

Klein & Eversoll, Inc. v Anthony's Custom Closets

2007 NY Slip Op 32673(U)

August 23, 2007

Supreme Court, Suffolk County

Docket Number: 0021720/2005

Judge: Robert W. Doyle

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SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 4-11-07
ADJ. DATE 7-11-07
Mot. Seq. # 001 - MD
 # 002 - MotD
 # 003 - MD

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KLEIN & EVERSOLL, INC.,	:	PICCIANO & SCAHILL, P.C.	
	:	Attorneys for Plaintiff	
Plaintiff,	:	900 Merchants Concourse, Suite 310	
	:	Westbury, New York 11590	
	:		
- against -	:	COZEN O'CONNOR, ESQ.	
	:	Attys for Deft Anthony's Custom Closets	
	:	45 Broadway, 16 th Floor	
ANTHONY'S CUSTOM CLOSETS and	:	New York, New York 10006	
ALL ISLAND CLEANING CORP.,	:		
	:	MILBER, MAKRIS, PLOUSADIS	
	:	Attys for Deft All Island Cleaning Corp.	
Defendants.	:	1000 Woodbury Road, Suite 402	
	:	Woodbury, New York 11797	
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Upon the following papers numbered 1 to 98 read on these motions for summary judgment; Notice of Motions/ Order to Show Cause and supporting papers 1 - 23; 24 - 48; 49 - 70 ; Answering Affidavits and supporting papers 71 - 83; 84 - 86; 87 - 90; 91 - 93; Replying Affidavits and supporting papers 94 - 95 ; Other sur-reply 96- 98 ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#001) by plaintiff for an order pursuant to CPLR 3212 granting it summary judgment (1) on its claim for indemnity and a defense from All Island Cleaning Corp. in the underlying action, *Sargent v Klein & Eversoll, Inc., et al. Index No. 25309/2003*; (2) on its claim for indemnity and a defense from Anthony's Custom Closets in the underlying action, *Sargent v Klein & Eversoll, Inc., et al. Index No. 25309/2003*; (3) on its claim for indemnity and a defense from Anthony's Custom Closets in the underlying action *Public Service Mutual Ins. Co. v Sirius American Ins. Co., Index No. 22458/2004*; and (4) on its claim for the reimbursement of all expenses, costs and legal fees expended in defending itself in both underlying actions; and for a hearing to determine the reasonableness of its legal fees, is denied; and it is further

ORDERED that the motion (#002) by defendant Anthony's Custom Closets for an Order granting it summary judgment (1) dismissing Malcolm C. Sargent's Labor Law § 240(1) claim in the underlying action, *Sargent v Klein & Eversoll, Inc., et al., Index No. 25309/2003*; (2) dismissing plaintiff's claims for common-law indemnification; and (3) dismissing plaintiff's claim for contractual

indemnification, is granted to the extent that plaintiff's claim for common-law indemnification against Anthony's Custom Closets is dismissed, and is otherwise denied; and it is further

ORDERED that the motion (#003) by defendant All Island Cleaning Corp. for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint and any cross claims asserted against it, is denied; and it is further

ORDERED that these motions are consolidated for the purpose of this determination.

This action for indemnification and/or contribution has as its genesis an action commenced by Malcolm C. Sargent (*Sargent v Klein & Eversoll, Inc., et al., Index No. 25309/2003*) pursuant to the Labor Law and common-law negligence for injuries he allegedly sustained in a slip and fall accident at a construction site, for which plaintiff was the general contractor. Plaintiff herein, Klein & Eversoll, Inc., (hereafter Klein) did not answer Sargent's complaint and an order of default was granted to Sargent and defendants Pinewood Estates Partners, LLC and Pinewood Estates Management, LLC, by order of this Court dated October 15, 2004 (Berler, J.).¹ The two actions were joined for trial by order of this Court dated May 11, 2006 (Berler, J.).² Sargent's claims pursuant to Labor Law §§ 200 and 241(6), and common-law negligence remain as against Klein.

Malcolm Sargent was employed by Anthony's Custom Closets (hereafter Anthony's), a subcontractor hired by Klein. He claims that he tripped or slipped and fell on stairs which contained construction debris and trash. He testified that he saw the debris on his previous trips on the stairs. His employer testified that it was not his workers' responsibility to clean up after other subcontractors and he also testified that he would expect his workers to clear an obstruction so that they could work safely.

Pursuant to Workers' Compensation Law §11, the Omnibus Workers' Compensation Reform Act, Anthony's, as the injured party's employer, is exempt from claims for contribution or indemnity in the absence of plaintiff's "grave injury" (*see also, Majewski v Broadalbin-Perth Cent. School Dist.*, 91 NY2d 577, 573 NYS2d 966 [1998]) unless there is a specific contractual obligation for such. Since Sargent did not suffer a grave injury, any claims for indemnification against Anthony's will depend on its contractual obligation (*Martelle v City of New York*, 31 AD3d 400, 817 NYS2d 504 [2006]). Accordingly, Klein's claim for common-law indemnification against Anthony is dismissed.

Anthony's contract with Klein states, in relevant part at paragraph 7, that Anthony's would provide certificates of insurance evincing coverage naming the builder and the owner as additional

¹ Klein's motion to vacate was denied by order dated January 28, 2005, and reargument was denied by order dated April 4, 2005, *appeal dismissed*, 31 AD3d 736, 819 NYS2d 546 (2006).

² Although the two actions were joined for trial and discovery purposes only, there was no consolidation and each action maintained its separate identity and separate notes of issue were required, the parties have mistakenly joined the two captions and co-mingled the papers and arguments. Anthony's request to dismiss Sargent's Labor Law § 240(1) claim cannot be addressed in this action. However, Sargent's Labor Law § 240(1) claim was dismissed in the underlying action by this Court's order decided simultaneously herewith.

insureds and containing subrogation waivers.³ The contract provides, in relevant part, at paragraph 13:

Sub acknowledges and agrees that the prevention of accidents to workers engaged upon or in the vicinity of the Site is its responsibility. Sub shall comply with the safety standards established by the Builder during the progress of the work, and with all Federal, State, County and Local laws. . . . When so ordered, the Sub shall stop any part of the work which Builder deems unsafe and shall perform such corrective measures, as Builder may require, and the Sub agrees that it shall not have or make any claim for damages growing out of such stoppages. . . . Failure on the part of Builder to stop unsafe practices shall in no way relieve the Sub of its responsibility. Sub shall indemnify, protect, and save harmless, Builder, the architect, and the Owner from any and all claims, actions, proceedings, fines and penalties and from [and] against any all loss, damages, liabilities, costs and expenses, including (without limitation) legal fees and disbursements, which Builder, the architect and/or the Owner may suffer, sustain or incur *due to Sub's failure to comply with the foregoing* [emphasis added].

And at paragraph 15:

Notwithstanding any provision of this contract to the contrary, the Sub acknowledges that it bears sole and exclusive responsibility for all construction safety procedures and precautions required by Federal, [S]tate, County or Local law; and Sub agrees to hold indemnify and save the Owner, the architect, and Builder harmless from and against any and all claims and expenses resulting from *any act of any employee* of the Sub, or any injury or damages *caused by unsafe or negligent act[s] or occurrences resulting from the sub's work* [emphasis added].

Therefore, the obligation to indemnify is dependent upon a finding that Anthony's was negligent in failing to comply with a safety standard or that Sargent was negligent. It does not provide for indemnification in the absence of negligence on the part of Anthony's or its employee (*compare, Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1999] and *Robinson v City of New York*, 8 Misc 3d 1012A, 801 NYS2d 781, *affd* 22 AD3d 293, 802 NYS2d 48 [2005] where the agreement called for indemnification without a finding of fault). Since the issue of the parties' respective negligence, if any, cannot be resolved herein, Klein is not entitled to summary judgment on its claim for contractual indemnification.

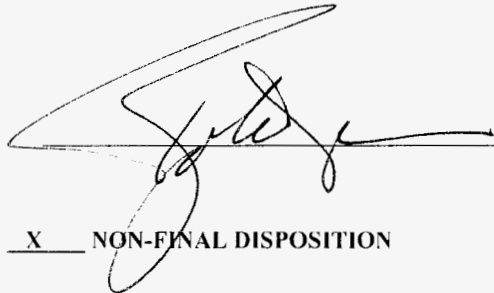
Klein hired All Island Cleaning Corp. (hereafter All Island) to supply laborers and equipment for keeping the site clean. All Island's contract provided a schedule of cleaning for the units, to coincide with the completion of various phases of construction, and provided that it would have on-site personnel to monitor and direct its work. There is also evidence that Klein was present at the site daily and saw that All Island's work was not satisfactory, that Klein expressed continued complaints about the presence of debris and trash to All Island, that Klein directed when specific buildings were to be cleaned,

³ It would appear that Anthony's did provide the requisite certificates of insurance and that its carrier, Zurich U.S., declined coverage to Klein by asserting that it was given untimely notice.

and that Klein had concerns that All Island was unable to handle the volume of debris at such a large development. The full content of the contract between Klein and All Island is in dispute. Klein asserts that the contract was a six-page document which included provisions for indemnification and insurance which named Klein as an additional insured. All Island argues that the contract was a three-page document which does not contain the indemnification and insurance provisions. Therefore, it is obvious that neither side can establish its entitlement to summary judgment as to the claims for contractual indemnification. Further, since the issue of any negligence on the part of Klein remains unresolved, the claim for common-law indemnification cannot be resolved herein (*Coque v Wildflower Estates Dev.*, 31 AD3d 484, 818 NYS2d 546 [2006]; *Farduchi v United Artists Theatre Circuit*, 23 AD3d 613, 804 NYS2d 786 [2005]). Accordingly, Klein's motion for summary judgment against All Island is denied, and All Island's motion for summary judgment dismissing the complaint is correspondingly denied.

Lastly, Klein also seeks indemnity and a defense in the underlying action, *Public Service Mutual Ins. Co. v Sirius American Ins. Co.*, Index No. 22458/2004. The gravamen of that action is a dispute between the carrier for the owner/Pinewood and the carrier for Klein, as well as Klein and Sargent. However, for Klein to establish that Anthony's is obligated to indemnify and defend Klein in that dispute, Klein must establish that the contract contemplated such coverage and that Anthony's actions triggered the indemnification provision. However, Klein has not established its entitlement to summary judgment on those issues nor on the remainder of the relief sought. Accordingly, Klein's motion is denied.

Dated: AUG 23 2007



J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION

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