

Rusin v 301 E. 93, LLC

2008 NY Slip Op 33344(U)

December 4, 2008

Supreme Court, New York County

Docket Number: 114272/03

Judge: Michael D. Stallman

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

PRESENT: Hon. MICHAEL D. STALLMAN
Justice

PART 7

CAROLYN RUSIN,
Plaintff,

INDEX NO. 114272/03

- v -

MOTION DATE 10/9/08

MOTION SEQ. NO. 007

301 EAST 93, LLC, NEW YORK SKYLINE LLC
s/h/a NY SKYLINE LLC and STRUCTURAL
PRESERVATION SYSTEMS, INC.,

MOTION CAL. NO. 87

Defendants.

(And two third-party actions).

The following papers, numbered 1 to 8 were read on this motion for summary judgment; cross motion for summary judgment

| | PAPERS NUMBERED |
|---------------------------------------------|-----------------|
| Notice of Motion— Affidavits — Exhibits A-N | 1-2 |
| Answering Affidavits — Exhibits | 3 |
| Replying Affidavits — Exhibits | 4 |
| Notice of Motion— Affidavits — Exhibits A-J | 5-6 |
| Answering Affidavits — Exhibits A-B | 7 |
| Replying Affirmation | 8 |
| <i>+ papers on Reg 006</i> | |

Cross-Motion: Yes No

FILED
DEC 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion and cross motion are determined in accordance with the annexed memorandum decision and order.

Dated: 12/14/08
New York, New York

[Signature]

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: IAS PART 7**

-----X
CAROLYN RUSIN

Index. No. 114272/03

Plaintiff.

DECISION and ORDER

- against -

301 EAST 93, LLC, NEW YORK SKYLINE LLC
s/h/a NY SKYLINE LLC and STRUCTURAL
PRESERVATION SYSTEMS, INC.,

Defendants.

-----X
PUBLIC SERVICE MUTUAL INSURANCE CO. A/S/O
CAROLYN RUSIN,

Index No. 100342/05

Plaintiff,

- against -

301 EAST 93, LLC., NY SKYLINE LLC, & STRUCTURAL
PRESERVATION SYSTEMS, INC.,

Defendants,

-----X
STRUCTURAL PRESERVATION SYSTEMS, INC.,

Third Party Index No. 590746/06

Third Party Plaintiff,

- against -

SUPERSTRUCTURES ENGINEERS & ARCHITECTS,
PLLC, SUPERSTRUCTURES, INC., & LMW
ENGINEERING, LLC.,

Third Party Defendants,

FILED
DEC 15 2008
COUNTY CLERK'S OFFICE
NEW YORK

-----X
NEW YORK SKYLINE LLC s/h/a NY SKYLINE LLC.,

Index No. 590283/07

Second Third Party Plaintiff,

- against -

SUPERSTRUCTURES ENGINEERS & ARCHITECTS,

PLLC and 1800 SECOND AVENUE CORPORATION,
MICHAEL YALOZ and DOREEN YALOZ.

Second Third Party Defendants.

-----X
HON. MICHAEL D. STALLMAN, J.S.C.

Motion sequence numbers 006 and 007 are consolidated for disposition.

In this property damage action, defendant/second third party plaintiff, New York Skyline LLC s/h/a NY Skyline LLC (“Skyline”) moves for summary judgment on its claim for indemnification and insurance procurement against Structural Preservation Systems, Inc. (“SPS”)(motion 006).

In motion 007, third party defendant LMW Engineering, LLC (“LMW”) moves for summary judgment dismissing the third party complaint and all cross claims against it. Third party defendant Superstructures Engineers & Architects, PLLC (“Superstructures”) cross moves for summary judgment dismissing the second third party complaint and all cross claims against it.

BACKGROUND

Plaintiff, Carolyn Rusin (“Rusin”), owner of a residential building located at 1802 Second Avenue in Manhattan (“Rusin’s property”), alleges that her building was damaged as a result of defendants’ negligent demolition, excavation and construction of a new building located at 1800 Second Avenue (“the new building”). Defendant 301 East 93rd (“owner”) owns the 1800 Second Avenue property; defendant Skyline was the construction manager for the new building and defendant SPS was employed by the owner and/or Skyline to perform pile drilling work at the new building.

Plaintiff Public Service Mutual Insurance Company (“Public Service”), Rusin’s insurer, investigated Rusin’s property damage claim and determined that a continuing condition on Rusin’s

property had been aggravated by the construction work on the new building. Public Service negotiated a settlement with Rusin and thereafter instituted a subrogation action against the owner, Skyline and SPS. The subrogation action was subsequently consolidated with the main action.

Thereafter, SPS instituted a third party action against Superstructures, the structural engineering firm that the owner retained to prepare the structural design and detailing for the new building, and LMW, the company retained to perform pile inspections. The third party action demands indemnification and/or contribution based on the alleged negligence and breach of contract of Superstructures and LMW.

Superstructures states, without contradiction, that SPS voluntarily discontinued the third party action against it.

Skyline then commenced a second third party action against, inter alia, Superstructures for contribution and/or indemnification.

MOTION 006

In support of the motion for indemnification and insurance procurement against SPS, Skyline alleges that SPS installed the piling and performed the pile drilling work that allegedly caused the damage to Rusin's building. It argues that the contract between the parties contained both a provision requiring SPS to obtain liability insurance naming Skyline as an additional insured and an indemnification clause and that pursuant to *Roddy v. Nederlander Producing Co.*, 44 A.D.3d 556 (1st Dept 2007) summary relief is appropriate on a claim for contractual indemnification when the obligation to indemnify is coupled with the indemnifying party's obligation to name the other party as an additional insured.

Skyline also states that because it is an additional insured under SPS's insurance policy, SPS's insurer is obligated to assume Skyline's defense and to indemnify it.

In opposition to the motion for summary judgment, SPS argues that Skyline is not a party to the contract between it and the owner and therefore Skyline is not entitled to indemnification from SPS; that pursuant to the arbitration clause in section 12.1 of Attachment "A"-General Conditions of the contract¹, that this dispute must be arbitrated and it also argues that there are questions of fact as to whether SPS was negligent and, if it was, whether that negligence caused the damage to Rusin's property.

A. Indemnification

Skyline's reliance on *Roddy, supra*, for the proposition that SPS is required to indemnify it, is misplaced. In that case, the First Department held that, "(s)ummary relief is appropriate on a claim for contractual indemnification where, as here, the license agreement is unambiguous and clearly sets forth the parties' intention that a licensee indemnify the licensor for the injuries sustained." *Roddy v. Nederlander*, 44 A.D.3d at 556. There the court found that, based on the license agreement, the licensor had established a prima facie case of entitlement to indemnification and that the licensee failed to demonstrate that there was a question of fact sufficient to overcome the licensor's proof.

Here, the indemnification clause in Attachment A to the contract between the SPS and the owner provides, "(t)o the extent caused by the negligent acts or omissions of SPS, its employees,

¹ Section 12.1 states, in pertinent part:

All claims, disputes and other matters and questions arising out of or related to this Agreement or any breach thereof, which cannot be resolved through negotiation, shall be submitted to mediation or arbitration in accordance with the American Arbitration Association

agents or subcontractors. SPS will indemnify and hold harmless Client² from and against claims, damages and expenses including reasonable attorney's fees arising out of bodily injury or property damage that occur during the performance of the work except as otherwise provided in Item 10 above." (O'Donnell Aff, Ex. B, Attachment A, Item 11) Item 10.3 of Attachment A states that the Client is responsible for property damage that results from damage to "interior and/or exterior underground/overhead surface mounted utilities or structures unless caused by SPS' sole negligence."

SPS correctly argues that the request for summary judgment on the indemnification claim is premature because Skyline has failed to demonstrate that SPS was negligent and that, if it was, that the damage to Rusin's property was caused by SPS's negligence.

Indeed, as the First Department recently stated in *Gomez v. Sharon Baptist Bd. Of Directors, Inc.*, 866 N.Y.S.2d 164, (1st Dept 2008):

Thus far there has been no finding that either [third party defendant] or its agents were negligent let alone that such negligence proximately caused plaintiff's injuries. Accordingly, summary judgment on the contractual indemnification claim is premature. (citations omitted)

(*See also, Cichon v. Brista Estates Associates*, 193 A.D.2d 926, 927-928 [3rd Dept 1993])

Moreover, Skyline has failed to demonstrate that, even if it is determined that SPS's negligence caused the property damage, it would be entitled to indemnification as the "Client" under the contract. The term "Client" is used in Attachment "A" the general conditions section of the contract which is the section that contains the indemnification clause and it is also used in a January

² The term "Client" is not defined in the contract or in any of the riders.

22, 2002 proposal that appears to have been incorporated into the contract. However, the term client is not defined in either document (O'Donnell Aff. Ex. B).

In the standard form portion of the contract the parties are identified as the owner and SPS. (O'Donnell Aff., Ex. B, p. 1) Skyline is named in that standard form contract as the construction manager. (O'Donnell Aff., Ex. B, p.1) The January 22, 2002 proposal letter from SPS which is addressed to Skyline recognizes that Skyline is the "owner's rep/manager" but that proposal also contains separate lines for acceptance by the "client" and SPS. The document appears to have been signed by the client, presumably the owner, but it was not separately signed by SPS. (O'Donnell Aff., Ex. B)

Accordingly, because the term client is not defined in the contract, it cannot be determined on these papers alone as to whether Skyline, as the owner's representative, falls within the meaning of a "client" under the contract.

As to SPS' argument that the indemnification claim must be arbitrated, it is well settled that a party waives its right to arbitrate when its participation in the lawsuit manifests an affirmative acceptance of the judicial forum. (*See, e.g., Advest, Inc. v. Wachtel*, 253 A.D.2d 659 [1st Dept 1998]) In determining whether the right to arbitration was waived, the court should consider factors such as the time that has elapsed from the commencement of the litigation and the extent of the litigation so far. (*Advest, Inc. v Wachtel*, 253 A.D.2d at 260).

Here, the litigation was commenced in 2003, discovery is complete and plaintiff has filed a note of issue. Skyline has affirmatively accepted the judicial forum by its full and active participation in this litigation. It has joined in motion practice, engaged in discovery and participated in court conferences in the matter. Its belated assertion that the question of indemnification must

be arbitrated has been waived by its own conduct.

B. Insurance Procurement

Skyline's insurance procurement claim appears, in actuality, to be a demand that SPS's insurer defend and indemnify Skyline for all claims and cross claims against it because SPS was required to procure a \$3 million liability policy and name Skyline as an additional insured. Skyline contends that SPS's policy naming it as additional insured is now primary. (O'Donnell Aff, para. 6 &9) To the extent that Skyline is seeking a defense and indemnification from the insurer, it must commence litigation against that insurer.

MOTION 007

A. LMW's Motion

In support of summary judgment dismissing the claims and cross claims against it, LMW argues that it was merely an engineering professional retained to conduct controlled inspections of the pile drilling. LMW claims that the inspections merely verified the depth of the drilled piles and their load capacity. It states that it had no contractual duty to supervise the work at the site or to control the method or means by which the demolition and construction work was done. Further, it states that it did not prepare plans or designs for the pile drilling and that there is no evidence that it negligently performed the engineering services that it was retained to provide. LMW also argues that the breach of contract cause of action will not lie because SPS did not have a contract with LMW.

In opposition to dismissal, SPS and Skyline argue that, under the New York City Building Code, sections 27-696(a)³ and 27-721⁴, LMW 's duties included a duty to insure that piles were installed in a manner that protected adjacent buildings and property. They claim that there is a question of fact as to whether LMW carried out its duties, outlined under the Building Code, in a non-negligent manner.

A party opposing a motion for summary judgment must produce proof in admissible form sufficient to overcome plaintiff's prima facie case and raise material questions of fact. Mere conclusions, expressions of hope or unsubstantiated allegations are insufficient. (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y.2d 525, 533 [1991][quoting *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980)])

In this case, SPS and Skyline's argument that there is a question of fact as to whether LMW carried out its duties under the Building Code in a non-negligent manner is without merit. Although the Building Code cautions that the piles should be installed with adequate protection for adjoining property, the Code does not charge the pile inspector with this responsibility. (Building Code Section 27-696[a]) Indeed, in this case the deposition testimony establishes that LMW was hired merely to inspect the piles to confirm that they were drilled into the ground to the required depth and that the piles could support the specified load. The testimony also establishes that LMW did not control the manner or means of the drilling, prepare the plans for the pile placement or actually perform the drilling. (*Marino Aff, Tavor Dep., Ex. G., p.48, l. 21 thru p. 49, l. 9; Ex. I, p. 36, l. 24 thru p. 37, l.*

³ Section 27-696(a) of the building code states, "(p)iles shall be installed with adequate provision for the protection of adjacent buildings and property."

⁴ Section 27-721 states in pertinent part, "(t)he installation of all piling shall be subject to controlled inspection. . . . Such inspection shall be preformed only be an architect or engineer resident at the site"

10; Pirro Aff., Ex. J, p. 49, ll. 3-12, p. 50, l., 9-11; Wang Aff., Ex. L, pp. 34-37, p. 55-56)

SPS and Skyline have failed to submit any evidence that demonstrates that LMW caused or contributed to the pile drilling vibrations that allegedly caused the damage to plaintiff's property, or that LMW was negligent in the performance of its duties and that such negligence caused or contributed to the damage.

SPS and Skyline's speculation and conjecture is insufficient to overcome LMW's prima facie case that it did not cause or contribute to the damage to Rusin's property and that it is entitled to judgment dismissing all claims and cross claims against it.

B. Superstructures's Cross Motion

Superstructures argues that it is entitled to summary judgment dismissing all claims and cross claims against it because the record is devoid of any evidence that it was negligent in the performance of its engineering services or that the pile designs it prepared were inaccurate or outside of industry standards. It contends that if, plaintiff's damages were caused by vibrations from the pile drilling, then responsibility for those damages should rest with the contractor who performed the drilling. Superstructures states that its contract specifically exempts it from responsibility, "for the means, methods, sequences, or procedures of construction selected by the contractor or the safety precautions and programs incident to the work of the contractor" and that it is also exempt from liability for the contractor's failure to perform the work in accordance with the construction documents. (Harenstein Aff., Ex. D, p. 3)

In opposition Skyline argues that summary judgment must be denied because Superstructures was the structural engineer that devised the pile location plan and that the responsibility for the pile drilling and the pile drilling locations was determined by Superstructures.

Here, Superstructures established its prima facie case that it is entitled to judgment dismissing the claims and cross claims against it by submitting the deposition testimony of Vikrant Sampat, an engineer and principal in the firm, who testified that the design of the pile caps was well within industry standards. (Harenstein Aff., Ex. F, p. 64-66) In addition it submitted the testimony of Robert Pirro, on behalf of SPS, who stated that SPS was the entity that determined the means and methods for drilling the piles. (Harenstein Aff., Ex. G, p. 69).

Moreover, Superstructures established that it was not retained to supervise the performance of the job. The contract specifically provided that Superstructures was not responsible for the “means, methods, sequences or procedures of construction selected by the contractor” and that it was not responsible for the contractor’s failure to carry out the work in accordance with the construction documents. (See, *Jewish Board of Guardians v. Grumman Allied Industries, Inc.*, 96 A.D.2d 465, 467 [1st Dept 1983]aff’d 62 N.Y.2d 684 [1984][an architect who is only responsible for the design of a building cannot be held liable for defects resulting from negligence during construction], see also, 15 N.Y. Prac, New York Law of Torts, Section 13.34[extending the ruling in *Jewish Board of Guardians v. Grumman Allied Industries, Inc.*, supra, to engineers])

Skyline’s conjecture fails to raise a genuine issue of material fact. It has not produced a scintilla of proof in admissible form demonstrating that Superstructures was negligent and thus, it has failed to overcome Superstructures prima facie showing that it is entitled to judgment dismissing the claims and cross claims against it.

Accordingly, it is ORDERED that, as to motion 006, Skyline’s motion for summary judgment on its claim for indemnification against SPS is denied; and it is further

ORDERED, that upon searching the record (CPLR 3212[b]), summary judgment is granted to SPS dismissing that branch of the motion which demands that SPS's insurer defend and indemnify Skyline in this action; and it is further

ORDERED as to motion 007, LMW's motion for summary judgment and Superstructures cross motion for summary judgment are granted and the action is hereby severed and dismissed as against LMW and Superstructures, and the clerk is directed to enter judgment in favor of those defendants; and it is further

ORDERED that the remainder of the action shall continue.

DATE: December ⁴, 2008
New York, New York

ENTER:



J.S.C.

FILED
DEC 15 2008
COUNTY CLERK'S OFFICE
NEW YORK