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SCANNED ON 4/3/2008

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

PRESENT: HON. NICHOLAS FIGUEROA Justice PART 46

Index Number : 102928/2004
MINORCZYK, EUGENIUSZ
VS
CITY OF NEW YORK
Sequence Number : 005
DISMISS

INDEX NO. 102928/04
MOTION DATE 9/4/07
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

s 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 is consolidated for disposition ~~herein~~ with motion sequence 006 and decided as per accompanying decision and order

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: MARCH 31, 2008

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: PART 46

EUGENIUSZ MINORCZYK and BARBARA MINORCZYK,

Plaintiffs,

- against -

CITY OF NEW YORK, DORMITORY AUTHORITY OF THE STATE OF NEW YORK and LIRO ENGINEERING AND CONSTRUCTION MANAGEMENT P.C.,

Defendants.

Index No. 102928/04

DECISION AND ORDER

THE CITY OF NEW YORK and LIRO ENGINEERING AND CONSTRUCTION MANAGEMENT P.C.

Third-Party Plaintiffs.

- against -

INTER CONNECTION ELECTRIC, INC.,

Third-Party Defendant.

Nicholas Figueroa, J.:

Motion sequences 005 and 006 are consolidated for disposition in the following:

Defendants City of New York (City) and Liro Engineering and Construction Management P.C. (Liro) move for an order setting aside the jury verdict dated May 29, 2007 as against the weight of the evidence and excessive; granting them indemnification against third-party defendant Inter Connection Electronic, Inc., granting them summary judgment against Inter Connection Electric, Inc., for breaching its contract to procure insurance. Further, defendant City of New York seeks

indemnification pursuant to its contract with defendant Dormitory Authority of the State of New York (DASNY) to the extent that the City was found liable due to the Dormitory Authority's negligence. Additionally, the moving defendants allege that the jury award is excessive. Finally, they ask that the court schedule a collateral source hearing.

Defendant Inter Connection Electric, Inc. (Inter Connection) separately moves to dismiss all claims for indemnification by the City and Liro on the grounds that Workers' Compensation Law §11 bars the City's common law negligence claim and that in light of the finding that the City and Liro were negligent, General Obligations Law §5-322.1 bars indemnification.

Inter Connection argues that the court failed to give the proper charge on premises liability and that it improperly mentioned Inter Connection when it charged Labor Law §241(6) against other defendants.

Inter Connection also seeks a collateral source hearing.

The action arose out of plaintiff's fall on a roof at a building owned by the City. Plaintiff was engaged in construction work and was employed by Inter Connection. Plaintiff alleged that a snow storm three days before the accident left an accumulation of ice, under the accumulated snow, that caused him to fall.

The jury returned a verdict for plaintiff finding that the City, Liro and DASNY were each liable in common law negligence, as well as under Labor Law §§200 and 241(6).

The jury apportioned liability as follows:

City	5 %
DASNY	5 %
Liro	50%
Inter Connection	40%

The jury awarded plaintiff, Eugeniusz Minorczyk, $400,000 for past pain and suffering, $1,000,000 for twenty years of future pain and suffering, $133,000 for past lost earnings, $386,000 for eight and one-half years of future lost earnings, $85,000 for past medical expenses.

The jury awarded Barbara Minorczyk $50,000 for past damages, and $75,000 for twenty years of future damages on her derivative cause of action.

Liro and the City argue that according to the testimony plaintiff had not observed any ice in the three hours he was working on the premises prior to his fall, and that if he had observed any hazardous conditions, he would have alerted his foreman.

DASNY's project manager, Richard Dalessio, testified that DASNY was responsible for the work at the premises and that it was the agent for the owner, the City. He testified that pursuant to its contract with the City DASNY hired all the entities working at the site including Inter Connection, plaintiff's employer.

Dalessio testified that DASNY hired a separate safety firm for the project, but that he had the authority to stop work if he observed a dangerous condition. He conceded that on the day of the accident he observed ice and snow at the work site but did not halt the work.

Dalessio testified that Liro did no physical work at the site; although, it had an employee at the building who mopped and dusted the building's interior. He acknowledged that this employee was not responsible for removing snow from the roof where the accident occurred.

Inter Connection's foreman, Miroslaw Parys, testified that he was the only person who supervised and controlled Inter Connection's employees, including plaintiff. He told his workers where to work and what to do. He had the authority to stop work if he observed a dangerous condition; however, he testified that he did not see such on the accident date. Parys acknowledged

that Liro was not responsible for ice and snow renewal.

Liro and the City argue that they did not supervise plaintiff's activities; rather, Parys conducted all supervision at the site.

Liro and the City also argue that they did not have actual notice of the ice condition and that all the evidence indicated that the ice was not visible. They assert that while Dalessio saw the ice, there was no evidence that he communicated his observation to them. Continuing, they argue that they did not have constructive notice, as the snow fell some four or five days prior to the accident and that there is no proof that the snow's melting and re-freezing caused the ice condition; moreover, they urge that there was no evidence of the origin of the ice.

Liro and the City assert that the common law negligence and Labor Law §200 causes of action against them must be dismissed because "There is simply no evidence but rank speculation that the ice which caused Mr. Minorczyk's fall existed for any significant period of time prior to the accident or [that] even with reasonable inspection, either the City or Liro would have discovered the condition."

Next, Liro argues that the complaint and cross claims against it must be dismissed because as a construction manager, and not a general contractor, therefore, it is not liable to plaintiff in common law negligence or under Labor Law §200 or 241(b). Liro argues that the contract between it and DASNY names it as a project manager. It argues that all of the testimony established that Liro did no physical work at the site, did not supervise or direct the actual work being done by the prime contractors, including plaintiff's employer, and that it merely performed daily inspections to check the progress of the work.

Liro notes that it "agreed to take every precaution against injuries to persons or damage to property and for the safety of persons engaged in work at the site and to establish and maintain safety procedures." However, Liro further states that although it agreed to enforce the provisions of the construction contracts regarding the owner's property from injury or loss arising out of or in connection with the negligent execution of the work, this portion of the contract "is limited to Liro's work as opposed to injury caused by the work of the prime contractors."

Concluding its argument, Liro states that as it "exercised only general supervisory authority both factually and under the terms of its contract, and that the actual day to day control of plaintiff's activities was solely and primarily assumed by Inter Connection...all claims and cross claims against Liro should be dismissed."

Next the City and Liro argue that they are entitled to contractual indemnification pursuant to the contract between DASNY and Inter Connection that requires Inter Connection to indemnify and hold Liro harmless as construction manager against all claims arising out of Inter Connection's work. They argue that as there is no basis for a finding of liability against it or the City, either under common law negligence or Labor Law §200. They argue that the indemnity provision is broad, requiring Inter Connection to indemnify the owner and construction manager for all liability or injury "caused by, resulting from, arising out of, or occurring in connection with the execution of the work." Therefore, the City and Liro argue, they are entitled to relief under the contract because there is no dispute that plaintiff's injury occurred while the plaintiff was in the course of Inter Connection's work. Moreover, the indemnity provision does not condition entitlement to indemnification on a finding that Inter Connection was negligent.

Further, the City and Liro argue that there is no evidence that they were actively negligent and that they did not do anything that affirmatively caused the accident.

Next the City argues that it is entitled to common law indemnification against DASNY, as DASNY was the City's agent and was responsible to insure that both the premises and persons using the building were not harmed by the construction activities. The City again argues it was not actively negligent and that as its liability derives solely from Inter Connection's operations, it is entitled to common law indemnification against DASNY.

The City and Liro seek summary judgment against Inter Connection alleging that it breached the contractual obligation between it and DASNY, that required Inter Connection to procure insurance for the City and Liro. The City and Liro argue that they are entitled to summary judgment, as they met the two requirements necessary for relief: the existence of a contract provision to procure insurance and the promisor's failure to comply with that provision.

The complaint and cross claims against Liro must be dismissed based on Labor Law §§200 and 241(b) and common law negligence. The proof establishes that Liro was not a contractor; rather, under the contract with DASNY, it was the project manager. Inter Connection assumed responsibility for the safety of its workers, including plaintiff. Moreover, DASNY was the City's agent and was responsible for the rehabilitation project. DASNY had the power to stop work if there was an unsafe condition.

The evidence reveals that Liro's only role as a construction manager was one of general supervision. Its duties were legally and factorially insufficient as a predicate to a liability finding under the common law or under Labor Law §200 or §241(b). Liro did not direct plaintiff's activities at the time of the accident; rather, plaintiff's foreman, Inter Connection's employee, exercised direct

control and supervision of plaintiff. There is no evidence that Liro controlled the manner in which plaintiff worked (see *Damiani v. Federated Department Stores*, 234 AD3d 329, 331). Nor does Liro's authority to stop work form a basis for liability (see *Buccini v. 1568 Broadway*, 308 AD 2d 400).

However, there was legally sufficient proof for the finding that the City was liable.

The City owns the property and DASNY was its agent. DASNY's employee, Dalessio, testified that he was aware of the ice, prior to the accident date. The evidence demonstrated that the snow fell only a few days prior to the accident and was present at the site on the accident date.

The facts, particularly its agent's testimony, sufficiently established that the City had at least constructive notice of the condition that caused the accident.

Contrary to defendants' argument, the origin of the ice was not remote in time. Nor was there a lack of evidence that the ice resulted from the recent storm; rather, the jury was able to determine, without speculation, that the snow accumulation caused the ice condition (cf. *Simmons v. Metropolitan Life Insurance Company*, 84 NY 2d 972). The snow and ice were in a confined area, the rooftop. There was no removal between the time of the storm and the accident. Thus, there was sufficient evidence on the record establishing how the condition formed (cf. *Davis v. City of New York*, 255 AD2d 356, 357).

Given the nature and duration of the condition, and the City's agents knowledge of it, there is no basis to dismiss the causes of action against the City. The City possessed the equipment necessary to remove the snow on the roof b ut failed to do so. Its failure to remove the snow was both negligent and violated Industrial Code §23.17(d).

The verdict does not deviate materially from what would be reasonable compensation (CPLR 5501(c)).

The record shows that following his injury, plaintiff had five surgical procedures, has undergone physical therapy and has not regained normal use of ankle, foot or leg. He continues to suffer chronic pain in his leg. His antalgic gait, caused by his leg problems, causes continuing lower back pain. Plaintiff uses a cane that his doctor prescribed.

Plaintiff's physician testified that plaintiff's pain and limitations are permanent; his back pain will worsen.

The evidence at trial was that plaintiff cannot work as an electrician, his former occupation, because of the consequences of his injuries.

Given the severity and permanency of plaintiff's injuries, the award of $400,000 and $1,000,000 for past and future pain and suffering, respectively, are reasonable (see *Singh v. Gladys Towncars, Inc.*, 42 AD3d 313).

Similarly, there was sufficient evidence to support the verdict derivative, cause of action, and the awards of $50,000 and $75,000 for past and future damages on the derivative action are not excessive (*Singh v. Gladys Towncars, Inc., id.*)

Liro's motion for summary judgment must be denied as untimely (see *Brill v. The City of New York*, 2 NY3d 648). Liro gives no excuse for seeking summary judgment far beyond the one hundred and twenty days from the note of issue's filing (CPLR 3212(a)). The question of the breach of contract to provide insurance could have been litigated within the statutory period; there was no impediment to making the motion at that time (cf. *Bullard v. St. Barnabas Hospital*, 27 AD3d 206). The matter must be resolved at a separate trial on the questions of liability and damages.

Contrary to Inter Connection's argument, the court's charge did not deprive it of a fair trial. The charge adequately informed the jury of the elements of negligence and causation. There has been no showing that the jury was unaware that they were to base their finding on the question of whether the ice condition was a cause of the accident. The jury was adequately instructed that they could find liability based on the failure to eliminate the ice condition. Charging Pattern Jury Instruction 2:91, the charge Inter Connection argues the court should have given, would not have made the jury any more aware of what it must find than the charge as given. The verdict sheet made the failure to remove ice and snow the basis of liability. Therefore, there is no basis for Inter Connection's argument that charging PJI 2:91 was the means for informing the jury of its need to determine liability based on failure to remove the ice and snow.

Nor was the court's mention of Inter Connection during its instruction on violations of Labor Law §§200 and 241(b) harmful error. The verdict sheet did not ask the jury to determine Inter Connection's fault under the statutes. Moreover, the court was required to inform the jury that Inter Connection was the employer in order to properly instruct the jury on the relevant statutes, as the jury instruction must identify the employer. Given the content of the charge and content of the verdict sheet, the jury could not have improperly imposed liability against Inter Connection on the basis of Labor Law violations.

The City's claims for common law indemnification against DASNY must be dismissed. As DASNY correctly argues, the jury finding of negligence bars the common law indemnification claim. The First Department noted, in distinguishing between contractual and common-law indemnity claims, "In distinction, in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability but must also prove

that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law..." (*Correia v. Professional Data Management, Inc.*, 259 AD2d 60, 65).

The jury determined that the City was negligent, in addition to its finding of statutory liability. Therefore DASNY is correct that it is not liable on the City's claim for common-law negligence.

The City and Liro do not rebut Inter Connection's argument that Workers' Compensation Law §11 bars common-law indemnification against it. The City does not address Inter Connection's argument that there has been no proof that plaintiff suffered a grave injury within the meaning of that statute. As such, the City concedes the argument and there is no need for a separate trial to determine whether plaintiff suffered a grave injury (cf. *The Neighborhood Partnership Housing Development Fund v. Blakel Construction Corporation*, 34 AD3d 303)).

The contractual indemnity provision §14.05, is, as Inter Connection argues, a broad provision that calls for complete indemnification. It states that "the contractor shall not be obligated to indemnify the owner, the client, the owner's representative, construction manager, servants and employees for their own negligence, if any." Unlike the case of *Dutton v. Charles Parker Builders, Ltd.*, 296 AD2d 321, a case on which the City relies, the contract did not contain the limiting phrase "to the fullest extent permitted by applicable law". Therefore, the City is not entitled to even partial indemnification as it was found negligent (see General Obligations Law §5-322.1).

While Liro would be entitled to contractual indemnification in light of the court's finding that it was not at fault, the amount of its recovery, if any, cannot be determined on these papers. Therefore, the amount of damages Liro may be entitled to must be determined at a separate trial.

There must be a collateral source hearing to determine if plaintiff's award must be reduced by Social Security Disability benefits.

Accordingly, it is

ORDERED that the motion by defendants City of New York and Liro Engineering and Construction Management, P.C. is granted to the extent that the jury verdict finding Liro Construction Management, P.C. forty percent at fault is vacated and all causes of action and cross-claims against it are dismissed, and it is further

ORDERED that the motion by defendant City of New York to set aside the verdict against it is denied, and it is further

ORDERED that the portion of the motion by defendants Liro Engineering and Construction Management, P.C. and the City seeking summary judgment against third-party defendant Inter Connection Electric, Inc. for breach of contract to procure insurance naming Liro Engineering and Construction Management, P.C. and The City of New York as additional insureds is denied and that cause of action is severed and a trial on that issue is directed, and it is further

ORDERED that Liro Engineering and Construction Management, P.C.'s motion for indemnification is granted and the issue of the amount of damages, if any, is severed and a trial on that issue is directed, and it is further

ORDERED that Liro Engineering and Construction Management, P.C. shall serve a copy of this order with notice of entry on the Clerk of the Trial Support Office, who is directed upon filing of a note of issue and a statement of readiness and payment of the proper fees, if any, to assign this matter to an appropriate part for trial of the issues ordered in the two immediately preceding paragraphs, and it is further

ORDERED that the parties shall report to Trial Term Part 46 of this court, on a date and time to be determined, for a collateral source hearing on the extent, if any, that plaintiff's recovery shall be diminished by his receipt of Social Security Disability payments, and the parties will be notified of that date, and it is further

ORDERED that the causes of action by defendant City of New York for contractual and common law indemnification are dismissed, and it is further

ORDERED that to the extent the motions have not been granted, they are denied.

This constitutes the decision and order of the court.

Dated: March 31, 2008

ENTER

J.S.C.