

Molinari v 167 Hous. Corp.

2010 NY Slip Op 33222(U)

November 12, 2010

Supreme Court, New York County

Docket Number: 100658/2007

Judge: Cynthia S. Kern

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

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 52

Index Number : 100658/2007

MOLINARI, PETER

vs

167 HOUSING

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision. This action is hereby transferred to a non city part as the City is no longer a party to this action.

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

FILED

NOV 17 2010

NEW YORK COUNTY CLERK'S OFFICE

Dated: 11/12/10

CK

CYNTHIA S. KERN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDG.

SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 52

-----X
PETER MOLINARI

Plaintiff,

-against-

167 HOUSING CORP AND AKAM ASSOCIATES, INC.
Defendants.

-----X
167 HOUSING CORP AND AKAM ASSOCIATES, INC.

Third party Plaintiffs,

-against-

THE CITY OF NEW YORK,

Third party Defendant.

-----X

HON. CYNTHIA S. KERN, J.S.C.

DECISION AND ORDER

Index no. 100658/07

FILED

NOV 17 2010

NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	<u>3</u>
Exhibits.....	_____

Plaintiff commenced this action against defendants to recover for injuries he incurred when he fell on a sidewalk. Defendants then commenced a third party action against the City of New York (the "City"). Plaintiff never asserted any direct claim against the City. The City has

now brought a motion for summary judgment to dismiss the third party claim against it on the ground that it has no liability pursuant to Section 7-210 of the Administrative Code because the accident occurred on a sidewalk for which it has no responsibility. The third party plaintiffs argue that summary judgment should be denied because there are disputed issues of fact as to whether the plaintiff's accident happened on the sidewalk or the tree well and as to whether the accident was caused by the curb rather than the sidewalk. If the accident happened in the tree well or was caused by the curb, the third party plaintiffs argue that the City would be responsible for the accident rather than the third party plaintiffs. For the reasons stated below, the third party action against the City is hereby dismissed.

The City is entitled to a dismissal of the third party action against it whether or not it is responsible for the accident—whether or not the accident happened on the sidewalk or in the tree well or whether or not the accident was caused by the curb. Since the plaintiff in this action has not brought any direct claim against the City, the only claim that could be asserted against the City is a claim for indemnification or contribution by the third party plaintiffs. However, as will be discussed below, the third party plaintiffs do not have any valid claim for indemnification or contribution against the City.

A claim for “indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer.” *Trustees of Columbia University v Mitchell/Giurgola associates*, 109 A.D.2d 449 (1st Dept 1985). The right to indemnification can be created by an express contract or may be implied by law. *Id.* Implied indemnity allows one who “is held vicariously liable solely on account of the negligence of

another to shift the entire burden of the loss to the actual wrongdoer.” *Id.* In the present case, the third party plaintiffs do not have any contractual claim for indemnification against the City as there is no contract between the third party plaintiffs and the City. They also do not have any common law indemnification claim against the City as they will only be held liable in the action brought by plaintiffs if they themselves are found to be negligent. There will not be any vicarious liability imposed against them in the main action based on the negligence of the City. If the City is found to be responsible for the accident because, for example, the accident occurred in the tree well, then third party plaintiffs will be found to not have any responsibility for the accident. Under these circumstances, they do not have a claim for common law claim indemnification against the City.

The third party plaintiffs also do not have any claim against the City for contribution. The “right to contribution and apportionment of liability among alleged multiple wrongdoers arises when they each owe a duty to plaintiff or to each other and by breaching their respective duties they contribute to plaintiff’s ultimate injuries. This is so regardless of whether they are liable under different theories, so long as their wrongdoing contributes to the damage or injury involved.” *Id.* at 454. In the present case, the third party plaintiffs do not have any claim for contribution against the City as there is no alleged wrongdoing on each of their respective parts which would have contributed to plaintiff’s injuries. Either the fact finder is going to find that the accident occurred on the sidewalk flag in which case the third party plaintiffs would potentially be responsible or the fact finder will find the accident occurred in the tree well or because of the curb in which case the City would potentially be held responsible. However, this is not a case where there is potential wrongdoing on the part of the third party plaintiffs and the

City which would have both contributed to plaintiff's injuries. Under these circumstances, there cannot be any valid claim of contribution by the third party plaintiffs against the City.

Based on the foregoing, the City's motion for summary judgment dismissing the third party complaint and any cross claims against it is granted. This constitutes the decision and order of the court.

Dated: 11/12/10

CK

J.S.C.

CYNTHIA S. KERN
J.S.C.

FILED

NOV 17 2010

NEW YORK
COUNTY CLERK'S OFFICE