

Hradsky v 95 Wall Assoc. LLC
2009 NY Slip Op 31028(U)
May 5, 2009
Supreme Court, New York County
Docket Number: 103490/2007
Judge: Michael D. Stallman
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SCANNED ON 5/8/2009
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. MICHAEL D. STALLMAN

PART 7

Index Number : 103490/2007
HRADSKY, STEFAN
vs.
95 WALL STREET ASSOCIATES LLC
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. 103490/2007

MOTION DATE 2/5/09

MOTION SEQ. NO. 003

MOTION CAL. NO. 53

The following papers, numbered 1 to 5 were read on this motion for summary judgment

Notice of Motion— Affirmation — Exhibits A-G
Answering Affirmation — Exhibits A-F; Affirmation
Replying Affirmation

PAPERS NUMBERED

1-2

3-4

5

Cross-Motion: Yes No

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

FILED
MAY - 8 2009
NEW YORK
COUNTY CLERK'S OFFICE

FILED
MAY - 8 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 5/5/09
New York, New York


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 7**

-----X
STEFAN HRADSKÝ and JAROSLAVA HRADSKÁ, Index No.: 103490/2007

Plaintiffs,

-against-

95 WALL ASSOCIATES LLC and WESTSIDE BUILDERS
LLC,

Defendants.

-----X
95 WALL ASSOCIATES LLC and WESTSIDE BUILDERS Index No.: 590218/2008
LLC,

Third-Party Plaintiffs,

-against-

Decision and Order

EAST COAST HAZMAT REMOVAL, INC.,

Third-Party Defendant.

-----X
HON. MICHAEL D. STALLMAN, J.:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is an action to recover damages for personal injuries sustained by an asbestos removal worker when he fell from an unsecured ladder while working at the premises known as 95 Wall Street in New York, New York on February 16, 2007.

In motion sequence number 003, defendants and third-party plaintiffs 95 Wall Street Associates LLC (95 Wall) and Westside Builders LLC (Westside) (together, Wall) move, pursuant to CPLR 3212, for (1) summary judgment dismissing plaintiffs Stefan Hradsky (plaintiff) and Jaroslava Hradska's common-law negligence and Labor Law § 200 claim against them, and (2)

summary judgment in their favor on their third-party claim for contractual indemnification against third-party defendant East Coast Hazmat Removal, Inc. (ECHR).

In motion sequence number 004, third-party defendant ECHR moves, pursuant to CPLR 3212, for summary judgment dismissing defendant and third-party plaintiff Walls' third-party complaint in its entirety.

BACKGROUND

On the date of the accident, defendant and third-party plaintiff 95 Wall owned the premises where the accident occurred. Defendant and third-party plaintiff Westside served as general contractor at the site. Pursuant to a contract, dated December 7, 2006 (the contract), 95 Wall hired third-party defendant ECHR to perform certain asbestos abatement activities at the premises. The scope of the contract included removing asbestos which had been identified in the basement through the 23rd floor of the premises, as well as in the bulkhead, on the roof and in the elevator brake pads. Plaintiff, who was employed as an asbestos handler by ECHR, sustained injury when a co-worker pulled a hose from underneath the ladder he was working on, causing him to fall and become injured.

Pursuant to the contract, in consideration for ECHR's asbestos removal at the premises, as well as for other promises in the contract, 95 Wall promised to pay ECHR a sum of \$2,725,000.00. Regarding the method of payment of this sum by 95 Wall, section 14.2.1 of the contract states, in pertinent part:

The Architect will, with approval of the Owner, within ten (10) business days after receipt of the Contractor's Application for Payment, issue a Certificate of Payment, to the Contractor, for such amount as the Architect and Owner determines is properly due, based upon the quality and progress of the Work. The Architect will also notify the Contractor in writing of the Architect's and/or Owner's reasons for withholding certification in whole or in part ... and (a) set forth in the amount to be paid to the Contractor, and (b) describe those items in the Application for Payment which are not

approved. ... In the event the Architect or Owner fail to issue a Certificate for Payment, the full amount of the Contractor's Application for Payment shall be paid in accordance with Subsection 14.2.5.

(ECHR's Notice of Motion, Exhibit F, 95 Wall/ECHR Contract, at 12).¹

On April 16, 2007, ECHR submitted an application for payment to 95 Wall. Although it is undisputed that ECHR performed asbestos removal at the premises, payment for this past work was never tendered by 95 Wall. In addition, a denial of any portion of the application for payment was never issued by 95 Wall or the project's architect.

As a result of this breach of contract, ECHR sent 95 Wall a notice on May 10, 2007, wherein ECHR informed 95 Wall that its account was past due. In addition, ECHR advised 95 Wall that "[a]s per meeting with your representative (Mr. Ali and Michael) we reached an agreement that the amount owed is \$225,000.00" (ECHR's Notice of Motion, Exhibit H, ECHR's May 10, 2007 Letter).

Due to 95 Wall's continued failure to remit payment, on May 23, 2007, ECHR elected to terminate the contract pursuant to section 19.1 of the contract. Section 19.1 of the contract, entitled "SUSPENSION OR TERMINATION BY THE CONTRACTOR," states, in pertinent part:

If the Owner fails to make payment of approved amounts in accordance with Article 14, the Contractor may, upon ten days' written notice to the Owner and the Architect, (a) terminate the Contract and recover from the Owner payment for Work executed and for proven loss with respect to materials ... profit and damages applicable to the Project, or (b) suspend contractually required performance

(ECHR's Notice of Motion, Exhibit F, 95 Wall/ECHR Contract, at 15). Section 19.1 of the contract

¹Subsection 14.2.5 of the contract requires that the "Owner shall pay the Contractor the required amount set for in the Certificate of Payment within ten (10) business days after the issuance of the Certificate of Payment (or within ten [10] business days after the date the Certificate of Payment is due under Subsection 14.2.1)" (ECHR's Notice of Motion, Exhibit F, 95 Wall/ECHR Contract, at 12).

also states that if the Owner has not cured its deficiency after the tenth calendar day following the written notice, “the Contractor may suspend performance or terminate the Contract” (*id.*).

In this case, there is no dispute that 95 Wall failed to remit payment, and that ECHR properly terminated the contract.

On March 14, 2007, plaintiffs commenced this action asserting causes of action sounding in negligence, violations of Labor Law §§ 200, 240, 241 and 241-a, and a derivative cause of action. Defendants impleaded ECHR, asserting causes of action seeking common-law indemnification and contribution, alleging breach of contract, seeking contractual indemnification, and alleging breach of an agreement to procure insurance.

DISCUSSION

“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 eliminate any material issues of fact from the case” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion’s opponent to “present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact” (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

PLAINTIFF’S COMMON-LAW NEGLIGENCE AND LABOR LAW § 200 CLAIMS AGAINST
DEFENDANT AND THIRD-PARTY PLAINTIFF WALL (motion sequence number 003)

Defendant and third-party plaintiff Wall moves for summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it. Wall has put forth a prima facie case that it is entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against it. Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; see also *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

Here, as plaintiff was injured when his co-worker pulled a hose out from underneath the ladder that he was working on, it can be said that plaintiff's accident was caused as a result of defects or dangers in the methods or materials of the work. In such a case, recovery under Labor Law § 200 requires that “it is shown that the party to be charged had the authority to supervise or control the performance of the work” (*Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]). “[T]he duty to provide a safe place to work [under Labor Law § 200] is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work” (*Ortega v Puccia*, 57 AD3d at 62, quoting *Persichilli v Triborough Bridge & Tunnel Authority*, 16 NY2d 136, 145 [1965]).

A review of the record in this case indicates that neither 95 Wall nor Westside directed or supervised the means and methods by which plaintiff and his co-workers performed their work. In fact, ECHR was responsible for all the means and methods of asbestos removal at the site. Plaintiff testified that he received all of his instructions and equipment from his employer and from no one else. He also testified that no other contractors were working in the area of his accident, and that he had no contact with the owners of the site. After his accident, plaintiff learned that it was a co-worker from ECHR who had pulled the hose from under the leg of the ladder that he was standing on, causing him to fall.

In addition, ECHR and Wall witnesses testified that, not only was ECHR solely responsible for all the means and methods of asbestos removal at the premises, but the owners and the other contractors were not even permitted in the enclosed area during the asbestos removal.

In his opposition papers, plaintiff states that he does not oppose that part of Wall's motion which seeks to dismiss plaintiff's common-law negligence and Labor Law § 200 claims. Thus, defendant and third-party plaintiff Wall is entitled to summary judgment dismissing the first cause of action of the complaint, and so much of the second cause of action of the complaint that alleges violations of Labor Law § 200 is dismissed.

DEFENDANT AND THIRD-PARTY PLAINTIFF WALL'S CLAIM FOR CONTRACTUAL INDEMNIFICATION AGAINST THIRD-PARTY DEFENDANT ECHR (motion sequence numbers 003 and 004).

Defendant and third-party plaintiff Wall moves for summary judgment in its favor on its third-party claim for contractual indemnification against third-party defendant ECHR. ECHR moves for summary judgment dismissing Wall's third-party complaint in its entirety.

"A party is entitled to full contractual indemnification provided that the 'intention to

indemnify can be clearly implied from the language and purposes of the entire agreement and the

~~surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774,~~

777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 402 [1st Dept 2005]).

It is well settled that with respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and that “[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant” [citation omitted]” (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Section 3.12.1 of the indemnification and insurance rider to the contract states, in pertinent part:

§ 3.12.1 To the fullest extent permitted by the applicable law governing this Agreement ... the Contractor ... agrees to defend, indemnify and hold harmless the Owner, the Architect, the Owner’s agents and their respective members ... from and against any judgments, claims, costs, losses, damages, expenses or liabilities, including reasonable attorneys’ fees, attributable to personal injury, bodily injury ... arising from or out of performance of the Indemnitor

(Wall’s Affirmation in Opposition, Exhibit A, Indemnification and Insurance Rider to Agreement, at 1).

Third-party defendant ECHR argues that defendant and third-party plaintiff⁹⁵ Wall’s failure to pay constituted a material breach of the contract, justifying ECHR’s termination of the contract (see *Awards.com v Kinko’s, Inc.*, 42 AD3d 178, 187 [1st Dept 2007] [a party’s default in payment is routinely held to constitute a material breach, justifying termination of the contract]; *Daiichi Seihan USA v Infinity USA*, 214 AD2d 487, 488 [1st Dept 1995] [in light of the unambiguous contract

between plaintiff and Infinity, and Infinity's failure to make monthly payments pursuant to that ~~contract, summary judgment was warranted~~). As a result, ECHR argues that it is discharged from any performance obligation under the contract, including defending and indemnifying 95 Wall and Westside.

However, importantly, as put forth by defendant and third-party plaintiff Wall, section 3.12.4 of the indemnification and insurance rider to the contract very clearly states that "[t]he indemnity contained herein shall survive the termination of this Agreement" (Defendant/Third-Party Plaintiff's Affirmation in Opposition, Exhibit A, Indemnification and Insurance Rider to Agreement, at 2). Thus, although ECHR properly terminated the contract for breach of contract, pursuant to section 3.12.4 of the indemnification and insurance rider to the contract, ECHR is not discharged from its obligation to defend and indemnify 95 Wall and its agent, Westside, on this basis. In addition, ECHR's arguments to the effect that this clause is illusory for its lack of mutuality, and/or contrary to the public policy of the Workers' Compensation Law, are without merit.

Thus, as it has been established that plaintiff's accident was not caused by any negligence on the part of 95 Wall or Westside, Wall is entitled to summary judgment in its favor as to liability on its third cause of action of the third-party complaint against ECHR, for contractual indemnification. Accordingly, ECHR is not entitled to summary judgment dismissing Wall's third-party complaint against it in its entirety.

Further, as noted by Wall, the right to indemnification at issue includes Wall's right to recover attorneys' fees, costs and disbursements for defending against plaintiff's action (*see Lowe v Dollar Tree Stores, Inc.*, 40 AD3d 264 [1st Dept 2007]; *Chapel v Mitchell*, 84 NY2d 345, 348 [1994]).

CONCLUSION AND ORDER

~~For the foregoing reasons, it is hereby~~

ORDERED that the part of defendants and third-party plaintiffs 95 Wall Street Associates LLC (95 Wall) and Westside Builders LLC's (Westside) motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Stephan Hradsky and Jaroslava Hradska's common-law negligence and Labor Law § 200 claims against them is granted, and the first cause of action of the complaint, and so much of the second cause of action of the complaint that alleges violations of Labor Law § 200 is dismissed; and it is further

ORDERED that the part of defendants and third-party plaintiffs 95 Wall and Westside's motion (motion sequence number 003), pursuant to CPLR 3212, for summary judgment in their favor against third-party defendant East Coast Hazmat Removal, Inc. (ECHR) is granted as to liability only on the third cause of action of the third-party complaint; and it is further

ORDERED that third-party defendant ECHR's motion (motion sequence number 004), pursuant to CPLR 3212, for summary judgment dismissing defendants and third-party plaintiffs 95 Wall and Westside's third-party complaint in its entirety is denied; and it is further

ORDERED that the remainder of the action shall continue as to the second and third causes of action, and as to the third-party complaint.

Dated: May 5, 2009
New York, New York

ENTER:



J.S.C.

FILED
MAY - 8 2009
NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN