

Bredow v CVS Pharm.

2007 NY Slip Op 32930(U)

September 13, 2007

Supreme Court, Suffolk County

Docket Number: 0020872/2005

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 6/28/07
ADJ. DATE 7/26/07
Mot. Seq. #002 - MD
Mot. Seq. #003 - XMD

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- against -

Upon the following papers numbered 1 to 23 read on this motion and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15; Notice of Cross Motion and supporting papers 16-18; Answering Affidavits and supporting papers 19; Replying Affidavits and supporting papers 20-22; 23; Other _____; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by defendant Greenlawn CVS, Inc., s/h/a CVS Pharmacy and CVS Pharmacy, Inc. ("CVS"), for an order pursuant to CPLR 3212 granting summary judgment (i) dismissing the complaint and (ii) in its favor on its cross claims against defendant Jato Building Contractors, Inc. for

common-law indemnification, contractual indemnification, and breach of contract for failure to procure insurance, is denied; and it is further

ORDERED that the cross motion by defendant Ja-To Building Contractors, Inc., s/h/a Jato Building Contractors, Inc. (“Ja-To”) for an order granting summary judgment dismissing the complaint and all cross claims against it is denied.

This is an action to recover damages for personal injuries allegedly sustained by the plaintiff at approximately 10:10 a.m. on May 4, 2004 as she was leaving the CVS Pharmacy located at 89 Broadway, Greenlawn, New York, when she lost control of her shopping cart and fell on a handicap access ramp extending from the sidewalk adjacent to the store into the parking lot. Based on the report of Nicholas Bellizzi, P.E., a consulting engineer who inspected the ramp on the plaintiff’s behalf following the accident, the plaintiff alleges that the “flared side” slope of the ramp exceeded the standards promulgated under the Americans with Disabilities Act and the New York State Building Code and did not conform with good and commonly accepted safety practices, and that the excessive slope, without the further benefit of a handrail or handhold, was a significant contributing cause of her accident.

CVS is the owner of the property and Ja-To is the contractor pursuant to a contract dated June 24, 2003 for the construction of the store, which work included the installation and construction of the ramp. Pursuant to article 12 of the contract, Ja-To was required to “comply with all laws, ordinances, rules and regulations bearing on the conduct of the Work” and, if it observed or became aware that any drawings, specifications or other contract documents were “at variance therewith,” it was to “promptly notify CVS in writing.” Article 12 further provided that if Ja-To “perform[ed] any work contrary to such laws, ordinances, rules and regulations, and without such notice to CVS,” it was to “bear all costs arising therefrom” and “to fully indemnify and hold CVS harmless for any costs it incurs, including reasonable attorneys’ fees, as a result of the Contractor’s actions in this regard.” Article 17 required Ja-To to indemnify CVS

from and against all claims, damages, losses and expenses, including attorneys’ fees, arising out of or resulting from:

- (i) Any negligence or tortious act or omission on the part of Contractor or any of its agents, contractors, subcontractors, servants, employees, licensees or invitees; or
- (ii) Any failure on the part of Contractor to perform or comply with any of the covenants, agreements, terms, provisions, conditions or limitations contained in this Contract on its part to be performed or complied with; or
- (iii) Operations or performance of any kind associated with and/or under the Contract by the Contractor, any subcontractor, anyone directly or indirectly employed by the Contractor or any subcontractor, or anyone for whose acts the Contractor or any subcontractor may be liable, which are caused in whole or in part by any error, omission

or act of Contractor, any subcontractor, anyone directly or indirectly employed by the Contractor or any subcontractor or anyone for whose acts the Contractor or any subcontractor may be liable, either at law, by statutes, or under this Contract.

Article 28 obligated Ja-To to maintain liability insurance for claims arising out of its performance of the contract, in an amount not less than \$3 million for personal injury and \$1 million for property damage, and naming CVS as an additional insured.

As between CVS and Ja-To, CVS contends that if the plaintiff fell as a result of the improper construction of the ramp, the loss resulted from Ja-To's negligence in failing to comply with applicable safety standards. Ja-To counters that the ramp was constructed pursuant to a set of drawings prepared for CVS by the site engineers and approved by the Town of Huntington, and that there is no claim that the work failed to conform with the drawings and specifications provided. Ja-To also claims that the work was not performed by Ja-To but rather by its subcontractor, Action Concrete.

CVS now moves for summary judgment in its favor and against Ja-To on those branches of its cross claims seeking common-law indemnification, contractual indemnification, and damages for breach of contract for failure to procure insurance.¹

Preliminarily, to the extent Ja-To contends that CVS's motion is defective because it fails to annex a copy of Ja-To's answer (*see*, CPLR 3212 [b]), the Court notes that such a defect may be overlooked if the record on summary judgment is "sufficiently complete" (*Welch v Hauck*, 18 AD3d 1096, 1098, 795 NYS2d 789, 792, *lv denied* 5 NY3d 708, 803 NYS2d 29 [2005]). Since Ja-To provided a copy of its answer in connection with its cross motion, CVS's failure to comply with CPLR 3212 (b) is not fatal to its application.

Nevertheless, the motion is denied. "Summary judgment on a claim for common-law indemnity * * * is appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved" (*La Lima v Epstein*, 143 AD2d 886, 888, 533 NYS2d 399, 401 [1988]). To be entitled to summary judgment, a party is required to establish "that no negligent act or omission on its part contributed to the plaintiff's injuries, and that its liability is therefore purely vicarious" (*Coque v Wildflower Estates Dev.*, 31 AD3d 484, 489, 818 NYS2d 546, 551 [2006]). Here, CVS offered no proof to controvert the plaintiff's claim that it was negligent in failing to design the ramp in accordance with good and commonly accepted safe industry practices, the New York State Building Code, and the standards and requirements set forth in the Americans with Disabilities Act. Consequently, it failed to establish as a matter of law that it was free from fault in the happening of the accident (*see, Wagner v Skanska Constr. Co.*, 289 AD2d 324, 734 NYS2d 489 [2001]). As to the claim for contractual indemnification, the Court finds that issues of fact, sufficient to defeat summary judgment, remain whether Ja-To was aware that the drawings it received relative to the construction of

¹ While CVS's notice of motion also lists dismissal of the complaint as an element of the relief requested, the supporting proof is addressed solely to the cross claims. CVS having thus limited its argument, the Court's inquiry on this motion is similarly limited.

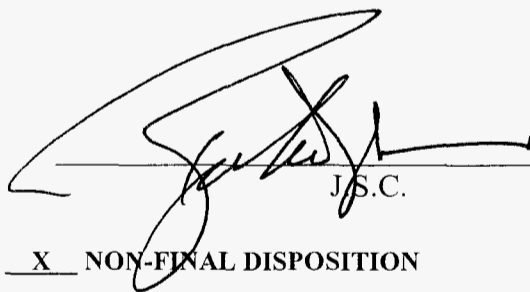
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the ramp were at variance with applicable law and, if so, whether it failed to advise CVS of this fact; and whether any negligence on the part of Ja-To contributed to the plaintiff's injuries. CVS's request for summary judgment on the branch of its cross claim for breach of contract, alleging Ja-To's failure to procure insurance naming CVS as an additional insured, is likewise denied. "A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with" (*Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738, 739, 759 NYS2d 107, 108 [2003]). CVS relies, in part, on a December 28, 2005 letter from UTC Risk Management Services, Inc., the claims administrator for Sirius America Insurance Company, Ja-To's general liability insurance carrier, denying Ja-To coverage for the plaintiff's claim based on a policy condition requiring Ja-To to obtain written indemnity agreements from its subcontractors. This letter, however, does not demonstrate that Ja-To's failure to procure insurance naming CVS as an additional insured and, hence, does not establish CVS's prima facie entitlement to judgment as a matter of law. CVS's further argument, raised for the first time in its reply, that Ja-To can present no evidence that it obtained the required insurance, is rejected not only as untimely (*see, Dannaesch v Bifulco*, 184 AD2d 415, 585 NYS2d 360 [1992]; *Ritt v Lenox Hill Hosp.*, 182 AD2d 560, 582 NYS2d 712 [1992]) but also as an improper attempt to shift the burden of proof on this motion to Ja-To. "As a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in its opponent's proof, but must affirmatively demonstrate the merit of its claim or defense" (*Larkin Trucking Co. v Lisbon Tire Mart*, 185 AD2d 614, 615, 585 NYS2d 894, 895 [1992]).

Ja-To's cross motion for summary judgment dismissing the complaint and all cross claims against it is denied as well. While Ja-To contends that it has no liability to the plaintiff because all of the concrete work involved in the construction of the ramp was performed by its subcontractor, Action Concrete, it does not appear whether or to what extent Ja-To controlled the manner or method in which its subcontractor performed the work. Absent such proof, it cannot be said as a matter of law that Ja-To owed no duty of care to the plaintiff (*cf., Duffy v Wal-Mart Stores*, 24 AD3d 1156, 808 NYS2d 434 [2005]). Ja-To's arguments relative to those branches of CVS's cross claims seeking common-law and contractual indemnification are addressed solely to whether CVS is entitled to summary judgment on those claims, and do not state a basis for dismissal. As to CVS's claim for breach of contract, the Court notes Ja-To's failure to offer any affirmative proof that it obtained insurance naming CVS as an additional insured. Accordingly, the Court finds Ja-To's showing insufficient to warrant the granting of any summary relief.

Dated: SEP 13 2007


J.S.C.

 FINAL DISPOSITION X NON-FINAL DISPOSITION