

Campanella v City of New York

2009 NY Slip Op 30038(U)

January 9, 2009

Supreme Court, New York County

Docket Number: 100078/06

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 100078/2006

CAMPANELLA, JOSEPH

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 004

SUMMARY JUDGMENT

INDEX NO. 100078/06

MOTION DATE _____

MOTION SEQ. NO. 004

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED	
1, 2	
3, 4	
5	

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 disposed of in accordance with the attached memorandum decision.

FILED
 JAN 13 2009
 COUNTY CLERK'S OFFICE
 NEW YORK

DORIS LING-COHAN
 J.S.C.

Dated: 1/9/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

... IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----x

JOSEPH CAMPANELLA,

Plaintiff,

Index No. 100078/06

- against -

Motion Seq No. 004

THE CITY OF NEW YORK, 5444 ASSOCIATES
and MIKESAM CONSTRUCTION CORP.,

Defendants.

-----x

5444 ASSOCIATES,

Third-Party Plaintiff,

- against -

MSL CONSTRUCTION CORP.,

Third-Party Defendant.

-----x

5444 ASSOCIATES,

Second Third-Party Plaintiff,

- against -

MIKESAM CONSTRUCTION CORPORATION and
THE ILLINOIS UNION INSURANCE
CORPORATION, a subsidiary of ACE INA
HOLDING, INC.,

Second Third-Party Defendant.

-----x

DORIS LING-COHAN, J.:

Defendant/Third-party plaintiff, 5444 Associates ("5444
Assocs."), moves, pursuant to CPLR 3212, for conditional summary
judgment on its cross claims and third-party claims for

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NEW YORK

contractual and common law indemnification against defendant Mikesam Construction Corp. ("Mikesam").

BACKGROUND

Plaintiff, Joseph Campanella, brings this action seeking to recover damages for personal injuries he allegedly sustained on July 27, 2005, when he slipped and fell on the sidewalk adjacent to 130 Duane Street, New York, New York. Defendant The City of New York ("The City") owns the sidewalk and 5444 Assocs. owns the premises located at 130 Duane Street, New York, New York. Mikesam entered into an agreement dated October 22, 2002 (the "Agreement"), with 5444 Assocs. to serve as general contractor during the construction of a hotel at 130 Duane Street, New York, New York.

The Agreement, which was in effect on the day of the alleged incident, contains a provision requiring Mikesam to keep the premises and surrounding area free from the accumulation of waste materials and rubbish caused by operations under said agreement (Agreement § 9.9, Andrew M. Roher Affirm, Exh F). The Agreement also requires Mikesam to indemnify and hold harmless 5444 Assocs. against all damages, including attorney's fees, for bodily injury caused by Mikesam's negligent acts or omissions (*id.* § 9.12).

The Complaint alleges that plaintiff slipped and fell while walking on the sidewalk adjacent to the construction site at 130 Duane Street, New York, New York (Compl ¶ 9, Roher Affirm, Exh

A). The Complaint also alleges that plaintiff fell due to a broken, cracked, dilapidated, worn, depressed, uneven, dangerous, and defective condition on the sidewalk (*id.*). The Complaint further alleges that the incident was caused solely by the negligence of the various defendants in the ownership and maintenance of the sidewalk (*id.* ¶¶ 10, 42-43). The Bill of Particulars contains similar allegations and outlines the injuries reportedly sustained by plaintiff (Roher Affirm, Exh C).

Issue was joined as to Mikesam with the service of an answer containing general denials of plaintiff's allegations set forth in the Complaint. 5444 Assocs. also served an answer, which included general denials of the allegations in the Complaint, as well as affirmative defenses and cross claims for indemnification against co-defendants.

In addition, 5444 Assocs. commenced a third-party action against MSL Construction Corp. ("MSL"), seeking contribution or indemnification. However, MSL, which is owned by the same owners as Mikesam, failed to appear, and 5444 Assocs. abandoned that third-party action in favor of one against Mikesam.

5444 Assocs. commenced the third-party action against Mikesam and its insurance carrier Illinois Union Insurance Corporation, s/h/a The Illinois Union Insurance Company, a subsidiary of ACE INA Holding, Inc. ("Illinois Union"), seeking contribution or indemnification. Illinois Union's answer alleged

general denials of the allegations in the Complaint and asserted numerous affirmative defenses.

By Order dated March 27, 2007, this Court (Smith, J.), granted The City's motion to dismiss the Complaint against it (Order, Roher Affirm, Exh D). Additionally, by Order dated March 13, 2008, this Court (Ling-Cohan, J.) granted the motion for a severance to the extent of ordering a separate trial of the third-party action (*id.*).

5444 Assocs. now seeks conditional summary judgment on its claims for indemnification against Mikesam.

DISCUSSION

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman*, 49 NY2d at 562). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

Furthermore, a conditional judgment permits an indemnitee to bring a third-party action and obtain a determination fixing the potential liability without the need for payment until it is shown that the judgment in the principal action has been satisfied in whole or part (see *McCabe v Queensboro Farm Prods.*, 22 NY2d 204, 208 [1968]). It permits the third-party plaintiff to obtain the earliest possible determination as to the extent to which he may expect to be reimbursed (*id.*).

Here, 5444 Assocs. concedes that it has a nondelegable duty to maintain the premises it owns in a reasonably safe condition (see *Mas v Two Bridges Assocs.*, 75 NY2d 680, 685 [1990]). However, in seeking summary judgment, 5444 Assocs. argues that, absent any showing of actual negligence on its part, as is the case herein, it is entitled to contractual indemnification from Mikesam based on the Agreement between the parties. 5444 Assocs. maintains that under the Agreement, it ceded to Mikesam full responsibility for the control and maintenance of the construction site, including the adjacent sidewalk where the alleged incident occurred. 5444 Assocs. further argues that, although it had no active role in the construction project, it is susceptible to liability, in the absence of negligence, under New York City Administrative Code § 7-210, which imposes liability on real property owners for failure to maintain sidewalks in reasonably safe conditions. Thus, 5444 Assocs. asserts that

Mikesam is obligated to indemnify it for plaintiff's alleged injuries and to pay attorney's fees.

5444 Assocs. provides transcripts of the examinations before trial ("EBT") of various witnesses and other evidence to substantiate its position that it had no control over the construction project or the sidewalk immediately adjacent to it at the time of the alleged incident, and that it committed no negligence. The submissions reveal that Mikesam constructed a perimeter plywood fence and sidewalk bridge in the area where plaintiff fell, and that said area was used by Mikesam as an entry point to the construction site for its equipment and personnel (M. Lee EBT, Roher Affirm, Exh N). The evidence submitted also demonstrates that Mikesam hired various subcontractors to perform work on the construction project; that prior to the alleged incident, an electrical subcontractor made arrangements for Con Edison to excavate the street and install a conduit in the area where plaintiff fell; and that Mikesam removed the sidewalk bridge to facilitate Con Edison's work and replaced it when the work was completed (D. Lee EBT, Roher Affirm, Exh M).

5444 Assocs. also relies on the deposition testimony of Rukesh Patel, project manager for Hersha Hospitality Management, L.P. ("Hersha") to bolster its position. Patel testified that, although Hersha has common owners or officers with 5444 Assocs.,

he had no direct involvement with the construction project (R. Patel EBT, Roher Affirm, Exh L). He stated that he was hired only to observe the progress of the construction project, and that he did so by attending project meetings and occasionally visiting the construction site (*id.*). He further stated that he was the only person who performed this function on behalf of 5444 Assocs., and that 5444 Assocs. did not have any employees present at the site during the construction project (*id.*).

In opposing the motion, Mikesam acknowledges that it was the general contractor for the construction project, but asserts that triable issues of fact exist which preclude summary judgment. Specifically, Mikesam contends that questions of fact exist as to whether 5444 Assocs. ceded total control to it to determine when to replace the pre-existing cracked sidewalk or whether the alleged incident was caused by the negligence of Mikesam, 5444 Assocs. or plaintiff.

Mikesam contends that documentary and other evidence reveals that sidewalks in the area had multiple cracks prior to the commencement of the construction project (Photos, Deborah Del Sordo Affirm in Opp, Exh B), and that as of July 2005, the scope of the construction project did not include sidewalk replacement (K. Patel EBT, Roher Affirm, Exh L; M. Lee EBT, Roher Affirm, Exh N). Mikesam also states that although the architect and project manager attended monthly safety meetings on behalf of 5444

Assocs. and repeatedly visited the construction site, neither made any recommendation to replace the sidewalk prior to the completion of the project (D. Lee, Roher Affirm, Exh M). Mikesam further contends that the entire sidewalk surrounding the construction project was replaced after 2006 (*id.*; Permit, Del Sordo Affirm in Opp, Exh E).

Mikesam acknowledges that it performed a temporary repair of the sidewalk prior to the alleged incident at the request of the Department of Transportation, but maintains that the Department of Transportation inspected the temporary repair and made no complaint (M. Lee EBT, Roher Affirm, Exh N). Mikesam further notes that there were no other accidents at the site (*id.*).

In addition, Mikesam relies on photographs to support its assertion that plaintiff's own negligence caused the alleged incident. Mikesam asserts that although many people traversed the area of the construction site, plaintiff was the only person to fall and sustain injury (Photos, Roher Affirm, Exhs I, J; Del Sordo Affirm in Opp, Exh B). Mikesam also notes that after the alleged incident, plaintiff stated that he tripped over equipment on the sidewalk (Medical Record, Del Sordo Affirm in Opp, Exh A).

Illinois Union also opposes the summary judgment motion, asserting that triable issues of fact exist as to whether the alleged incident triggered the indemnity clause in the Agreement between 5444 Assocs. and Mikesam. Illinois Union disputes the

assertions that Mikesam and its subcontractors assumed 5444 Assocs.' duty to maintain the sidewalk, and that the alleged incident was caused by the negligent acts or omissions of Mikesam or its subcontractors.

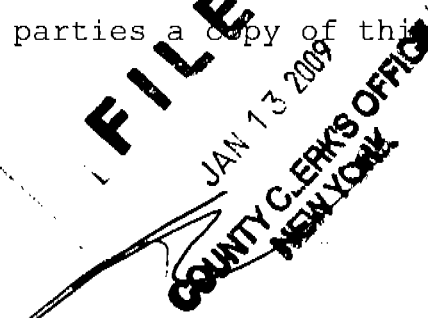
On review of the submissions, the Court concludes that the existence of triable issues of fact as to whether plaintiff's injuries resulted from any negligence on the part of 5444 Assocs., or solely from the negligent acts or omissions of Mikesam, preclude summary judgment in this case (see *Roddy v Nederlander Producing Co. of Am., Inc.*, 44 AD3d 556 [1st Dept 2007]). Thus, the motion for conditional summary judgment on 5444 Assocs.' cross claims and third-party claims for indemnification against Mikesam must be denied.

Accordingly, it is

ORDERED that the motion for conditional summary judgment is denied; and it is further

ORDERED that within 30 days of entry of this decision/order, defendant Mikesam shall serve upon all parties a copy of this decision/order with notice of entry.

Dated: January 9, 2009


Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Campanella.City of NY - sj, gordon, updated.wpd