

Malloy v Stellar Mgt.

2007 NY Slip Op 32783(U)

September 4, 2007

Supreme Court, New York County

Docket Number: 0109054/2005

Judge: Martin Shulman

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
GERARD MALLOY,

Plaintiff,

Index No: 109054/05

-against-

Decision and Order

STELLAR MANAGEMENT, STELLAR MANAGEMENT,
LLC and W 12/14 WALL REALTY, LLC,

Defendants.

-----X
STELLAR MANAGEMENT, STELLAR MANAGEMENT,
LLC and W 12/14 WALL REALTY, LLC,

Third-Party Plaintiffs,

-against-

MAINCO ELEVATOR & ELECTRICAL CORPORATION,

Third-Party Defendants.

FILED
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NEW YORK
COUNTY CLERKS OFFICE

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HON. MARTIN SHULMAN, J.S.C.

Third-party defendant, Mainco Elevator & Electrical Corporation ("Mainco"), moves for summary judgment pursuant to CPLR 3212 dismissing the third-party complaint and granting Mainco judgment on its counterclaim against defendants-third-party plaintiffs Stellar Management, Stellar Management, LLC and W 12/14 Wall Realty, LLC (collectively "Stellar") for indemnification/contribution and attorneys' fees. Stellar opposes the motion.¹

¹ Although Mainco's motion seeks no relief as against plaintiffs Gerard Malloy ("Malloy") and Soonhwa Malloy (collectively "plaintiffs"), plaintiffs submit written opposition to refute Stellar's position that an issue of fact exists as to Malloy's alleged comparative negligence.

Background

Defendant W 12/14 Wall Realty, LLC (the "owner") is the owner of the building located at 14 Wall Street, New York, New York (the "building"). Defendants Stellar Management and/or Stellar Management, LLC manage the building for the owner. Pursuant to a Full Service Elevator Maintenance and Repair Agreement dated in or about April 2004 (the "agreement" at Exh. K to motion), Mainco provided elevator maintenance and repair services at the building. On June 21, 2004, Malloy, a Mainco employee working at the building as an elevator mechanic, was injured when he tripped and fell over an exhaust fan cover (part of the building's air handling equipment) which Stellar's agents and/or employees allegedly left on the floor of the building's 17th floor motor room.

Malloy commenced this personal injury action against Stellar in or about June 2005. Thereafter, Stellar commenced the third-party action against Mainco seeking common law and contractual indemnification and contribution in the event plaintiffs recover judgment against Stellar (Exh. B to motion). Mainco counterclaimed against Stellar for *inter alia* contribution and indemnification.

The Parties' Respective Positions

In support of its motion for summary judgment dismissing Stellar's third-party complaint, Mainco argues that Stellar's claim for contractual indemnification² under the agreement must fail because pursuant to Article 14 of the agreement, Mainco is only responsible to indemnify Stellar if Mainco was actually negligent. Citing each party's

² Mainco argues, and Stellar concedes, that section 11 of the Workers Compensation Law precludes all common law claims against Mainco.

deposition testimony, Mainco contends that: 1) Mainco was responsible only for the building's elevator equipment; 2) Mainco cannot be found negligent since it was not responsible for the building's air handling equipment which caused Malloy's injury; and 3) Stellar was solely responsible for maintaining the building's air handling equipment.

With respect to its counterclaims against Stellar, Mainco asserts that it is entitled to common law indemnification and/or contribution, including attorneys' fees, from Stellar. Mainco requests reimbursement for its attorneys' fees in defending the third-party action claiming Stellar frivolously pleaded Mainco in this action.

In opposition to the motion, Stellar contends issues of fact exist with respect to Malloy's comparative negligence for which Mainco could be responsible under the agreement's indemnity provision. Specifically, Stellar argues a jury could find that the fan belt cover Malloy tripped over was readily visible and thus, summary judgment is premature until fault has been determined. As to Mainco's counterclaim for common law indemnification, Stellar asserts that there is no basis for Mainco to be held vicariously liable for Stellar's actions and the claim must fail. Finally, Stellar argues that Mainco is not entitled to an award of attorneys' fees as same are not authorized by statute or agreement.

Discussion

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary

judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923 (1986). Indeed, the moving party has the burden to set forth evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)), once such proof has been offered, in order to defeat the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Further, "[w]here the moving party has demonstrated its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action ..." *Id.*, 49 N.Y.2d at 560, 427 N.Y.S.2d at 596. See also, *Vermette v. Kenworth Trucking Co., a Div. of Paccar, Inc.*, 68 N.Y.2d 714, 506 N.Y.S.2d 313 (1986); *Marinelli v. Shifrin*, 260 A.D.2d 227, 228-229, 688 N.Y.S.2d 72, 73 (1st Dept., 1999); *Spearmon v. Times Square Stores Corp.*, 96 A.D.2d 552, 553, 465 N.Y.S.2d 230, 232 (2nd Dept., 1983).

Stellar's Claim for Contractual Indemnification

Article 14 of the agreement provides in relevant part:

Contractor agrees to indemnify and save W 12/14 Wall Acquisition Associates LLC³ . . . harmless against and from any and all liabilities and claims of loss, damage and/or injury to person and/or property, and/or otherwise, arising from or in a [sic] way connected with the services and obligations to be performed hereunder . . . but only to the extent same are caused by negligence, misconduct, or other fault of Contractor, it's [sic] Agents and employees **which arise out of work performed under this agreement** . . . (emphasis added)

The court agrees that the third-party complaint against Mainco should be dismissed. It is apparent from the deposition testimony of Stellar's own employees that Stellar was responsible for the exhaust fan cover Malloy tripped over and that Stellar employees left the cover on the floor. As to Malloy's claim that poor lighting also led to his injury, Stellar further conceded responsibility for the building's lighting. Mainco's only responsibility at the building was for the elevator systems. It owed no duty with respect to the building's lighting and air handling equipment and as such there is no evidence of negligence on Mainco's part.

Nor would any alleged contributory negligence on Malloy's part trigger any duty by Mainco to indemnify Stellar under the agreement's indemnification provisions. While Malloy was injured while he was lawfully present at the building as a Mainco employee performing elevator maintenance and repair work pursuant to the agreement, his trip and fall injury did not arise from such work. Rather, the injury arose from Stellar's

³ The court does not address Mainco's argument that the indemnity obligation set forth in Article 14 of the agreement applies only to W 12/14 Wall Acquisition Associates, LLC, a non-party to this action, and not to Stellar. As more fully set forth below, Article 14's language itself precludes a finding that Mainco may be liable to indemnify Stellar under the facts herein.

admitted removal of the exhaust fan cover and its placement on the floor. Accordingly, no obligation on Mainco's part to indemnify Stellar arose under the terms of Article 14 of the agreement, regardless of any alleged comparative negligence on Malloy's part.

Mainco's Claim for Common Law Indemnification

Mainco's counterclaims are predicated upon Malloy's potential recovery of judgment against Mainco. However, Malloy asserts no causes of action against Mainco and as such, there is no basis for the claim that Mainco is entitled to contribution and/or indemnification from Stellar. As a result, Mainco's counterclaims must be dismissed and its request for attorneys' fees based upon common law indemnification must be denied. Attorneys' fees are incidents of litigation which may not be recovered unless authorized by agreement between the parties, statute or court rule. *Hooper Associates, Ltd. v. AGS Computers, Inc.*, 74 N.Y.2d 487, 491, 549 N.Y.S.2d 365, 366 (1989). Here, Mainco does not allege any basis for its recovery of attorney's fees from Stellar. Accordingly, it is

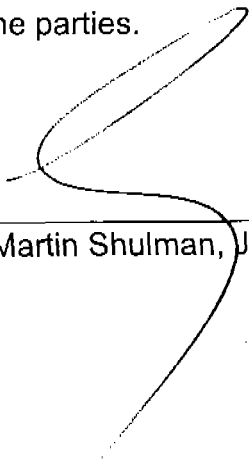
ORDERED that the portion of Mainco's motion for summary judgment dismissing Stellar's third-party complaint is granted and the third-party complaint is hereby dismissed; and it is further

ORDERED that the remaining branches of Mainco's motion are denied and Mainco's counterclaims are dismissed *sua sponte*.

Counsel for plaintiff and Stellar are directed to appear for a pre-trial conference on September 25, 2007 at 9:30 am, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York
September 4, 2007



Hon. Martin Shulman, J.S.C.

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