Millstein v Atlas Park, L.L.C.
2010 NY Slip Op 30527(U)
March 10, 2010
Supreme Court, New York County
Docket Number: 112029/06
Judge: Carol R. Edmead
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SCANNED ON 3/15/2010

[* 1]

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

PRESENT: Edmead PART 35
Justice

Millstein

INDEX NO. 112029/06

MOTION DATE

- v -

MOTION SEQ. NO. 001

Atlas Park et. al.

MOTION CAL. NO.

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☑ No

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Upon the foregoing papers, it is ordered that this motion

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendant/third-party plaintiff Atlas Park, L.L.C., s/h/a Atlas Park LLC d/b/a The Shops at Atlas Park and Atco Properties and Management Inc., and A & Co., i/s/h/a A & Co., Inc., d/b/a Amenta & Company for summary judgment against Plaza Construction on their claims for defense and indemnification is denied, without prejudice; and it is further

ORDERED that defendant/third-party plaintiff Atlas Park, L.L.C., s/h/a Atlas Park LLC d/b/a The Shops at Atlas Park and Atco Properties and Management Inc., and A & Co., i/s/h/a A & Co., Inc., d/b/a Amenta & Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

FILED
MAR 15 2010
NEW YORK COUNTY CLERK'S OFFICE

Dated: 3/10/10 J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

---X

LYNN MILLSTEIN and THEODORE MILLSTEIN,

Plaintiffs,

-against-

ATLAS PARK, L.L.C. d/b/a THE SHOPS AT ATLAS PARK, ATCO PROPERTIES & MANAGEMENT, INC., and A & CO and M.P.F.P., L.L.P.,

Defendants.

Index No.: 112029/06
Sequence No.: 001

---X

ATLAS PARK, L.L.C. s/h/a ATLAS PARK LLC d/b/a THE SHOPS AT ATLAS PARK and ATCO PROPERTIES & MANAGEMENT INC., and A & Co. INC., d/b/a AMENTA & COMPANY,

Third-Party Plaintiffs,

-against-

PLAZA CONSTRUCTION and THANHAUSER ESTERSON KAPELL,

Third-Party Defendants.

Third-Party Index No.: 590059/08

FILED
MAR 15 2010
NEW YORK COUNTY CLERK'S OFFICE

---X

PLAZA CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

MASPETH WELDING, INC.,

Second Third-Party Defendant.

Second Third-Party Index No.: 591124/09

---X

HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

Plaintiffs Lynn Millstein ("plaintiff") and Theodore Millstein ("plaintiffs") commenced this personal injury action for injuries plaintiff sustained as a result of a slip and fall accident at

the Atlas Park Mall located in Glendale, New York.

Defendant/third-party plaintiff Atlas Park, L.L.C., s/h/a Atlas Park LLC d/b/a The Shops at Atlas Park and Atco Properties and Management Inc., and A & Co., i/s/h/a A & Co., Inc., d/b/a Amenta & Company (the "Atlas defendants") now move for summary judgment against Plaza Construction ("Plaza").

Factual Background

Defendant Atlas Park LLC ("Atlas"), as owner contracted with third-party defendant Plaza to perform general contracting construction management work at the location. Under the relevant contract between Atlas and Plaza (the "Contract"), Plaza agreed to indemnify and hold harmless Atlas for claims, damages and expenses arising from Plaza's work. Plaza was also required to obtain insurance in Atlas's favor. Third-party defendant Thanhauser Esterson Kapell ("TEK") was the architect of the construction site. Plaza retained second third-party defendant Maspeth Welding, Inc. ("Maspeth"), a subcontractor at the premises.

On June 3, 2006, plaintiff was descending the stairs at the Atlas Park Mall when she lost her footing and attempted to grab a handrail that was not present.

After plaintiffs commenced this negligence action, defendants commenced a third-party action against Plaza and TEK for contractual and common law indemnification, and for failure to procure insurance. Plaza then commenced a second third-party action against Maspeth.

In support of their motion for summary judgment against Plaza, the Atlas defendants argue that there is no question that this case arises out of or from Plaza's work. In support of their motion, the Atlas defendants submit their pleadings, their Contract with Atlas, and the deposition testimony of its Project Engineer, Christa Skaboulos ("Skaboulos"). The Atlas

defendants contend that TEK indicates that the plans called for the presence of a handrail, and that there was only an architectural handrail at the location where plaintiff fell. Defendants argue that as said handrail was required on the plan, and Plaza failed to put in a handrail according to the plans, Plaza, the construction manager, is responsible for the accident, thereby triggering the indemnification and insurance clauses of the Contract.[1]

In opposition, Plaza argues that defendants' claim for common law indemnification against Plaza must be denied. Plaza argues that it cannot be held liable for this accident, and Plaza did not own, occupy, or maintain the subject location, had no duty or responsibility to maintain the location, and did not cause or create or have notice of the alleged condition. Plaza's field superintendent at the work site testified at his deposition that he coordinated the delivery of products and "certain timing" of the subcontractors, but was not responsible for the "supervision of the subcontractors' installation." Plaza would receive shop drawings from the subcontractors, review them, and the pass them on to the pertinent engineers, architects and landscape architects and the owner. Plaza's superintendent further testified that "Changes were owner-directed to the architect, then we proceeded to build the project."

Further, there are questions of fact as to what from, if anything, this case arises. Plaintiff testified at her deposition that she was unaware of any debris or anything on the steps that caused her to start to fall. Plaintiff failed to identify the actual cause of the start of her fall. Whether the presence of a handrail at the staircase or lack thereof even contributed to her accident remains

[1] It is noted that as to Plaza's insurance obligations under the Contract, the Atlas defendants merely argue that the "insurance is triggered" and that Plaza is required defend and indemnify the Atlas defendants (Richard O'Connell Affirmation, ¶8). The Atlas defendants do not argue that they are entitled to summary judgment on their breach of insurance obligation claim, and submit no documentation or proof that insurance was not so provided. In any event, Plaza's opposition papers contain evidence, i.e., a Commercial Insurance Policy from St. Paul Travelers, indicating that it obtained insurance in favor of the Atlas defendants.

pure speculation. Additional questions of fact remain as to the design and installation of the subject handrail which allegedly has not been built or installed by Maspeth, despite the owner's direct involvement with the staircase. There were more than 115 owner-directed changes to the building plans for the subject mall, and questions exist as to whether the owner's representative ever made design changes to the staircase, and if so, whether these design changes included removing handrails off a portion of the staircase. Discovery established that defendants not only retained an owner's representative, Mark Powers, who was "in charge of the build out" and in the day-to-day "decisions about the design and construction of the subject staircase," defendants also retained a construction code consultant for the work site. Owner-directed changes were made to the project's plans and specifications "roughly 115" times.

Further, defendants' motion for contractual indemnification against Plaza must be denied, as the subject indemnity claim is unenforceable under GOL §5-322.1, as it would require Plaza to indemnify defendants for their own negligence.

Finally, defendants' motion for summary judgment on their claim for breach of insurance must be denied, as Plaza in fact maintained insurance for its activities at the work site. Whether Plaza's insurer chose to provide coverage to defendants is not within Plaza's control, and cannot be addressed in the absence of that insurer's involvement in this action. Even if there were a failure to procure insurance, such failure would not mandate indemnity to defendants, as caselaw holds that damages would be limited to the cost of the insurance for the year of the accident.

Maspeth also opposes the motion, arguing that defendants' motion is premature pursuant to CPLR §3212(f). Defendants are in sole possession of the facts regarding the substance of their third-party action and the material information forming the basis of their representations.

Defendants did not produce a witness with knowledge of the work performed at the site. Further, Maspeth has not yet received any responses to its discovery demands. Defendants' motion is based on the unsupported declaration that the accident arose out of the work of Plaza. According to the deposition of defendants' project engineer, Mark Powers made the majority of the construction decisions and would have knowledge of the design and construction of the subject staircase. The project engineer did not draw up the plans and did not have any involvement in the physical construction. Yet, defendants have not yet produced Mark Powers for a deposition. Mark Powers was potentially responsible for the design and construction and/or any modification of the staircase. Without discovery, Maspeth cannot prepare a defense in this matter.

Further, defendants failed to demonstrate the absence of triable issues of fact in that here, the subject handrail did not cause plaintiff to start to fall. Plaintiff failed to identify the actual cause of the start of her fall, if anything. Moreover, whether the presence of a handrail or lack thereof contributed to plaintiff's accident remains speculation. However, in the event plaintiff's accident was due to the negligence in the design and construction of the subject staircase, issues exist as to the extent of defendants' involvement in the design and construction of the staircase. Defendants failed to establish that (1) it did not owe plaintiff a duty and (2) it was not negligent, and therefore, did not breach that duty to the plaintiff. Defendants had direct involvement in the design and construction of the staircase and questions remain as to whether any of the owner-directed changes to the building plans involved design changes to the staircase and/or handrails. Mark Powers has exclusive knowledge of such changes. Defendants have not proven they were free from negligence or that the accident arose out of Plaza's work.

Discussion

The proponent of a motion for summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (CPLR 3212 [b]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Silverman v Perlbinder*, 307 AD2d 230, 762 NYS2d 386 [1st Dept 2003]; *Thomas v Holzberg*, 300 AD2d 10, 11, 751 NYS2d 433, 434 [1st Dept 2002]). Thus, the motion must be supported "by affidavit [from a person having knowledge of the facts], by a copy of the pleadings and by other available proof, such as depositions" (CPLR § 3212 [b]). A party can prove a *prima facie* entitlement to summary judgment through the affirmation of its attorney based upon documentary evidence (*Zuckerman, supra*; *Prudential Securities Inc. v Rovello*, 262 AD2d 172 [1st Dept 1999]).

Where the proponent of the motion makes a *prima facie* showing of entitlement to summary judgment, the burden shifts to the party opposing the motion to demonstrate by admissible evidence the existence of a factual issue requiring a trial of the action, or to tender an acceptable excuse for his or her failure to do so (CPLR §3212 [b]; *Vermette v Kenworth Truck Co.*, 68 NY2d 714, 717 [1986]; *Zuckerman, supra*, 49 NY2d at 560, 562; *Forrest v Jewish Guild for the Blind*, 309 AD2d 546, 765 NYS2d 326 [1st Dept 2003]). Like the proponent of the motion, the party opposing the motion must set forth evidentiary proof in admissible form in support of his or her claim that material triable issues of fact exist (*Zuckerman, supra* at 562). Mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient (*Alvord and Swift v Steward M. Muller Constr. Co*, 46 NY2d 276, 281-82, 413

NYS2d 309 [1978]; *Fried v Bower & Gardner*, 46 NY2d 765, 767, 413 NYS2d 650 [1978]; *Platzman v American Totalisator Co.*, 45 NY2d 910, 912, 411 NYS2d 230 [1978]; *Mallad Const. Corp. v County Fed. Sav. & Loan Assn.*, 32 NY2d 285, 290, 344 NYS2d 925 [1973]; *Plantamura v Penske Truck Leasing, Inc.*, 246 AD2d 347, 668 NYS2d 157 [1st Dept 1998]).

A party is entitled to full contractual indemnification provided that the intention to indemnify can clearly be implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*Drzewinski v Atlantic Scaffold & Ladder Co Inc.*, 70 NY2d 774,777 521 NYS 2d 216 [1987]; *Masciotta v Morse Diesel International, Inc.*, 303 AD2d 309, 758 NYS2d 286 [1st Dept 2003]).

The indemnification clause in the Contract provides, in pertinent part:

> 16.2 To the fullest extent permitted by law, the Construction Manager [Plaza] shall defend an, indemnify and hold harmless the Owner, its offices, directors, agents and employees, as well as Owner's affiliated companies including . . . Atco Properties and Management . . . from and against claims, damages, losses, liabilities, cost, causes of action and expenses, . . . *arising out of or resulting from performance of the Work and Construction Manager's obligations hereunder*, provided that such claim, damage, loss or expense is attributable to . . . bodily injury . . , but only to the extent caused by the acts or omissions of the Construction Manager . . . ., a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . . (Emphasis added).

Contrary to Plaza's contention, the indemnification agreement at issue, which contains the language "[t]o the fullest extent permitted by law," does not violate GOL §5-322.1"s proscription against indemnifying the indemnitee against its own negligence (*see Jackson v City of New York*, 38 AD3d 324, 324-325 [1st Dept 2007] (indemnification "provision contains the requisite language limiting the subcontractor's obligation to that permitted by law"), citing *Dutton v Charles Pankow Builders*, 296 AD2d 321, 322 [1st Dept 2002] [no violation of GOL §

5-322.1 because clause provides indemnification only "to the fullest extent permitted by applicable law"); *Bush v City of New York*, 195 Misc 2d 882, 762 NYS2d 775 [Sup Ct 2003] ("an indemnification agreement containing the phrase 'to the fullest extent permitted by law' is an indemnification agreement intended to avoid the proscriptive ambit of GOL 5-322.1")).

However, the Atlas defendants failed to demonstrate that plaintiff's accident arose out of or resulted from the Work or Plaza's obligations. At the outset, apart from the Contract and the pleadings, the Atlas defendants submitted only the deposition testimony of its Project Engineer, Skaboulos, who unequivocally stated that her role was "clerical" and "administrative" and "not the actual physical construction." She had "nothing to do with any of who was involved with the designing" and "just reviewed the paperwork." The "owners' rep" Mark Powers, "was the construction person" who "made the majority of the decisions of what would happen and what wouldn't happen." When presented with drawings at her deposition and asked whether she had ever seen them before, Skaboulos testified "I can't recall that I've seen this specific drawing." Although she was able to confirm that the drawing "is definitely the location," she could not "identify" the staircase at issue. She later clarified that as to the drawings, she saw "actual pictures of the handrails" but could not state what they were "allocated to because [she] can't read it. . . . [It was] a Mark Powers issue." Skaboulos's deposition testimony does not establish, as the Atlas defendants argue, that the architect's design called for a handrail and that Plaza failed to install same. In this regard, while the Atlas defendants contend that TEK "indicated that a handrail was called for the location of the accident" (Richard O'Connell Affirmation, ¶3), the Atlas defendants failed to identify, either by testimony or documents, any evidence to support this contention. The record as presented by the Atlas defendants fails to establish that the

installation of any handrail was required under the "Work" or required as one of Plaza's obligations under the Contract. Therefore, it cannot be said, as a matter of law, that plaintiff's accident arose out of or resulted from the "Work" or Plaza's obligations under the Contract.

In any event, even assuming that the Atlas defendants satisfied its burden on their motion for summary judgment, Plaza and Maspeth raised an issue of fact as to whether the plaintiff's accident was caused by the negligence of the Atlas defendants. It is uncontested that there were approximately "115" owner-directed changes to the project's plans and specifications, and that Mark Powers, who has not been deposed, is the person with knowledge as to such changes. Since the deposition of Mark Powers would shed light as to the Atlas defendants' role in the changes made to the specifications, and as to whether such changes involved changes to the handrail allegedly required by the architect, defendant's motion is also premature pursuant to CPLR §3212(f). CPLR § 3212(f) permits a party opposing summary judgment to obtain further discovery, when it appears that certain facts within the knowledge and control of the movant and supporting the plaintiff's position may exist, but that they cannot yet be stated (*Harris v McDowell*, 15 Misc 3d 1133, 841 NYS2d 218 (Sup Ct Nassau County 2007; *Baldasano v Bank of New York*, 199 AD2d 184, 605 NYS2d 293 [1st Dept 1993]). The Atlas defendants are in sole possession of the facts regarding handrail in question, which is material to the defense of Plaza and Maspeth. Therefore, as issues remain as to Altas defendants' negligence, summary judgment in their favor on their indemnification claims is unwarranted.

There are also triable issues of fact which preclude summary judgment with respect to the common-law indemnification claim, as the Atlas defendants failed to establish that no negligent act on their part contributed to the plaintiff's injuries. Thus, the motion by the Atlas defendants

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for summary judgment on their common law indemnification claim is also unwarranted.

Conclusion

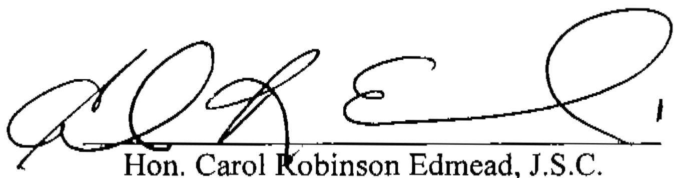
Based on the foregoing, it is hereby

ORDERED that the motion by defendant/third-party plaintiff Atlas Park, L.L.C., s/h/a Atlas Park LLC d/b/a The Shops at Atlas Park and Atco Properties and Management Inc., and A & Co., i/s/h/a A & Co., Inc., d/b/a Amenta & Company for summary judgment against Plaza Construction on their claims for defense and indemnification is denied, without prejudice; and it is further

ORDERED that defendant/third-party plaintiff Atlas Park, L.L.C., s/h/a Atlas Park LLC d/b/a The Shops at Atlas Park and Atco Properties and Management Inc., and A & Co., i/s/h/a A & Co., Inc., d/b/a Amenta & Company shall serve a copy of this order with notice of entry upon all parties within 20 days of entry.

This constitutes the decision and order of the Court.

Dated: March 10, 2010



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD

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