

Tekverk v Baldwin Union Free School Dist.

2007 NY Slip Op 33168(U)

September 26, 2007

Supreme Court, Nassau County

Docket Number: 0050-06/

Judge: Daniel Martin

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**SHORT FORM ORDER
SUPREME COURT OF THE STATE OF NEW YORK**

**PRESENT: HON. DANIEL MARTIN
Acting Supreme Court Justice**

**TRIAL/IAS, PART 31
NASSAU COUNTY**

JOSEPH TEKVERK.

Plaintiff.

**Sequence No.: 003
Index No.: 000050/06**

- against -

**BALDWIN UNION FREE SCHOOL DISTRICT,
BALDWIN PUBLIC LIBRARY, CASHIN, SPINELLI,
HELLER & FERRITI, LLC and SULLIVAN &
NICKEL CONSTRUCTION CO., INC.**

Defendants.

BALDWIN PUBLIC LIBRARY.

Third-Party Plaintiffs.

- against -

**HUTTON ELECTRICAL CONTRACTING CORP.
And EXTERIOR WALL AND BUILDING
CONSULTANTS, INC.**

Third-Party Defendants.

The following named papers have been read on this motion:

	Papers Numbered
Notice of Motion and Affidavits Annexed	X
Order to Show Cause and Affidavits Annexed	
Answering Affidavits	X
Replying Affidavits	X

Upon reading the papers submitted and due deliberation having been had herein, defendant Sullivan & Nickel Construction Co., Inc.'s (hereinafter "Sullivan & Nickel") motion for summary judgment dismissing the complaint as well as all cross-claims as asserted against this defendant or alternatively for summary judgment on its cross-claim against defendant

Cashin, Spinelli, Heller & Ferriti, LLC is granted in part and denied in part as set forth below.

The following facts are undisputed. Plaintiff was injured on August 25, 2004 when he tripped at a construction site at the Baldwin Public Library. Plaintiff was employed at that time by third-party defendant Hutton Electrical as an electrical foreman and was working in his capacity as an electrical foreman at the time of his accident. The property where the accident occurred is owned by defendant Baldwin Public Library. Defendant Cashin, Spinelli, Heller & Ferriti, LLC (hereinafter "Cashin, Spinelli") was the general contractor on the renovation project at the time of plaintiff's accident. Defendant Sullivan & Nickel Construction Co., Inc. was the construction manager of the project. Hutton Electrical was a sub-contractor on the project providing electrical work thereat.

Plaintiff commenced the instant action against defendants asserting causes of action pursuant to Labor Law §§ 200, 240(1) and 241(6) and common law negligence. Defendants have answered and assert cross-claims against each other. Defendant Baldwin Public Library commenced a third-party action against third-party defendant Hutton Electrical and Exterior Wall and Building Consultants, another sub-contractor on the job.

Defendant Sullivan & Nickel moves for summary judgment dismissing the complaint upon the basis that as a construction manager which lacked control over the performance of plaintiff's work it cannot be held liable for the occurrence of plaintiff's injuries. Alternatively, Sullivan & Nickel moves for summary judgment on its cross-claim against defendant Cashin, Spinelli for contractual and common law indemnification.

In moving for summary judgment defendant Sullivan & Nickel must demonstrate that there are no issues of fact which preclude summary judgment by the tender of evidence in admissible form. Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). Any party opposing the motion must demonstrate a triable issue of fact through admissible evidence. Zuckerman v. City of New York, supra.

At the outset defendant Sullivan & Nickel asserts that the Labor Law §240(1) claim should be dismissed because plaintiff was not working at a height at the time of his accident. A trip and fall which does not result in plaintiff's falling from a height is not a gravity-related accident as contemplated by Labor Law §240(1). See, Melber v. 6333 Main Street, Inc., 91 N.Y.2d 759 (1998); Wendell v. Sylvan Lawrence Co., 279 A.D.2d 383 (1st Dep't 2001). The court therefore determines that defendant Sullivan & Nickel has made a *prima facie* demonstration of entitlement to dismissal of plaintiff's Labor Law §240(1) claim.

In support of the rest of its motion seeking dismissal of the complaint, Sullivan & Nickel point, *inter alia*, to the deposition testimony of Dennis Sullivan, the project manager for Sullivan.

At his deposition Mr. Sullivan testified that he was the project manager for Sullivan & Nickel at the Baldwin project and that Sullivan & Nickel had entered into a contract pursuant to which Sullivan & Nickel served as construction manager and consultant to the Baldwin Public

Library. He also stated that Sullivan & Nickel, as the construction manager would organize “coordination meetings” between the contractors on the job at which if he noticed a safety problem at the job site he would bring it to the attention of the contractors and encourage them to correct the problem. He also testified that Sullivan & Nickel could stop the work in the area if a contractor did not stop a dangerous condition but did not recall if this situation happened at the job site. Mr. Sullivan does not recall discussing the subject staircase with any contractors, received no complaints about it and did not recommend modification of the staircase. (See, deposition transcript of Dennis Sullivan, pp. 7, 8, 12, 14, 32, 33, 40, 45).

The contract between Sullivan & Nickel and Baldwin Public Library, argue this defendant, required Sullivan & Nickel to act as a consultant to the Baldwin Public Library and specifically provided the library did not authorize Sullivan & Nickel to act in the owner’s stead or place with respect to any third party.

Where a defendant in an action in which plaintiff asserts causes of action pursuant to Labor Law §§240(1); 241(6) and 200 as well as common law negligence is merely a construction manager who does not direct or control how the plaintiff performs his work, the court will conclude that the defendant has made a *prima facie* demonstration of entitlement to summary judgment dismissing the complaint. See, Linkowski v. City of New York, 33 A.D.3d 971 (2nd Dep’t 2006); Loiacono v. Leher McGovern Bovis, Inc., 270 A.D.2d 464 (2nd Dep’t 2000).

Having reviewed the contract between defendant Sullivan & Nickel and Baldwin Public Library and based upon the above referenced deposition testimony the court finds that defendant Sullivan, Nickel has failed to demonstrate that it had no control over plaintiff’s work. First, Mr. Sullivan specifically testified that Sullivan & Nickel had the authority to stop work in an area where there was a safety problem. Further, having reviewed the contract, the court notes that paragraph 22 of Article II, §2(E) of the contract authorizes Sullivan & Nickel to “[t]ake action as may be reasonably necessary in an emergency to protect life and property, and promptly notify owner of any emergency conditions and thereafter advise owner of the actions taken by construction manager as soon as possible.”

Given Mr. Sullivan’s understanding of Sullivan & Nickel’s authority on the project and the above referenced language contained in the controlling contract, the court concludes that defendant Sullivan & Nickel have failed to demonstrate that there are no issues of fact which preclude summary judgment. See, Zuckerman v. City of New York, supra. Where, as here, defendant Sullivan & Nickel fails to meet its burden for summary judgment on this branch of the motion, the court will deny same regardless of the sufficiency of the opposition papers. See, Ayotte v. Gervasio, 81 N.Y.2d 1061 (1993).

Defendant Sullivan & Nickel also seeks summary judgment on its cross-claim against Cashin, Spinelli for common law and contractual indemnification. In support of this branch of the motion, defendant Sullivan & Nickel point to the contract between the library and Cashin, Spinelli’s predecessor (which contract it is undisputed Cashin, Spinelli assumed) §3.18.1 which provides:

“3.18.1 to the fullest extent permitted by law, the contract shall indemnify and hold harmless the owner, architect, architect’s consultants and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney’s fees arising out of or resulting from performance of work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury or destruction of tangible property... including loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the contractor or sub-contractors, anyone directly or indirectly employed by them or anyone who acts that may be liable.”

As pointed out in opposition by defendant Cashin, Spinelli, its contract with Sullivan & Nickel requires indemnification from Sullivan & Nickel. Same provides as follows:

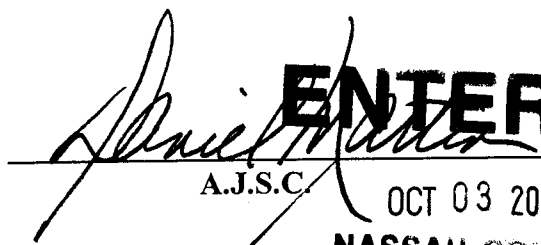
“The construction manager shall to the extent authorized under law, indemnify, defend and hold harmless the owner, its board, agents, employees, partners, officers and directors (collectively, the “indemnitees” from any and all claims, suits, actions, fines, charges, penalties, liens, costs, court costs, damages, losses, liabilities and expenses, including but not limited to, reasonable fees and disbursements of attorneys, architects, engineers and other professionals engaged by owner which may be incurred by or imposed on any indemnity or which may arise in connection with any claims, suits or actions, the investigation thereof or the defense of any action or proceeding brought thereon, or from and against any orders, judgments and/or decrees which may be entered or which may arise in whole or in part with respect to or on account of the performance of the work, provided that any such claim, damage, loss, liability or expense (i) is attributable to any personal injury, bodily injury, sickness, disease or death or to injury to or destruction of tangible property other than this work itself covered by owners or risk policy, and (ii) is caused in whole or in part by any negligent act or omission of the construction manager, its agents, employees or representatives.” etc.

Accordingly, as defendant Sullivan & Nickel expressly appears to have agreed to indemnify the owner and its agents (in this case the general contractor), the court denies this branch of the motion.

The court, however, notes that no party addresses that part of the motion in which moving defendant asserts that the Labor Law §240(1) claim should be dismissed on the basis that there was no gravity related incident as required by the statute which caused plaintiff’s injuries. The undisputed facts of this case bear this out. Accordingly, the court searches the record and directs that the claim maintained in the complaint pursuant to Labor Law §240(1) is dismissed in its entirety as against all defendants.

So Ordered.

Dated: September 26, 2007


ENTERED
 A.J.S.C. OCT 03 2007
**NASSAU COUNTY
 COUNTY CLERK'S OFFICE**