

Kamin v James G. Kennedy & Co., Inc.

2007 NY Slip Op 33135(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 0110401/2005

Judge: Leland G. DeGrasse

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

HON. LELAND DEGRASSE

PRESENT: _____
Justice

PART 25

Index Number : 110401/2005

KAMIN, CHARLES

vs

JAMES G.KENNEDY & CO INC

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

OCT - 3 2007

NEW YORK
COUNTY CLERK'S OFFICE

NOTED TO BE FILED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

SEP 27 2007

MS

Dated: _____

J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

-----X
CHARLES KAMIN and CAROLINE KAMIN,

Plaintiffs,

-against-

Index No. 110401/05

JAMES G. KENNEDY & CO., INC., NEW YORK
STOCK EXCHANGE, INC., W12/14 WALL
ACQUISITION ASSOCIATES, LLC and STELLAR
MANAGEMENT, LLC,

Defendants.

-----X
JAMES G. KENNEDY & CO., INC.,

Third-Party Plaintiff,

-against-

INTERIOR DESIGN FLOORING CORPORATION,

Third-Party Defendant.

-----X

DeGrasse, J.:

Defendant the New York Stock Exchange, Inc. (NYSE) moves for summary judgment. Defendant / third-party plaintiff James G. Kennedy & Co., Inc. and defendants W12/14 Wall Acquisition Associates, LLC (W12/14) and Stellar Management, Ltd. cross-move for the same relief. Plaintiff Charles Kamin, a laborer, was injured on July 31, 2002 during the renovation of office space leased to NYSE in a building owned by W12/14 and managed by Stellar. Kennedy was the general contractor of the project. Kamin, an employee of third-party defendant, Interior Design Flooring Corporation, sustained the injury when he tripped over protective paper which lay in a passageway. The complaint and bill of particulars set forth claims under Labor Law §§

200 and 241 (6) as well as a theory of common law negligence. NYSE seeks the dismissal of plaintiff's Labor Law § 200 and common-law negligence causes of action plus a determination of liability on its contractual and common-law indemnification claims against Kennedy. W12/14 and Stellar also seek the dismissal of plaintiff's Labor Law § 200 and common-law negligence causes of action as well as a determination of liability on its contractual indemnification claims against NYSE, Kennedy and Interior.¹ Kennedy seeks a dismissal of the complaint, a determination of liability on its contractual indemnification third-party claim against Interior and a similar determination with respect to its third-party claim based upon Interior's failure to obtain liability insurance for Kennedy's benefit.

Plaintiffs limit their opposition to Kennedy's cross motion. Accordingly, NYSE, W12/14 and Stellar are entitled to a dismissal of the Labor Law § 200 and common-law negligence causes of action interposed against them. Industrial Code of the State of New York (12 NYCRR) § 23-1.7 (e)(1) provides that passageways shall be kept free of obstructions or conditions which could cause tripping. Kennedy is not entitled to summary judgment with respect to the Labor Law § 241 (6) cause of action because there is a triable factual issue as to whether § 23-1.7 (e)(1) has been violated. Article 3.18.1 of contract between NYSE and Kennedy entitles NYSE to contractual indemnification by Kennedy but only to the extent that the underlying injury is caused by the negligence of Kennedy, a subcontractor or anyone employed by them. Whether any of the above was negligent is a triable factual issue. Therefore, summary judgment on NYSE's indemnification claims would be premature.

¹W12/14's papers also refer to a Labor Law § 240 (1) cause of action although no such claim is set forth in the complaint or bill of particulars.

W12/14 and Stellar had no contract with Kennedy. In addition, they do not cite a single lease provision in support of their contractual indemnification claim against NYSE. Summary judgment on W12/14's and Stellar's contractual indemnification claim against Interior would be premature because it has not been determined that the accident arose from Interior's "acts, omissions, breach or default" as set forth in its purchase order. Kennedy's third-party claims against Interior sound in contribution, contractual indemnification, common-law indemnification and a breach of an agreement to obtain insurance as noted above. For similar reasons, a determination of liability cannot be made at this time with respect to Kennedy's contractual and common-law indemnification claims against Interior. The purchase order also required Interior to obtain coverage for Kennedy as an additional insured under a comprehensive general liability policy with a limit of not less than \$5, 000, 000. Interior has submitted a copy of its carrier's certificate of insurance. Although inconclusive, a certificate of insurance suffices to raise an issue of fact as to whether the necessary coverage existed (*Horn Maint. Corp. v Aetna Cas. & Sur. Co.*, 225 AD2d 443, 444 [1996]).

For the foregoing reasons, the motion and cross motions are granted to the extent that the Labor Law § 200 and common-law negligence causes of action are dismissed as against NYSE, W12/14 and Stellar. In addition, the Labor Law § 241 (6) cause of action is dismissed except insofar as it is predicated on an alleged violation of Industrial Code § 23-1.7 (e)(1). The branch of NYSE's motion by which it seeks a determination of liability on its contractual and common-law indemnification cross claims against Kennedy is denied. The cross motion by W12/14 and Stellar is denied to the extent that they seek a determination of liability on their contractual and common-law indemnification claims against Kennedy, NYSE and Interior. Kennedy's cross

motion is denied to the extent that it seeks a dismissal of the surviving portion of plaintiffs' Labor Law § 241 (6) cause of action as well as a determination of liability on its third-party claims against Interior.



J. S. C.

Dated: September 27, 2007

FILED
OCT 3 2007
NEW YORK
COUNTY CLERK'S OFFICE