

**Clavano v New York City Tr. Auth.**

2008 NY Slip Op 31717(U)

June 10, 2008

Supreme Court, New York County

Docket Number: 0107805/2000

Judge: Donna Mills

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SCANNED ON 6/19/2008  
[\* 1 ]  
SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS  
*Justice*

PART 21

CLAVANO, ARNEL

Plaintiff,

-v-

NEW YORK CITY TRANSIT AUTHORITY, et. al.,  
Defendants.

INDEX No. 107805/00

MOTION DATE \_\_\_\_\_

MOTION SEQ. No. 005

MOTION CAL No. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion for \_\_\_\_\_.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1

Answering Affidavits- Exhibits \_\_\_\_\_ 2, 3

Replying Affidavits \_\_\_\_\_ 5 & 6

CROSS-MOTION: \_\_\_\_\_ YES  NO

Upon the foregoing papers, it is ordered that this motion is:

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION. \_\_\_\_\_

Dated: 6/10/08

DM  
J.S.C.

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

Check one: \_\_\_\_\_ FINAL DISPOSITION

NON-FINAL DISPOSITION

**FILED**  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 21

-----x

ARNEL CLAVANO,  
Plaintiff,

Index No.: 107805/00

-against-

DECISION AND ORDER

THE CITY OF NEW YORK AND THE NEW  
YORK CITY TRANSIT AUTHORITY,

Defendants.

-----x

NEW YORK CITY TRANSIT AUTHORITY,  
Third-Party Plaintiff,

-against-

GRACE INDUSTRIES, INC.,  
Third-Party Defendant.

-----x

GRACE INDUSTRIES, INC.,  
Fourth-Party Plaintiff,

-against-

A.J. PEGNO CONSTRUCTION CORP.,  
Fourth-Party Defendant.

-----x

A.J. PEGNO CONSTRUCTION CORP.,  
Fifth-Party Plaintiff,

-against-

WARDE ELECTRIC COMPANY,  
Fifth-Party Defendant.

-----x

MILLS, J.:

**BACKGROUND**

Motion sequence numbers 005 and 006 are consolidated for  
disposition.

**FILED**  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff alleges to have sustained a fractured elbow after falling from his bicycle at approximately 10 pm on July 25, 1999, at the southwest corner of the intersection of West 116<sup>th</sup> Street and Lennox Avenue in New York City. The plaintiff states that there was construction and no lights at the intersection at that time. He further maintains that he was riding very fast and could not see where he was going when his bicycle hit the curb, causing him to fall.

Plaintiff initiated the present action against the City of New York and the New York City Transit Authority (NYCTA). NYCTA thereafter instituted a third-party action against Grace Industries, Inc. (Grace), one of the subcontractors working on the intersection. Grace, in turn, instituted a fourth-party action against A. J. Pegno Construction Corp. (Pegno), the general contractor, who then brought a fifth-party action against Warde Electric Company (Warde), another subcontractor.

NYCTA was responsible for the overall supervision and preparation of the plans and specifications for the construction project to rebuild the subway tracks between 110<sup>th</sup> and 118<sup>th</sup> Streets. NYCTA had a construction manager in charge of the project who was responsible for approving all of the work of the subcontractors, had staff members to examine the progress of the project on a daily basis, and monitored the course of the project from 1996 through 2000.

Pegno was hired by NYCTA as the general contractor in connection with this project, specifically to rebuild the subway tracks and subgrade the area between 111<sup>th</sup> and 118<sup>th</sup> Streets, waterproof the tunnel, and provide lighting and platform rehabilitation at the 110<sup>th</sup> and 116<sup>th</sup> Street stations. Additionally, Pegno contracted with NYCTA to perform road work between 110<sup>th</sup> and 118<sup>th</sup> Streets and Lennox Avenue.

Grace was hired by Pegno to replace curb sidewalks, utilities and roadways from 112<sup>th</sup> to 118<sup>th</sup> Streets. Warde was subcontracted by Pegno to replace or upgrade the lighting along Lennox Avenue between 111<sup>th</sup> and 118<sup>th</sup> Streets.

In the underlying action, plaintiff alleges that his injuries were the result of negligence on the part of New York City and NYCTA in failing to provide proper lighting in the area where the alleged accident took place. Each of the accompanying lawsuits are based on a theory of contractual and/or common law indemnification.

On June 7, 2002, Warde filed a voluntary petition of bankruptcy in the United States Bankruptcy Court for the Southern District of New York, which stayed all proceedings against it. On June 26, 2007, by stipulation, the Warde bankruptcy trustee allowed the case to proceed against Warde only to the extent of available coverage. The bankruptcy stay was eventually lifted on September 13, 2007, by order of the Bankruptcy Court.

On April 13, 2004, and August 31, 2004, discovery conferences were held, at which Warde was represented by counsel. According to the August 31, 2004, stipulation, Warde agreed to have one of its employees with personal knowledge deposed by Pegno and, that should such employee fail to appear for the deposition, Warde would be precluded calling witnesses at trial.

Pegno made repeated requests to Warde for the documents to be provided pursuant to the above-referenced stipulations, and for the witness to be deposed, but Warde failed to comply.

Pegno and NYCTA make the instant motion requesting the following relief: one, to strike Warde's fifth-party answer pursuant to CPLR 3126 or, in the alternative, to preclude Warde from testifying or offering documentary evidence at trial; two, upon preclusion, granting summary judgment against Warde in favor of Pegno and NYCTA regarding contractual indemnification; three granting summary judgment in favor of Pegno and NYCTA and dismissing Grace's complaint pursuant to CPLR 3212; four, grant summary judgment in favor of Pegno and NYCTA against Grace based on contractual indemnification; and five, granting summary judgment in favor of NYCTA and dismissing plaintiff's complaint.

#### **DISCUSSION**

In his opposition, plaintiff argues that the instant motion by Pegno and NYCTA must be dismissed as untimely pursuant to CPLR 3212 (a). According to CPLR 3212 (a), a motion for summary

judgment must be brought "no later than one hundred twenty days after the filing of the note of issue, except with leave of court on good cause shown." The note of issue in this case was filed on October 3, 2003, during the pendency of the bankruptcy stay. The bankruptcy stay was lifted on September 13, 2007, making the one hundred twentieth day January 11, 2008. Movants maintain that they served an initial "Notice of Motion" on January 10, 2008, one day before the expiration of the statutory period, and afterwards filed an "Amended Notice of Motion" on January 14, 2008.

Motion sequence 005 includes a copy of a "Notice of Motion" dated December 12, 2007, attached to an affirmation in support of the motion dated January 8, 2008. The affidavit of service for this motion appearing with these papers indicates that they were served by mail on January 10, 2008, which supports movants' contention that the motion is timely. Consequently, plaintiff's argument regarding the timeliness of the motion fails and movants' requests must now be addressed.

In its opposition, Warde, by its attorney, asserts that it is out of business, has no documents in its possession, and maintains that the only employee who would have actual knowledge of the surrounding facts is its former owner. It has supplied an affidavit of an investigator who states that the only current address for the former owner is a post office box in North

[\* 7 ]

Carolina, and efforts to contact him there have been unavailing. Further, Warde's attorney affirms that at the discovery conferences noted above he informed the other parties of these facts.

However, regardless of the assertions of Warde's attorney, even if the court would preclude Warde from presenting documentary evidence or testifying at trial based on CPLR 3126 for its failure to comply with discovery orders, the movants still could not prevail.

"To obtain summary judgment, it is necessary that a movant establish his cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form." *Zuckerman v The City of New York*, 49 NY2d 557, 562 (1980).

The basis of movants' motion is an alleged indemnification clause in the subcontract Pegno had with Warde; however, the moving papers fail to submit a copy of that contract, which would be the only admissible proof of its existence absent an admission by Warde, which has not been made. *Schozer v William Penn Life Ins. Co.*, 84 NY2d 639 (1994); *Comerica Bank, N.A. v Benedict*, 39 AD3d 456 (2d Dept 2007). Therefore, even if Warde could not testify or submit documentary evidence at trial, movants could not meet their initial burden of evidencing a contractual

indemnification between Warde and Pegno.

The affidavit of movants' attorney that he believes the contract with Warde had a similar indemnification clause as the one in the contract between Pegno and Grace is insufficient to support the motion absent the contract itself. *Zuckerman, supra* at 563. Consequently, movants' request for summary judgment against Warde is denied.

At this time movants' request for preclusion is premature, since they have not demonstrated, by submission of a valid contract between Pegno and Warde, that they could meet their own burden at trial.

Pegno's next request is for summary judgment against Grace based on the indemnification clause in the subcontract between Pegno and Grace. Pursuant to this subcontract, which is attached as an exhibit, Grace agrees to indemnify and hold Pegno harmless for any damages arising out of Grace's "operations, work or materials, irrespective of whether any claim, demand, or suit seeks damages arising out of tortious conduct, breach of contract or otherwise."

According to the depositions submitted with the papers,<sup>1</sup> there remains a question as to who may be responsible for the alleged accident. NYCTA had a supervisor on the sight every day

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<sup>1</sup>Depositions of Sadham M. Guha, a NYCTA engineer, Ted Barbatsuly, Pegno's job superintendent, James McCarthy, Grace's on-sight supervisor, and plaintiff.

to inspect the work of Pegno and all of the subcontractors, Pegno's job superintendent confirmed that Pegno itself performed a great deal of the work at the sight, and Grace's own supervisor testified that he visited the sight at least bi-weekly to insure that all safety measures were being complied with and to have safety meetings with the workers. Each deponent indicates that its party was careful, not negligent, and that the alleged accident must be the result of someone else's actions. Consequently, there remains a question of fact as to who, if anyone, may be responsible for plaintiff's injuries.

Where there is a genuine issue of fact as to who, if anyone, may be responsible for an alleged accident, summary judgment cannot be granted under a theory of contractual or common law indemnification. *Matthews v Trump 767 Fifth Avenue*, \_\_\_ AD3d \_\_\_ (1<sup>st</sup> Dept 2008). If Pegno is found to have been negligent itself, it is barred from recovering contractual indemnity under New York's General Obligation Law §5-322.1. *Brown v 2 Exchange Plaza Partners*, 76 NY2d 172, 181 (1990) (cannot be indemnified for one's own negligence). Furthermore, "summary judgment on a claim of common law indemnification is 'appropriate only where there are no issues of material fact concerning the precise degree of fault attributable to each party involved' [citations omitted]." *Coque v Wildflower Estates Developers, Inc.*, 31 AD3d 484, 489 (2d Dept 2006). Therefore, movants' request for summary

judgment against Grace is denied.

Pegno's last requested relief is to grant summary judgment in favor of NYCTA dismissing plaintiff's complaint. However, as stated above, questions of fact remain as to the cause of the alleged accident precluding the grant of summary judgment.

**CONCLUSION**

It is hereby

ORDERED that New York City Transit Authority and A.J. Pegno Construction Corp.'s motion is denied in all respects.

Dated: 6/10/08

ENTER:

  
\_\_\_\_\_

DONNA MILLS, J.S.C.

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

**FILED**  
JUN 19 2008  
COUNTY CLERK'S OFFICE  
NEW YORK