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

PRESENT: JANE S. SOLOMON Justice PART 55

Index Number : 113518/2004
PICCHIONE, ARTHUR
VS.
SWEET CONSTRUCTION
SEQUENCE NUMBER : 005
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 12/3/07
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Exhibits ...	1-4
Answering Affidavits — Exhibits	5-13
Replying Affidavits	14-18

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.

M/B -- Pre-trial conference scheduled for August 11, 2008 at 2 PM.

FILED
JUL 01 2008
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/25/08

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: I.A.S. PART 55

----------X

ARTHUR PICCHIONE,

Plaintiff,

Index No. 113518/03

DECISION and ORDER

-against-

SWEET CONSTRUCTION CORP., DISCOVERY COMMUNICATIONS, INC., FIRST LEXINGTON CORPORATION and RUDIN MANAGEMENT CO., INC.,

Defendants.

----------X

SWEET CONSTRUCTION CORP.,

Index No. 590694/05

Third-party plaintiff,

-against-

ARC ELECTRIC CONSTRUCTION CO.,

Third-party defendant.

----------X

FIRST LEXINGTON CORPORATION and RUDIN MANAGEMENT CO., INC.,

Index No. 591040/05

2nd Third-party plaintiffs,

-against-

DISCOVERY COMMUNICATIONS, INC., SCHINDLER ELEVATOR CORPORATION, ZURICH-AMERICAN INSURANCE COMPANY and HARTFORD INSURANCE CO.,

2nd Third-party defendants.

----------X

----------X

DISCOVERY COMMUNICATIONS, INC., Index No. 591106/06

3rd Third-party plaintiff,

-against-

ARC ELECTRIC CONSTRUCTION CO.,

3rd Third-party defendant.

----------X

SWEET CONSTRUCTION CORP., Index No. 590667/06

4th Third-party plaintiff,

-against-

KEMPER CASUALTY INSURANCE CO.,

4th Third-party defendant.

----------X

FIRST LEXINGTON CORPORATION and RUDIN MANAGEMENT CO., INC., Index No. 591106/06

5th Third-party plaintiffs,

-against-

DISCOVERY NEW YORK, INC.,

5th Third-party defendant.

----------X

JANE S. SOLOMON, J.:

Plaintiff Arthur Picchione alleges that he sustained serious personal injuries as the result of a work-place accident on a construction site. The owner of the premises where the

accident occurred, its managing agent, the tenant, the general contractor and the sub-contractor have made motions for summary judgment dismissing the complaint, and for summary judgment on their claims for indemnification. The motions are decided as follows.

FACTS

Picchione alleges that he was injured as the result of an accident that occurred on October 9, 2001 on a construction site located on the eighth floor of 641 Lexington Avenue in Manhattan. He claims that while he was moving an equipment cart loaded with electrical equipment, a wheel on the cart broke when it hit a hole in the concrete floor, causing the cart to tip over which, in turn, caused Picchione to twist his back. He was pushing the cart through a hallway leading from a freight elevator to his work area. Before the date of the accident, the general contractor, defendant Sweet Construction Corp. (Sweet Construction), had caused the carpeting and tiles to be removed from the floor as part of the renovation project, including from the floor in the hallway. Marc Landey, a former construction manager for Sweet, said in an affidavit opposing defendants' motion that Sweet kept the hallway floor in an unfinished condition while work proceeded because it was used by workers to access construction areas; the project schedule dictated that the floor would not be finished until near the end of the project

(Affidavit of Marc H. Landey, annexed to Aff. In Opposition of David Lewis Feld, Esq., Ex. D, and see Landley EBT transcript, Feld Aff. Ex. C, 133). Landey states that Picchione had discussed the condition of the floor with him before the accident (id.).

Picchione was employed as a foreman electrician by third party defendant Arc Electrical Construction Company (Arc). Arc was a subcontractor hired by Sweet Construction to perform electrical work. After the accident, Picchione saw that a wheel on the cart was broken, and he directed his workers to remove the cart from the hallway to the Arc shanty area. There, he saw Landey and described the accident to him (Landey Aff.). He took Landey to the cart, which was leaning over with a wheel broken off (Landey EBT Trans., 139).

The building is owned by defendant First Lexington Corporation (Owner). Defendant Rudin Management (Rudin) is managing agent of the building. Owner leased the entire eighth floor and a portion of the ninth floor of the building to fifth third-party defendant Discovery New York, Inc. (DNY). DNY is a wholly owned subsidiary of defendant Discovery Communications, Inc. (Discovery Communications) (Discovery Communications and DNY are referred to together as "Discovery"). It appears that DNY is a single purpose entity that possesses the lease and nothing else, although it has insurance with coverage available in this

litigation (Reply Aff. of Robert B. Churbuck, Esq). The premises were used by Discovery Communications, which paid the rent. The lease between Owner and DNY provides that DNY will indemnify Owner for any cost or liability, including reasonable attorney's fees, incurred by Owner in connection with or arising from DNY's use of the demised premises, or by any acts, omissions or negligence of DNY or its contractors (Aff. Of Sharon Schweidel, Esq. In Support of Motion for Summary Judgment, Ex. M, section 19.02).

Discovery Communications hired Sweet Construction as its general contractor to demolish and renovate the eighth floor. Before Sweet Construction was permitted to begin work, it was required to add Owner and Rudin as additional insureds under its liability insurance policy, and to provide Rudin with a broadly writen indemnification whereby Sweet Construction agreed to indemnify Owner and Rudin for any claim or loss, including costs and reasonable attorney's fees, in connection with a personal injury arising from Sweet Construction's work (Aff. Of Martin Gluck, Senior V.P. of Rudin, and Schweidel Aff., Ex. Y). Sweet Construction executed the indemnification agreement and provided a certificate of insurance showing Owner and Rudin as additional insureds on its policy.

Rudin's employee, Wayne Ayling, testified at deposition that he inspected the work site at least once a week, walking

through the entire eighth floor to make certain that it complied with Rudin's specifications (Schweidel Aff., Ex U, 42-43). He testified that the floor had been left in a demolished condition for several weeks and he had seen the concrete floor, but he did not recall noticing its condition (id., at 51, 63).

Sweet Construction did not agree to indemnify DNY or Discovery Communications. However, its contract with Arc provides that Arc indemnifies the owner and contractor to the fullest extent permitted by law (Aff. Of Robert B. Churbuck, Esq., in Support of Cross-Motion for Summary Judgment, Ex. G). Although the terms "owner" and "contractor" are not defined in the contract, it presumably is intended to pertain at least to Owner and Sweet Construction. Arc has picked up Sweet Construction's defense in this lawsuit, and the third-party action between Sweet Construction and Arc has been discontinued (Churbuck Aff., Ex. D).

Picchione commenced this lawsuit against Sweet Construction, Discovery Communication, Owner and Rudin in September 2004. Owner and Rudin commenced third-party actions against Sweet Construction, Arc, Discovery Communications, DNY, Schinlder Elevator Corporation, Zurich-American Insurance Company and Hartford Insurance Company (Hartford). Discovery Communications commenced a third-party action against Arc, and Sweet Construction commenced a third-party action against Kemper

Casualty Insurance Company.

In motion 05, Owner and Rudin move for summary judgment dismissing the complaint and all cross-claims as against them, and for summary judgment on their contractual indemnification claims against DNY, Discovery Communications and Sweet Construction. Discovery Communications and DNY cross-move for summary judgment dismissing the complaint as against them and dismissing Owner's and Rudin's cross-claims and third party action claims, and for summary judgment on their common law indemnification claim against Sweet Construction and their common law and contractual indemnification claims against Arc.

In motion 06, Sweet Construction and Arc move for summary judgment dismissing the complaint and all cross-claims as against them.

Discussion

Plaintiff's Claims

Picchione alleges that his injury is the result of defendants' common law negligence and violations of Labor Law sections 200 and 241(6).[1] Labor Law section 200 codifies a landowner's and general contractor's common law duty to maintain a safe work place (Ross v Curtis-Palmer Hydro-Electric Co., 81

[1] Plaintiff withdraws his claim under Labor Law section 240(1).

NY2d 494, 505 (1993). Where the claim arises from a subcontractor's methods or materials, "recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation" (id.). Here, the claim does not arise entirely from the subcontractor's methods and materials. Picchione alleges that he was injured when the cart he was pushing failed because one of its wheels hit a rut in the floor. The cart was supplied by his employer, the subcontractor Arc, but the floor was in a hazardous unfinished condition because Sweet had previously removed the carpet and tile. Arguably, the hazard arose in part from Sweet's methods in permitting work to proceed on a demolished floor. Moreover, Sweet directed the subcontractors to use the subject hallway to access work areas. Accordingly, Sweet's motion to dismiss the section 200 claim is denied.

There also is evidence to show that Owner, through its agent, Rudin, exercised sufficient supervision and oversight for section 200 liability. Rudin controlled contractor access to the premises, and its employee routinely inspected the premises to ensure compliance with Owner's specifications. The employee observed the demolished floor for several weeks. Under section 200, an owner is required to use reasonable care to provide a safe workplace (Ross, 81 NY2d at 505). The claim does not arise solely from a contractor's methods or materials because Rudin was

on site conducting inspections to ensure compliance with its specifications, and it allegedly suffered an unsafe condition to persist. Therefore, Picchione does not need to establish Owner's supervisory control over his work to make out a claim. A jury could reasonably find that Owner, by its agent, was obligated to take steps to exercise its authority to correct an observable hazardous condition such as the damaged concrete floor. Therefore, Owner's motion to dismiss the Labor Law section 200 claim also is denied. Sweet's motion to dismiss the common law negligence and Labor Law section 200 claims likewise is denied.

The motions by Discovery Communications and DNY present a novel problem: Picchione sued Discovery Communications, which engaged Sweet but is not the tenant on the lease. DNY is the tenant. However, Discovery Communications acted as if it were the tenant, and its own deposition witness appears to have been confused by the distinction. Discovery Communications does not seek to dismiss the complaint on the grounds that it was not the tenant, and in light of the nature of its relationship with DNY, the complaint will not be dismissed against Discovery Communications on that basis. Unlike the Owner, Discovery Communications and DNY are not alleged to have taken an active role to inspect and supervise the contractor's work. There being no evidence of their active role in overseeing the project, the common law negligence and section 200 claims are dismissed as

against Discovery Communications.

To make out a claim under Labor Law section 241(6), a plaintiff must allege that his injury was caused by a failure to comply with a specific safety rule or regulation promulgated by the Commissioner of the Department of Labor (see, Ross, 81 NY2d at 501-502; and Morris v Pavarini Constr., 9 NY3d 47, 50 [2007]). Picchione has alleged specific violations of the Industrial Code, issued by the Commission of the Department of Labor. Industrial Code section 23-1.28 (a) provides that hand-propelled vehicles, such as the equipment cart at issue here, shall be maintained in good repair; section 23-1.28(b) provides that wheels of hand-propelled vehicles shall be maintained "free-running" and well-secured to the frame of the vehicle. In Brasch v Yonkers Constr. Co., the court held that these code sections are sufficiently specific to provide a predicate for a cause of action under Labor Law section 241(6) (306 AD2d 508, 509 [2d Dept 2003]). Industrial Code section 23-1.7(e)(1) provides that passageways shall be kept free of any condition which could cause tripping. Picchione alleges that the cart fell on him because its wheel became trapped in a hole in the floor and broke off. The place where the accident occurred was a passageway used by Arc workers between the freight elevator and their work area. These facts are sufficient to support a claim under section 241(6).

Sweet argues that the complaint should be dismissed

because Picchione spoliated crucial evidence. "Under New York law, spoliation sanctions are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them" (Kirkland v NYCHA, 236 AD2d 170 [1st Dept 1997]). After Picchione's accident, the cart was taken out of service and removed from the building. The cart was removed after Picchione notified Sweet of the accident. Sweet's employee, Landey, saw the cart in the building. There is no indication that Picchione destroyed or in any way disposed of the cart, or that Sweet took steps to secure it for inspection. Accordingly, this branch of Sweet's motion is denied.

Third-Party and Cross Claims

As an initial matter, Owner and Rudin seek to pierce DNY's corporate veil and sue Discovery Communications directly for indemnification under the lease. The party seeking to pierce the corporate veil bears a heavy burden to show that the corporation was dominated as to the transaction attacked, and that such domination was the instrument of fraud or otherwise resulted in wrongful or inequitable consequences (TNS Holding v MKI Sec. Corp., 92 NY2d 335 [1998]). Owner and Rudin cannot show that they suffered any wrongful or inequitable consequence, particularly since DNY contends it has insurance coverage for the

instant claim. Therefore, the motion to pierce DNY's corporate veil must be denied.

In light of the triable issues of fact regarding Owner's and Rudin's negligence, their motions for common law and contractual indemnity must be denied as premature.

Since Discovery Communications is potentially liable only vicariously under Labor Law section 241(6), its motion for common law indemnification from Sweet is granted because Sweet undertook sole responsibility for the renovation project. Contrary to Sweet's arguments, Discovery's project manager was not actively involved in overseeing the work, but only monitored budgets and schedules (Alexander EBT Trans. 9-11, annexed to Discovery motion at Ex. F).

Discovery's motion for contractual indemnification against Arc is denied because the subcontract between Arc and Sweet provided that Arc would idemnify the "owner". Without explanation, Discovery urges the court to find that it is the "owner" within the terms of that subcontract as a matter of law. Although Arc clearly intended to indemnify the owner, it is not clear from the entire agreement that Arc intended to indemnify Discovery and not the actual owner. Accordingly, it hereby is

ORDERED that the motion by defendants Owner and Rudin for summary judgment is denied; and it further is

ORDERED that the cross-motion by defendants Discovery

Communications and DNY for summary judgment is granted to the extent that plaintiff's claims for common law negligence and under Labor Law section 200 are dismissed, and that its claim for common law indemnification against Sweet is granted as to liability with damages to be determined at trial, and the cross-motion otherwise is denied; and it further is

ORDERED that the motion by Sweet and Arc for summary judgment is denied; and it further is

ORDERED that counsel shall appear for a pre-trial conference in Part 55 on August 11, 2008 at 2 PM.

Dated: June 25, 2008

ENTER:

J.S.C.

[redacted] SOLOMON

FILED

JUL 01 2008

COUNTY CLERK'S OFFICE
NEW YORK