

Spagna v City of New York

2008 NY Slip Op 32832(U)

October 8, 2008

Supreme Court, New York County

Docket Number: 118509/03

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan
Justice

PART 36

Index Number : 118509/2003

SPAGNA, JOSEPH

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : # 003

SUMMARY JUDGMENT

INDEX NO.

118509-03

MOTION DATE

MOTION SEQ. NO.

#003

MOTION CAL. NO.

are read on this motion to/for Summary judgment
1-4

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1,2

Answering Affidavits — Exhibits

3

Replying Affidavits

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Re summary judgment by defendant/third-party plaintiff, Hudson Telegraph, L.P. + defendant/second third party plaintiff Sprint PCS, is decided in accordance with the attached memorandum decision.

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

FILED

OCT 16 2008

COUNTY CLERK'S OFFICE
NEW YORK COUNTY
BORIS LING-COHAN
HONORABLE JUDGE

Dated:

10/8/08

[Signature]

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 36

-----X
JOSEPH SPAGNA,

Plaintiff,

- against -

THE CITY OF NEW YORK, ZAND ENTERPRISES
d/b/a ESSEX STEEL CO., SPRINT PCS and
HUDSON TELEGRAPH ASSOCIATES,

Defendants.
-----X

HUDSON TELEGRAPH ASSOCIATES, L.P.,
sued incorrectly herein as HUDSON TELEGRAPH
ASSOCIATES,

Third-Party Plaintiff,

- against -

DRILL CONSTRUCTION CO., INC.,

Third-Party Defendant.
-----X

SPRINT PCS,

Second Third-Party Plaintiff,

- against -

DRILL CONSTRUCTION CO., INC. and ESSEX
ENGINEERING CO. d/b/a ESSEX STEEL.,

Second Third-Party Defendants.
-----X

LING-COHAN, J.:

Plaintiff Joseph Spagna commenced this action to recover for injuries sustained while

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NEW YORK

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working on a construction site. The owner and lessee of the site move, pursuant to CPLR 3212, to be indemnified against some claims and to dismiss others.

Defendant/second third-party plaintiff Sprint PCS (Sprint) leases part of the 13th floor in the building where the construction took place. Defendant/third-party plaintiff Hudson Telegraph, L.P. (Hudson) owns the building. Sprint hired third-party defendant/second third-party defendant Drill Construction Co. (Drill) to act as general contractor on a project to install two generators. Drill hired subcontractor defendant/second third-party defendant Essex Steel (Essex). Spagna was Essex's employee.

The contract between Sprint and Drill contained an indemnification clause that provided the following.

To the fullest extent permitted by law, the Contractor shall, release, defend indemnify and hold harmless from all liability, suit, claim or proceeding the Owner ... from and against claims, damages, losses and expenses, including but not limited to all judgments, costs and attorneys' fees, arising out of or resulting from the performance...of the Work ... caused in whole or in part by acts, omissions, negligence, willful misconduct ... by Contractor, subcontractor, anyone directly or indirectly employed by them, or anyone for whose acts they may be liable ...

(Notice of motion, Ex. F, ¶ 3.18.1).

On August 1, 2002, Spagna was placing iron beams. One group of workers tied ropes around each beam, connected the rope to a hoist, and pulled the rope to lift the beam up. Spagna would then position the beam into place, connect the beam to other beams using lugs, and make sure the beam was level. The rope connected to a beam snapped and the beam fell on Spagna's foot.

Spagna brought a personal injury suit against Essex, Sprint, and Hudson. His complaint

alleges liability based on Labor Law §§ 200, 240, 241, and 241 (6). Hudson and Sprint brought the third-party and second third-party actions, respectively. The same counsel represents Sprint and Hudson, who move for contractual indemnification against Drill, the general contractor, and for dismissal of Spagna's common-law negligence and Labor Law § 200 claims.

Sections 241 (6) and 240 (1) of the Labor Law impose a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to construction workers (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348-350 [1998]; *Kyle v City of New York*, 268 AD2d 192, 195 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Liability under the statutes is vicarious, rendering owners and contractors responsible although they did not control or supervise the work (*id.*). Parties vicariously responsible may be indemnified against damages and legal fees by the party whose negligence actually caused the laborer to suffer an injury (*Tighe v Hennegan Constr. Co., Inc.*, 48 AD3d 201, 202 [1st Dept 2008]; *Aarons v 401 Hotel, L.P.*, 12 AD3d 293, 294 [1st Dept 2004]). A court may render a conditional judgment on the issue of indemnity, pending determination of the primary action (*Masciotta v Morse Diesel Intl., Inc.*, 303 AD2d 309, 310 [1st Dept 2003]).

In order for a party to be held liable under Labor Law § 200 (the codification of the common-law negligence standard), it must have exercised actual supervision and control over the work of the injured party, when the accident resulted from the method of the work (*Mitchell v New York Univ.*, 12 AD3d 200, 200 [1st Dept 2004]). When the accident resulted from a dangerous condition, a party must have had actual or constructive notice of the unsafe condition before it can be held liable (*id.* at 201).

Here, the movants present evidence to show that they had no control or supervision over

the construction project and that any liability on their part for Spagna's injuries can only be vicarious. The movants submit deposition transcripts. At his deposition, Spagna testified that to gain entry to the worksite, he had to show identification to a Sprint employee and sign in. Otherwise, he indicated no involvement with Sprint. Spagna testified that he received directions from his employer, that his employer provided tools and equipment, and that neither movant directed or controlled his work.

At their respective depositions, representatives from Sprint and Hudson testified that neither company controlled or supervised the work. Lyndon Forde, from Sprint, testified that he was the site manager at the time of the accident. He was in charge of Sprint's switch operations. Forde was the liaison between Drill, the general contractor, and Sprint headquarters in Kansas City. Forde briefed Kansas City on the progress of the construction and consulted with Drill regarding whether the construction would interfere with the switch operations.

Drill reported to headquarters in Kansas City. Forde said that representatives from Kansas City visited the construction site once a month or once every two months. Forde said that building management maintained a security desk where everyone, including the construction workers, were signed onto the floor.

Shaun Mooney, an employee of the building management company who testified on behalf of Hudson, stated that Sprint had to get building approval for the construction work. Before giving approval, the building management inquired whether the work would interfere with building services. Mooney testified that he did not visit the construction site and had no dealings with Drill.

General supervision of a worksite that included regular walk-throughs and the authority to

halt work upon the discovery of an unsafe condition has been held insufficient to trigger Labor Law liability, where the plaintiff never took orders from the defendant and the latter was not responsible for overseeing the work (*Singh v Black Diamonds LLC*, 24 AD3d 138, 140 [1st Dept 2005]; see also *Mitchell*, 12 AD3d at 201). In this case, there is even less evidence of supervision or control by the movants. Sprint was responsible for monitoring how the construction affected its own operations, but it had no direct involvement in the construction work. Sprint personnel were at the site at various times to inspect the work, but plaintiff's work was admittedly overseen and directed by his employer's personnel. The fact that Sprint dispatched employees to observe the progress of the construction does not translate into supervision or control (see *Masciotta*, 303 AD2d at 312). Similarly insignificant is the fact that Spagna had to show identification to either Sprint or Hudson in order to gain access to the floor where he was working. There is no evidence that plaintiff took orders from either moving party or that they had notice of any dangerous condition.

As there is no evidence that Hudson or Sprint were responsible for plaintiff's accident, they are entitled to dismissal of the Labor Law § 200 and common-law negligence claims. Any liability on the movants' part is vicarious. Therefore, Sprint is entitled to conditional contractual indemnification from Drill concerning the Labor Law §§ 240 and 241 claims.

While the contract between Sprint and Drill identifies Sprint as the Owner and does not apply to Hudson, Hudson may still be entitled to common-law indemnification from Drill. To establish a claim for common-law indemnification, the party seeking indemnity must prove that it was not guilty of any negligence beyond the statutory liability and must also prove that the proposed indemnitor was guilty of some negligence that contributed to the accident (*Perri v*

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Gilbert Johnson Enterprises, Ltd., 14 AD3d 681, 684-685 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). Here, Hudson has shown that it is not guilty of negligence and that its liability is purely statutory, but it remains to be seen whether Drill was negligent. Therefore, Hudson is entitled to a grant of conditional common-law indemnification against Drill, pending the ultimate resolution of Spagna's personal injury claims.

In conclusion, it is

ORDERED that the motion for summary judgment by defendant/third-party plaintiff Hudson Telegraph, L.P. and defendant/second third-party plaintiff Sprint PCS is granted in its entirety as follows:

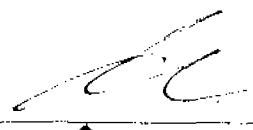
(1) plaintiff Joseph Spagna's Labor Law § 200 and common-law negligence claims are hereby dismissed as against the moving parties; and

(2) the moving parties Hudson and Sprint are granted a conditional order of indemnification against third-party defendant/second third-party Drill Construction Co., pending a determination of liability at the trial of this case; and it is further

ORDERED that within 30 days of entry of this order, movants shall serve a copy upon all parties with notice of entry

Dated: October __, 2008

J:\Summary Judgment\Spagna.nyc.wpd


Hon. Morris Ling-Cohan, J.S.C.

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