

107 W. Apt. Corp. v K&J Restoration, Inc.

2008 NY Slip Op 30717(U)

March 12, 2008

Supreme Court, New York County

Docket Number: 0109637/2005

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 : 109637/2005
107 WEST APARTMENT

INDEX NO. 109637/2005

vs
K & J RESTORATION

MOTION DATE 10-29-07

Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to 12 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
<u>1-4</u>
<u>5-8</u>
<u>9-12</u>

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.

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

FILED
MAR 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/12/08


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

107 WEST APARTMENT CORP., INSIGNIA
MANAGEMENT CORPORATION, INSIGNIA
RESIDENTIAL GROUP, INC. and ARROW
RESTORATION, INC.,

DECISION AND ORDER

Plaintiffs,

-against-

INDEX NO.
109637/2005

K & J RESTORATION, INC.,

Defendants.

FILED
MAR 13 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X

JANE S. SOLOMON, J.

This lawsuit arises from an accident that occurred on the premises owned by plaintiff 107 West Apartment Corp. ("Owner"). Owner's managing agent, plaintiff Insignia Residential Management Group, Inc. ("Insignia"), hired plaintiff Arrow Restoration, Inc. ("Arrow") to perform exterior work at the building located at 245 West 107th Street in Manhattan. Arrow hired defendant K & J Restoration, Inc. ("K&J") as a subcontractor to do masonry and pointing. On this motion, K&J moves for partial summary judgment to dismiss the contractual indemnity and a breach of contract claim, and plaintiffs cross-move for partial summary judgment on their contractual indemnity claim. The motions are decided as follows.

K&J's employee, Antoni Gluza ("Gluza"), claimed in another lawsuit (Gluza v. 107 West Apartment Corp., New York

County index number 110574/2001) that on January 11, 2001, he slipped on dust and fell from the bottom rung of a ladder permanently affixed to the exterior of Owner's building. He sued plaintiffs herein under Labor Law § 240(1). There was testimony that K&J generated dust in its work, and that it used pointing compound, which is dusty. After a trial in December 2002, Gluza prevailed on his § 240(1) claim and won a judgment for \$90,000, plus interest. There was no finding regarding negligence by any party. The jury awarded Gluza \$90,000, and plaintiffs satisfied the judgment with interest by paying \$104,418.39 on July 20, 2004. In this lawsuit, plaintiffs seek to recover what they paid, together with costs and reasonable attorneys fees, under theories of contribution, common law indemnification and contractual indemnification, including indemnification under K&J's insurance policy if applicable.

The sub-contract between Arrow and K&J consists of an American Institute of Architects standard form contract dated April 11, 2000, and several attachments (collectively referred to as the "Contract"). The attachments were prepared entirely by Arrow and were "part and parcel" of the Contract (Transcript of Brian Geller deposition, Exhibit E to Notice of Motion, 38).

Section 4.6 of the Contract contains an indemnification provision whereby K&J is obligated to indemnify and hold harmless Arrow and Owner. In addition to this provision in the body of

the standard form, one of the attachments is titled a "Hold Harmless Contract" and also outlines K&J's obligations to indemnify Arrow and Owner. It is not dated or signed by K&J, but appears to be contemporaneous with the standard form contract. There is a third indemnification provision in a "Subcontractor's Agreement" that was enclosed with a letter from Arrow to K&J dated August 2, 2000. The letter provides that it is in relation to "245 WEST 107 STREET, JOB #10935 - ADDENDUM TO CONTRACT." A signature for K&J appears at the bottom of the Subcontractor's Agreement above a typed date of "7/27/00;" K&J's representative also initialed the indemnity provision, this time, inserting in ink the date "8/18/00" (the "August 18 Indemnification Agreement").

The indemnification provision in section 4.6 of the Contract obligates K&J to indemnify and hold harmless Arrow and Owner, to the fullest extent permitted by law, against claims, damages and expenses, including attorney's fees, arising from the subject work, "but only to the extent caused by the negligent acts or omissions of the Subcontractor" (Contract, annexed to Notice of Motion at Exhibit F, section 4.6.1). The Hold Harmless Contract is not materially different from the indemnification provision in section 4.6.

The August 18 Indemnification Agreement, however, is different. It provides that K&J will indemnify Arrow, to the

fullest extent permitted by law, against all claims "in any manner directly or indirectly caused, occasioned or contributed to in whole or in part, by reason of any action, omission, fault or negligence whether active or passive of Subcontractor, or of any one acting under its direction or control . . . in connection with or incidents [sic] to the performance of the Contract. Subcontractor's aforesaid indemnity shall apply to the fullest extent permitted by law." (August 18 Indemnification Agreement, annexed to Notice of Motion at Exhibit F.) All three indemnity provisions include coverage for Arrow's legal fees and costs.

Apart from the three indemnification provisions, there are also two separate insurance procurement clauses in the Contract: one at section 13.1 in the main body and a second in the Subcontractor's Agreement accompanying the August 2, 2000 letter. The one at section 13.1 leaves blank the types of coverage and limits of liability Arrow asks K&J to obtain. The August 2, 2000 letter states that an enclosed Subcontractor's Agreement outlines K&J's insurance requirements, which are "non-negotiable." The Subcontractor's Agreement set out the types of coverage, and limits, that Arrow expects K&J to obtain. Also enclosed was a sample certificate of insurance that K&J was to obtain from its insurance broker.

Plaintiffs allege four causes of action. The first two causes of action assert that Gluza's damages were the result of

K&J's negligence, so that plaintiffs are entitled to indemnity and contribution in a share proportionate to K&J's culpability. The third cause of action makes reference to K&J's obligation to procure insurance, and seeks contractual indemnification under the contract between Arrow and K&J, including reimbursement of defense costs and legal fees. The fourth cause of action repeats the claim for contribution.

K&J moves for partial summary judgment on the ground that the contractual indemnification and insurance procurement provisions are unenforceable because they are inconsistent and ambiguous. K&J further argues that the broad August 18 Indemnification Agreement is unenforceable under General Obligations Law § 5-322.1 and Dutton v. Charles Pankow Builders, Ltd. (296 A.D.2d 321 [1st Dept 2002]). Plaintiffs cross-move for partial summary judgment, arguing that the indemnity and hold harmless provisions are enforceable because they are unambiguous and readily harmonized.

Discussion

Contractual Indemnification

K&J's argument that the existence of the three indemnification provisions makes them ambiguous, and, because they were drafted by Arrow, they should be found void (*cf* Syed v. Normel Construction Corp., 4 A.D.3d 303 [1st Dep't 2004]), is unpersuasive. The August 18 Indemnification Agreement is dated

more than four months later than the initial provisions of the Contract, and to the extent it differs from the other provisions, represents a valid written modification of K&J's indemnification obligations.

K&J's further argument that this provision is too broad also is unpersuasive. Section 5-322.1 of the General Obligations Law bars the enforcement of an indemnity agreement that purports to indemnify a general contractor for its own negligence. However, in order for an indemnity agreement to be void under GOL § 5-322.1, there must also be "active" negligence by the owner or general contractor (Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786 [1997]). Furthermore, the phrase "to the fullest extent permitted by law" has been interpreted as a savings clause to an otherwise unenforceable indemnity agreement, even permitting for partial indemnification that excludes joint liability attributable to a general contractor's negligence (See Dutton, 296 A.D.2d 321). Here, the August 18 Indemnification Agreement contains the "to the fullest extent permitted by law" clause. It is enforceable, requiring K&J to indemnify Arrow for "any action, omission, fault or negligence whether active or passive of [K&J], or of any one acting under its direction or control," except as limited by Arrow's joint negligence.

Moreover, if plaintiffs are found to be free of negligence, they would be entitled to full indemnification from

K&J, including reasonable attorneys fees and costs, under the August 18 Indemnification Agreement (See Murphy v. Columbia University, 4 A.D.3d 200 [1st Dep't 2004]; Maschiotta v. Morse-Diesel International, Inc., 303 A.D.2d 309 [1st Dep't 2003]).

There was no evidence presented in the underlying trial regarding any party's negligence; plaintiffs were found vicariously liable by reason of their status as owners and general contractors under Labor Law § 240(1).

The record submitted on this motion shows no basis for finding that plaintiffs were negligent in causing Gluza's injury. Gluza's verified bill of particulars in the underlying action (Notice of Motion, Ex. C) shows that he alleged negligence against plaintiffs, but the verdict was made only pursuant to Labor Law § 240(1), which does not require a plaintiff to prove negligence. The record is silent as to how Gluza's negligence claims were disposed. It is well-settled that GOL § 5-322.1 is not a bar to enforcement of a contractual indemnification provision where the indemnitee was held strictly liable under Labor Law § 240(1) and there was no evidence of its negligence (Maschiotta v Morse Diesel International, Inc., 303 AD2d 309 [1st Dept 2003]).

K&J initiated this motion, and was obligated to come forward with evidence of plaintiffs' negligence to demonstrate its entitlement to judgment as a matter of law, or to rebut

plaintiffs' evidence in the cross-motion. It has not done so. Gluza claimed that he slipped on a dusty substance on a ladder, which is a transitory condition, and there is no evidence that plaintiffs' had notice of the condition or that their negligence otherwise resulted in the accident. General on-site inspection activities to ensure compliance with safety regulations ordinarily do not amount to the supervision and control required to make a general contractor liable for the negligence of a subcontractor (See Cabrera v. Board of Education, 33 A.D.3d 641 [2nd Dep't 2006]). Gluza also alleged that the ladder was permanently affixed to the exterior to the building and was unfit for the way he was using it. There is no evidence on the record plaintiffs were negligent in suffering K&J's use of the ladder by its employees; indeed, this case demonstrates how the potential for liability under § 240(1) is broader than under a simple negligence claim.

Accordingly, K&J's motion for summary judgment to dismiss the contractual indemnification claim must be denied, and plaintiffs' cross-motion is granted.

Breach of Contract for Insurance Procurement

Although the third cause of action makes reference to K&J's obligation to procure insurance, and demands recovery under that policy for the judgment plus attorneys fees and costs, it does not allege breach of contract for K&J's failure to procure.

K&J's argument seems to concede that it did not procure insurance, but this branch of the motion is irrelevant because K&J is obligated to indemnify plaintiffs whether or not it procured insurance to cover the risk.

Common Law Indemnity and Contribution

K&J's motion for partial summary judgment addresses only plaintiffs' contractual claims. Upon searching the record, the first, second and fourth causes of action, which seek to recover under theories of contribution and common law indemnity, must be dismissed. Gluza did not suffer a "grave injury" as defined in the Workers Compensation Law, so K&J is not liable except under the contractual indemnification claim (Worker's Compensation Law § 11). Accordingly, it hereby is

ORDERED that K&J's motion for partial summary judgment is denied; and it further is

ORDERED that plaintiffs' cross-motion for summary judgment on their contractual indemnification claim is granted, and K&J is required to indemnify plaintiffs in the amount of \$104,418.39, with interest at the statutory rate from July 20, 2004, plus the costs and reasonable attorneys fees incurred to defend the underlying action; and it further is

ORDERED that, upon searching the record, the first, second and fourth causes of action are dismissed; and it further is

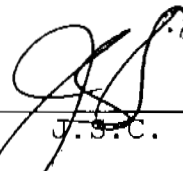
ORDERED that the issue of the amount of plaintiffs' reasonable attorneys fees and costs in the underlying action, and interest due on that amount, is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon filing of a stipulation by the parties, as permitted under CPLR 4317, the Special Referee, or another person designated by the parties to serve as a referee, shall determine the aforesaid issue; and it further is

ORDERED that entry of judgment shall abide receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it further is

ORDERED that plaintiff shall serve a copy of this order with notice of entry by hand within 45 days on the Special Referee Clerk (Room 119M) to arrange a date for the reference to a Special Referee.

Dated: March 12, 2008

ENTER:



J.S.C.
JANE S. SOLOMON

FILED

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