

Bonsignore v Lakota Constr. Group

2008 NY Slip Op 33387(U)

December 10, 2008

Supreme Court, Nassau County

Docket Number: 5207/07

Judge: Daniel R. Palmieri

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SHORT FORM ORDER

Scan

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

Present:

**HON. DANIEL PALMIERI
Acting Justice Supreme Court**

-----x
MARYANN BONSIGNORE,

TRIAL TERM PART: 48

Plaintiff,

INDEX NO.: 5207/07

-against-

MOTION DATE: 10-30-08

SUBMIT DATE: 12-2-08

SEQ. NUMBER - 001

**LAKOTA CONSTRUCTION GROUP,
INC., ASSOCIATED MARBLE INDUSTRY,
INC., CLK COMMERCIAL MANAGEMENT
LLC., CKL/HOULIHAN-PARNES LLC., CLK
HOULIHAN-PARNES OFFICE MANAGEMENT,
LAKE PARK 1000 WOODBURY, LLC and
CLK-HP 1000 WOODBURY, LLC.,**

Defendants.

-----x
The following papers have been read on this motion:

- Notice of Motion, dated 9-30-08.....1**
- Affirmation in Opposition (pltf.), dated 11-6-08).....2**
- Affirmation in Opposition (def. CLK), dated 11-7-08.....3**
- Affirmation in Opposition (def. Assoc. Marble), 11-10-08.....4**
- Reply Affirmation, dated 12-1-08.....5**

This motion by the defendant Lakota Construction Group, Inc. ("Lakota") pursuant to CPLR 3212 for summary judgment is granted to the extent indicated in this order. The complaint and all cross claims asserted against this defendant are dismissed, excepting cross claims sounding in breach of contract and/or contractual indemnification.

This action stems from an accident in which the plaintiff fell as she was attempting to exit the building where she worked, 1000 Woodbury Road, in Woodbury, New York. At the time of the accident the building was undergoing extensive renovations. The plaintiff was approaching a revolving door and stepped on a mat that served as a temporary cover for a concrete underfloor, which had been exposed when old tiles had been removed during the course of construction. According to the plaintiff, a depression/hole under the mat caused her foot to twist as she stepped forward on to the mat to enter the revolving door, and she fell, sustaining injuries.

The moving defendant Lakota asserts that it performed no work at the location of the fall, did not cause the alleged defect, had no duty to warn the plaintiff or to secure the area for the public. The Court agrees that the record supports these contentions, and accordingly dismisses the plaintiff's case as asserted against Lakota. Further, dismissal of cross claims sounding in common-law contribution and indemnification also is warranted.

Generally speaking, to obtain summary judgment it is necessary that the movant establish its claim or defense by the tender of evidentiary proof in admissible form sufficient to warrant the court, as a matter of law, in directing judgment in its favor (CPLR 3212 [b]), which may include deposition transcripts and other proof annexed to an attorney's affirmation. *Olan v Farrell Lines*, 64 NY2d 1092 (1985). Absent a sufficient showing, the court should deny the motion, irrespective of the strength of the opposing papers. *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985).

If a sufficient *prima facie* showing is made, however, the burden then shifts to the

non-moving party. To defeat the motion for summary judgment the opposing party must come forward with evidence to demonstrate the existence of a material issue of fact requiring a trial. CPLR 3212 (b); *see also* *GTF Marketing, Inc. v. Colonial Aluminum Sales, Inc.*, 66 NY2d 965 (1985); *Zuckerman v. City of New York*, 49 NY2d 557 (1980). The non-moving party must lay bare all of the facts at its disposal regarding the issues raised in the motion. *Mgrditchian v. Donato*, 141 AD2d 513 (2d Dept. 1988). In reviewing the record, however, the court must draw all reasonable inferences in favor of the nonmoving party. *Nicklas v Tedlen Realty Corp.*, 305 AD2d 385 (2d Dept. 2003); *Rizzo v. Lincoln Diner Corp.*, 215 AD2d 546 (2d Dept. 1995).

The Court finds that Lakota has made out its *prima facie* case. The deposition transcripts submitted indicate that another party, defendant CLK/Houlihan-Parnes LLC (“CLK”)¹ was the general contractor for the project, as stated by its executive vice-president and director of operations. Baglio EBT, at 30. Nor was Lakota an owner or tenant, but rather stood in the position of subcontractor to CLK and was hired to do several aspects of the overall job. Baglio EBT, at 30-31.

Lakota did no work in the area where the plaintiff fell. The removal of the floor above the concrete was performed by non-party Panzer Demolition. Baglio EBT, at 33. Notwithstanding his testimony that placing mats over areas that had been subject to demolition was in Lakota’s contract (Baglio EBT, at 19-20), the witness stated that the mats were in fact placed by CLK. Baglio EBT, at 18, 32-33. Mr. Baglio also stated it hired

¹ It is apparent that all defendants other than Lakota and Associated Marble Industry, Inc. are effectively one for purposes of this motion, and “CLK” should thus be read to refer to all such defendants.

Panzer to do the demolition of the tiles. (Baglio EBT, at 40).

Lakota's witness, its president, testified that Lakota also had hired Panzer to do demolition work for it, but that work had to do with the revolving door system, which occurred after the tiles were removed. Cervini EBT, at 30, 36-37). Panzer had been brought in by CLK. Cervini EBT, at 50. Lakota's witness also testified that CLK had placed the mats over the concrete slab that remained after removal of the original tile floor, as had Balio on behalf of CLK. Cervini EBT, at 30. There was no contract for Lakota to do any work on the lobby floor where the accident occurred. Cervini EBT, at 73.

The foregoing establishes that Lakota was not the owner nor a tenant of the premises. It was, rather, a contractor brought on to the premises to perform work under an agreement with CLK. It also has provided proof that as it did no work in the subject area it was not negligent nor caused the defect that allegedly caused the accident. Accordingly, Lakota has demonstrated that it owed no duty of care to persons in plaintiff's position, and that no act of negligence on its part contributed to the happening of the accident. These factors support dismissal of plaintiff's action as against this defendant. *See, Cohen v Schachter*, 51 AD3d 847 (2d Dept. 2008); *Walls v City of New York*, 48 AD3d 792 (2d Dept. 2008); *John v Tishman Constr. Corp. of N.Y.*, 32 AD3d 458 (2d Dept. 2006); *see also, Piccirillo v Beltrone-Turner*, 284 AD2d 854 (3d Dept. 2001).

Further, a *prima facie* showing has been made that common-law contribution is not available to Lakota's codefendants. This is so because such a claim requires that two or more tortfeasors share in responsibility for an injury in violation of duties they respectively owe to the injured person. *Guzman v Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559, 568

(1987); *Smith v Sapienza*, 52 NY2d 82 (1981). As the record presented indicates that no duty was owed to the plaintiff, nor was Lakota negligent or a cause of the accident, such claim cannot stand. The same is true with regard to common-law indemnification, which requires a finding that any wrongdoing was attributable to the alleged indemnitor alone. *See, Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 (1st Dept. 2006); *Trump Vil Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891 (1st Dept. 2003).

The Court cannot, however, make any findings with regard to contractual indemnification, nor on any other breach of contract claim asserted by Lakota's codefendants, because it has not presented contracts or other proof demonstrating that these claims have no merit as a matter of law. Absent such proof, the mere statement by Cervini that Lakota did not have a contract to do work in the area where the plaintiff fell does not necessarily mean that it was not otherwise obligated to provide insurance for the entire work site, or had some other contractual duty that might support such claims.²

In response to the foregoing, the plaintiff, CLK and Associated Marble Industry have been unable to rebut the showing that Lakota owed no duty to the plaintiff upon which liability might be fastened. Nor have they been able to demonstrate that issues of fact exist with regard to Lakota's freedom from negligence, and/or that such negligence, if it existed, was a proximate cause of the accident. At best, they have demonstrated that an issue of fact exists as to Lakota's responsibility to place mats at the scene and to keep the entire work area

² In so ruling, however, the Court does not mean to suggest that these claims necessarily have merit. If it is clear that the written agreements are insufficient to ground them, the remaining cross claims should be withdrawn to the extent they are not supported by such agreements.

safe. These, however, are matters of contractual duties owed to codefendants, not to the plaintiff, and as indicated above such contractual claims cannot be dismissed in any event because no *prima facie* showing has been made entitling Lakota to that relief.

This shall constitute the Decision and Order of this Court.

ENTER

DATED: December 10, 2008


HON. DANIEL PALMIERI
Acting Supreme Court Justice

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ENTERED

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