

Brownell Steel, Inc. v Hirsch

2009 NY Slip Op 30442(U)

February 27, 2009

Supreme Court, New York County

Docket Number: 117272/06

Judge: Martin Shulman

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

PRESENT: HON. MARTIN SHULMAN
Justice

PART 1

Brownell Steel, Inc.,

INDEX NO. 117272/06

MOTION DATE _____

- v -

MOTION SEQ. NO. 002

Jack C. Hirsch, et al,

MOTION CAL. NO. _____

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

PAPERS NUMBERED


Notice of Motion by Defendant Hirsch — Affidavits — Exhibits A-K	1
Notice of Cross-Motion by Defendant McClinch-Affidavits-Exhibits L-T	2
Answering Aff. of Plaintiff to Hirsch Motion & McClinch Cross-Motion-Exhibits A-D	3
Reply Aff. by Defendant Hirsch	4
Notice of Cross-Motion by Plaintiff- Affidavits-Exhibits A-C	5
Answering Affidavit by Defendant McClinch-Exhibits 1 & 2	6
Reply Aff. by Plaintiff	7
Answering Affidavit by Defendant Hirsch-Exhibits A & B	8
Reply Aff. by Plaintiff	9
Notice of Cross-Motion by Defendant United-Affidavits-Exhibits A-H	10
Answering Affidavit by Plaintiff-Exhibits A-C	11
Reply Aff. by Defendant United-Exhibit A	12

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motions are decided in accordance with the attached decision and order.

FILED
MAR -2 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: FEB 27 2009

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Martin Shulman, 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 1

-----X
BROWNELL STEEL, INC.,

Plaintiff,

Index No. 117272/06

-against-

JACK C. HIRSCH, McCLINCH LEASING
CORPORATION and UNITED RENTALS, INC.,
Defendants.
-----X

SHULMAN, J.:

In this action for contribution and/or indemnification, defendants Jack C. Hirsch, Inc. s/h/a Jack C. Hirsch ("Hirsch"), McClinch Equipment Service, Inc. s/h/a McClinch Leasing Corporation ("McClinch") and United Rentals (North America), Inc. s/h/a United Rentals, Inc. ("United") move or cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint of plaintiff Brownell Steel, Inc. ("Brownell"), dated November 8, 2006 ("Complaint") and dismissing all cross-claims as against each such defendant. Brownell cross-moves for an order, pursuant to CPLR §3126, sanctioning Hirsch and McClinch for their failure to provide discovery.

For the reasons stated herein, summary judgment is granted in defendants' favor and the Complaint and all cross-claims are dismissed. Brownell's-cross motion is denied.

BACKGROUND

The Martuscelli Action

On August 7, 1998, Pasquale Martuscelli, an ironworker employed by Brownell, suffered injuries in connection with a fall while working on a hydraulic scissor lift at a construction project located at the Walt Whitman Mall in Huntington, New York.

Charles Pankow Builders, Ltd. ("Pankow") was the general contractor for the renovation project of the mall, hired by the mall's owner. Pankow retained Cives Steel, Inc. ("Cives") as a subcontractor to perform structural steel and metal decking work for the renovations. Cives, in turn, retained Brownell as a sub-subcontractor to provide all labor, supervision and equipment in connection with the erection of the structural steel at the project.

The sub-subcontract agreement between Cives and Brownell, among other things, required Brownell to: (1) "provide all labor, supervision, and equipment to erect all structural steel for the Walt Whitman Mall project"; (2) "provide and install all safety cable and or netting required for the twenty-five foot fall protection per OSHA requirements"; and (3) be solely responsible for "the prevention of accidents to workers."

Martuscelli commenced the underlying personal injury action in this court, entitled *Martuscelli v Cives Steel, Inc.*, Index No. 110216/01 ("Martuscelli Action"), alleging that the named defendants were negligent and violated Labor Law § 240 (1) based on the claim that he was not provided proper protection when exposed to an elevation-related risk. By order dated January 16, 2004, the court in the Martuscelli Action granted Martuscelli judgment against Pankow, and granted Pankow summary judgment as against Brownell based on the obligation to defend and indemnify Pankow. Brownell thereafter settled the Martuscelli Action for \$1.85 million.

This Action

Brownell commenced this action against Hirsch (the alleged owner of the subject scissor lift), McClinch (the company allegedly responsible for the maintenance of the

scissor lift) and United (the company that purchased the stock or assets of McClinch), seeking contribution and/or indemnification from said defendants with regard to the settlement of the Martuscelli Action. The Complaint contains three causes of action against defendants for negligence, contractual and common-law indemnification, and negligent manufacture and strict liability based on defective design or manufacture of the scissor lift.

In the Complaint, Brownell asserts that it is entitled to indemnification from defendants, as defendants allegedly owned, leased and/or maintained the scissor lift, which was defective, and because the accident occurred because said lift malfunctioned, not as a result of any act or omission by Brownell. It is undisputed that Brownell did not have a written agreement with any of the named defendants. Moreover, while the purchase agreement, pursuant to which United purchased the stock or assets of McClinch, was dated prior to the date of the Martuscelli accident, the transaction did not close until after the accident.

DISCUSSION

Defendants submit that Brownell has no basis to seek contribution or indemnification from any of them. Brownell does not dispute that: (a) having settled the Martuscelli Action, it is precluded, by General Obligations Law § 15-108(c), from making a claim for contribution against other parties; and (b) it does not have a claim for contractual indemnification against any of the defendants because there was no contract between Brownell and any of the defendants. Brownell contends that summary judgment should be denied as premature because critical discovery is outstanding concerning, *inter alia*, defendants' ownership and repair of the subject lift.

Brownell contends that its claim for common-law indemnification is a viable claim, and that issues of fact exist which preclude summary judgment. However, for the reasons set forth below, Brownell does not have a viable claim for common-law indemnification, and, accordingly, the court grants defendants' requests for summary judgment.

"A party who has settled and seeks what it characterizes as indemnification . . . must show that it may not be held responsible in any degree. The statutory bar to contribution may not be circumvented by the simple expedient of calling the claim indemnification (citations omitted)" (*Rosado v Proctor & Schwartz, Inc.*, 66 NY2d 21, 24-25 [1985]). "[W]here a settling party is at least partially responsible for the plaintiff's damages because of its own negligence, such party may not seek indemnification from other tortfeasors. The critical issue is thus whether the liability of the settling parties was entirely derivative or whether they also had some role in the event that actually caused the injury" (*Brazell v Wells Fargo Home Mortgage, Inc.*, 42 AD3d 409, 410 [1st Dept 2007] [citations omitted]; see also *Trump Vill. Section 3, Inc. v New York State Hous. Fin. Agency*, 307 AD2d 891, 896 [1st Dept 2003]; *Rockefeller Univ. v Tishman Constr. Corp. of New York*, 232 AD2d 155 [1st Dept 1996]; *Dormitory Auth. of State of New York v Scott*, 160 AD2d 179, 181 [1st Dept 1990]).

To prevail on a claim for common-law indemnification, the proponent must prove both that: (a) it was not guilty of any negligence (beyond any statutory vicarious liability); and (b) "the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident or in the absence of any negligence that the proposed indemnitor had the authority to direct, supervise, and control the work giving rise to the

injury" (see *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005] [internal quotation marks and citations omitted]; *Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65 [1st Dept 1999]). Where a party, such as Brownell, has been held vicariously liable under the Labor Law, it may seek common-law indemnification from actively negligent parties unless it is shown that Brownell played some role in the negligence that caused the underlying accident, or that it directed, controlled and/or supervised the work in question (*Canka v Coalition for the Homeless, Inc.*, 240 AD2d 355 [2d Dept 1997]). Thus, if Brownell played a role in the negligence, or directed, controlled and/or supervised Martuscelli's work, it is barred from seeking common-law indemnification.

Here, the evidence, including the contract between Cives and Brownell, as well as the deposition testimony, unequivocally confirms that Brownell was not merely a "passive tortfeasor." Rather, the evidence shows that Brownell actively supervised and controlled the work of its employees, including Martuscelli, and that Brownell decided what safety protection, if any, would be utilized by its employees, including Martuscelli. These facts preclude Brownell's common-law indemnification claim as a matter of law. Thus, defendants are entitled to summary judgment dismissing the action against them.

Additionally, the proof demonstrates that Martuscelli's accident occurred prior to United's acquisition of McClinch. United is thus entitled to summary judgment on the additional ground that it did not acquire any interest in the subject lift until after the date of the underlying accident, and did not, in the subject purchase agreement, agree to

assume any tort liability of the seller, McClinch, for the subject accident. Brownell's claim that questions of fact exist on this issue is conclusory and without merit.

The discovery sought by Brownell relates to defendants' potential negligence. Much of it was already produced by defendants to Brownell in a prior related action. However, even if the discovery sought confirms Brownell's contention that defendants were negligent, Brownell's claim for indemnification must nevertheless fail because, as stated above, to succeed on a claim for common-law indemnification, the proponent must first prove that it was not guilty of any negligence and did not supervise or control the work in question. Thus, Brownell's opposition to defendants' motions is flawed, and its cross-motion for sanctions is denied since it has not demonstrated any sanctionable conduct herein by defendants.

CONCLUSION

It is ORDERED that the motion and cross motions by defendants Jack C. Hirsch, Inc. s/h/a Jack C. Hirsch, McClinch Equipment Service, Inc. s/h/a McClinch Leasing Corporation and United Rentals (North America), Inc. s/h/a United Rentals, Inc. for summary judgment in favor of said defendants and dismissing the complaint and all cross-claims herein is granted, and the complaint and all cross-claims are dismissed with costs and disbursements to defendants as taxed by the Clerk of the court upon the submission of an appropriate bill of costs; and it is further

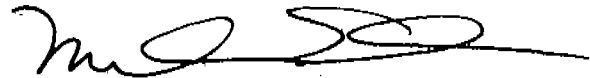
ORDERED that the cross motion by plaintiff Brownell Steel, Inc. for sanctions is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Counsel for United is directed to retrieve the Share Purchase Agreement submitted to the court for *in camera* review on or before March 31, 2009.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been sent to counsel for the parties.

Dated: New York, New York
February 27, 2009



Hon. Martin Shulman, J.S.C.

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