

Severo v Rockefeller Univ.

2007 NY Slip Op 33236(U)

October 2, 2007

Supreme Court, New York County

Docket Number: 0108138/2005

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JUDITH J. GISCHE

PRESENT: _____
Justice

PART 10

Index Number : 108138/2005

SEVERO, CORTESE

vs

ROCKEFELLER UNIVERSITY

Sequence Number : 002

DISMISS

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

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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

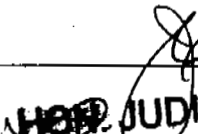
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OCT 10 2007

NEW YORK
COUNTY CLERK'S OFFICE

OCT 02 2007

Dated: _____


HON. JUDITH J. GISCHE J.S.C.

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: PART 10**

-----X

Cortese Severo,
Plaintiff

-against-

The Rockefeller University, Barr & Barr,
Inc., and Dooley Electric Company, Inc.

Defendants.

DECISION/ORDER

Index No.: 108138/05
Seq. No.: 002, 003

Hon. Judith J. Gische
J.S.C.

-----X

The Rockefeller University, and
Barr & Barr, Inc.,
3rd Party Plaintiffs,

-against-

Nelson Air Device Corporation and
Luna Mechanical & Sons, Inc.,

3rd Party Defendants

3rd Party Index No.:
Index No.: 590041/06

FILED
OCT 10 2007
NEW YORK
COUNTY CLERK'S OFFICE

-----X

The Rockefeller University, Barr & Barr, Inc.
2nd- 3rd Party Plaintiffs,

-against-

Siemens Building Technologies,

2nd- 3rd Party Defendants.

2nd- 3rd Party Index No.:
Index No.: 590203/07

-----X

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of
this/these motion(s):

Papers	Numbered
Luna's n/m (§3212) w/JAD affirm, JM affid, exhs	1
Pltff's "no opp" w/RBR affirm	2
RU, B&B opp w/RPF affirm, exhs	3

Nelson opp w/GTS affirm, MD affid, exhs 4
 Luna reply w/JAD affirm, exh 5
 RU, B&B n/m (§3126) w/RPF affirm, exhs 6
 Pltff's "no opp" w/RBR affirm 7
 Luna opp w/JAD affirm, exhs 8

Upon the foregoing papers the court's decision is as follows:

GISCHE, J.

This is an action by plaintiff to recover monetary damages for injuries he claims to have sustained as a result of defendants' violation of the labor laws. The Rockefeller University ("Rockefeller") and Barr & Barr ("Barr") are, respectively, the owner of the premises and construction manager of the project where plaintiff was injured. They have commenced a third party action for indemnification and breach of contract claim against Luna Mechanical & Sons, Inc. ("Luna"), Mr. Severo's employer.

The court has before it two motions. The first (sequence 002) is by Luna for summary judgment in its favor dismissing the 3rd party complaint against it, as well as the cross claims by its co-third party defendant, Nelson Air Device Corporation ("Nelson"). The second motion (sequence 003) is by Rockefeller and Barr for an order of preclusion based upon Luna's alleged failure to comply with their discovery demands, including producing a witness to be deposed. Since there are related arguments and facts, the motions are consolidated herein for consideration and decision.

Although issue has been joined, the note of issue has not yet been filed. Thus, while these motions are timely under CPLR § 3212, and applicable appellate authority [Brill v. City of New York, 2 NY3d 648 (2004)], the court will also consider whether, as

the third party plaintiffs claim, the information necessary for them to fully oppose this motion remains under the control of Luna. CPLR § 3212 (f); Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006) (*internal citations omitted*). The court will also further consider whether the sanction of preclusion is available and should be granted.

In deciding whether Luna is entitled to the grant of summary judgment in its favor, the court will consider whether it has tendered sufficient evidence to eliminate any material issues of fact from this case. " E.G. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985); Zuckerman v. City of New York, 49 N.Y. 2d 557, 562 (1980). If met, the burden will shift to the third party plaintiffs who must then demonstrate the existence of a triable issue of fact in order to defeat the motion. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, *supra*.

Plaintiff has filed an affirmation of "no position" in connection with each motion. Nelson opposes Luna's motion for summary judgment dismissing its cross claims, as further addressed below in this decision/order. It joins in the motion by Rockefeller and Barr insofar as they contend there is outstanding discovery, and therefore information still within the control of Luna, that they need to fully develop their case against their co-3rd party defendant.

Arguments presented

Luna is Mr. Severo's employer. At the outset the court notes that Rockefeller,

Barr and Nelson appear to have retreated from, if not abandoned, their claims and cross claim for common law indemnification against Luna. There is no factual dispute that Mr. Severo did not sustain a "grave injury" within the meaning of the Worker's Compensation Law, section 11. Therefore, any claims for indemnification must be based on contract. Therefore, the claims and cross claims for common law indemnification, to the extent they are based upon Mr. Severo having sustained a grave injury (e.g. not contract based) must be, and hereby are, severed and dismissed.

The genuine dispute among Rockefeller, Barr, Nelson and Luna centers on whether Luna had an agreement with Nelson containing insurance and indemnification provisions. Luna contends, and there appears to be no material factual dispute, that Nelson was hired to do work on the HVAC system at the premises owned by Rockefeller. In turn, Nelson subcontracted a portion of this work to Luna. There is also no factual dispute that there are a series of purchase orders between Luna and Nelson setting forth aspects of their agreement, including the scope of the work. Luna, however, denies that it had any written contract with Nelson, and claims that the third party plaintiffs, nor Nelson can prove that it did.

In support of its motion for summary judgment, Luna offers the sworn affidavit of its President, Mr. Mongiello. Mr. Mongiello contends there is no written contract with Nelson or either of the third party plaintiffs, only the purchase orders. He maintains that he did not agree to indemnify any of these parties, nor was he under any contractual obligation to obtain insurance naming them as additional insureds. Thus, it is Luna's contention that there is no basis for any of the contract based claims against it by the

third party plaintiffs, or Nelson.

The third party plaintiffs and Nelson argue that because no one from Luna has been deposed, Luna's motion is premature and should therefore be denied.

Rockefeller and Barr has brought a motion for preclusion on the basis that it made good faith efforts to have someone from Luna deposed, as the parties had agreed in their so-ordered stipulation of January 18, 2007, but Luna stonewalled them, first telling them their principal was ill, and then by bringing this motion for summary judgment. The January 18th stipulation provides that Luna would produce its witness for a deposition on February 20, 2007. Luna filed this motion for summary judgment on March 7, 2007.

In the alternative, the third party plaintiffs and Nelson argue that they can prove the existence of a contract between Nelson and Luna through circumstantial evidence. In support of this argument, Nelson offers the sworn affidavit of its COO, Mr. Doff, who states that it is Nelson's custom and practice for many years to require any contractor who it does business with to agree to indemnify Nelson, etc., through the execution of a "master subcontract agreement." Nelson provides an exemplar of this kind of agreement, and though Nelson cannot locate or produce any similar agreement signed by Luna, it notes that the exemplar contains indemnification and insurance provisions for Nelson's benefit. Rockefeller and Barr separately note that these provisions, if proved at trial, will also inure to the benefit of the "owner" and "general contractor," because of how those terms are defined in the example provided.

Nelson separately argues that there is evidence Luna obtained insurance for its benefit, as an additional insured. Mr. Doff states that this is further circumstantial

evidence of a contract between itself and Luna, because it is unlikely that Luna would have voluntarily obtained such coverage, unless it had an obligation to do so.

In reply to these foregoing arguments, Luna first contends that there is no basis for an order of preclusion against it because a motion for summary judgment stays discovery by its very nature, and in any event, the parties stipulated that all discovery was stayed as to Luna until the court decided these motions. Luna does not offer any meaningful explanation for why it obtained the certificates of insurance for the benefit of Nelson.

Discussion

At the outset, the court determines that there is no basis to issue an order of preclusion against Luna, as Rockefeller and Barr urge, merely because Luna's principal has not been deposed. A motion for summary judgment may be made any time after issue has been joined CPLR § 3212 [a] and Luna had answered the 3rd party complaint by the time it brought this motion. While the 3rd party plaintiffs (and Nelson) may disagree with Luna's litigation strategy, this record does not justify the imposition of the severe sanction of issue preclusion, or any of the other remedies available under CPLR § 3126. The court makes this determination regardless of whether the parties' stipulation of May 29, 2007, staying discovery as to Luna, applies *nunc pro tunc* to the date Luna's principal should have been deposed, or from that date forward only.

Although Rockefeller, Barr and Nelson have provided firm support for their claims that further discovery is needed in this action, and this would be sufficient reason to deny Luna summary judgment, the court nonetheless has considered the merits of

Luna's motion and finds that there are factual disputes that preclude the grant of summary judgment to Luna. While Luna contends that there is no contract, this is sharply in dispute and will have to be decided at trial. The certificates presented by Nelson are extrinsic evidence tending to prove that such a contract may exist, even though neither side can produce the actual contract. See: Bovis Lend Lease LMB Inc. v. Garito Contracting, Inc., 38 A.D.3d 260 (1st Dept 2007). Furthermore, the conflicting factual statements by Mr. Doff and Mr. Mongiello only frames credibility issues that the will also have to be tried.

In sum, Luna's motion for summary judgment, is denied not only because there is outstanding discovery, but on the merits because there are issues of fact whether there is a written contract between Luna and Nelson. Whether the certificates of insurance naming Nelson as Luna's additional insured are extrinsic evidence of a contract that cannot now be located or produced presents a mixed issue of law and fact that cannot be decided at this time.

Rockefeller and Barr's motion for an order of preclusion is denied, without prejudice. Luna, however, shall comply with the outstanding discovery demands of Rockefeller, Barr and Nelson, including those set forth in the so-ordered stipulation of January 18, 2007. Such production shall be no later than **October 26, 2007**. In addition, Luna shall produce its witness for an examination before trial on **November 7, 2007 at 10:00 a.m.**, or such other date that the parties may agree to in writing.

To the extent any claims have been made by Rockefeller, Barr and Nelson for common law indemnification against Luna, the plaintiff's employer, they are severed

and dismissed since plaintiff did not sustain a grave injury, within the meaning of the Workers' Compensation Law, section 11.

Conclusion

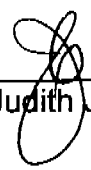
The motions before the court for summary judgment (by Luna) and for preclusion (by Rockefeller and Barr) are decided in accordance with the foregoing.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
October 2, 2007

So Ordered:



Hon. Judith J. Gische, JSC

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