

Buttolph v PS Marcato Elevator Co., Inc.

2008 NY Slip Op 33086(U)

November 14, 2008

Supreme Court, New York County

Docket Number: 107880/06

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**

PART 15

Justice

Index Number : 107780/2006

BUTTOLPH, RITA

vs

P.S. MARCATO ELEVATOR

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/14/08

WALTER B. TOLUB 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 15

-----x
RITA BUTTOLPH

Plaintiff,

Index No. 107880/06
Mtn Seq. 002

-against-

PS MARCATO ELEVATOR COMPANY, INC.,
MANHATTAN PLAZA ASSOCIATES LP.,
AQUARIUS MANAGEMENT CORP., and
MANHATTAN PLAZA TENANT'S ASSOCIATION

Defendants.

FILED
NOV 17 2008
COUNTY CLERK'S OFFICE
NEW YORK

WALTER B. TOLUB, J.:

This is Aquarius Management Corp (Aquarius) and Manhattan Plaza Tenant's Association's (Manhattan Plaza) motion for conditional summary judgment against Defendant PS Marcato Elevator Company, Inc. (Marcato) on its claim for contractual and common law indemnification (CPLR 3212).

Facts

The underlying action is one for personal injuries. Plaintiff claims she was injured on August 23, 2005, when she got off of an elevator at 400 West 43rd Street NY, NY (Building). When the door opened on the main floor, Plaintiff claims she stepped out, tripped and fell.

At the time of the incident there was a contract (Agreement) between Manhattan Plaza and Aquarius as owners and Marcato as an elevator contractor. The agreement between the parties was dated May 29, 1996. The Agreement provided that Marcato, agreed to

furnish all work, labor, services, materials and equipment necessary for the maintenance services, preventative maintenance procedures, repairs, adjustments and component replacements for the elevators and related apparatus for twelve passenger elevators in the Building.

Paragraph 9 of the Agreement states in relevant part that during the entire duration of the Agreement, the contractor (Marcato) will, maintain Workman's Compensation, General Comprehensive Liability or Manufacturer's Products and Contractor's liability naming Manhattan Plaza and Aquarius as additional insured parties and that the public liability insurance cover at least \$3,000,000 for any single occurrence (Manhattan Plaza Ex. D ¶9). In addition to public liability insurance, the contractor shall indemnify and hold harmless Manhattan Plaza and Aquarius from any claim or occurrence arising out of the operations of the Contractor, its subcontractor, agents, servant or employees (Id).

The Agreement also stated that the owner would not be responsible or liable for any injury to any person, whether employed by the Contractor or otherwise or for the loss or damage to any property whether belonging to the Contractor or others, arising out of the acts of the contractor or its agents, servants, and/or employees during the progress of work covered by the Agreement (Manhattan Plaza Ex. D ¶16). The Agreement stated

that liability of the Contractor is absolute and independent of any question of negligence on its part or its agents, servants and employees, and that the failure of the owner to direct the Contractor to take any particular precaution, shall not excuse the Contractor from liability in the event of damage or injury to person or property (Id). In the event that a suit is brought against the owner regarding any claim arising from any of the abovementioned causes, the Contractor will defend and indemnify the owners in such litigation at its own expense (Id).

The indemnity insurance rider in the Agreement provides that the Contractor agrees, to the fullest extent permitted by the law, to assume the entire responsibility and liability for and defense arising out of or in connection with, or as a consequence of the performance of all work at the Building. The rider also provides that the Contractor will pay and indemnify the owners of the Building and will hold each of them harmless from paying for any loss or damage, cost or expense, including judgments, attorneys' fees arising out of or in connection with, or as a consequence of the performance of all work at Manhattan Plaza.

Manhattan Plaza and Aquarius seek conditional summary judgment on their contractual and common law indemnification claims against Marcato based on the Agreement and the testimony of: (1) Mr. Maloney, the Marcato resident mechanic who testified that, inter alia, the elevator became mis-leveled, that he fixed

it and that the elevator thereafter worked normally; (2) Mr. Betts, the executive vice president of Marcato, who testified that Marcato was the sole service provider for the elevator involved in the incident; and (3) Mr. Hunnings, the director of operations at Manhattan Plaza, who testified that Marcato was solely responsible for the maintenance of the elevators and no one else would perform work on the elevators.

Discussion

To be clear, Manhattan Plaza and Aquarius do not seek summary judgment dismissing the Complaint, rather this is a motion for summary judgment on the cross-claims against Marcato. Manhattan Plaza and Aquarius seek relief based on common law and contractual indemnity.

In matters concerning contractual and common-law indemnification, it is well established that the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident (Cocala v. Stearns Conrad and Schmidt Consulting Engineers, Inc., 10 Misc3d 1066(A) [December 2, 2005] citing Corerria v. Professional Data Management Inc., 259 AD2d 60 [1st Dept 1999]).

For a moving party to obtain summary judgment, the cause of action or defense must be established sufficiently to warrant the

court as a matter of law in directing judgment in the movant's favor (Santono v. Bertelsman Property, 21 AD3d 712 [1st Dept 2005]; CPLR 3212[b]). Here Manhattan Plaza and Aquarius have demonstrated their prima facie entitlement to summary judgment by virtue of the Agreement and the depositions of Mr. Maloney, Mr. Batts and Mr. Hunnings. The evidence presented indicates that Marcato was in sole control of the Building's elevators and that neither Manhattan Plaza nor Aquarius were negligent in their actions and that they did not perform work on the elevators and did not have notice of a problem with the elevator.

In order to defeat the summary judgment motion, Marcato must show the existence of a bona fide issue raised by evidentiary facts, reliance upon mere conclusions, expressions of hope or unsubstantiated allegations are insufficient (Santono v. Bertelsman Property, 21 AD3d 712 [1st Dept 2005] citing Rotuba Extruders v. Ceppos, 46 NY2d 223 [1978]; Corcoran Group v. Morris, 107 AD2d 622 [1st Dept 1985]). Marcato argues that the motion for summary judgment is premature because it is unclear if Manhattan Plaza was negligent. However as stated above, without more, expressions of hope or unsubstantiated allegations are insufficient to defeat a motion for summary judgment.

In the absence of showing actual negligence on Manhattan Plaza or Aquarius's part, and where under the Agreement, Marcato assumed responsibility for the maintenance, inspection, repair

and servicing of the elevators, and agreed to indemnify Manhattan Plaza and Aquarius for injuries arising out of the performance that work, the motion for conditional summary judgment must be and is granted.

Accordingly, it is

ORDERED that Manhattan Plaza and Aquarius's motion for summary judgment on its contractual indemnification claim against Marcato is granted to the extent that Marcato is held liable on Plaintiff's claim; and it is further

ORDERED that the Clerk of the Court enter judgment accordingly.

Counsel for the parties are directed to appear for a pre-trial conference on December 19, 2008 at 11:00am in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 11/14/08

Wf

HON. WALTER B. TOLUB, J.S.C.

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NEW YORK 6