

Sicilia v City of New York

2007 NY Slip Op 34147(U)

December 13, 2007

Supreme Court, New York County

Docket Number: 0103443/2003

Judge: Donna Marie Mills

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

PRESENT : DONNA M. MILLS
Justice

PART 21

SICILIA, STEPHEN

Plaintiff,

-against-

NEW YORK CITY TRANSIT AUTHORITY, et al.,

Defendants.

INDEX No. 103443/03

MOTION DATE _____

MOTION SEQ. No. 006

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion for _____

PAPERS NUMBERED

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

13 1A

Answering Affidavits- Exhibits _____

FILED

Replying Affidavits _____

DEC 27 2007

CROSS-MOTION: YES NO

NEW YORK COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion

DECIDED IN ACCORDANCE WITH ATTACHED MEMORANDUM DECISION.

Dated: 12-13-07

Donna M. Mills
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 21

-----X

STEPHEN SICILIA,

Plaintiff,

-against-

Index No. 103443/03

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY and VERTEX ENGINEERING SERVICES,
Defendants.

-----X

CITY OF NEW YORK, NEW YORK CITY TRANSIT
AUTHORITY,

Third-Party
Plaintiffs,

-against-

MAINCO ELEVATOR & ELECTRICAL CORP.,
Third-Party
Defendant.

-----X

VERTEX ENGINEERING SERVICES,
Second Third-Party
Plaintiff,

-against-

MAINCO ELEVATOR & ELECTRICAL CORP. a/k/a
MAINCO ELEVATOR SERVICES CO.,
Second Third-Party
Defendant.

-----X

MAINCO ELEVATOR & ELECTRICAL CORP. a/k/a
MAINCO ELEVATOR SERVICES CO.,

Third Third-Party
Plaintiff,

-against-

PRUDE CONSTRUCTION, and
JB ELECTRICAL CORP.

Third Third-Party
Defendant.

-----X

FILED
DEC 27 2007
NEW YORK
COUNTY CLERK'S OFFICE

DONNA MILLS, J.:

Motion sequence numbers 006 and 007 are consolidated for disposition.

The first and second third-party defendant, and third third-party plaintiff Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services Co. (Mainco) moves, pursuant to CPLR 3212, for an order granting, either summary judgment, or partial summary judgment in its favor.

The third third-party defendant JB Electrical Corporation (JB Electrical) moves for an order granting summary judgment dismissing Mainco's third third-party complaint and all cross claims.

The plaintiff Stephen Sicilia (Sicilia) cross-moves, pursuant to CPLR 203 and 3025, for an order permitting the amendment of the complaint to include a direct claim against the third third-party defendant JB Electrical.

This is an action to recover damages for personal injuries allegedly suffered by the plaintiff Sicilia while working for Mainco, on a New York City Transit Authority renovation project. Sicilia alleges that while operating a construction elevator from the rooftop of the car, he tripped, fell, and injured his back, when a temporary drop light became unplugged and went out. The drop light was plugged into an electrical outlet in the motor room. The extension cord would travel up and down with the elevator car. Vertex Engineering Services (Vertex) was the general contractor on the project. Mainco was the subcontractor assigned to renovate the subway station elevator. JB Electrical was the electrical subcontractor.

In support of its motion for summary judgment, Mainco argues that Workers' Compensation Law § 11 bars all common-law claims against it, and that the subcontract between it and Vertex contains an indemnity provision (paragraph 7) that is void because it violates

General Obligations Law § 5-322.1 by purporting to indemnify Vertex for its own negligence. In opposition to the motion, Vertex argues that an indemnification provision in a contract is enforceable, regardless of the language set forth, where the proposed indemnitee, Vertex, is shown to be free of any active negligence. It is argued by Vertex that its general supervisory responsibility, alone, does not rise to the level of active negligence.

In support of its motion for summary judgment, JB Electrical argues that the credible evidence fails to support a prima facie case of negligence against it. JB Electrical claims that although, pursuant to its subcontract, it installed temporary lights in the elevator shaft, it was Mainco that installed the drop light that became unplugged, causing the trip and fall. In opposition, Mainco argues that there is an issue of fact as to whether or not a JB Electrical employee unplugged the drop light.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (JMD Holding Corp. v Congress Fin. Corp., 4 NY3d 373 [2005]; Alvarez v Prospect Hosp., 68 NY2d 320 [1986]; Friends of Animals v Associated Fur Mfrs., 46 NY2d 1065 [1979]). The failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851 [1985]). In addition, this burden cannot be satisfied by merely pointing out gaps in the plaintiff's case (Nationwide Property Cas. v Nestor, 6 AD3d 409 [2d Dept 2004]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated

allegations are insufficient for this purpose (Zuckerman v City of New York, 49 NY2d 557 [1980]). Finally, it is uncommon to grant summary judgment in a negligence action, even where the facts are uncontradicted (Ugarriza v Schmieder, 46 NY2d 471, 475 [1979]).

Preliminarily, the court notes that all of the parties concede that the plaintiff's injured back is not a grave injury as defined by Workers' Compensation Law § 11. Workers' Compensation Law § 11 permits an alleged tortfeasor in an action arising from a workplace accident to assert a claim against the plaintiff's employer sounding in common-law indemnity or contribution only where the plaintiff suffered a grave injury as defined by the statute. However, a defendant impleading the plaintiff's employer need not prove a grave injury for a cause of action for contribution or indemnification, based upon a provision in a written contract entered into prior to the accident (Pena v Chateau Woodmere Corp., 304 AD2d 442 [1st Dept 2003]). Therefore, any third-party liability against the plaintiff's employer, Mainco, must be based on the subcontract containing the indemnification provision. The parties also concede that the indemnification provision (paragraph 7) of the subcontract between Mainco and Vertex by its terms, impermissibly provides that Mainco must indemnify Vertex for Vertex's negligence.

The court will first dispose of Mainco's motion. General Obligations Law § 5-322.1 prohibits owners and contractors from gaining indemnification, other than through insurance, for their own sole or partial negligence based on contracts relative to construction projects. Therefore, an agreement between a general contractor and subcontractor that imposes an indemnification obligation on a subcontractor, without limitation in terms of the negligence of the general contractor, is void where the general contractor has been found partially negligent (Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786 [1997]). However, where the general contractor is not negligent, the agreement to indemnify is enforceable under General Obligations Law § 5-322.1 even

Construction Co., Inc., 38 AD3d 477 [1st Dept 2007]; Mahoney v Turner Construction Co., 37 AD3d 377 [1st Dept 2007])

Contrary to Mainco's assertion, General Obligations Law § 5-322.1 does not void indemnification agreements at the behest of a general contractor held liable pursuant to statute without a showing of fault (Brown v Two Exchange Plaza Partners, 76 NY2d 172 [1990]). To invoke General Obligations Law § 5-322.1, the party seeking to avoid the indemnity agreement must come forward with facts sufficient to infer actual negligence on the part of the party seeking indemnification (Brown v U.S. Vanadium Corp., 198 AD2d 863 [4th Dept 1993]; Patenaude v General Electric Co., 147 AD2d 335 [3d Dept 1989]; Walsh v Morse Diesel, Inc., 143 AD2d 653 [2d Dept 1988]).

In the instant case, there is absolutely no evidence that the general contractor, Vertex, was in any way negligent. Rather, Vertex had a general supervisory role over the work of the subcontractors, and its liability, if any, will be imposed solely pursuant to statute (Cavanaugh v 4518 Associates, 9 AD3d 14 [1st Dept 2004]).

Finally, the subcontract significantly, at paragraph 7, in addition to requiring indemnification, contains an insurance procurement clause directing the subcontractor, Mainco, to name the general contractor, Vertex, as an insured on a liability insurance policy. Against this background of declared purpose, the indemnification clause is not exempting Vertex from liability from the victim for its own negligence. Rather, the parties are allocating the risk (Great Northern Ins. Co. v Interior Construction Corp. 7 NY3d 412 [2006]). Mainco fails to demonstrate its prima facie entitlement to judgment as a matter of law dismissing the third-party cause of action for indemnification. The indemnity provision may ultimately prove to be enforceable by Vertex against Mainco, and Mainco's motion must be denied.

motion must be denied.

Turning to JB Electrical's motion, summary judgment on a claim for common-law indemnification is appropriate only where there are no triable issues of material fact concerning the precise degree of fault attributable to each party involved (Perri v Gilbert Johnson Enters., Ltd., 14 AD3d 681 [2d Dept 2005]; Terranova v City of New York, 197 AD2d 402 [1st Dept 1993]; La Lima v Epstein, 143 AD2d 886 [2d Dept 1988]). The issue of JB Electrical's negligence, if any, remains unresolved. There are triable issues of material fact concerning which entity installed the drop light, and who unplugged the drop light. In addition, was the drop light within JB Electrical's subcontract to light the shaft? Moreover, there is even an issue of fact concerning which lights went out. Contrary to the plaintiff's assertion, it is far from clear that the temporary lighting installed by JB Electrical ever went out. At page 76 of the plaintiff's examination, he testified that the shaft was dark. However, at page 67, the plaintiff testified that only the drop light went out, not the shaft lights. Therefore, JB Electrical's motion also must be denied.

Finally, the plaintiff Sicilia's cross motion to assert a direct claim against JB Electrical is granted without opposition.

Accordingly, it is

ORDERED that the motions by Mainco Elevator & Electrical Corp. a/k/a Mainco Elevator Services Co., and JB Electrical Corporation for summary judgment are denied, and it is further

ORDERED that the plaintiff Sicilia's cross motion for leave to assert a direct claim against JB Electrical Corporation is granted; and it is further

ORDERED that the amended complaint, in the form annexed as Exhibit 1 to the plaintiff's cross motion, is deemed served upon service by the plaintiff upon all parties of a copy of this order with notice of entry; and it is further

ORDERED that amended responsive pleadings be served within 20 days thereafter.

Dated: 12-13-07

ENTER:

Donna Mills

J.S.C.
DONNA M. MILLS, J.S.C.

FILED
DEC 27 2007
NEW YORK
COUNTY CLERK'S OFFICE