

O'Connell v DBAB Wall St., LLC

2007 NY Slip Op 33290(U)

October 11, 2007

Supreme Court, New York County

Docket Number: 0106960/2004

Judge: Jane S. Solomon

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

PRESENT: SOLOMON

PART 55

Index Number : 106960/2004

O'CONNELL, THOMAS

vs

DBAB WALL STREET, LLC

Sequence Number : 004

SUMMARY JUDGMENT

INDEX NO. 106960/2004

MOTION DATE 5 - 02 - 2007

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

The following papers, numbered 1 to 7 were read on this motion to/for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1 - 3

4 - 6

6 - 7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. Pre-trial conference is scheduled for Monday, November 5, 2007 at 2:00 PM.

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

Dated: 10/11/07

FILED
 OCT 15 2007
 NEW YORK
 COUNTY CLERK'S OFFICE

JANE S. SOLOMON
JANE S. SOLOMON
 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: IAS PART 55

-----X
THOMAS O'CONNELL and CHRISTINE O'CONNELL,

Plaintiffs,

-against-

INDEX NO. 106960/2004

DBAB WALL STREET, LLC, JONES LANG LASALLE,
INC., ATLANTIC COOLING TOWER SERVICES,
INC. and MARLEY COOLING TECHNOLOGIES, INC.

Defendants.

-----X
JONES LANG LASALLE AMERICAS, INC.,

Third Party Plaintiff,

-against-

TP INDEX NO. 590682/2005

J & S PRECISION BALANCING, INC. and
ANALYSIS TECHNOLOGY SYSTEMS, INC.

Third Party Defendants.

DECISION and ORDER

-----X
JONES LANG LASALLE AMERICAS, INC.,

Second Third Party Plaintiff,

-against-

2ND TP INDEX NO. 590863/2005

ATLANTIC COOLING TOWER SERVICES, INC. and
MARLEY COOLING TECHNOLOGIES, INC.

Second Third Party Defendants.

-----X
JANE S. SOLOMON, J.

The named third-party defendants J&S Precision
Balancing ("J&S Precision") and Analysis Technology Systems s/h/i
as Analysis Technology Systems, Inc. ("ATS") move as "J&S

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Precision Balancing, Inc. d/b/a/ Analysis Technology Systems s/h/a Analysis Technology Systems, Inc." (the "Movant") for summary judgment dismissing the third-party action with index number 590682/2005, on the grounds that, as plaintiff's employer, it cannot be a party to his action under Workers Compensation Law § 11 in the absence of a "grave injury" or an express contract for indemnification or contribution. For the reasons described herein, the motion is granted.

The underlying action is for personal injuries allegedly sustained by plaintiff Thomas O'Connell ("O'Connell"), and for his wife's loss of services. On November 21, 2003, O'Connell states he was employed by J&S Precision and working at or near a cooling tower on the roof of the premises located at 60 Wall Street, New York, NY (the "Premises"), when he fell into an uncovered sump drain hole. Defendant DBAB Wall Street, LLC ("DBAB") owns the Premises, which is managed by Jones Lang LaSalle Americas, Inc. ("Jones"). As evidenced by purchase orders, proposals and invoices, Jones hired ATS for certain work at the Premises.

Plaintiffs commenced this action against DBAB, Jones and the two other main defendants on May 3, 2004. Jones answered on June 9, 2004, and then commenced the third-party action on June 7, 2005 for common law and contractual indemnity referring

to one contract with both of J&S Precision and ATS (see Paragraph Eleventh of the Third-Party Complaint). The Movant (rather than J&S Precision and ATS individually) answered on July 27, 2005.

The parties do not provide a clear explanation, but seem to accept that ATS is either a division of or a trade name under which J&S Precision does business. In O'Connell's Examination Before Trial held on April 26, 2006, he states that he was paid by J&S Precision, but that he has done work for ATS and that they are the same company.

In the Examination Before Trial of John Lemminn, III ("Lemminn") held on September 14, 2006, Lemminn states the he and his wife Susan own J&S Precision, ATS and a third company Vibronetics (not a party to this action). Lemminn says that although there are, in fact, three companies which specialize in different vibration related work, the companies essentially function as divisions of one entity with J&S Precision as the parent company. Certain employees may say they work for one of the other companies, but the companies share employees freely and J&S Precision pays their salaries. O'Connell runs the vibration analysis division, which is essentially the ATS portion of the business. ATS appears to be the only entity that entered into any contract with Jones for work at the Premises. However,

Lemminn states no matter which entity is paid for a project, the money goes to J&S Precision.

Under Workers Compensation Law § 11, an employer is not "liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury,'" as defined in the statute, or unless there exists "a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

It is undisputed that O'Connell was employed by the Movant and was acting in the scope of his employment at the time of his accident. It is also undisputed that O'Connell's injuries did not rise to the level of a "grave injury" as defined in Workers Compensation Law § 11, and the motion for summary judgment with regards to common law indemnity is granted without opposition. The only issue is whether Jones entered into a contract with either or both of J&S Precision and ATS that would require the Movant to indemnify Jones for O'Connell's injury.

The Movant contends that the only written documents executed with respect to the work it performed for Jones at the Premises were purchase orders, proposals and invoices with ATS. None of these documents contain any hold harmless or indemnification language that would make the Movant liable to Jones for O'Connell's injury as pleaded by Jones.

Jones, however, points to a Service Contractor Agreement (the "Contractor Agreement") entered into on May 30, 2003, between Jones and ATS for certain work to be performed by ATS for the benefit of Deutsche Bank AG ("Deutsche Bank"). The Contractor Agreement names six properties in New Jersey that are defined as the "Properties," and which are owned by Deutsche Bank and managed by Jones. Section 8 of the Contractor Agreement provides that ATS will indemnify Jones for any negligence in the performance of its duties under the Contractor Agreement.

Section 4 provides that Jones may request ATS "to perform services or provide materials which are not set forth in the Contract Duties¹ but are related to the services encompassed within the Contract Duties (herein 'Additional Work')." Section 4 further provides that payment for such Additional Work must be secured in writing, or ATS would agree that the Additional Work would be included in scope of the work called for in the

¹Exhibit A to the Contractor Agreement provides that the Contract Duties are to "[p]rovide HVAC repairs and maintenance services upon the request of" Jones.

Contractor Agreement. Jones argues that this "Additional Work" clause gave it the right to request ATS to perform work at other Deutsche Bank locations beyond those listed in the Agreement. It points out that no provision in the Agreement confines work to the named Properties, and that Section 11 ("Notices") lists the Premises as a contact location for Jones "c/o Deutsche Bank," where notices must be sent. Thus, Jones argues that it should be indemnified accordingly.

In support of its opposition, Jones submits an affidavit of Koley Mackay ("Mackay"), its Vice President, Facilities Management Account Manager, who was a Property Manager at the Premises on the date of O'Connell's accident. In his affidavit, Mackay states that Jones' practice dictated that any work performed by O'Connell at the Premises had to have been performed, and any proposals, purchase orders and invoices had to have been executed pursuant to the terms of the Contractor Agreement. Mackay's affidavit is belied by his deposition testimony of July 19, 2006, where he testified that it was routine for merely purchase orders to be issued for outside contractors for maintenance activities, and that Jones had work done at the Premises through purchase orders with a number of approved vendors.

Moreover, Jones' reliance on Rodrigues v. N & S Bldg. Contrs., Inc., 5 N.Y.3d 427 (2005) is misplaced. In that case,

two companies had a longstanding relationship and entered into a one page "Insurance, Indemnification and Safety Agreement," but no work site was specified in the agreement. After the subcontractor's employee was injured at a work site not used at the time of the agreement and sued the contractor, the court held that the indemnification agreement satisfied the written contract requirements of Workers Compensation Law § 11. The court also held that the agreement applied to the new work site based on the deposition of the contractor's vice-president, who stated the agreement reflected all sites on which the two companies worked.

Here, the Contractor Agreement lists six specific Properties owned by Deutsche Bank and managed by Jones in New Jersey, which are the subject of ATS's contractual duties under the Agreement. That the Premises is listed as a contact address where notices must be sent for Jones does not extend the Agreement's provisions to it. If anything, the inclusion of the Premises there and not one of the named Properties supports the argument that the Agreement was not intended to apply to it.

With regard to the Additional Work clause, on its face, it does not refer to work on any building other than the six defined Properties in the Contractor Agreement. This Court cannot rewrite the plain wording of the Contractor Agreement, and in the absence of an express written agreement where ATS (or J&S Precision) agreed to indemnify Jones for its work at the

Premises, the Movant's motion must be granted. See Flores v. Lower E. Side Serv. Ctr., 4 N.Y.3d 363 (2005).

Accordingly, it hereby is

ORDERED that the Movant's motion for Summary Judgment under CPLR § 3212 and Workers Compensation Law § 11 is granted; and it further is

ORDERED that the third-party complaint with index number 590682/2005 is dismissed in its entirety and the clerk is directed to enter judgment accordingly with costs and disbursements as taxed; and it further is

ORDERED that counsel for the remaining parties shall appear at a pretrial conference in Part 55 on Monday, November 5, 2007 at 2:00 PM.

Dated: October 11, 2007

ENTER:



J.S.C.
JANE S. SOLOMON

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OCT 15 2007
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