Picano v Rockefeller Ctr. N., Inc.

2011 NY Slip Op 30654(U)

March 18, 2011

Sup Ct, New York County

Docket Number: 115832/04

Judge: Judith J. Gische

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SCANNED ON 3/21/2011

[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Picard

Plaintiff (s),

INDEX NO. 115832/04

MOTION DATE

- v -

MOTION SEQ. NO. 003

Rockefeller

Defendant(s).

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

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAR 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/18/11

Hon. Judith J. Gische, *J.S.C.*

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

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

----------X

CORRADO PICANO and KATHLEEN PICANO,

Plaintiffs,

-against-

ROCKEFELLER CENTER NORTH, INC. and TIME, INC.,

Defendants.

----------X

ROCKEFELLER CENTER NORTH, INC. and TIME, INC.,

Third-Party Plaintiffs,

-against-

McCANN, INC.,

Third-Party Defendant.

----------X

ROCKEFELLER CENTER NORTH, INC. and TIME, INC.,

Second Third-Party Plaintiffs,

-against-

PACE PLUMBING CORP.,

Second Third-Party Defendant.

----------X

Decision/Order

Index No. 115832/04
Seq. No. 003

Third-Party Index No. 590876/06

FILED

MAR 21 2011

NEW YORK
COUNTY CLERK'S OFFICE

Second Third-Party Index No. 590089/09

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Rockefeller n/m (3212) w/TAP affirm, BC, CD, BM affids exhs	1
Pace opp w/WP affirm, exhs	2
Rockefeller reply/TAP affirm, RP affid	3

Gische J.;

Upon the foregoing papers, the decision and order of the court is as follows:

This action by plaintiff alleges violations of the Labor Laws. In this court's prior order, dated October 15, 2008, plaintiffs' motion for summary judgment on the issue of defendants' liability under Labor Law § 240 (1) was granted, and defendants Rockefeller Center North, Inc. (RC) and Time, Inc. (Time)'s cross motion for summary judgment dismissing the complaint was granted only to the extent that plaintiffs' Labor Law § 200 claim was dismissed.[1]

Having impleaded plaintiff's employer, Pace Plumbing Corp. (Pace), RC and Time now move for summary judgment on their contractual indemnification claim against Pace. Although the plaintiff filed the note of issue, it was stricken (Order, GIsche J., 4/21/10). Since this motion was brought after issue was joined, summary judgment relief is available and, therefore, the motion will be decided on the merits (CPLR 3212 [a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1st Dept. 2001]).

The court's decision and order is as follows:

Arguments Presented

As set forth in the court's October 2008 Order, on April 17,

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[1]Although RC and Time state numerous times that, in dismissing the Labor Law § 200 claim, the court found that they were not negligent, and that that finding is now law of the case, the statement is inaccurate. Plaintiffs "voluntarily [withdrew] the Labor Law § 200" claim (October 15, 2008 Order, at 4). No finding of negligence or the absence of negligence was made.

2003, plaintiff Corrado Picano (plaintiff), then a plumber employed by Pace, was working on the 22nd floor of the Time-Life Building located at 1271 Avenue of the Americas in Manhattan. RC was the title owner of the building, and Time the principal tenant, whose demised premises included the 22nd floor, where the accident occurred. Time had entered into a construction management contract with McCann, Inc. (MC) for renovation work within Time's premises, and MC and Pace had entered into a March 2003 subcontract for plumbing demolition work on the 6th, 22nd, and 29th floors.

On April 17, 2003, plaintiff was told by his supervisor that a water line had to be repaired at the Time-Life Building. He reported to the building, where an MC employee directed plaintiff to repair water pipes on the 22nd floor. While he was so employed, the ladder he was standing on shifted, and he fell and was injured.

At issue in this matter is whether a one-page Indemnification Agreement which was signed by Pace's CEO, Harold Block, on April 15, 2003, two days before plaintiff's accident, applies in this matter. The agreement reads, in relevant part:

> To the fullest extent permitted by law, the Contractor [Pace] shall indemnify and hold harmless, Time, Inc. ... [and] Landlord [RC] ... from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from the performance of the Work, provided that any such claim, damage, loss or expense (i) is attributable to

> bodily injury ... and (ii) is caused in whole or in part by any negligent act or omission of the Contractor ..., regardless of whether or not it is caused in part by a party indemnified hereunder.

The parties' contentions revolve around the issues of: (1) whether plaintiff's work was pursuant to a service call/work order, separate and distinct from work under the March 2003 MC/Pace subcontract for plumbing demolition work, in which case, the Indemnification Agreement would not apply; and (2) whether the "Work" contemplated by the Indemnification Agreement was part of the March 2003 MC/Pace subcontract for plumbing demolition work on the 6th, 22nd and 29th floors of the Time-Life Building, or whether it was part of Pace's June 2003 bid for the plumbing installation work which would begin on the same floors at the end of June of that year. If the "Work" fell under Pace's June 2003 bid, the Indemnification Agreement would not apply to plaintiff's accident.

RC and Time's Position

RC and Time aver that Pace is obligated to indemnify them. They contend that plaintiff's work fell within the scope of the MC/Pace subcontract, and that, therefore, Pace is subject to the insurance and indemnification provisions of that subcontract, as well as of the Indemnification Agreement itself, which was subsumed into the subcontract documents.

According to RC and Time, Pace's obligations under the Indemnification Agreement were triggered by Pace's negligence, in

that Pace was at least partially at fault in plaintiff's accident, thus triggering its obligations under the Indemnification Agreement.

Pace's Position

Pace maintains that it is not obligated to indemnify RC and Time because plaintiff's work on the day of the accident was the result of a service call, pursuant to a separate and distinct work order, and thus, did not fall within the purview of the MC/Pace subcontract or the Indemnification Agreement.

Summary Judgment Standard

"It has long been settled that 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'" (*Meridian Management Corp. v Cristi Cleaning Service Corp.*, 70 AD3d 508, 510 [1st Dept 2010], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). "'Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers'" (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). Once the movant has met its burden, "the party opposing such motion must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212 [b]) 'by producing evidentiary proof in admissible form'" (*Meridian Management Corp.*, 70 AD3d at 510, quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). "[A]ll of the

evidence must be viewed in the light most favorable to the party opposing the motion, and all reasonable inferences must be resolved in that party's favor" (*Udoh v Inwood Gardens*, 70 AD3d 563, 565 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility [interior citations omitted]" (*Meridian Management Corp.*, 70 AD3d at 510-511). "When there is any doubt as to the existence of triable issues, summary judgment should not be granted" (*Udoh*, 70 AD3d at 565).

I. Contractual v Emergency Repair Work

The April 1, 2002 Time/MC construction management contract required MC to "bind every Subcontractor to the terms of the Contract Documents to the extent the same are applicable to the Work to be performed by such Subcontractor," and to include in such subcontracts an indemnification provision by which the subcontractor would agree to defend and indemnify Time and RC against all liability for bodily injury arising out of the performance of the subcontractor's work, as well as an agreement to provide and maintain liability insurance (Time/MC Construction Management Contract, ¶¶ 7.6, 7.7 [d]).

Page 1 of the March 2003 MC/Pace subcontract stipulates that "McCann's insurance requirements are hereby attached as part of this proposal" as Exhibit B. Although Exhibit B is not appended to either copy of the MC/Pace subcontract that was submitted on

this motion, its presence or absence as part of the MC/Pace subcontract is irrelevant with respect to the issue of Pace's purported obligation to indemnify RC and Time. Exhibit B does not contain an indemnification provision running in favor of RC and Time.

Since the MC/Pace subcontract does not contain an indemnification provision in RC and Time's favor, it is hardly surprising that RC and Time maintain that the April 15, 2003 Indemnification Agreement was part of the March 2003 MC/Pace subcontract.

Harold Block, Pace's CEO, attested that in March 2003, Pace would not have entered into an indemnification agreement before doing work for a contractor or owner "unless there was an extensive contract tied to it" (Block Depo., at 13). Pace would not enter into such an agreement if it was just summoned to make a service call (*ibid.*). However, if a contract required an indemnification agreement, "I would sign [the indemnification agreement], send it to my broker for approval and if they said it's okay, I would submit it" (*id.* at 26, 24-27). Nevertheless, Pace would "[a]bsolutely not" obtain insurance or sign an indemnification agreement before it was awarded a given project and its bid was accepted (*id.* at 50).

Block also testified that some professional buildings in Manhattan have "approved vendor" lists, and that, if a contractor is not on the list, it cannot work in the building (*id.* at 14).

Contractors on an approved vendor list "have to have insurance with the management or owner" (*id.* at 15).

Blaise Cresciullo, who was RC's property manager at the Time-Life Building at the time of plaintiff's accident, attested that to be an approved vendor, RC required a certificate of insurance showing that the contractor had obtained insurance naming RC as an additional insured (Cresciullo 8/12/10 Aff., ¶ 5). Although Cresciullo averred that Pace was not an approved vendor hired by RC in March or April 2003, it nevertheless would have been allowed to work in the building if it had been hired by a tenant, such as Time, or by a tenant's contractor, such as MC (*id.*, ¶ 7). It is undisputed that Pace was hired by MC to work within Time's demised premises, and that Time approved the engagement.

With respect to whether Pace was an approved vendor which would have been allowed to perform work at the building, MC's March 24, 2003 Bid Analysis notes that "Pace Plumbing has not worked in this building but, has worked at other [Rockefeller Group] buildings and is an approved vendor on [Rockefeller Group]'s list" (Parra 10/1/10 Affirm., Ex. E, at 4 of 4).

In his affidavit, Christopher Devaney, who was Time's director for facility services in 2003, asserted that Time approved MC's hiring of Pace (Devaney 8/12/10 Aff., ¶ 5), but that Pace was not an approved vendor in April 2003 (*id.*, ¶ 8). He concluded, based on his knowledge of the project, RC and Time's

customs and practices at the building in April 2003, and his review of records, that "if the plaintiff was working on the 22nd floor of the building on April 17, 2003 repairing a water line, it would have been pursuant to Pace's agreement with [MC] for plumbing work on Tranche II of the rolling refurbishment project" (*id.*, ¶ 11).

In support of its contention that plaintiff's work was in response to an emergency service call, Pace notes that the "approved vendor" for plumbing in the building was J & E Plumbing (J&E). A work request to "repair domestic water line on the 22nd floor damaged by demolition crew Tue. 4/15/03" was requested and dispatched on the morning of April 16th, and the work was completed on April 21, 2003 (Exhibit H to Parra 10/1/10 Affirm.). The "repair description" was that "J & E Mechanical called to cut and cap hot water line which was cut by demolition crew on 22nd floor" (*id.*). Pace then calls the court's attention to Exhibit I of Mr. Parra's affirmation, which consists of J&E's April 21, 2003 proposal for the repair work; RC's April 28, 2003 purchase order; J&E's May 2, 2003 invoice; and a May 29, 2003 check from RC to J&E for the work. According to Pace, these documents demonstrate that, by the morning of April 17, 2003, hot water service to the 23rd through 33rd floors had been off for at least 36 hours, and that J&E, the approved plumbing vendor for the building, had yet

to submit a proposal for the repair.[2] Thus, "an urgent need existed on the morning of Plaintiff's incident for a temporary or 'emergency' service call and repair by PACE" (Parra 10/1/10 Affirm., ¶ 28). Pace alleges that, because the work was an emergency repair, MC, Time and RC "all intended for this repair to be handled outside of the scope of [MC's] renovation project. As such, it was also outside of PACE's plumbing demolition scope of work" (*id.*, ¶ 29).

Pace's Block testified that if a contractor required extra work, for example, to deal with an emergency situation, a work order would be generated. Work orders were only generated by service calls, and the work performed under a work order would be billed separately from that covered by a contract (Block Depo., at 42-43). Contrary to Pace's contention now that defendants intended emergency repairs to be considered outside of the contract's scope, Block attested that general contractors "always" say the emergency work falls within the contract (*id.* at 43).

Pace contends that the August 6, 2003 McCann Change Order Request, by which MC provided Time with a credit of $1,419.85 for repair of a "domestic water line on the 22nd floor damage[d] by demolition crew on Tuesday, 04/15/03," "establishes their mutual intention not to consider the work to repair that same 22nd floor water line as part of [MC's] renovation project scope of work

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[2]The court is aware that J&E's proposal for the work, and the work's completion share the same date, April 21, 2003.

[i.e., the MC/Pace subcontract]" (Parra 10/1/10 Affirm., ¶ 22). However, once again, Pace's counsel's assertion that there was a "mutual intention" not to consider the repair work as part of the MC/Pace subcontract flies in the face of Pace's CEO's statement that general contractors "always" say the emergency work falls within the contract.

Pace's supervisor who dispatched plaintiff to the building on the day of the accident, Zygmunt Moscicki (Moscicki), attested that Pace employs two kinds of plumbers, those who work a particular project each day, and those who arrive at a site on a truck, to respond to emergencies or service calls in different locations (Moscicki Depo., at 36-37). For the period in question, plaintiff was "the mechanic on the service truck and he was going to different jobs almost every day" (*id.* at 37).

Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue of fact or where the factual issue is arguable or debatable (International Customs Assoc., Inc. v. Bristol-Meyers Squibb Co., 233 AD2d 161, 162 [1st Dept 1996]). Moreover, the court cannot resolve issues of credibility for it is the jury to weight the and draw legitimate inferences therefrom. S.J. Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 (1974). RC and Time have not made a prima facie showing of entitlement to summary judgment against Pace. They have not shown that, as a matter of law, the work done was within the purview of the contract and not emergency work.

Even if they had satisfied their burden on this motion, Pace has demonstrated, by admissible evidence, the existence of a factual issue as to whether the work done was emergency work (Zuckerman v. City of New York, supra at 562). Therefore, there is no basis to grant summary judgment against Pace on this basis.

II. March 2003 MC/Pace Subcontract v June 2003 Bid

The court still proceeds to determine the separate issue of whether the Indemnification Agreement was part of the MC/Pace subcontract or Pace's bid for work which began some time after plaintiff's accident.

MC faxed May 23, 2003 bid invitations to several plumbing contractors, including Pace, on May 27, 2003 (*see* Ex. R to Paradeis 8/13/10 Affirm.). The bids had to be received by MC by June 6, 2003, with the work to begin on June 26, 2003. This subcontract would be for plumbing installation services on the 6th, 22nd and 29th floors of Time's leased premises (*id.*).

Bernard Molka, who was MC's project manager on the project, attested that MC hired various subcontractors after a competitive bidding process. The proposals submitted by the subcontractors became part of the larger agreements between MC and the subcontractors. "Each agreement included insurance and indemnification obligations for the respective trade (subcontractor)" (Molka 8/6/10 Aff., ¶ 4; *see also* ¶¶ 7-8). When MC informed Pace that it had been awarded the contract, it also told Pace that it would have to provide MC with a signed

indemnification agreement running in favor of Time and RC, and a certificate of insurance naming Time and RC as additional insureds on Pace's policy. Pace met both requirements before it was allowed to work in the building (*id.*, ¶ 12).

This comports with Block's testimony that Pace would not have entered into an indemnification agreement unless an "extensive" contract was in place, it had been awarded a given project, and its bid had been accepted (Block Depo., at 13, 50).

According to Molka, the signed Indemnification Agreement was received by MC and Time prior to Pace's commencement of its plumbing demolition work which it performed pursuant to the MC/Pace subcontract. The Indemnification Agreement could not have been in relation to the plumbing installation work for which bids were submitted on June 6, 2003 because the invitation to bid for this work was not sent out until around May 23, 2003. Thus, the Indemnification Agreement pertained the MC/Pace subcontract (Molka 8/6/10 Aff., ¶ 14; *see also* ¶ 19 [MC demanded certificates of insurance and indemnification agreements only from subcontractors who had been awarded contracts; no invitation to bid or award of contract for the plumbing installation work had been made by April 17, 2003 because MC's architect only rendered drawings for work after completion of the demolition phase, and that phase was not yet finished on April 17, 2003]).

Molka also testified that plaintiff's work would have fallen within the MC/Pace subcontract whether the repair was required

because Pace had performed faulty work or whether it was necessitated by something other than Pace's work. Either way, "[u]nder no circumstance would Pace Plumbing have been allowed to perform the pipe repairs on April 17, 2003 without the work being related to an existing contract, with insurance procure[ment] and indemnity provisions in place" (*id.*, ¶¶ 15-16). "[T]he work performed by the plaintiff would have been done pursuant to the McCann, Inc.-Pace Plumbing contract dated March 12, 2003" (*id.*, ¶ 17).

While Pace contends that the fact that MC's April 17, 2003 time sheet does not show that Pace worked on the project that day, and thus, that "this is further evidence that [MC] did not consider Plaintiff's emergency service call on April 17, 2003, as part of PACE's plumbing demolition work" (Parra 10/1/10 Affirm., ¶ 49), Pace fails to disclose that the April 17, 2003 time sheet is for the 29th floor, not the 22nd, where the accident occurred. Thus, it is not the evidence Pace claims it to be.

The court finds that the Indemnification Agreement was part of the March 2003 MC/Pace subcontract, and not part of Pace's bid for the plumbing installation work. More than adequate evidence supports RC and Time's position, whereas Pace again fails to raise an issue of fact.

Contractual Indemnification

As set forth above, the Time/MC construction management contract required MC to include in its subcontractors' agreements

insurance, defense and indemnification provisions running in Time and RC's favor. Exhibit B of the MC/Pace subcontract does not contain such a provision. However, the court has determined that the Indemnification Agreement was part of the MC/Pace subcontract, and that plaintiff's work arose out of that subcontract.

"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 Insurance Co.*, 32 NY2d 149, 153 [1973]). "'[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor'" (*Mott v Tromel Construction Corp.*, 79 AD3d 829, 831 [2d Dept 2010], quoting *Hirsch v Blake Housing, LLC*, 65 AD3d 570, 571 [2d Dept 2009]).

In this court's October 2008 Order, the court granted plaintiff's motion for summary judgment on the issue of RC and Time's liability under Labor Law § 240 (1). The statute imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect the workers from elevation-related risks and hazards (*see e.g. Ross v Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 501 [1993]). However, section

240 (1)'s liability

> is not predicated on fault: it is imputed to the owner or contractor by statute and attaches irrespective of whether due care was exercised and without reference to principles of negligence [citations omitted]. A violation of the statute is not the equivalent of negligence and does not give rise to an inference of negligence

(*Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 179 [1990]). Thus, this court's finding that RC and Time are liable under section 240 (1) is not a determination that they were negligent. However, a finding of negligence may be made under two other statutes, Labor Law §§ 200 and 241 (6).

"Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work" (*Cambizaca v New York City Transit Authority*, 57 AD3d 701, 701 [2d Dept 2008]). Since plaintiff's withdrawal of his Labor Law § 200 claim left the issue of RC and Time's negligence unresolved, this issue must go to the jury.

"Labor Law § 241 (6) imposes a nondelegable duty upon owners and general contractors to provide reasonable and adequate protection and safety to persons employed in construction, excavation, or demolition work, regardless of the absence of control, supervision, or direction of the work" (*Romero v J & S Simcha, Inc.*, 39 AD3d 838, 839 [2d Dept 2007]).

> In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation [of New York's Industrial Code] was a proximate cause of

> the accident. Moreover, where such a violation is established, it does not conclusively establish a defendant's liability as a matter of law, but constitutes some evidence of negligence and "thereby reserve[s], for resolution by a jury, the issue of whether the equipment, operation or conduct at the worksite was reasonable and adequate under the particular circumstances" (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 351 [1998]) [internal citations omitted]

(*Seaman v Bellmore Fire District*, 59 AD3d 515, 516 [2d Dept 2009]; *see also Ramputi v Ryder Construction Co.*, 12 AD3d 260, 261 [1st Dept 2004]). This claim was not considered on this motion; thus, RC and Time's possible negligence under Labor Law § 241 (6) remains undetermined.

Although this court has found that the Indemnification Agreement is applicable to plaintiff's claims, no obligation of Pace to indemnify RC and Time arises unless it is determined that the claims were "caused in whole or in part by any negligent act or omission of the Contractor." The issue of plaintiff's possible negligence has not been adequately explored on this motion; thus, this issue must also await trial.

Conclusion

Accordingly, it is hereby

ORDERED that the motion of Rockefeller Center North, Inc. and Time, Inc. is denied; and it is further

ORDERED that plaintiff shall refile the note of issue within Ten (10) Days of being served with a copy of this decision with Notice of Entry; and it is further

ORDERED that after the mediation process is completed, this case is ready to be tried; and it is further

ORDERED that any relief not expressly addressed is hereby denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
March 18, 2011

SO ORDERED:

Hon. Judith J. Gische, J.S.C.

FILED

MAR 21 2011

NEW YORK
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