

Pinnock v City of New York

2007 NY Slip Op 32537(U)

July 10, 2007

Supreme Court, Queens County

Docket Number: 0022404/2002

Judge: Duane A. Hart

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present : HONORABLE DUANE A. HART
Justice

IA Part 18

SHARON PINNOCK, x

Plaintiff,

- against -

THE CITY OF NEW YORK, et al.,

Defendants.

x

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Number 22404 2002

Motion
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Motion Seq. No. 7

The following papers numbered 1 to 18 read on this motion by the RBA Group (RBA), for leave to file a belated motion for summary judgment and, if granted, to dismiss all claims and cross claims asserted against RBA, and cross motion by EBRO Restoration Corp., for summary judgment in its favor on its claims for contractual indemnification and contribution pursuant to CPLR 3212.

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Upon the foregoing papers it is ordered that the motion and cross motion are denied.

Plaintiff in this negligence action seeks damages for personal injuries sustained on March 4, 2002, when she was struck by a dump truck owned by her employer, EBRO, and operated by another EBRO employee. RBA moves to dismiss the complaint insofar as asserted against it on the grounds that (1) the peril to plaintiff was open and obvious, (2) the instrumentality (the dump truck) had nothing to do with the construction activities, and (3) the movement of the dump truck had nothing to do with workplace safety. EBRO cross moves for summary judgment in its favor on its claims for

contractual indemnification and contribution. Plaintiff opposes the motion and cross motion.

At the outset, the court notes that a motion for summary judgment must be made within 120 days after filing a note of issue, except with leave of the court on good cause shown (CPLR 3212[a]; see Brill v City of New York, 2 NY3d 648 [2004]). It is undisputed that the instant motion for summary judgment is made beyond the 120 days, however, RBA submits that "good cause" exists for the belated motion, namely, that discovery was not complete. Good cause for a late summary judgment motion can be established where, as here, a discovery request relevant to the motion was outstanding until shortly before the motion was made (see Gonzalez v 98 Mag Leasing Corp., 95 NY2d 124 [2000]; Cooper v Hodge, 13 AD3d 1111 [2004]; see also Kunz v Gleeson, 9 AD3d 480 [2004]), or where the movant was awaiting the receipt of deposition transcripts relevant to the motion (see Burnell v Huneau, 1 AD3d 758 [2003]). Based upon the undisputed fact that there was outstanding discovery, the court will entertain the belated motion.

Upon consideration of the merits of the motion, however, the court declines to grant the movant summary judgment in favor of RBA based upon its submissions. The record indicates that EBRO was retained by the City of New York (City) to place pedestrian ramps at various corners on sidewalks for the handicapped. This work involved, inter alia, independent crews working on as many as 15 independent work sites during the course of the day. Construction vehicles such as dump trucks and back hoes were used. When used, proper supervision and safety personnel were to be in place.

A transcript of plaintiff's deposition testimony reveals as follows: plaintiff was employed as a flag-person at the construction site to alert pedestrians when construction vehicle(s) were moving; on the date in question, plaintiff had finished in her work area and had gone to the nearby subject location to retrieve her handbag; after retrieving the handbag from the dump truck, she got out and started to walk in the direction of her car; the dump truck was running (idling) when she got in to retrieve her handbag, and she did not hear a horn blow or the engine get louder as the accident occurred; she did, however, hear a co-worker call out to her; the zone where the accident occurred was an active construction site which had not yet been closed; construction debris was present at the location, including excavated material, and construction cones were placed marking the area as an active construction site.

During discovery in the action against the City (the sidewalk owner), it was determined that the supervisory and hands-on

responsibility for the project was assigned and contracted (by the City) to RBA, an engineering consulting firm. Indeed under the contract, RBA was to "perform a daily inspection at the end of each day and issue directives to the contractor to correct any deficiencies which were identified; monitor conditions at the site for performance with the construction contract [to ensure] that the contractor provided a safe environment for both workers and the general public; review the safety program developed by the contractor and monitor adherence by the contractor to such program and inspect the maintenance and protection of pedestrian and vehicular traffic operations on a daily basis; review and evaluate contractor proposals regarding pedestrian and vehicular traffic operation and make recommendations to the Commissioner; and have a 'safety officer' for the project properly trained and approved regarding safety for pedestrian and vehicular traffic operations." In this regard, dump trucks were a necessary part of the project and RBA employed "flag persons" to safely direct the traffic flow around these vehicles.

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or employer to provide construction site workers with a safe place to work (see Jock v Fien, 80 NY2d 965 [1992]; Brown v Brause Plaza, LLC, 19 AD3d 626 [2005]). The statute applies to owners and contractors who exercise control or supervision over the work being performed, or who have either created a dangerous condition or had actual or constructive notice of such condition (see Lombardi v Stout, 80 NY2d 290 [1992]; DeBlase v Herbert Constr. Co., Inc., 5 AD3d 624 [2004]). Plaintiff sets forth two theories of liability under Labor Law § 200 as to defendant RBA: (1) that as the engineering company charged with overall responsibility for safety at the construction site, RBA was responsible for the allegedly dangerous condition created by EBRO, and (2) RBA created the dangerous condition by failing to have adequate safety measures in place. Thus, while plaintiff may have worked at a different (yet nearby) construction site and may have concluded her work day when she was injured, there is evidence indicating that the actual site of the accident was an active construction site with ongoing construction activity, without adequate safety measures in place. Specifically, there is conflicting evidence as to whether there was, at a minimum, a flag person present to safely direct the traffic flow around the subject dump truck. These triable issues as to whether RBA created the allegedly dangerous condition which caused the plaintiff to be struck by the dump truck preclude the granting of summary judgment on the Labor Law § 200 cause of action (see Hatfield v Bridgedale, LLC, 28 AD3d 608 [2006]; Fernez v Kellogg, 2 AD3d 397 [2003]). Accordingly, the motion for summary judgment in favor of RBA is denied.

Cross Motion

The cross motion by EBRO for summary judgment in its favor on its claims for contractual indemnification and contribution is also denied. An indemnification clause that purports to indemnify a party for its own negligence may be enforced where the party to be indemnified is found to be free of any negligence (see Brown v Two Exch. Plaza Partners, 76 NY2d 172 [1990]; Cabrera v Board of Educ. of City of N.Y., 33 AD3d 641 [2006]; Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr., 23 AD3d 508 [2005]), and its liability is merely imputed or vicarious (see Potter v M.A. Bongiovanni, Inc., 271 AD2d 918 [2000]). Plaintiff contends that EBRO (also) created the allegedly dangerous condition since its employee operated the dump truck which struck her. Based upon the submissions in support of the cross motion, it cannot be said as a matter of law that EBRO was wholly free from negligence under the circumstances.

Moreover, the right to contractual indemnification depends upon the specific language of the contract (Kader v City of N.Y. Hous. Preserv. & Dev., 16 AD3d 461 [2005]); Gillmore v Duke/Fluor Daniel, 221 AD2d 938 [1995]. Here, EBRO did not submit copies of the relevant portions of the contract in order for the court to make a proper determination. Therefore, since EBRO failed to establish, prima facie, entitlement to summary judgment on the issues of contractual indemnification and contribution, its cross motion for the same is denied (see Kelly v City of New York, 32 AD3d 901 [2006]; Brasch v Yonkers Constr. Co., 306 AD2d 508 [2003]).

Dated: July 10, 2007

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J.S.C.