

Marku v 222 Broadway, LLC
2008 NY Slip Op 32060(U)
July 18, 2008
Supreme Court, New York County
Docket Number: 0117204/2002
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 21

MARKU, DASHNOR

INDEX No. 117204/02

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. 008

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

MOTION CAL No. _____

The following papers, numbered 1 to 3 were read on this motion for _____.

PAPERS NUMBERED

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

Answering Affidavits- Exhibits _____ 2

Replying Affidavits _____ 3

CROSS-MOTION: _____ YES NO

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

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

FILED
JUL 22 2008
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/18/08

[Signature]
J.S.C.

Check one: _____ FINAL DISPOSITION NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART 21

DASHNOR MARKU and ARJETA MARKU,

Index No.: 117204/02

Plaintiffs,

- against -

DECISION/ORDER

222 BROADWAY, LLC and NEW YORK
CITY TRANSIT AUTHORITY,
Defendants.

DONNA MILLS, J.:

In this action, plaintiffs sue to recover damages for personal injuries allegedly sustained by plaintiff Dashnor Marku on September 5, 2001, when he slipped and fell while cleaning an external stairway leading to a subway station entrance, located at premises owned or managed by defendant 222 Broadway, LLC (222 Broadway). Defendant 222 Broadway brought a third-party action against plaintiff's employer, ABM Industries, Inc., American Building Maintenance Co. and American Building Maintenance Co. of New York (collectively ABM), based on contractual indemnification and failure to procure insurance. ABM now moves for summary judgment dismissing the third-party complaint on the grounds that there is no evidence that ABM was negligent and that the subject indemnification provision violates General Obligations Law § 5-322.1.

It is undisputed that ABM, as Contractor, and 222 Broadway, as Customer, entered into a contract for ABM to provide janitorial services at the premises located at 222 Broadway, New

* 3]
York, New York (subject premises). Janitorial Maintenance Agreement, Ex. I to Mero Aff. In Support.

Paragraph 8.1 of the contract provides in pertinent part:

Contractor shall be liable for and hereby agrees to indemnify, defend and hold harmless Customer, its parent, subsidiaries, affiliates, and their officers, agents, directors, employees, subcontractors ... against any and all liabilities, damages, losses, expenses, demands, claims, suits or judgments (including reasonable attorneys' fees, costs and expenses) for death or injury to any person ... in any manner arising out of the acts or omissions of Contractor, its parent, subsidiaries, affiliates, or their officers, agents, directors, employees, or subcontractors.

The contract also provided, with respect to the procurement of insurance, that "Contractor shall arrange, at its cost ... Employers' Liability Insurance including Bodily Injury coverage ... [and] Comprehensive General Liability Insurance and Umbrella Liability." Id., ¶¶ 9.1, 9.1.2, 9.1.3.

It is not disputed that, at the time of his accident, plaintiff was employed by ABM as a porter at the subject premises and was cleaning an exterior stairway which led to the entrance to a subway station. ABM argues that the contractual indemnification provision does not apply here because ABM's contractual janitorial responsibilities did not include cleaning the stairway where plaintiff's accident occurred and, therefore, the accident did not arise out of ABM's work.

In support of its argument, ABM relies chiefly on the

and brush (id. at 40, 43), and to scrape gum off the stair tiles with a scraper (id. at 44).

The conflicting testimony of Mr. Marty and Mr. Marku raises triable issues of fact regarding the scope of ABM's obligations to provide services to 222 Broadway and plaintiff's responsibilities as an employee of ABM. Under these circumstances, ABM has not demonstrated as a matter of law that plaintiff's accident did not arise out of ABM's work.

Further, ABM's argument that the absence of any specific reference in the contract to its obligation to clean the exterior stairway shows that it had no responsibility for the exterior staircase, is unsupported by facts or law. To the extent that ABM argues that the indemnification provision is inapplicable because there has been no proof that it was negligent, the provision by its terms does not require proof of ABM's negligence.

In support of its motion, ABM also argues that the contract's indemnification clause violates General Obligations Law § 5-322.1 (1), which provides:

[a] covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or

[*5]
resulting from the negligence of the promisee
... whether such negligence be in whole or in
part, is against public policy and is void
and unenforceable.

It thus is well settled that General Obligations Law § 5-322.1 prohibits the enforcement of an agreement indemnifying a promisee for its own negligence where the promisee "is actually found to have been negligent." Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 (1997). See Barnes v New York Mercantile Exch., Inc., 7 AD3d 304 (1st Dept 2004); Davis v All State Assocs., 23 AD3d 607 (2d Dept 2005); Alesius v Good Samaritan Hosp. Med. & Dialysis Ctr., 23 AD3d 508 (2d Dept 2005).

In this case, there has been no finding of negligence on the part of 222 Broadway. In its moving papers, ABM fails to make a prima facie showing, or to even address, 222 Broadway's negligence. To the extent that ABM argues in its reply papers that 222 Broadway was negligent, the court declines to consider that argument raised for the first time in reply. See Ritt v Lenox Hill Hosp., 182 AD2d 560 (1st Dept 1982). In any event, ABM's reliance on an unverified letter to argue that 222 Broadway had actual notice of the condition causing plaintiff's accident, is insufficient to demonstrate that 222 Broadway was negligent. Therefore, in the absence of a finding that 222 was negligent, the indemnification provision does not run afoul of General Obligations Law § 5-322.1.

Finally, although the third-party complaint also alleges a

cause of action for ABM's failure to procure insurance, ABM does not address that cause of action in its motion. Nor does ABM present any argument to support the branch of the motion which seeks dismissal of the complaint.

Accordingly, it is

ORDERED that the motion is denied.

Dated: 7/18/08

Donna M. Mills
DONNA MILLS, J.S.C.

DONNA M. MILLS, J.S.C.

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