

Cawley v New York Univ.

2007 NY Slip Op 34122(U)

December 7, 2007

Supreme Court, New County

Docket Number: 0115579/2002

Judge: Shirley W. Kornreich

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

PRESENT: KORNREICH
Justice

PART 54

ANDREW CAWLEY
- v -
NYU

INDEX NO. 115579/02
MOTION DATE 9/20/07
MOTION SEQ. NO. 12
MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for renew/argue

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-2

3

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED
DEC 19 2007
NEW YORK
COUNTY CLERKS OFFICE

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM
DECISION AND ORDER.**

Dated: 12/7/07

HON. SHIRLEY WERNER KORNREIC

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

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

-----X
ANDREW CAWLEY and ELEANOR CAWLEY,

Plaintiffs,

-against-

NEW YORK UNIVERSITY, BRENNAN
CONSTRUCTION CORP., GEORGE BRESLAW
& SONS, INC., and BRESLAW PLUMBING, INC.,

Defendants.

-----X
NEW YORK UNIVERSITY and BRENNAN
CONSTRUCTION CORP.,

Third-Party Plaintiffs,

-against-

BRESLAW PLUMBING, GEORGE BRESLAW &
SONS, INC., MATRIX MECHANICAL CORP.,
and PARAGON SHEET METAL, INC.,

Third-Party Defendants.

-----X
NEW YORK UNIVERSITY and BRENNAN
CONSTRUCTION CORP.,

Second Third-Party Plaintiffs,

-against-

FOX ELECTRIC, INC.,

Second Third-Party Defendants.

-----X
SHIRLEY WERNER KORNREICH, J.

Defendants/third-party plaintiffs, R.P. Brennan General Contractors s/h/i as Brennan

Index No. 115579/02

DECISION & ORDER

Third-Party
Index No. 590883/05

Construction Corp. ("Brennan") and NYU University ("NYU") (collectively, "movants or defendants") move to renew and reargue their motion for summary judgment on their claims for common law indemnification, contractual indemnification and failure to procure insurance against Matrix Mechanical Corp. ("Matrix"), Paragon Sheet Metal ("Paragon"), George Breslaw & Sons, Inc., and Breslaw Plumbing (collectively "Breslaw"). The order and decision for which reconsideration is requested was dated July 31, 2007 and entered on August 6, 2007 ("Prior Order"). Familiarity with the Prior Order is assumed and the facts and procedural history of the action will not be repeated except as necessary to dispose of this motion.

Motion to Renew against Matrix and Paragon

Movants have presented new evidence that the Workers' Compensation Board determined that Matrix was the employer of plaintiff. The Prior Order determined, based upon uncontradicted deposition testimony by plaintiff and Paragon, that Paragon was plaintiff's employer. However, Matrix and Paragon did not argue in their papers that the employer was Paragon and not Matrix. The finding was made by the court *sua sponte*.

Hence, movants may renew on the basis of evidence from the Workers' Compensation proceeding, despite the fact that this evidence was available at the time of the original motion. *Esa v. N.Y. Prop. Ins. Underwriting Ass'n*, 89 A.D.2d 865 (2nd Dept. 1982)(renewal should be granted where additional facts not previously raised by parties but, rather, *sua sponte* by court). Movants had no reason to present the evidence concerning the Workers' Compensation hearing, as Matrix did not attempt to argue that it was not plaintiff's employer. Matrix is bound by the holding of the Workers' Compensation Board that it was plaintiff's employer on the date of the accident, a fact which it has never protested. *Liss v. Trans Auto Systems, Inc.*, 68 N.Y.2d 15, 21

(1986).

As a result, the court reverses the Prior Order insofar as it dismissed movants' claims against Matrix for contractual indemnification, but the motion for summary judgment on this claim is denied due to issues of fact as to whether movants were negligent in maintaining the premises and whether their negligence was a substantial factor in causing the accident. As noted in the Prior Order, a claim for contractual indemnification requires proof that the indemnitee was free from negligence.

With respect to movants' contribution and common law indemnification claims against Matrix, Matrix is still entitled to dismissal of those claims, but for a different reason. As an employer, Matrix is entitled to assert §11 of the Workers' Compensation Law as a defense.¹

The Prior Order is reversed to the extent that it dismissed movants' claims against Paragon for contractual indemnification, common law indemnification and contribution. There is now an issue of fact as to whether Paragon was plaintiff's special employer. *See, Thompson v. Grumman Corp.*, 78 N.Y.2d 553, 557 (1991)(special employee is one who is transferred for a limited duration to the service of another where general employer surrenders to special employer control and direction of employee's work). In addition, there is an issue of fact as to whether there is reason to disregard Matrix's corporate form. There is evidence that Matrix contracted to perform work at the site, sent Paragon to perform the work, and, then claimed at the Workers' Compensation hearing that plaintiff was Matrix's employee. A jury could find that this was a misuse of the corporate form as a fraud or for the improper purpose of avoiding the obligation to

¹Movants do not argue that there is a question of fact as to whether Matrix was plaintiff's employer or that plaintiff suffered grave injury.

obtain workers' compensation insurance and that Matrix dominated and controlled Paragon.

Morris v. State Dep't of Taxation & Fin., 82 N.Y.2d 135, 141-142 (1993); *Billy v. Consolidated Machine Tool Corp.*, 51 N.Y.2d 152, 163 (1980).

The Prior Order is reversed with respect to movants' claims against Matrix and Paragon for failure to procure insurance. Matrix is no longer entitled to dismissal on the ground that there is no evidence that it committed any act for which it would need to be insured and summary judgment is granted against Matrix on Brennan's claim against it for failure to procure insurance. With respect to Paragon, there are issues of fact as to whether Matrix and Paragon are alter egos of one another and, therefore, whether Matrix's promise to procure insurance bound Paragon. In addition, there are issues of fact as to whether the promise to obtain insurance naming "the client" runs to NYU.

It is necessary to reconsider the cross-claims of Paragon for contribution and common law indemnification against Breslaw, Brennan and NYU. Paragon's cross-claims against Breslaw, NYU and Brennan for common law indemnification and contribution are reinstated as they are no longer moot.

Reargument of Motion against Breslaw

Movants assert that the court erred in interpreting the merger clause contained in a document signed by Breslaw after the date of the accident. The motion for reargument is granted as the court, upon reconsideration, finds issues of fact as to the meaning of the various documents signed by Breslaw and movants' claims against Breslaw for failure to procure insurance and contractual indemnification are reinstated.

Movants argued on the prior motion that the terms and conditions signed by Breslaw on

June 6, 2002, two days after the accident, are the terms and conditions applicable to Breslaw's purchase order number 5109, dated March 14, 2002, which was transmitted by fax on May 2, 2002. Movants rely on the following language in the June 6, 2002 terms: "all understandings and agreements between us heretofore had are merged in this order, which alone completely expresses our agreement." It is unclear from the record whether or not "this order" refers to the purchase order 5109, dated March 14, 2002. While movants point to evidence that Breslaw continued to work on the site, the record also contains a June 10, 2002 purchase order, number 5276, signed by Breslaw, and a June 14, 2002 terms and conditions sheet. It is possible that a jury could find the June 6, 2002 terms corresponded to the earlier purchase order, and the later purchase order was paired with the still later terms and conditions.

However, movants are not entitled to summary judgment on their claim against Breslaw for failure to procure insurance and contractual indemnification, due to issues of fact concerning the applicability of the June 6, 2002 terms to the March 14, 2002 purchase order. In addition, there is an issue of fact as to whether the promise to procure insurance for "the client" referred to NYU. Finally, there are issues of fact as to whether movants were negligent in maintaining the premises which preclude summary judgment on their claim for contractual indemnification.

Reconsideration of Brennan and NYU's Motion to Amend

In light of the decision to reinstate movants' claims against Matrix and Paragon, the court reconsiders the motion of NYU and Brennan to amend their answer to: 1) add the affirmative defense of release against Paragon and Matrix, and 2) to reassert as cross-claims against Paragon and Matrix the claims by NYU and Brennan for failure to procure insurance, contractual indemnification and common law indemnification.

The Prior Order held that the issue of release was moot against Matrix and Paragon due to the dismissal of movants' claims against them. The release is no longer moot, but there are issues of fact as to whose claims were released by the documents upon which movants rely. Matrix is defined in the release as "Subcontractor." However, the releasor is the "Contractor," defined in the releases as Brennan, and Brennan's "subsidiaries, successors, assigns, subcontractors and vendors." The releasees are the "Company," which is an unnamed New York corporation, and the Owner, which includes NYU. The release presents issues of fact as to whether there were scrivener errors, i.e., as to whether Matrix was meant to be a releasor and Brennan was meant to be a releasee, and whether Paragon was a releasor as an alter ego of Matrix.

The request to assert movants remaining claims against Matrix and Paragon as cross-claims instead of third-party claims is denied, as plaintiffs have no direct claims against Matrix and Paragon.

Finally, the court recognizes that the Prior Order failed to take into account that the court had previously ordered that movants' third party claims against Breslaw were to be asserted as cross-claims. Accordingly, it is

ORDERED that the motion for renewal and reargument by NYU and Brennan (collectively, "movants") is granted and it is further

ORDERED that upon renewal the court reinstates: 1) movants' claims for contractual indemnification and failure to procure insurance against Matrix and Paragon; 2) movants' claims for common law indemnification and contribution against Paragon; and 3) Paragon's claims for common law indemnification and contribution against Breslaw and movants; and it is further

ORDERED that movants' motion for summary judgment against Matrix and Paragon for failure to procure insurance is granted solely to the extent that Brennan's motion against Matrix for failure to procure insurance is granted on liability, with damages to be determined at trial, and in all other respects the motion is denied; and it is further

ORDERED that summary judgment is granting dismissing, pursuant to Workers' Compensation Law §11, the claims of NYU and Brennan against Matrix for common law indemnification and contribution; and it is further

ORDERED that movants' motion for summary judgment against Matrix and Paragon for contractual indemnification is denied; and it is further

ORDERED that, upon reargument, the court reinstates movants' claim against Breslaw for failure to procure insurance, but movants' motion for summary judgment on that claim is denied; and it is further

ORDERED that the motion by movants to amend is granted solely to the extent that it sought to amend to assert a claim of release against Matrix and Paragon and in all other respects the motion is denied, and movants shall serve an amended pleading within ten (10) days after service upon them of a copy of this order with notice of entry; and it is further

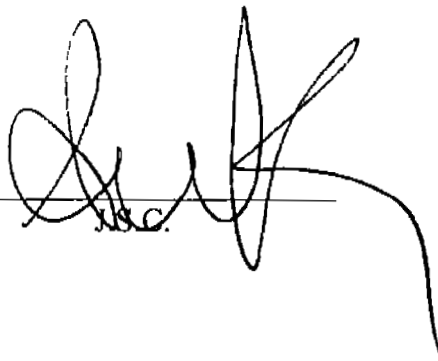
ORDERED that the Prior Order is vacated to the extent that it held that movants' claims

against Breslaw should be treated as third-party claims rather than cross-claims; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly and sever the remainder of the action, which shall continue.

Dated: December 7, 2007

ENTER:


_____ JSC

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COUNTY CLERK'S OFFICE