Vicente v RJR Mech., Inc.

2010 NY Slip Op 31922(U)

July 9, 2010

Supreme Court, Richmond County

Docket Number: 13377/2000

Judge: Joseph J. Maltese

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND

DCM PART 3

THOMAS VICENTE,

Plaintiff,

-against-

RJR MECHANICAL, INC., and
LEEWEN CONTRACTING CORP.,

Defendants.

Index No: 13377/2000

DECISION & ORDER

HON. JOSEPH J. MALTESE

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RJR MECHANICAL, INC., and
LEEWEN CONTRACTING CORP.,

Fourth-Party Plaintiffs,

-against-

GTU ASSOCIATES,

Fourth-Party Defendants.

Motion Nos. 376 - 023
1508 - 024

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RJR MECHANICAL, INC. and
LEEWEN CONTRACTING CORP.,

Second Fourth-Party Plaintiffs,

-against-

MONOSIS, INC.,

Second Fourth-Party Defendant.[1]

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The following papers numbered 1 to 4 were marked fully submitted on the 21st day of May, 2010 :

	Pages Numbered
Notice of Motion for Summary Judgment by Second Fourth-Party Defendant Monosis, Inc., with Supporting Papers and Exhibits (dated January 19, 2010)	1

[1] Although the "Fourth-Party" nomenclature is technically inaccurate, it is employed herein in the interest of internal consistency.

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Pages Numbered

Upon the foregoing papers, the motion (No. 376) by second fourth-party defendant MONOSIS, INC. (hereinafter MONOSIS) for summary judgment dismissing all of the causes of action asserted against it in the second fourth-party complaint, and any and all cross claims against it, is granted, with prejudice. The cross motion by defendants/fourth-party plaintiffs/second fourth-party plaintiffs, RJR MECHANICAL, INC. and LEEWEN CONTRACTING CORP. for partial summary judgment on its claim for indemnification as against the second fourth-party defendant and to strike said party's answer is denied.

Plaintiffs commenced this action to recover damages for injuries allegedly sustained by plaintiff THOMAS VINCENTE while he was working for sub-contractor/second fourth-party defendant MONOSIS, which was hired to perform heating, ventilation and air conditioning (hereinafter "HVAC") work at the State University of New York (SUNY) Health Center in Brooklyn. Defendants RJR MECHANICAL INC. (hereinafter RJR), and LEEWEN CONTRACTING CORP. (hereinafter LEEWEN) were the general contractors on the project. It is alleged that plaintiff sustained an injury to his right knee and leg when he fell through an uncovered metal grating while insulating certain steam pipes. Plaintiff claims that he lost his balance after being asked by a co-worker to move a box.

Defendants/fourth-party plaintiffs/second fourth-party plaintiffs, RJR and LEEWAN commenced their second fourth-party action against plaintiff's employer, MONOSIS, for, *inter alia*, common-law and contractual indemnification pursuant to a contract between LEEWAN and subcontractor/fourth-party defendant GTU ASSOCIATES, INC. (hereinafter GTU), which MONOSIS is alleged to have assumed. GTU has never appeared in this action, and a default judgment has been entered against it.

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In moving for summary judgment dismissing the causes of action asserted against it in the second fourth-party complaint, MONOSIS maintains that plaintiff did not sustain a "grave injury" as required by Workers' Compensation Law §11. According to MONOSIS, while it is undisputed that plaintiff was under its employ at the time of the subject accident, RJR and LEEWEN have failed to meet their burden of establishing that the injury to plaintiff's right knee injury qualifies as a "grave injury" under section 11 of the Workers' Compensation Law. Accordingly, RJR and LEEWEN are not entitled to seek indemnification and/or contribution from it. In particular, MONOSIS refers to the injuries cited in plaintiff's bill of particulars, and notes that none of them qualifies as a "grave injury".

In support, MONOSIS submits the affirmed report of an orthopedic examination of the plaintiff by Dr. William Kulak which indicates that while plaintiff underwent general diagnostic right-knee arthroscopic surgery on May 10, 2002, he does not, at present, require any medication, nor is he under the care of any physician. It is further opined that although plaintiff experiences occasional throbbing in his right knee, he is not incapacitated in any way except for his subjective claim that he can no longer play handball or other sports as before the accident. According to Dr. Kulak, plaintiff is fully functional in terms of the activities of daily living, and is capable of performing his occupational duties without restriction due to his injury. In fact, it appears that plaintiff is currently working at his prior occupation installing insulation at various construction sites. According to Dr. Kulak, plaintiff's injury was minimal in nature, and consistent with age-related early chondromalacia, a condition completely unrelated to this accident.

With regard to the contractual indemnification claims by RJR and LEEWEN, MONOSIS contends that there is no contract between the subject parties, and therefore neither is entitled to any such indemnification. According to MONOSIS, the only executed agreement relative to the HVAC/insulation work at the subject location was between LEEWEN and GTU. MONOSIS further argues that it was never assigned that contract, nor was there an assumption of the duties or obligations undertaken by GTU in that agreement by MONOSIS. Instead, it is claimed that the only assignment occurred when the GTU contract was assigned by RJR by LEEWEN. In addition, MONOSIS argues that it and GTU are entirely separate and distinct entities, and that there is no proof that MONOSIS agreed to be bound by the terms contained within the LEEWEN/RJR/GTU agreement.

In support, of this contention, MONOSIS points to the EBT testimony of RJR's treasurer and general counsel, Randy Karpman, who testified that he believed that while there were two insulators on the subject jobsite, GTU and MONOSIS, there was no express agreement with MONOSIS. As a result, MONOSIS argues that it cannot be bound by the terms of any agreement to which it was not a party. Finally, MONOSIS contends that the course of conduct between itself and LEEWEN or RJR is insufficient to create any duty of indemnification. Accordingly, the claims for contractual indemnification as against it must be dismissed.

In a cross motion for summary judgment and in opposition to the motion to dismiss, RJR and LEEWEN contend that LEEWEN subcontracted the HVAC work at the SUNY Health Science Center to GTU. It is further alleged that this contract was subsequently assigned to RJR, which contracted with MONOSIS to perform the work required under GTU's subcontract. According to LEEWEN and RJR, MONOSIS assumed GTU's contract and performed the work in accordance with the terms thereof. In support, LEEWEN and RJR rely on the EBT testimony of Michael Theodorobeakos, a principal of MONOSIS, who testified that he believed that there was a contract between RJR and MONOSIS, but that he could not locate a copy thereof it. He acknowledged that MONOSIS later undertook the project for which GTU was initially hired, including insulation, but that the only relationship between it and GTU was that the latter was formed by a former principal of MONOSIS, Zisis Gatzoflias, who wanted to start his own insulation business. According to this witness, it was Gatzoflias on behalf of GTU who originally signed the subcontract with LEEWEN for the subject job, but that MONOSIS actually performed the work which GTU was obligated to perform.

According to RJR and LEEWEN, even in the absence of any written contract between themselves and MONOSIS, the proof clearly indicates that MONOSIS agreed to perform the work in accordance with the subcontract executed by LEEWEN and GTU. As a result, it is claimed that MONOSIS is bound by all of its terms, including the indemnification provision contained therein. RJR and LEEWEN also argue that MONOSIS cannot shield itself from liability merely because it cannot locate a copy of any contract or valid assignment from RJR or LEEWEN to MONOSIS.

In addition, RJR and LEEWEN contend that their common-law indemnification and contribution claims against MONOSIS were discontinued by stipulation with the second fourth-party defendant's former counsel. Accordingly, it is claimed that these issues have been rendered moot.

Finally, RJR and LEEWEN argue that the answer of MONOSIS should be stricken on the ground that it spoliated material evidence. In this regard, the cross movants claim that they have been irrevocably prejudiced because MONOSIS cannot produce a copy of the assigned contract or any receipts for payment related to the SUNY project, claiming that the relevant file has been inadvertently lost or destroyed.

It is well settled that Workers' Compensation Law §11 prohibits third-party indemnification or contribution claims against the employers of injured workers except (1) where the employee in question has sustained a "grave injury", or (2) the claim is based on a provision in a written contract entered into prior to the accident or occurrence in which the employer expressly agrees to assume that obligation (Rodrigues v. N & S Bldg Contrs., Inc., 5 NY3d 427, 431- 432). Here, RJR and LEEWEN do not dispute the claim by the second fourth-party defendant that plaintiff did not suffer a "grave injury". Rather, their claim against MONOSIS is based solely on the contractual indemnification clause contained within the contract between themselves and GTU. In this regard, RJR and LEEWEN maintain that MONOSIS assumed the terms of the subject contract, including the indemnification clause, when it took over GTU's HVAC work at the SUNY Health Science Center.

The Court disagrees.

Here, MONOSIS demonstrated its prima facie entitlement to summary judgment by submitting EBT testimony and other documents related to the HVAC project demonstrating the lack of any written agreement to provide indemnification or contribution to RJR/LEEWEN (*see* Zuckerman v. City of New York, 49 NY2d 557, 562). While it is apparent that MONOSIS completed the job that GTU had originally contracted to perform, there is no proof establishing that MONOSIS *expressly agreed to all of the terms of GTU's contract*, including, in particular, the agreement to indemnify RJR/LEEWEN. Moreover, Mr. Theodorobeakos of MONOSIS expressly testified at his EBT that the job was performed under terms different from the original contract signed on behalf of GTU, and that when he agreed for MONOSIS to perform the work, it was with the understanding that the contract needed to be revised. However, he conceded that work on such projects often starts without a completed contract or a signed proposal (*see* MONOSIS Motion, Exhibit N, pgs. 38-39).

In opposition, RJR and LEEWEN have failed to raise a triable issue of fact (*see* Alvarez v. Prospect Hosp., 68 NY2d 320, 324). "When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (Rodrigues v. N & S Bldg Contrs, Inc., 5 NY3d at 433 [internal quotation marks omitted]). At bar, it is undisputed that there is no proof of the existence of a contract between RJR, LEEWEN and MONOSIS in which the latter expressly agreed to indemnify the former. Neither is there a written assignment between GTU and MONOSIS. Although it is conceded that MONOSIS does may not have a copy of any contracts or other documents related to this job in its possession, it should be noted that RJR and LEEWEN also have been unable to come forward with any documents or other affirmative proof of a contract or written assignment in which MONOSIS expressly agreed to indemnify RJR and/or LEEWEN as per their agreement with GTU. Both parties would normally be expected to retain copies of these agreements if they ever existed, and are equally at fault in this regard. Moreover, no evidence of spoliation has been adduced by either RJR or LEEWEN.

In light of the foregoing, the cross motion of RJR and LEEWEN is denied in its entirety.

Accordingly, it is hereby:

ORDERED that the motion of MONOSIS, INC. for summary judgment dismissing the second fourth-party complaint of RJR MECHANICAL, INC. and LEEWEN CONTRACTING CORP., as well as any cross claims for contribution or indemnification against it, is granted, and any such causes of action are hereby severed and dismissed; and it is further

ORDERED that the cross motion of defendants/fourth-party plaintiffs/second fourth-party plaintiffs for summary judgment on its remaining claim for contractual indemnification, and to strike the second fourth-party's answer is denied; and it is further

ORDERED that the Clerk enter judgment and mark his records accordingly.

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All parties shall appear in DCM Part 3 for a status conference on **August 9, 2010** at **9:30 a.m.**

E N T E R,

Dated: July 9, 2010

Joseph J. Maltese
Justice of the Supreme Court