1864 7 Avenue Hous. Dev. Fund Corp. v Weston United Community Renewal, Inc.
2008 NY Slip Op 30115(U)
January 15, 2008
Supreme Court, New York County
Docket Number: 0109903/2006
Judge: Carol R. Edmead

[* 1]

SCANNED ON 1/17/2008

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

PRESENT: ~~HON. CAROL EDMEAD~~ Justice PART 35

1864 7 Avenue

INDEX NO. 108803/06

MOTION DATE 1/3/08

- v -

MOTION SEQ. NO. 002

Westm United

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

FILED
JAN 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by Weston United Community Renewal, Inc. and Weston Community Renewal on their cross-claims as against co-defendant Wonder Works Construction Corp. for contractual indemnification, including reimbursement of any judgment amounts, costs and attorneys fees is denied, without prejudice to renew upon completion of discovery; and it is further

ORDERED that Weston United Community Renewal, Inc. and Weston Community Renewal serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: 1/15/2008

J.S.C.
HON. CAROL EDMEAD

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: PART 35

----------x

1864 7 AVENUE HOUSING DEVELOPMENT FUND CORPORATION,

Plaintiff,

-against-

WESTON UNITED COMMUNITY RENEWAL, INC.
WESTON COMMUNITY RENEWAL INC.,
and WONDER WORKS CONSTRUCTION CORP.,

Defendants.

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Index No. 108803/2006

DECISION/ORDER

HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

In this property damage action, defendant Weston United Community Renewal, Inc. and Weston Community Renewal ("Weston") move for summary judgment on their cross-claims as against co-defendant Wonder Works Construction Corp. ("Wonder Works") for contractual indemnification, including reimbursement of any judgment amounts, costs and attorneys' fees.

In this action, plaintiff, 1864 7 Avenue Housing Development Fund Corporation ("plaintiff"), alleges that Weston and Wonder Works caused damage to its building located at 1864 7th Avenue, New York, New York as a result of work performed by defendants to the building located at 203 West 113th Street, New York, New York from July 2005 through February 2006, which caused black/brown dust to invade plaintiff's building. It is uncontested that Weston owns the building located at 203 West 113th Street, and that Weston hired Wonder Works to perform exterior repairs to Weston's building pursuant to a contract dated April 28, 2005 (the "contract").

Pursuant to paragraph 3.18.1 of the contract, Wonder Works agreed to "indemnify,

defend and hold harmless the Owner . . . . (b) from and against all claims, damages, losses and expenses, including but not limited to attorney's fees arising out of or resulting from the performance of the Work, attributable to bodily injury, . . . or to injury to or destruction of tangible property (other than the Work itself).

As it is undisputed that Wonder Works agreed to defend, indemnify and hold Weston harmless against all claims arising out of work performed under the contract, Weston is entitled to judgment over and against Wonder Works based upon contractual indemnification. Further, Weston submits the affidavit of its Executive Director, Jean Newberg, who attests that Weston "did not supervise, direct or control any of the work performed under the terms of the contract" with Wonder Works. Therefore, no negligence can be imputed to Weston for creating or contributing to the alleged property damage sustained by the plaintiff herein.

Weston further argues that the right to indemnification also encompasses the right to recover attorneys' fees, costs, and disbursements incurred in connection with defending the instant action. Here, Weston was required to pay for the defense of plaintiff's claim, and the alleged negligence lies with Wonder Works. Thus, Weston is entitled to attorneys' fees, costs and disbursements.

Thus, summary judgment should be granted to Weston on its cross-claims for contractual and common law indemnification, attorneys' fees and defense costs.

In opposition, Wonder Works contends that issues of fact exist as to whether plaintiff's claim of damages arose out of or resulted from the performance of the work, and that discovery, including depositions, expert witness disclosure, and photographs of the property damage, has not been completed. There is no proof indicating that the alleged property damage was caused by

the work performed under the contract. Further, in its answer, Weston denies the plaintiff's allegation of damages, denies that the alleged damage was causally related to the work, and denies knowledge or information of any negligence or wrong doing on the part of Wonder Works. Thus, the position Weston now takes in support of the motion for contractual indemnification is inconsistent with its answer. Additionally, according to the affidavit of Wonder Works' President, Joseph Klaynberg, Wonder Works performed the work in a non-negligent manner and did not cause dust or any other substance to invade, settle upon or damage plaintiff's property. Thus, there is no proof that the alleged loss in any way arose from or resulted from the work.

Nor is Weston entitled to attorneys' fees. Wonder Works points out that plaintiff's allegations of negligence are brought against both Wonder Works and Weston. Additionally, Mr. Klaynberg also attests that Weston retained the authority to supervise, direct and control the work and in fact, supervised the progression of the work. Yet, Weston never notified Wonder Works regarding any complaints regarding the manner in which the work was performed. Therefore, other than the allegations in the complaint, Weston's allegation that Wonder Works was negligent lacks foundation, and the relative responsibility of two entities allegedly actively at fault raises an issue of apportionment and contribution.

In reply, Weston argues that there are no material issues of fact since this is purely a contractual issue and a question of law within the Court's province. Weston contends that its motion is not premature, as Wonder Works fails to proffer any facts within Weston's exclusive knowledge which would provide an alternate explanation for the deciding of this motion. Nor is there any outstanding discovery or discoverable fact that would give rise to an issue of fact.

Further, all of the allegations of negligence arise out of the four corners of the plaintiff's summons and complaint, wherein it is alleged that Wonder Works was negligent in their performance of work to the facade and exterior of Weston's building. There are no allegations that Weston was negligent in the performance of this work to the facade and exterior of plaintiff's building. Thus, any damages incurred by the plaintiff would have stemmed from the work performed by Wonder Works. In addition, the affidavit submitted by Wonder Works is vague and clearly self-serving, created solely for the purposes of creating a question of fact to defeat Weston's motion.

Analysis

It is well settled that the proponent of a motion for summary judgment make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002] [defendant not entitled to summary judgment where he failed to produce admissible evidence demonstrating that no triable issue of fact exists as to whether plaintiff would have been successful in the underlying negligence action]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212[b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Alternatively, to defeat a motion for summary judgment, the opposing party must show facts sufficient to require a trial of any issue of fact (CPLR §3212[b]). Thus, where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (*Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman v City of New York, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Opponent "must assemble and lay bare [its] affirmative proof to demonstrate that genuine issues of fact exist" and "the issue must be shown to be real, not feigned since a sham or frivolous issue will not preclude summary relief" (*Kornfeld v NRX Technologies, Inc.*, 93 AD2d 772 [1st Dept 1983], *affd*, 62 NY2d 686 [1984]).

"A party is entitled to full contractual indemnification [for damages incurred in a personal injury suit] provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances (internal citations omitted)" (*Jones v Powell Plaza Housing Development Fund Co., Inc.*, 12 Misc 3d 1182, 824 NYS2d 763 [Supreme Court, New York County 2006] *citing Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774 [1987]). As long as an owner or general contractor is not negligent, General Obligations Law § 5-322.1 does not bar a party from receiving contractual indemnification (*Jones v Powell Plaza Housing Development Fund Co., Inc.*, 12 Misc 3d 1182,

supra citing Brown v Two Exch. Plaza Partners, 76 NY2d 172, 178-181 [1990]). This is true even if the contract language purports to provide indemnification for an owner or general contractor's own negligence (*see Delaney v Spiegel Assocs.*, 225 AD2d 1102, 1104 [1996]).

Paragraph 3.18.1 provides that

> The Contractor shall also indemnify, defend and hold harmless the Owner . . . (b) from and against all claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from the performance of the Work, attributable to . . . destruction of tangible property (other than the Work itself).

Plaintiff's complaint alleges that "defendants performed work and caused work to be performed" upon the facade and exterior of 203 West 113th Street, "proceeded with wanton and reckless disregard of Plaintiff's said rights," that "defendants" knew or should have known that the work being performed by Wonder Works would cause "an invasion of black/brown dust" upon plaintiff's building, and that "defendants" trespassed upon plaintiff's building by causing the dust to settle upon plaintiff's building. Plaintiff's complaint also alleges that "Defendants'" flagrant disregard of plaintiff's rights resulted in damages. Thus, contrary to Weston's contention, the plaintiff's complaint does allege negligence on the part of Weston.

Although Weston's Executive Director attests that Weston did not supervise, direct or control the work being performed by Wonder Works, such conclusory affidavit, without more, is insufficient to establish the absence of any evidence of negligence or misconduct by Weston (*Barraillier v City of New York*, 12 AD3d 168 [1st Dept 2004] [affidavit of defendant's "executive vice president did not indicate the sources (e.g., documents he may have searched or reviewed, or persons he consulted) of his familiarity with the construction project at issue, or the company's purported lack of involvement with same," and thus, insufficient to establish

entitlement to summary relief]; *Wen Ying Ji v Rockrose Development Corp.*, 34 AD3d 253 [1st Dept 2006] [hearsay evidence, and as such was insufficient to satisfy the movant's burden of establishing a prima facie showing of entitlement to an award of summary judgment]). Furthermore, the President of Wonder Works attests that Weston not only retained the authority to supervise, direct and control the work, but "did in fact supervise the progression of the Work." Contrary to Weston's contention, the affidavit of Wonder Works' President is no less self-serving than the affidavit of Weston's own Executive Director.

Thus, it cannot be said at this juncture, as a matter of law, that Wonder Works exercised exclusive supervision and control over the work giving rise to the property damage allegedly sustained by the plaintiff (*see Keojane v Littlepark House Corp.*, 290 AD2d 382, 736 NYS2d 664 1st Dept 2002] [denying contractual indemnification where issues existed as to whether defendant contributed to the occurrence of the accident by, *inter alia*, negligent supervision of the work]).

Based on the foregoing, it is hereby

ORDERED that the motion by Weston United Community Renewal, Inc. and Weston Community Renewal on their cross-claims as against co-defendant Wonder Works Construction Corp. for contractual indemnification, including reimbursement of any judgment amounts, costs and attorneys fees is denied, without prejudice to renew upon completion of discovery; and it is further

ORDERED that Weston United Community Renewal, Inc. and Weston Community Renewal serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: January 15, 2008

Hon. Carol Robinson Edmead, J.S.C.