

Goldenberg v One Bryant Park, LLC

2007 NY Slip Op 32500(U)

August 2, 2007

Supreme Court, New York County

Docket Number: 0104573/2004

Judge: Jane S. Solomon

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: **JANE S. SOLOMON**

PART 55

Index Number : 104573/2004

GOLDENBERG, SARA

vs
ONE BRYANT PARK

Sequence Number : 003

DISMISS

INDEX NO. _____

MOTION DATE 8/22/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-9

10-15

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the general memorandum decision and order.

N.B. — pre-trial conference scheduled for 8/27/07 @ 2 PM

FILED

AUG 14 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/21/07

J.S.
JANE S. SOLOMON

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 55

-----x
SARA GOLDENBERG,

Index No.: 104573/04

Plaintiff,

-against-

DECISION AND ORDER

ONE BRYANT PARK, LLC, ONE BRYANT PARK
DEVELOPMENT PARTNERS, LLC, THE DURST
BUILDINGS CORPORATION, THE DURST
ORGANIZATION, INC., CHASHAMA, INC. and
ANITA DURST,

Defendants.

-----x
ONE BRYANT PARK, LLC, ONE BRYANT PARK
DEVELOPMENT PARTNERS, LLC, THE DURST
BUILDINGS CORPORATION, THE DURST
ORGANIZATION, INC., CHASHAMA, INC. and
ANITA DURST,

Index No.: 591070/04

Third-Party Plaintiffs,

-against-

TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK,

Third-Party Defendant.

-----x
ONE BRYANT PARK, LLC, ONE BRYANT PARK
DEVELOPMENT PARTNERS, LLC, THE DURST
BUILDINGS CORPORATION, THE DURST
ORGANIZATION, INC., CHASHAMA, INC. and
ANITA DURST,

Index No.: 590372/05

Second Third-Party Plaintiffs,

-against-

V.I.S.T.A. OF NEW YORK, INC.,

Second Third-Party Defendant.

-----x

Hon. Jane S. Solomon, J.S.C.:

Third-party defendant Tishman Construction Corporation of New York (Tishman) moves for summary judgment in its favor against defendants/third-party plaintiffs One Bryant Park, LLC, One Bryant Park Development Partners, LLC, The Durst Buildings Corporation, The Durst Organization, Inc. (the Durst Organization), Chashama, Inc. (Chashama) and Anita Durst (collectively, the Durst defendants). The Durst defendants oppose this motion and cross-move for summary judgment in their favor as to their claims for common-law and contractual indemnification against Tishman, and for summary judgment in their favor dismissing the complaint of plaintiff Sara Goldenberg (plaintiff).¹ Plaintiff opposes that branch of the Durst defendants' motion seeking summary judgment against her.

For the reasons stated below, Tishman's motion is granted and the Durst defendant's cross-motion is denied.

Background

Chashama is a non-profit art service organization, headed by defendant Anita Durst. Chashama regularly provided artists with studio space within buildings that the Durst Organization loaned to it at no charge. Chashama granted plaintiff, an artist, the rent-free use of a space within a Durst

¹Although the caption in these actions has not been amended as of yet, it appears that the second third-party action (*One Bryant Park, LLC, et al., v V.I.S.T.A. of New York*, (Index No.: 590372/05) was discontinued by stipulation dated March 27, 2006.

building at 135 West 42nd Street in Manhattan. Plaintiff seeks to recover for personal injuries purportedly sustained on July 10, 2002, when a portion of the space she used on the second floor collapsed, causing her to fall to the first floor theater below.

Plaintiff's space encompassed two staircase landings and the stairs between them (Goldenberg Examination Before Trial (EBT) Transcript (Tr.) annexed as Exh F to Motion, at 52), which she had occupied for a few months prior to her fall. Plaintiff had a desk and chair located at the bottom of the staircase on the lower landing (*id.* at 64); she also had a "little area" on the top landing where she also worked (*id.* at 65). It was here that Plaintiff was sitting on a pillow when the floor collapsed (*id.* at 89). She had sat on this ledge on an almost daily basis (*id.* at 112), although when she first moved into the space, there were sculptures stored there (*id.* at 92-93). She noted that the sculptures were heavy because "a lot of people" were involved when they were removed (*id.* at 93).

Pursuant to a Construction Management Agreement made in 1997, (CMA) (annexed as Exh L to Motion), Tishman was hired by the Durst Organization to serve as construction manager for the 4 Times Square Project, which adjoined the subject building. Tishman used a portion of the second floor of the subject building as its field office and retained a sub-contractor,

[*5]

Giamboi Brothers (Giamboi), to construct a staircase permitting access to Tishman's field office without disturbing other occupants of the building. Giamboi's construction of the access staircase included the placement of a fireproof door at the top of this staircase and, on or about May 27, 1997, Giamboi also installed fireproof doors on two additional staircases in the subject building. Finally, Tishman also performed certain "renovation" work within the subject building.

Tishman's Motion

Tishman now moves for summary judgment as to the Durst defendants' third-party complaint sounding in contractual indemnification, common-law indemnification, contribution, and Tishman's purported breach of contract in failing to name the Durst defendants as additional insureds on Tishman's liability policy.

Tishman contends that it had no contract with the Durst defendants for its field office in the subject building, the construction of the staircase within the building or any other work performed there by or on Tishman's behalf. It maintains that in the absence of a contract there can be no claim for contractual indemnification or breach of contract.

The Durst defendants counter that the CMA was intended to cover both the work performed at 4 Times Sq. and the work performed at the subject building. In support of this

contention, the Durst defendants rely, inter alia, on the affidavit of Louis Esposito (Esposito Aff), who, at the time of the 4 Times Sq. project, was a vice president and "part of the construction division" of the Durst Organization (Esposito Aff annexed to Cross-motion at 1, ¶ 1). Esposito avers that "there was no separate agreement for the renovation of 135 West 42nd Street as it was part of the 4 Times Sq. project. The contract annexed hereto [the CMA] is also the contract for the work at 135 West 42nd Street" (*id.*, ¶ 6). The Durst defendants also rely on the EBT of Thomas Troiano (Troiano), Tishman's project manager at the subject building, who said that he "believed" that Tishman's involvement there was pursuant to a contract; that the renovation of the subject building was part of the 4 Times Sq. project; and his "recollection" was that the subject building and 4 Times Sq. "shared the same property" (Troiano EBT Tr., at 20-23).

Tishman also asserts that the staircase in which the collapse took place was not the staircase that Giamboi constructed. It was there before Tishman's arrival, and Tishman had no involvement with it other than installation of the fireproof doors.

Tishman next contends that the Durst defendants cannot succeed on their claim for common law indemnification. It asserts that even if there remain questions of fact as to whether it performed work in what became plaintiff's space, the Durst

defendants have no claim because all of its work in the subject building was completed in 1997, and "signed off" by the New York City Department of Buildings on June 18, 1997. In the absence of any evidence that Tishman was negligent, it cannot be held liable in connection with plaintiff's 2002 accident.

As it relates to their claim for common-law indemnification, the Durst defendants rely, *inter alia*, on the following: the EBT testimony of Shan Covey (Covey EBT Tr. Annexed as Exh. H to Motion), an employee of the Royal Realty Corporation, property manger for the subject building; the Esposito Affidavit; Troiano's EBT testimony; a copy of Giamboi work order no. 6307, dated 3/5/97 (annexed as Exh. G to Cross-Motion), bearing the notation "sheetrock stairs," and Giamboi work order no. 6310, also dated 3/5/97 (annexed as Exh. A to Harris Reply Aff.), bearing the notation "add sheetrock at inside of stairs."

Covey's testimony contained the following relevant information: A drawing marked at the deposition as defendants' exhibit S (annexed as Exh. D to Cross-Motion) depicts the stairwell located in plaintiff's space (Coven EBT Tr. at 39); the sheetrock in that staircase, as depicted in a photograph marked as Exh. F, was not there prior to Tishman's work in the subject building (*id.* at 67-68, 70); the area where plaintiff was sitting when she fell had an "unsupported aluminum stud and sheetrock

ceiling" (*id.* at 73); and the renovation plans (annexed as Exh. E to Cross-Motion) indicate that the staircase in what later became plaintiff's space was to be renovated by Tishman and a soffit was to be installed there (*id.* at 43-44).

In his affidavit, Esposito avers that a review of the relevant photographs and renovation plans confirms that the soffit to be installed per those plans is the one plaintiff was sitting on when she fell, and also that the stairwell in that space had not been enclosed prior to Tishman's work in the subject building (Esposito Aff., ¶¶ 7-12).

As for Troiano's EBT testimony, the Durst defendants' note that he did not initially recall whether or not the renovation of the building included enclosing the subject stairwell.

Summary Judgment

It is well-established that, "[t]o obtain summary judgment it is necessary that the movant establish his cause of action or defense 'sufficiently to warrant the court as a matter of law in directing judgment' in his favor." *Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067 (1979) quoting CPLR 3212 (b). Once such proof has been offered, the opposing party must "show facts sufficient to require a trial of any issue of fact" to defeat the motion. CPLR 3212 (b); *Alvarez v Prospect Hospital*, 68 NY2d 320 (1986); *Friends of Animals v Associated Fur*

Mfrs., 46 NY2d 1065 (1979); *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Contractual Indemnification

A contractual right to indemnification can be had only where a party assumes this obligation. *Rosado v Proctor & Schwartz*, 66 NY2d 21, 25 (1985). A careful review of the CMA discloses no language that evinces Tishman's purported "intention to indemnify" the Durst defendants for work performed at the subject building. Even though the work Tishman performed at the subject building was adjacent to the project site, and may have aided in the construction of 4 Times Sq., e.g., by providing a readily accessible field office, because the subject building was separate and apart from the project site, the indemnity provisions of the CMA do not apply to work performed at the subject building. Nor can Esposito's self-serving affidavit or Troiano's EBT testimony expand the scope of the CMA indemnification provision to include the work performed at the subject building. Accordingly, that branch of Tishman's motion for summary judgment dismissing the Durst defendants' claim for contractual indemnification is granted.

Breach of Contract

It is well settled that a contractor who breaches a contractual obligation to procure insurance that names another party as an additional insured is liable for damages.

Inchaustegui v 666 Fifth Avenue Limited Partnership, 96 NY2d 111 (2001). However, in the absence of a valid contract between Tishman and the Durst defendants relating to work performed at the subject building, the Durst defendants cannot maintain their cause of action for breach of contract arising from Tishman's putative failure to name the Durst defendants as additional insureds on a liability insurance policy. As such, Tishman is granted summary judgment as to this cause of action too.

Common-Law Indemnification

Where one party is held liable to another solely on account of the acts of a third party, indemnification is applicable to shift the entire liability to the actual wrongdoer. *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 (1988). Common-law indemnification is generally applied in instances where one party is held vicariously liable for the tort of a third party. *Hawthorne v South Bronx Community Corp.*, 78 NY2d 433, 437 (1991). But it also may be applied where the failure "to do so would result in the unjust enrichment of one party at the expense of the other." *Mas v Two Bridges Assocs.*, 75 NY2d 680, 690 (1990).

Even if one assumes that the Durst defendants have demonstrated that Tishman, as movant, has failed to meet its burden in establishing that there are no triable issue of facts regarding whether it performed work on the soffit, the Durst

defendants cannot prevail on their common-law indemnification claim. This is because whatever work Tishman performed was completed in 1997, and New York City's Department of Buildings records show that an architect or engineer retained by the Durst Organization certified the work, and that on June 18, 1997, DOB signed off on it. Prior to plaintiff's use of the space, she noted the presence of heavy sculptures on top of the soffit, and she utilized its surface as part of her workspace, on a nearly daily basis of which the Durst defendants, via Chashama and Anita Durst, were aware. The floor collapsed more than five years after Tishman completed its work, and the Durst defendants fail to point to any specific negligence or defects in any of the work purportedly performed by Tishman. Rather, the Durst defendants merely engage in speculation.

As noted by the Appellate Division, Third Department, in *Coffey v Dormitory Authority of State of N.Y.*, (26 AD2d 1, 3 [3rd Dept 1966]):

[Where a] negligent condition may have been created by contractors or others involved with construction of the building, the right to indemnity will rest on the circumstances in each case such as failure to plead the presence of a latent defect (see *Inman v Binghamton Housing Authority*, 3 NY2d 137, 145 [1957]); the length of time elapsed between the completion of the construction and the accident (see *Inman v Binghamton Housing Authority*, *supra*, at 148); whether the defects were readily noticeable and whether the third party has contracted to indemnify the one sued or if the liability of the one sued is predicated on passive

negligence and that of the third party is based on active negligence.

Given the time that passed after Tishman's work, the intervening uses to which the soffit was put with the consent of the Durst defendants, and the lack of any indicia of negligence on Tishman's part, the Durst defendants' cause of action for common law indemnification must be dismissed.

The Cross-Motion

Tishman's motion for summary judgment as against the Durst defendants having been granted, the Durst defendants' cross-motion for summary judgment against Tishman is denied.

That branch of the Durst defendants' cross-motion for summary judgment dismissing plaintiff's complaint is premised on the following argument:

TISHMAN claims that they cannot be held liable even if they were responsible for the construction of the area because . . . there is no evidence that they were negligent as plaintiff would have had to get over a partition to reach this area. If that is the case, then the plaintiff's complaint should be dismissed since THE DURST DEFENDANTS had no knowledge of a defective condition. There were no prior complaints regarding this ledge to DURST and they could not have either actual or constructive notice of the condition.

(Harris Aff in support of Cross-Motion, ¶ 92).

The Durst defendants are mistaken. The duty of reasonable care owed by the Durst defendants to plaintiff, as owners and/or operators of the building, differs from any duty

and accompanying liability that Tishman may have had to plaintiff. In addition, the absence of complaints to the Durst defendants about the soffit does not, in and of itself, imply that the Durst defendants may avoid liability. See *Personius v Mann*, 5 NY3d 857 (2005) (defendant's motion for summary judgment properly denied where question of fact existed as to whether defendant met its obligation to maintain and inspect pole on its property); *Campbell v City et al.*, 32 AD3d 703 (1st Dept 2006) (in regards to common-law negligence claim against defendant, issues of fact raised including whether defendant fulfilled its duty to inspect and maintain pole located on its property); *Albergo v Deer Park Meat Farms, Inc.*, 138 AD2d 656 (2nd Dept 1988) (defendant had a non-delegable obligation to maintain its premises and equipment in a safe condition, so that even in the absence of constructive or actual notice of a defective condition, plaintiff prevailed where evidence at trial disclosed that an inspection would have uncovered said defective condition). As the Durst defendants have failed to meet their burden of eliminating all material triable issues of fact, including their duty to maintain plaintiff's space in a reasonably safe condition, this branch of the Durst defendants' cross-motion is denied.

Accordingly, it hereby is

ORDERED that Tishman's motion for summary judgment is granted in its entirety and the third-party complaint is dismissed and the Clerk is directed to enter judgment accordingly, with costs and disbursements to Tishman as taxed; and it is further

ORDERED that the Durst defendants' cross-motion for summary judgment as to its third-party claims against Tishman and for summary judgment dismissing plaintiff's complaint is denied; and it further is

ORDERED that counsel for the remaining parties shall appear in Part 55 for a pre-trial conference on August 27, 2007 at 2 PM.

Dated: August 2, 2007

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

AUG 14 2007

**NEW YORK
COUNTY CLERK'S OFFICE**