

Brandt v IMICO 86 Dev.

2008 NY Slip Op 33190(U)

November 24, 2008

Supreme Court, New York County

Docket Number: 115901/06

Judge: Walter B. Tolub

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

PRESENT: WALTER B. TOLUB
Justice

PART 15

BRANDT, SHERYL

INDEX NO. 115901/2006

Plaintiff,

-v-

IMICO 86 DEVELOPERS, et. al.,

MOTION DATE _____
MOTION SEQ. NO. 001

Defendants.

MOTION CAL. NO. _____

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and motion sequence 003 are consolidated for disposition and decided in accordance with the accompanying memorandum decision.

FILED

NOV 28 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 11/24/08

WALTER B. TOLUB, 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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
SHERYL BRANDT,

Plaintiff,

-against-

IMICO 86 DEVELOPER a/k/a EXTELL DEVELOPMENT
COMPANY, BOVIS LEND LEASE LMB, INC., and
BREEZE NATIONAL,

Defendants.

-----X
WALTER B. TOLUB, J.:

Index No 115901/06

FILED
NOV 24 2008
CLERK OF COURT

In this personal injury action, plaintiff Sheryl Brandt (Brandt) alleges that at 11:00 A.M. on July 25, 2006, she sustained serious physical injuries when she was struck by a gate as she walked along the sidewalk adjacent to a construction site on East 85th Street in Manhattan. On or about October 26, 2006, Brandt commenced this action to recover monetary damages, naming as defendants the construction site owner, IMICO 86 Developer a/k/a Extell Development Company (Extell), the construction site manager, Bovis Lend Lease LMB, Inc. (Bovis), and the demolition subcontractor, Breeze National (Breeze). It is plaintiff's contention that on the day and at the time of her accident, defendants were negligent in leaving the gate unlocked, unsecured, and unsupervised, creating a hazardous condition for pedestrians walking along the sidewalk. Issue was joined by service of defendants' separate answers on or about January 18, 2007, November 20, 2006, and January 8, 2007, respectively. Discovery ensued and the note of issue was filed on March 28, 2008, triggering the instant motions for summary judgment.

Under motion sequence 001, Extell moves pursuant to CPLR 3212, for an order granting judgment in its favor and dismissing the complaint and all cross claims against it. Under motion

sequence 003, Bovis seeks an order pursuant to CPLR 3212, dismissing both plaintiff's complaint and all cross claims against it, and for an order granting it contractual and common-law indemnification against Breeze. Motions sequence numbers 001 and 003 are consolidated for the purpose of disposition, and Breeze, who does not seek summary judgment relief, opposes both motions along with plaintiff.

The following facts are not in dispute. Extell was the owner of a construction project (the Project) located at 1269 Lexington Avenue in Manhattan (construction site) which ran along East 85th Street and involved phases of demolition, foundation, and superstructure. At all relevant times, the construction site was contained by temporary, chain-linked construction fencing, and a trucking entrance which consisted of two, approximately twelve-feet high by eight-feet wide, chain-linked gates on the East 85th Street side. The fencing, including the gates, was installed by Breeze but was not manufactured by Breeze. Demolition was taking place in and about July 2006, during which time the gates were routinely opened to permit trucks involved in the removal of debris to both enter and exit the construction site. The gate¹ was erected so as to swing inward into the site but it was also able to swing, at least partway, outwards over the public sidewalk. The gate was held in a closed position by a steel chain with either one or two key-operated padlocks. Keys to the padlock(s) were held by personnel from both Breeze and Bovis.

It is plaintiff's contention that while she was walking along the sidewalk on East 85th Street near Lexington Avenue, the gate swung outwards and stuck her, knocking her to the

¹Although there were two construction gates on East 85th Street, the parties primarily refer to only one of the gates as involved in plaintiff's accident.

ground, causing injury. At her deposition in this matter, Brandt testified that, although she was not aware of any witnesses to her accident, she recalled being helped to her feet by someone who was passing by, and that one of the construction site workmen came over to close and lock the gate. She also testified that she asked the workman to get someone for her to speak with, that he said he would, and then walked away. When no one came over, she walked back to her neighboring apartment building. Brandt did not get the name of either the person who stopped to help her, or the workman she spoke with.

Extell seeks a summary dismissal of the complaint against it on the ground that it did not have any responsibility, supervisory or otherwise, with respect to the construction, the maintenance, or the operation of the gate. Extell argues that because its role with respect to the Project was limited to acquiring the site, managing the design team, and hiring the professionals to perform the construction, it cannot be liable for plaintiff's injuries and should not be a defendant in this action.

In addition to Brandt's deposition transcript, Extell submits copies of the defendants' deposition transcripts, together with written documents spelling out the roles and responsibilities of the various parties to this action. Included as an exhibit is a copy of the written contract, dated December 21, 2005, by which Extell hired Bovis to be the Project construction manager (Exhibit 1). Under the terms of the contract, Bovis agreed, among other things, to act as Extell's

Construction Manager for preconstruction in connection with [the Project]. It is the express intent of the parties for [Bovis] to provide complete construction management services for the entire Project pursuant to a subsequently executed Construction Management Agreement (the "CMA"). This Agreement will serve to commence [Bovis'] pre-construction services pending execution of such an agreement.

The deposition transcript of Extell's senior project manager at the construction site, Anthony Abbruzzese, Jr. (Abbruzzese), contains an explanation of what Extell intended by the words "complete construction management services." Abbruzzese explained that Bovis was hired to manage the "the whole process from day one, demolition through construction" (Abbruzzese Deposition, at 9), and that Bovis, in turn, hired subcontractor Breeze to handle the demolition/abatement phase of the Project which had to be completed before the excavation could take place. He stated that he routinely visited the site two to three times per month to check on the status of the demolition. When asked, Abbruzzese recalled seeing trucks remove debris from the site, but had no independent recollection of any workmen directing traffic by the trucking entrance. Abbruzzese also testified that Bovis was responsible for supervising all trade subcontractors on the Project, that both Breeze and Bovis were responsible for managing the trucks as they entered and exited through the gate, and that the agreement between Breeze and Bovis defined the job responsibilities as between their two companies.

Bovis's field superintendent for the Project, Robert Marketta (Marketta), was present at the construction site on July 25, 2006, and was deposed in this matter. According to Marketta's testimony, his job involved supervising the site, checking to make sure that everything was where it was supposed to be, and ensuring, on a daily basis, that the various trades showed up and did their jobs. Marketta confirmed that the fencing and "trucking" gate were installed by Breeze and pointed out that it was Breeze's responsibility to maintain and repair the fence and the gate. He denied that Bovis had anything to do with the alleged defective and/or dangerous condition of the gate, and he denied having any personal involvement with either supervising or handling the opening and closing of the trucking entrance gate.

Marketta testified that he initially learned of plaintiff's accident when he received a phone call from the building manager next door, Shane O'Reilly, who informed him that one of his tenants (Brandt) had just walked in all shaken up and suggested that he call her. Marketta telephoned Brandt later that same day, introduced himself, asked if she needed medical attention. Brandt, purportedly, responded no, that she had been hit by a gate at the construction site, but she was fine. Marketta testified that after the phone call, he personally investigated the matter but was unable to find any witnesses to the incident. He later filled out an incident report about the accident.

When questioned about the gates themselves, Marketta provided detailed information regarding both the operation of the gates and the safety procedures which were in place at the time of the accident. Included in his testimony was his explanation that, during regular business hours, the gates were held in place by four-foot long rebars (or metal pins) which were inserted into the sidewalk and which protruded, approximately three-feet upward from the sidewalk. He stated that the rebars needed to be manually removed in order for the gate to be opened, and that it would not have been physically possible for the gate to simply swing outward toward the street because of the rebars and because of the presence of a steel street plate which had been laid on top of the sidewalk prior to the installation of the gate. He described the steel plate as about an inch to an inch and a quarter thick, and large enough to cover the width of the sidewalk. Marketta testified that the gate would have to have been physically lifted up over the plate in order for it to swing outward, but acknowledged that once the gate went past a certain point, it had the ability to move or sway about three or four feet.

Marketta testified that the gate was supposed to be kept closed except for the passage of

trucks in and out of the site. He explained that when the gates were opened for "trucking," the metal chain would be wrapped around only one of the gates, and that when they were not in use during regular business hours, the metal chain would be wrapped around both of them to hold them closed, but would not actually be locked with the padlock until work was completed for the day. Marketta testified that Breeze held a key to the padlock, but acknowledged that he himself had occasion to lock the gate shut with the padlock.

Finally, Marketta explained that when the gates were opened, either two or three Breeze employees and/or flag people would monitor the passage of both pedestrian and vehicular traffic near the trucking entrance, using "jersey" barriers when necessary, and occasionally placing one or more orange cones on the sidewalk as an added safety precaution. He stated that Bovis and Breeze regularly held safety meetings covering various topics, including pedestrian and traffic safety, and that on the day of the accident, a Breeze foreman, named "Casper," would have been the individual in charge of directing the flag people.

Breeze produced for deposition its Project foreman, Casper George (George), who indicated that he first learned of the incident the next day, when Marketta asked him if he knew anything about it. According to George, he was one of approximately 10 to 12 Breeze employees present at the site on July 26, 2006. George testified that his management of the demolition work required him to coordinate the truckers with the demolition workers, and to supervise the loading of the trucks, as well as the safe passage of the trucks through the gate. He also testified that he took direction from, and reported to, Marketta on a daily basis about the progression and coordination of the work.

Like Marketta, George explained that the gate was held in place by a pin (rebar) and kept

locked with a metal chain and padlock when no "trucking" was taking place. George stated that a key was needed to open, but not to close, the padlock(s), that he and Marketta were the only ones with padlock keys, that if the gate was opened, it was opened by one of them, and that Breeze's flagmen would monitor the trucking and pedestrian traffic when the gate was open. George, in much the same manner as Marketta, explained that, due to the presence of the rebar and metal street plate, it was not possible for the gate to swing open toward the street on its own, and that the heft of the gate itself required two workmen to lift it up over edge of the metal street plate to even be in a position from which it could be opened outward toward the street. George testified that if the gate was opened entirely toward the street, a pedestrian would not be able to walk straight ahead, but rather, would be redirected by flagmen to walk into the street between the protective "jersey" barriers.

When asked where he was at the time of the incident, George responded that he was precisely where the incident is alleged to have taken place, but that he neither observed an accident involving a pedestrian and a gate, nor did he hear about the accident until the next day when Marketta came to speak with him about it. Finally, George was unable to identify which workers were assigned to the trucking entrance gate on the day of plaintiff's accident because, according to him, different men managed the gate at different times.

Extell argues that it cannot be held liable for Brandt's accident and injuries because the evidence on submission does not constitute competent proof that it directed, controlled, or supervised either the subject gate or the demolition and/or excavation work performed at the site. More specifically, Extell argues that its involvement with the Project was limited to having its senior project manager, Abbruzzese, check on the on-site progress of the work on a regular, but

infrequent, basis. Based on its submissions, Extell has demonstrated prima facie entitlement to a summary dismissal of the claims against it. The burden, therefore, shifts to Brandt and Breeze, as the parties opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

Neither Brandt nor Breeze offer proof: (1) of any previous incidents involving the gate; (2) that Extell was involved in leaving the gate unsecured and/or unsupervised on July 25, 2006; or (3) that Extell had one or more employees present at the construction site on the day, or at the time, of the accident. Rather, both Brandt and Breeze cite *D'Amico v Christie* (71 NY2d 76 [1987]) for the proposition that a landowner has a duty to reasonably control the actions of third parties on its land so that those actions do not injure others on the property, and argue that this proposition applies to the instant facts. Brandt and Breeze point to Brandt's deposition testimony in which she stated that it was her "belief" that the workman who came over and closed the gate after her accident was the same man, Bovis's employee Marketta, who later telephoned her to inquire about her well being. Brandt and Breeze reason that because it was Bovis's employee who came over and closed the gate, Bovis must have been involved in monitoring and controlling the gate, and therefore, that it was Extell's duty, as the landowner, to reasonably control the actions of the actions of third-party Bovis who was present on its land.

To successfully oppose Extell's motion for summary judgment, its opponents "must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which [it] rests [its] claim . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" (*Zuckerman v City of New York*, 49 NY2d at 562).

Brandt acknowledged that she did not know this individual and that this individual did not identify himself to her during their brief encounter. She stated that she could tell that he was a construction workman because of the type of clothing he was wearing. However, her identification of the construction workman who came over and locked the gate as the same man, Marketta, who telephoned her later that same day, appears to be based on little more than unsubstantiated supposition, which is insufficient to withstand summary judgment.

Finally, Brandt opposes the motion on the ground that Extell should be liable for her injuries because the type of work being performed on its property was “inherently dangerous,” and the New York courts have long recognized that the performance of inherently dangerous work on one’s property by a contractor or subcontractor increases the property owner’s (Extell’s) duty of care with respect to the general public (*Boylhart v Di Marco & Reimann, Inc.*, 270 NY 217 [1936]).

While a principle is not, ordinarily, held liable for the acts of its independent contractors, exceptions to this rule have been carved out and recognized by the courts based on public policy considerations (*see Chainani v Board of Educ. of City of N.Y.*, 87 NY2d 370, 381 [1995]).

Inherently dangerous work is one such exception.

In order for the inherently dangerous exception to apply. . . the danger must be readily apparent and the accident must be foreseeable. A mere showing that precautions must be taken to avoid a dangerous condition is insufficient to classify an activity as inherently dangerous. . . Moreover, in order for the work to be inherently dangerous, it must be “attended with danger, no matter how skillfully or carefully it is performed”

(*Eastern Airlines v Joseph Guida & Sons Trucking Co.*, 675 F Supp 1391, 1395-1396 [ED NY 1987], citing *McDonald v Shell Oil Co.*, 20 NY2d 160 [1967]; *Carmel Associates Inc. v Turner*

Construction Co., 35 AD2d 157 [1st Dept 1970]). Activities which the courts have recognized as “inherently dangerous” include blasting, reservoir construction, the use of vicious animals, and high-tension electric wires (*Chainani v Board of Educ. of City of N.Y.*, 87 NY2d at 381, citing Prosser and Keeton, Torts § 71, at 513 [5th ed]).

Applying this standard to the instant facts, the trucking of demolition debris through a temporary trucking entrance does not constitute an activity sufficiently fraught with danger as to be properly classified as an inherently dangerous endeavor. Even assuming the gate was allowed to swing outward over the sidewalk in the manner alleged by plaintiff, plaintiff’s accident occurred as a result of common negligence rather than as a result of an inherently dangerous activity, and Extell cannot be found responsible for plaintiff’s injuries. As neither Brandt nor Brecze has produced admissible evidence sufficient to raise an issue of fact requiring a trial as to Extell’s negligence, the instant motion for a summary dismissal of the complaint is granted (*Zuckerman v City of New York*, 49 NY2d at 562 - 563).

Turning to the motion by Bovis for summary judgment, Bovis makes, essentially, three separate arguments as to why the complaint against it should be dismissed: (1) that it cannot be held liable for negligence because it did not create the trucking gate and did not have prior notice of any defect in, or problem with the gate; (2) that Brandt has failed to demonstrate, as she must, that Bovis owed her a duty, that Bovis breached this duty, and that Bovis’s breach was a proximate cause of her injury; and (3) that it cannot be held liable for the alleged negligence of Brecze, its independent contractor. In other words, it is Bovis’s contention that, if plaintiff was injured in the manner she alleges, then liability for her injuries must rest with Brecze, because, pursuant to their agreement, Brecze was the independent contractor solely responsible for all

facts of its work, and Bovis had neither actual nor supervisory control over Breeze's work.

It is well settled that a general contractor is not responsible for the negligent, independent acts of its subcontractor unless that general contractor controls, directs, or interferes with the manner in which the subcontractor performs its work (*see Eastern Airline v Joseph Guida & Sons Trucking Co.*, 675 F Supp at 1395; *see also Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]).

Attached to Bovis's notice of motion is a copy of the subcontractor agreement by and between Bovis and Breeze, together with a copy of the "Scope of Work" document which, together, set forth and define Breeze's specific demolition and abatement responsibilities at the construction site. With respect to the trucking gate, not only was Breeze obligated to furnish, install, maintain, and repair the truck entrance gate, but it was also compelled to take measures to "protect the public from potential hazards resulting from accessing to & from the site" (Bovis Notice of Motion, Exhibit J, Scope of Work §§ 3 and 68). The deposition transcripts of Marketta and George confirm that it was not Bovis's obligation, but rather Breeze's obligation, and specifically, George's job, to oversee the trucking, and to make sure that everything was going correctly as the trucks entered and exited the trucking entrance gate.

The Scope of Work document clearly, and repeatedly, mandated that Breeze "work closely with the Construction Manager" during the term of the job, and despite Bovis's denials of control, the probative evidence is inconclusive as to Bovis's day-to-day supervisory role and involvement with Breeze's demolition, abatement, and trucking responsibilities. Moreover, while there is competent testimonial proof that both Breeze and Bovis had keys to the padlock used to hold the gate closed when it was not in use, there is a lack of proof as to how, on July 25,

2006, the gate came to be in a position from which it could, as alleged by plaintiff, swing forward and strike her. More questions were raised than resolved by Marketta's acknowledgment that he did, from time to time, close and lock the gate at the trucking entrance, and that it was his job, in July 2006, to supervise the "trades" at the construction site on a daily basis and to conduct regular safety meeting regarding pedestrian and traffic safety. As a result, the evidence does not preclude a finding that employees from both Bovis and Breeze were responsible for negligent handling and/or management of the gate, and that such negligence resulted in plaintiff's injuries.

Moreover, Bovis and Breeze have raised significant questions of fact as to the circumstances surrounding Brandt's injuries, specifically, whether it was feasibly possible for the gate to swing outward on its own. Resolution of these disputed factual issues involve determinations as to the credibility of the witnesses, and it is inappropriate for a court on a motion for summary judgment to assess the credibility and value of the deposition witnesses' testimony (*Dollas v W.R. Grace and Co.*, 225 AD2d 319, 320 [1st Dept 1996]). Accordingly, Bovis has failed to demonstrate entitlement to a summary dismissal of the complaint against it (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 323 [1986]).

Bovis also moves for an order granting both contractual and common-law indemnification against Breeze. Bovis reasons that, because Brandt's accident and injuries arose out of Breeze's work, and because Breeze contractually agreed to indemnify it for any liability that arose out of its work, Breeze must indemnify Bovis for any money it pays to plaintiff, including attorney's fees. Bovis also seeks common-law indemnification on the ground that its role in causing plaintiff's injury was passive, rendering its liability vicarious. As stated above, the competent evidence is inconclusive as to how plaintiff was injured and what roles, if any,

Bovis and/or Breeze played in causing her injuries.

Additionally, as proof of entitlement to contractual indemnification, Bovis directs the court to "Exhibit 'J' at exhibit B 'Scope of Work', section 3(d)," which purports to include a complete copy of both the agreement between Bovis and Breeze and the Scope of Work document relevant to the Project. Upon review of Exhibit J, the indemnification language, referenced by Bovis as Article 11 and section 3 (d), appears not to have been included in the materials on submission, and a determination cannot be rendered as to contractual indemnification. Summary judgment is also denied as to Bovis's demand for common-law indemnification. Where, as here, more than one party may be responsible for the accident leading to plaintiff's injuries, a court cannot summarily decide a pre-trial claim for common-law indemnification (*Freeman v National Audubon Socy., Inc.*, 243 AD2d 608, 609 [2nd Dept 1997]).

Accordingly, it is

ORDERED that the motion for summary judgment by defendant IMICO 86 Developer a/k/a Extell Development is granted, and the complaint and all cross claims are severed and dismissed as against IMICO 86 Developer a/k/a Extell Development, and the Clerk is directed to enter judgment in favor of this defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the motion for summary judgment by defendant Bovis Lend Lease LMB, Inc. is denied in all respects; and it is further

ORDERED that the remainder of the action shall continue.

Counsel for the remaining parties are to appear as scheduled for jury selection on December 1, 2008 at 9:30 am in room 335 at 60 Centre Street.

Dated: 1/24/08

ENTER:

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WALTER B. TOLUB J.S.C.

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