

Callegari v Davis & Partners, LLC

2011 NY Slip Op 30671(U)

March 21, 2011

Supreme Court, New York County

Docket Number: 102354/2005

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 57

EDWARD CALLEGARI
DAVIS & PARTNERS, L^VPC
et al

INDEX NO. 102354/05
MOTION DATE _____
MOTION SEQ. NO. 011
MOTION CAL. NO. _____

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

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

PAPERS NUMBERED
<u>1</u>
<u>2-5</u>
<u>6</u>

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion & cross-motion are determined as per decision/order dated 3/21/11.

FILED

MAR 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/21/11

Marcy S. Friedman
MARCYS. FRIEDMAN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/JUDGMENT SETTLE ORDER/JUDGMENT

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 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
EDWARD CALLEGARI

Plaintiff,

Index No.:102354/2005

- against -

DAVIS & PARTNERS, LLC, RFD 425 FIFTH
AVENUE, L.P., and DREW ROSE

Defendants.

DECISION/ORDER
FILED

MAR 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

_____ x
DAVIS & PARTNERS, LLC and RFD 425 FIFTH
AVENUE, L.P.,

Third-Party Plaintiffs,

Index No.:

- against -

DECISION/ORDER

JANSEN ASSOCIATES, INC,
Third-Party Defendant.

_____ x

In this personal injury action, plaintiff sues for injuries sustained at a construction site when he was stabbed by defendant Drew Rose, a worker allegedly employed by Davis & Partners, LLC (Davis). Davis and RFD 425 Fifth Avenue, L.P. (RFD), the alleged owners or managers of the construction site, brought a third-party action against plaintiff's employer, Jansons Associates, Inc., sued as Jansen Associates (Jansons), for common law indemnification, contribution, and contractual indemnification. Jansons now moves for summary judgment dismissing the third-party complaint. Davis and RFD cross-move for summary judgment on the

third-party complaint.

The procedural history of this matter is as follows: Plaintiff commenced this action on February 17, 2005, alleging claims against Davis and RFD under a respondeat superior theory, for negligent hiring and supervision, and for violations of Labor Law §§ 240, 241 and 241(6). The Note of Issue was filed on August 21, 2007, and defendants subsequently moved for summary judgment. By Order dated August 22, 2008 (Prior Order), this court dismissed the Labor Law claims without opposition. The court denied the motion as to the respondeat superior cause of action, holding that defendants failed to demonstrate “that the assault was generally unforeseeable,” given the prior labor problems at the site and the testimony that Rose had pulled a knife on plaintiff’s foreman during a prior dispute. The court also found that “[t]riable issues of fact exist as to whether Davis was on notice of Rose’s tortious propensities,” precluding summary judgment on the negligent hiring and supervision claims. The third-party action was commenced on July 17, 2008. The instant motion was served on July 20, 2010.

As a threshold matter, third-party plaintiffs contend that Jansons’ motion is untimely, as more than 120 days elapsed between the filing of the Note of Issue and the service of the motion. While the 120 day deadline has passed, the third-party action was not commenced until almost one year after the Note was filed. CPLR § 3212 requires a showing of “good cause” for the delay in making the motion, and the movant must present “a satisfactory explanation for the untimeliness.” (Brill v City of New York, 2 NY3d 648, 652 [2004].) In this case, the fact that movant was not even a party to the action when the 120 deadline expired constitutes good cause to allow this late motion for summary judgment.

Third-party plaintiffs contend that Jansons is “precluded” from offering any evidence or

testimony in support of its claims as a result of Jansons' failure to comply with a so-ordered stipulation regarding document discovery. By so-ordered stipulation, dated March 4, 2010, the parties agreed that "[t]hird party defendant [is] to provide documents set forth in 3rd party [plaintiffs'] letter date[d] 2/23/10 and order dated 1/14/10 w/in 30 days or are precluded from opposing any claim of contractual indemnity and/or defense as set forth in 3rd party complaint." (Third-Party Ps' Aff. in Opp., Ex. A.) The February 23, 2010 letter and January 14, 2010 order request production of contracts between the parties, workers compensation and general liability policies issued for the project, documents listing Davis and RFD as additional insureds, and underwriting files. (Third-Party Ps' Aff. in Support, Exs. A, B.) It is undisputed that third-party defendant responded to these demands on or about April 16, 2010. This response was rejected by third-party plaintiffs by letter dated May 5, 2010, stating that the response "fails to adequately respond to the court's order and is untimely." (Id., Ex. C.) Third-party plaintiffs contend that this approximately 12 day delay bars Jansons from making its motion for summary judgment and from offering evidence on its defenses and in opposition to third-party plaintiffs' motion. (See Third-Party Ps' Aff. in Support, ¶ 22.)

In order "to obtain relief from the dictates of a conditional order that will preclude a party from submitting evidence in support of a claim or defense, the defaulting party must demonstrate (1) a reasonable excuse for the failure to produce the requested items and (2) the existence of a meritorious claim or defense." (Gibbs v St. Barnabas Hosp., 16 NY3d 74, 80 [2010].) Here, the delay in the production of the requested contract-related documents was de minimis. Furthermore, although third-party plaintiffs allege that the response was inadequate as well as untimely, they fail to identify any insufficiencies. The potential merit of third-party defendant's

defenses is also established by the triable issues of fact on such defenses which are found by the court below. Third-party plaintiffs' cross motion will accordingly be denied.

Common Law Indemnification & Contribution Claims

In moving for summary judgment dismissing third-party plaintiffs' common law indemnification and contribution claims, Jansons contend that they are barred by Worker's Compensation Law § 11, which provides in pertinent part:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

It is well settled that "[t]he grave injuries [in the amended statute] are deliberately both narrowly and completely described. The list is exhaustive, not illustrative." (Castro v United Container Mach. Group, Inc., 96 NY2d 398, 402 [2001] [citing Governor's Mem approving L 1996, ch 635, 1996 NY Legis Ann, at 460].)

The bare conclusory assertion, made without reference to any medical authority, that none of plaintiff's injuries, including his alleged brain injury, constitutes a grave injury is insufficient to make a prima facie showing that Worker's Compensation Law § 11 bars recovery. Even if this assertion were sufficient, however, the affirmation of plaintiff's treating neurologist, Dr. Paul

Lerner, would raise triable issues of fact.¹ Dr. Lerner states that “the stabbing and subsequent hypoxia, hypotension and coma has resulted in an acquired injury to his brain that is permanent in nature and has left him totally disabled and completely unemployable due to significant neuropsychiatric disturbance.” In reply, Jansons merely focuses on the phrase “subsequent hypoxia, hypotension and coma,” and argues that these conditions are “not ‘external’ physical force[s].” Jansons’ argument ignores the fact that Dr. Lerner’s opinion finds that one of the precipitating causes of the brain injury was “the stabbing,” an undisputedly “external physical force.” As Jansons thus fails to eliminate triable issues of fact as to whether plaintiff sustained a grave injury, the branch of Jansons’ motion to dismiss third-party plaintiffs’ common law indemnification claim will be denied.

Contractual Indemnification Claim

Jansons seeks to dismiss the contractual indemnification claims on several grounds. First, it contends that the parties to this action, Davis & Partners, LLC and RFD 425 Fifth Avenue, L.P., are not named as indemnitees in the contract for the project. Second, it contends that the injuries that plaintiff sustained were the result of an altercation that did not “arise out of” the contracted-for work. Third, it argues that the contract does not contemplate indemnification for third-party plaintiffs’ negligent hiring and supervision of defendant Rose, and that such indemnification would be barred by the General Obligations Law. Finally, it contends that the

¹ Jansons argues that the court should disregard plaintiff’s opposition because Jansons is not seeking any relief in conjunction with plaintiff’s complaint, and because plaintiff has no claims against Jansons. Although plaintiff was an employee of third-party defendant at the time of the alleged accident and was consequently barred from suing it directly, he is entitled to oppose dismissal of the third-party action. (Mendez v Union Theological Seminary in City of New York, 26 AD3d 260, 261 [1st Dept 2006].)

respondeat superior claim against third-party plaintiffs is not subject to indemnification because Davis and RFD were not defendant Rose's employer.

The contract at issue was made between Tishman Construction Corporation of New York "as 'Construction Manager' Agent" for Davis Construction Co. Inc. and Jansons Associates, Inc., as contractor. It provides in relevant part:

Contractor shall, to the fullest extent permitted by law and at its own cost and expense, indemnify, defend and hold harmless Construction Manager, Architect, DCCI, Owner, and the Additional Insureds (listing attached hereto), and each of their respective directors, officers, partners, members, agents and employees ("the Indemnitees"), and save them harmless from and against any and all claims, damages, losses, liabilities, suits, judgments, actions and expenses (including attorneys fees' and disbursements) arising out of any act, error or omission of or breach by Contractor or any of its subcontractors of any tier . . . in connection with the performance of the Work or otherwise arising out of, in connection with or as a consequence of the performance of the Work

(Jansons' Aff. in Support, Ex. N, § 12.3.)

The "additional insureds," as listed in Exhibit Q to the contract, include RFD 425 Fifth Avenue LLC C/O Davis & Partners, LLC and Davis & Partners, LP, as well as "any and all related companies."

It is well established that "[w]here 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." (Hooper Assocs., Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989].) In this case, although the contract does not expressly name Davis & Partners, LLC and RFD 425 Fifth Avenue, L.P. , the named defendants/third-party plaintiffs in this action, the contract does unambiguously require indemnification of additional insureds which include specified Davis and RFD entities and "related companies." In seeking dismissal of the third-

party complaint Jansons fails to make any showing that the named third-party plaintiffs are not related companies. Jansons' motion to dismiss the contractual indemnification claim on the ground that third-party plaintiffs are not parties to the contract must accordingly fail.

Jansons also fails to demonstrate its entitlement to summary judgment dismissing the contractual indemnification claim on the ground that plaintiff's injuries did not arise out of Jansons' work under the contract. In seeking dismissal of the indemnification claim, Jansons points to plaintiff's testimony that he was involved in an altercation with defendant Rose, who stabbed plaintiff. (P's Dep. At 175-179, 184-193 [Jansons' Aff. in Support, Ex. O].)

The language "arising out of or in consequence of the performance of [the contractor's] work" has been held to "refer[] to the scope of the employment of the person injured and the site of the occurrence." (George A. Fuller Co. v Fischbach & Moore, Inc., 7 Ad2d 33, 36 [1st Dept 1958], lv denied 6 NY2d 705 [1959].) As Jansons correctly points out, there is persuasive authority that a contractual indemnification provision requiring indemnification for injuries arising out of a contractor's work is not applicable where the injured worker "was not acting within the scope of his employment when he initiated the physical confrontation" with another employee. (Zanghi v Laborers' Intl. Union of N. Am., AFL-CIO, 21 AD3d 1370, 1372-1373 [4th Dept 2005].)

Jansons argues that here, similarly, plaintiff was not acting within the scope of his employment because he initiated an altercation with Rose. However, this argument ignores that plaintiff's testimony, read as a whole, raises a triable issue of fact as to whether plaintiff was acting within the scope of his employment. Plaintiff testified that the altercation occurred when he was trying to talk to Rose, who ran Davis' cleaning crew, about a problem with Davis' non-

union workers doing cleaning at the construction site that was the union workers' responsibility. Plaintiff testified, more particularly, as follows: Plaintiff was told by a Davis & Company supervisor that there was wood that needed to be cleaned out of an apartment. (P's Dep. at 68-70.) When he went to the apartment to remove the wood, he saw one of Davis & Partners' "cleaning guys" working in the apartment. (Id. at 74.) Plaintiff, who was the shop steward of the union, Local 79, left the apartment and was on his way to see "Tibby," a supervising employee of a Davis entity. He intended to complain that the Davis workers, who were non-union labor, were doing the cleaning work that was the responsibility of the union workers employed by Jansons. Plaintiff then saw Rose, and decided to try to talk to him about the problem. He said to Rose: "You go[t] to stop sending your guys to do our work, man, you know?" (Id. at 177.) Rose responded: "You better watch yourself." (Id.) Plaintiff followed Rose as Rose went into the room that was to be cleaned. (Id. at 179.) Plaintiff maintains that he was still intending to discuss the problem with Rose. (Id. at 188-189.) However, a confrontation ensued. (Id. at 179-193.) Plaintiff saw Rose reaching for something in his pocket, "realized that [Rose] was going for his knife," and hit Rose. Rose then stabbed plaintiff in his flank. (Id. at 192-193.)

In his jury trial for Assault in the First Degree, Penal Law § 120.10, Rose claimed that he stabbed plaintiff in self-defense. (See People v Drew, Indictment No. 2273/ 04 [Sup Ct New York County Feb. 1, 2005] Trial Tr. at 258 [Jansons' Aff. in Support, Ex. L].) This contention was rejected by the jury, and Rose was convicted. (Id. at 270.)

While the evidence presents a close question, it is for the jury to decide whether plaintiff, rather than Rose, was the aggressor in the altercation, or whether plaintiff was acting within the scope of his employment at the time he was injured, by taking a position on the responsibilities

of respective trades for clean up work at the job site.

Jansons further argues that the contract expressly excludes, and that GOL §5-322.1 bars, indemnification of an indemnitee for its own negligence, and that third-party plaintiffs' claims for indemnification should be dismissed to the extent that they are found liable for negligent hiring or supervision of defendant Rose. With regard to § 5-322.1, the contract at issue expressly provides that nothing in the contract shall require the indemnitor to indemnify the indemnitee for the latter's own negligence. In any event, the court has held that triable issues of fact exist as to Davis and RFD's negligence. (Prior Order at 3.) The branch of Jansons' motion for summary judgment on this issue is therefore premature.

Finally, Jansons contends that neither RFD nor Davis may be held liable for defendant Rose's acts under a respondeat superior theory because neither was Rose's employer. Jansons fails to show as a matter of law that Rose was not employed by named defendant/third-party plaintiff Davis & Partners, LLC, and was instead employed by Davis Construction Company Inc. (DCCI). Tibby Greenstein, an employee of DCCI, testified that "DCCI was the construction arm of Davis & Partners," and that Rose was employed by DCCI. (Greenstein Dep. at 6-7, 9 [Jansons' Aff. in Support, Ex. T].) This testimony is wholly conclusory, and no foundation was submitted to show that Greenstein had knowledge of the corporate structure of the Davis entities or of which entity was in fact Rose's employer. Moreover, Greenstein's testimony is insufficient to eliminate the issues of fact as to the identity of Rose's employer in light of the admission in Davis & Partners, LLC's answer that it "hired, trained and supervised" Rose. (Ans., ¶ 11 [P's Aff. in Opp., Ex. G].)

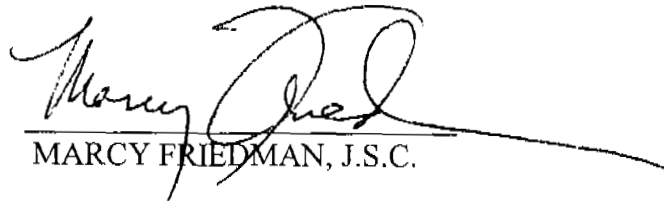
Accordingly, it is hereby ORDERED that the motion of third-party defendant Jansons

Associates, Inc., i/s/h/a Jansen Associates, Inc., is denied; and it is further

ORDERED that the cross-motion of third-party plaintiffs Davis & Partners, LLC and RFD 425 Fifth Avenue, L.P. is denied.

This constitutes the decision and order of the court.

Dated: New York, New York
March 21, 2011



MARCY FRIEDMAN, J.S.C.

FILED

MAR 22 2011

**NEW YORK
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