollbrecht v Jacobson*, ___ AD3d ___, 2007 WL 1362897 [3d Dept.]). "[W]hen there has been an inordinate delay [in] seeking the amendment, the [movant] must show a reasonable

excuse for the delay and must also submit an affidavit to establish the merits of the proposed amendment" (*Spada v Sepulveda*, 306 AD2d 270, 271 [2d Dept 2003]). *See also, Jablonski v County of Erie*, 286 AD2d 927, 928 [4th Dept 2001] ["Where there has been an extended delay in moving to amend, the party seeking leave to amend must establish a reasonable excuse for the delay"]. In *Jablonski*, the Supreme Court's denial of a motion to amend was affirmed when the movant merely indicated that the two-year delay in making the motion was the result of an "inadvertent oversight."

Here, there has been no reason given, other than that it was a "mere oversight," for the two-year delay in the motion by Invensys and TDX to amend, and no affidavit of merit has been submitted. Invensys and TDX argue that delay alone is not a sufficient reason to deny amendment, citing *Stengel v Clarence Materials Corp.* (144 AD2d 917, 918 [4th Dept 1988]) and *Rutz v Kellum* (144 AD2d 1017, 1018 [4th Dept 1988]), maintaining that the delay must be coupled with "a showing of prejudice or surprise resulting directly from the delay" (*Stengel*, 144 AD2d at 918). That prejudice has been shown. The note of issue has been filed and discovery is complete. It cannot be said that adding TDX as a second third-party plaintiff, when its role in the circumstances underlying this action was very different from that of Invensys, would not prejudice or surprise Mezz. Invensys was the HVAC contractor. TDX was the construction manager, and built the staircase that collapsed. TDX and Invensys's statement that Mezz would require no further discovery fails to demonstrate that to be true. The same can be said for the implication that Mezz would not have conducted its discovery any differently had it known at the time that TDX was intended as

a second third-party plaintiff. Therefore, the cross-motion of Invensys and TDX's for leave to amend the second third-party complaint is denied.

Mazzeo's Cross Motion

For Summary Judgment in Favor of Invensys, Dismissing All Claims and Counterclaims Against It

Labor Law § 240 (1) imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect workers from elevation-related risks and hazards, such as "falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). It has been held that a temporary stairway that is used to facilitate workers' access to a different elevation level is "indisputably an elevation device within the meaning of Labor Law § 240 (1)," and that proof that a worker fell when the staircase collapsed "established a prima facie case of liability under Labor Law § 240 (1)" (*Megna v Tishman Construction Corp. of Manhattan*, 306 AD2d 163, 164 [1st Dept 2003]).

Plaintiff maintains that Invensys was the general contractor and agent of the owner and hence Invensys falls within the intendment of section 240 (1). Plaintiff reasons that because there is a direct contractual chain from Invensys to Mazzeo (DASNY hired Invensys, which hired Mezz, which hired Universal), Invensys is both the general contractor "for the work Rizo was performing" and an agent of DASNY (Feld 8/17/06 Affirm., 6th unnumbered page). Plaintiff attempts to buttress his arguments by appending

the DASNY/Siebe (Invensys) contract and citing numerous provisions thereof as proof that Invensys was the general contractor and agent of DASNY.

The facts and the law require a different conclusion. The DASNY/Siebe (Invensys) contract provides quite clearly that the work Invensys was hired to do consisted solely in providing "Automatic Temperature Controls ... HVAC," and allowed Invensys to hire subcontractors to perform work that fell within that umbrella, such as those which would provide the electrical components. While being retained directly by an owner may make a contractor a prime contractor at a project, there is no evidence that Invensys had authority or supervision over any other contractor or its work. Plaintiff has cited no case law that supports his rather novel proposition that there can be a general contractor only "for the work Rizo was performing."

> An agency relationship for purposes of section 240 (1) arises only when work is delegated to a third party who obtains the authority to supervise and control the job. Where responsibility for the activity surrounding an injury was not delegated to the third party, there is no agency liability under the statute

(*Blake v Neighborhood Housing Services of New York City*, 1 NY3d 280, 293 [2003]; *see also Walls v Turner Construction Co.*, 4 NY3d 861, 863-864 [2005]; *Morales v Spring Scaffolding, Inc.*, 24 AD3d 42, 46 [1st Dept 2005] [contractor "not being permanently present at the construction site and lacking the ability to control the workplace, ... is not subject to the Labor Law"]).

Plaintiff was injured when the staircase he was using to go from one level to another collapsed under him. TDX was the contractor that had its carpenters build, install, and

eventually repair the staircase. The authority to supervise, control or direct the work of the carpenters was not delegated to Invensys. Thus, it was not a statutory agent of DASNY, and does not fall within the strictures of section 240 (1). Plaintiff's Labor Law § 240 (1) claim as against Invensys fails.

Section 241 (6) also applies only to owners, contractors and their agents. Thus, plaintiff's Labor Law § 241 (6) claim also fails as against Invensys.

"It is settled that § 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]). In cases, like this one, where the injury is the result of a dangerous condition, rather than the result of a contractor's method of doing the work, "[t]he statute applies ... to owners and contractors who either created a dangerous condition or had actual or constructive notice of it" (*Linares v United Management Corp.*, 16 AD3d 382, 384 [2d Dept 2005]). *See also, Dowd v City of New York*, ___ AD3d ___, 2007 WL 1502242, [2d Dept.]; *Public Administrator of Kings County v 8 B.W., LLC*, ___ AD3d ___, 2007 WL 1439559 [2d Dept.].

TDX is the only contractor that built and installed the staircase that collapsed. There is no evidence that Invensys had anything to do with the staircase, or that it had any kind of notice of its imminent collapse. Thus, plaintiff's claims in common-law negligence and Labor Law § 200 also fail as against Invensys.

In sum, summary judgment dismissing the complaint as against Invensys is granted.

When a complaint against a defendant is dismissed in its entirety, "[t]he third-party actions and all cross claims are dismissed as a necessary consequence" of that dismissal (*Turchioe v AT & T Communications*, 256 AD2d 245, 246 [1st Dept 1998]).

Mezz's Counterclaim

"To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident' [citations omitted]" (*Perri v Gilbert Johnson Enterprises, Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005]; *see also, Correia v Professional Data Management*, 259 AD2d 60, 65 [1st Dept 1999]). This implied indemnification "lies only against those who are actually at fault" (*Nourse v Fulton County Community Heritage Corp.*, 2 AD3d 1121, 1122 [3d Dept 2003]), after the party seeking indemnification "present[s] evidence that [the party from whom indemnification is sought] was either negligent, or supervised and controlled the plaintiff's work" (*Singh v Congregation Bais Avrohom K'Krula*, 300 AD2d 567, 569 [2d Dept 2002]; *see also, Toledo v Long Island Jewish Medical Center*, 309 AD2d 921, 922 [2d Dept 2003]).

Since this court has found that no claim in common-law negligence lies as against Invensys, summary judgment dismissing Mezz's counterclaim for common-law indemnification is granted.

In sum, that part of Mazzeo's cross- motion which seeks summary judgment in favor of Invensys dismissing all claims and counterclaims as against it is granted.

For Summary Judgment Dismissing the Third Third-Party Complaint and All Cross-Claims Asserted Against Them

Since Invensys's second third-party complaint against Mezz is dismissed as a necessary consequence of the dismissal of the complaint as against Invensys, Mezz's third third-party complaint against Mazzeo is also dismissed. The same holds true for the cross-claims asserted against Mazzeo, and summary judgment dismissing the third third-party complaint and the cross-claims asserted against Mazzeo is granted.

Mezz's Motion

In light of the above determinations, Mezz's motion for the dismissal of all claims asserted as against it and Invensys is granted.

Conclusion

Accordingly, it is

ORDERED that Mezz Electric Inc.'s motion is granted, and the amended complaint and second third-party complaint are severed and dismissed as against defendant Invensys Building Systems, Inc., f/k/a Siebe Environmental Controls, A Division of Barber-Coleman Company and Mezz Electric Inc., and the Clerk is directed to enter judgment in favor of these parties, and it is further

ORDERED that the cross-motion of Invensys Building Systems, Inc., f/k/a Siebe Environmental Controls, A Division of Barber-Coleman Company and TDX Construction Corporation is denied; and it is further

ORDERED that the cross-motion of Universal/M.M.E.C. Ltd. and Michael Mazzeo

Electric Corp. is granted, and the third third-party complaint and all cross-claims asserted as against them are severed and dismissed. and the Clerk is directed to enter judgment in favor of these third third-party defendants, and it is further

ORDERED that the remainder of the action, i.e., plaintiffs' claims against TDX Construction Corporation, shall continue.

Dated: June 13, 2007

J.S.C.