

Gibbs v Spring Scaffolding, Inc.

2008 NY Slip Op 32935(U)

October 28, 2008

Supreme Court, New York County

Docket Number: 104015/04

Judge: Eileen A. Rakower

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

PRESENT: Rakower

PART 5

Justice

Index Number : 104015/2004
GIBBS, EVELYN
vs.
SPRING SCAFFOLDING
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. 104015/04

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

this 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

FILED
OCT 29 2008
COUNTY CLERK'S OFFICE
NEW YORK

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

Dated: 10/28/08



EILEEN A. RAKOWER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

10-28-08

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

-----X
EVELYN GIBBS and MARTIN GIBBS,

Plaintiffs,

Index No.
104015/04

- against -

SPRING SCAFFOLDING, INC., METROPOLITAN
INSURANCE AND ANNUITY COMPANY, ROSE
ASSOCIATES, INC. and YATES RESTORATION
GROUP, LTD.

Decision/
Order,

Defendants.

FILED
OCT 29 2008
104015/04
Seq.:
005
COUNTY CLERK'S OFFICE
NEW YORK

-----X
HON. EILEEN A. RAKOWER, J.

Plaintiffs bring this action for personal injuries allegedly sustained when plaintiff Evelyn Gibbs tripped and fell over a wooden block located at the base of a sidewalk bridge pole which was located in front of the premises known as 522 East 20th Street ("Stuyvesant Town") in the County and State of New York on December 24, 2003. Specifically, plaintiffs allege that Evelyn Gibbs tripped over the wooden block because it was partially obstructed by protective netting which had come loose and/or the sidewalk bridge was too narrow. Plaintiff Martin Gibbs brings a derivative action. Defendant Metropolitan Insurance and Annuity Company ("Metropolitan") brings a cross claim for indemnification as against defendant Spring Scaffolding, Inc. ("Spring"). Defendants Insignia Residential Group ("Insignia"), PCV/ST LLC ("PVC") and Metropolitan bring a third party action against Yates Restoration Group, LTD ("Yates"). Yates brings a cross claim against Spring for indemnification. A second action was commenced by plaintiff against Residential Management Group, LLC ("Residential") and Rose Associates, Inc. ("Rose"). Plaintiffs moved to consolidate the two actions on April 6, 2006 and the motion was granted. Spring now moves for summary judgment pursuant to CPLR 3212, dismissing plaintiffs' complaint and dismissing all cross claims as against it. No party opposes.

Spring, in support of its motion, submits the following: (1) the pleadings; (2) plaintiffs' bill of particulars; (3) the deposition transcript of Evelyn Gibbs; (3) the deposition transcript of Valeriu Nica, Foreman for Spring; (4) the deposition transcript of Virgil Lupu, Estimator for Spring; (5) the deposition transcript of William Knight, Estimator for Spring; (6) the deposition transcript of Michael Yates, President of Yates; (7) the deposition transcript of Gregory Macquan, Assistant Project Manager for Yates; (8) four black and white photocopies of a photograph of the subject location; (9) Spring's one page contract with Yates; (10) a document titled "Partial Waiver of Lien;" (11) a "Certificate of Liability Insurance;" (12) two compliance conference orders dated October 16, 2007 and November 27, 2007, respectively; (13) three letters sent by Spring regarding requests for the last known address of Joseph Besada; (14) an affirmation by Spring's counsel; (15) an affidavit by Steven Mauceri, C.P.A.; and (16) a copy of plaintiff's note of issue.

The premises where plaintiff fell was alleged to have been owned and managed by Metropolitan. Rose is alleged to have been the managing agent of the property. Yates contracted with Metropolitan to repair the building's facade. Yates contracted with Spring by an agreement dated July 30, 2003 to erect a sidewalk bridge.

Spring argues that it did not owe plaintiffs a duty because it did not own, operate or control the premises in question. Further, Spring argues that it was merely a non-contracting third party and after it finished building the bridge the area was left entirely under the control of Metropolitan, Rose, and Yates. As to the cross-claims, Spring argues that it is entitled to dismissal because the annual contract and the partial waiver of lien it entered with Yates were signed and dated after the accident date and were not intended to be retroactive. Finally, Spring argues that Metropolitan's cross claim for common law indemnification is without merit and thus, Metropolitan's cross claim should also be dismissed.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are

not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*, 145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Generally, no duty of care is owed to a non contracting third- party except in three limited circumstances. Those circumstances are: first, where one engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others or increases that risk; second, where the plaintiff has suffered injury as a result of reasonable reliance upon defendant's continuing performance of a contractual obligation; and third, where the contracting party has entirely displaced the other party's duty to maintain the premises safely. (*Church v. Callanan Industries, Inc.*, 99 NY2d 104 [2002]).

Under the first exception, the question is whether the sidewalk bridge that Spring erected created or increased an unreasonable risk of harm to others or whether Spring took any actions which "launched a force or instrument of harm." (*H.R. Moch Co. v. Renssalaer Water Co.*, 247 N.Y. 160[1928]). There is no evidence that Spring's performance rises to this level or that the installation of the bridge was done in a manner that "launched a force or instrument of harm." Indeed, the entire project, including the netting, was approved by Yates after Spring completed the job. Mr. Nica, Spring's foreman testifies that, before starting the project he had to have a drawing of the proposed bridge approved by Yates and obtain a permit from New York City Department of Buildings. (Nica Deposition, Pages 26&40). Mr. Nica was in charge of supervising and assisting in the installation of the black netting that was installed around the columns. (*Id.* at 84). The netting is held into place with plastic ties so that it does not blow off or fall down. (*Id.* at 96). After the job was finished Mr. Nica walked along the bridge to make sure everything was safe for pedestrians and he checked for tripping hazards. (Nica Deposition at 159&160). When Spring was finished building the bridge, Tom Stafford, Yates' employee, came and conducted an inspection and he did not direct Mr. Nica to make any changes. (*Id.* at 92 &94).

Liability cannot be placed on Spring under the second exception in *Church*. There is no allegation by plaintiffs that they reasonably relied on Spring's continuing performance of a contractual obligation. Mr. Nica testifies that Spring completed the construction of the bridge and that Spring had no continuing obligation after the bridge was complete. Thus, plaintiffs have no basis upon which to claim that Evelyn Gibbs reasonably relied upon Springs continuing performance.

* 5]

Finally, Spring has shown that it did not entirely displace Yates with respect to maintenance of the subject area. In fact, Mr. Lupu testifies that Spring's only responsibility with respect to the sidewalk bridge was its installation and removal. (Lupu Deposition, Page 44). Mr. Yates, President of Yates, testifies that Yates had a duty to maintain and inspect the sidewalk bridge to the extent that if they noticed an obvious defect, someone would contact Spring to come and fix it. (Yates Deposition, Page 30). Mr. Yates further testifies that it would be at Spring's discretion to come back and inspect but that it was not obligated to do so by contract following approval of the completed structure. (*Id.* at 96). As to the netting, Mr. Yates testifies that if it came loose and it was obvious, a Yates employee might call Spring or they may take care of it. (*Id.* at 31). Significantly, Mr. Yates also testifies that his crew would sometimes have to remove the clips which held the netting in place in order to do "yard work inside the sidewalk bridge area," and that it was something that Yates would not call Spring back to do. (*Id.* at 94-96).

Yates' cross-claim for contractual indemnification must also fail as a matter of law. Summary judgment is appropriate when a contract is signed and dated after an accident occurs for which indemnity is sought, if it is not intended to be retroactive. (*Burke v. Fisher Sixth Ave. Co.*, 287 AD2d 410 [1st Dept. 2001]) The "Annual Bridge Construction Contract," which contains the indemnification clause and the requirement that Spring provide insurance coverage, states that the contract covers "installation and dismantling of sidewalk bridges to be performed on various projects during the calendar year 2004." Further, the contract is signed and dated January 5, 2004. Plaintiff's accident occurred on December 24, 2003. As such, the indemnification clause contained in the contract was not in effect on the date of the accident and does not contain any language which indicates that it was intended to apply retroactively. On its face, the "Partial Waiver of Lien" submitted by Spring does not apply to personal injury suits and is dated November 24, 2004, almost a year after the accident. The common law indemnification claims by Metropolitan and Yates are also dismissed as no negligence can be attributed to Spring as a matter of law.

No party opposes the motion. Where the movants have established a prima facie showing of entitlement to summary judgment, the motion, unopposed on the merits, shall be granted. (*See, Access Capital v. DeCicco*, 302 AD2d 48, 53-54 [1st Dept. 2002]). Further, "the factual allegations of the moving papers, uncontradicted by plaintiff, are sufficient to entitle defendants to judgment dismissing the complaint as a matter of law." (*Tortorello v. Carlin*, 260 A.D.2d 201 [1st Dept. 1999]).

[*6]
Finally, inasmuch as New York City is not a party to this action, the remainder of the case is transferred to a non-City part.

Wherefore it is hereby

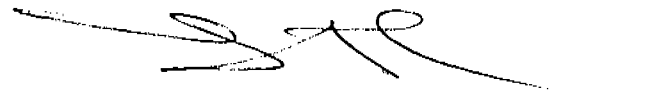
ORDERED that the motion is granted without opposition and the complaint is hereby severed and dismissed as against defendant the Spring Scaffolding, Inc. and the Clerk is directed to enter judgment in favor of said defendant; and it is further;

ORDERED that all cross-claims as against defendant Spring Scaffolding, Inc. are dismissed; and it is further

ORDERED that the remainder of the action continues; and it is further

ORDERED that the Trial Support Office is directed to reassign this case to a non-City part and remove it from the Part 5 inventory. Plaintiff shall serve a copy of this order on all other parties and the Trial Support Office, 60 Centre Street, Room 158.

DATED: October 28, 2008



EILEEN A. RAKOWER, J.S.C.

FILED
OCT 29 2008
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NEW YORK