

Katz v Jae Moon Kim
2011 NY Slip Op 30885(U)
April 11, 2011
Supreme Court, New York County
Docket Number: 112747/05
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN
Justice

PART 36

Katz

INDEX NO.

112747/2003

MOTION DATE

- v -

Kim

MOTION SEQ. NO.

009

MOTION CAL. NO.

The following papers, numbered 1 to 3 were read on this motion to/for

Summary

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits

Replying Affidavits

5, 6, 7

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, It is ordered that this motion

for summary judgment

& cross-motion to renew are denied in accordance with the attached memorandum decision.

(Consolidated for disposition with motion SUPPLE B11)

APR 12 2011

Dated:

[Signature]

NEW YORK COUNTY CLERK'S OFFICE

[Signature]

J.S.C.

Check one: FINAL DISPOSITION

HON. DORIS LING-COHAN
 NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 36

-----x
MICHAEL KATZ and TANYA KATZ,

Plaintiffs,

-against-

JAE MOON KIM, ATLANTIC HEYDT CORP., THE CITY
OF NEW YORK, PAVARINI MCGOVERN, LLC, and RC
DOLNER, INC.,

Defendants.

-----x
MICHAEL KATZ and TANYA KATZ,

Plaintiffs,

-against-

ADELLCO DEVELOPMENT, LLP, and ONE HAND
REALTY, LLC,

Defendants.

-----x
ONE HAND REALTY, LLC,

Third-Party Plaintiff,

-against-

RC DOLNER, LLC, ATLANTIC-HEYDT CORP. and
URBAN FOUNDATION/ENGINEERING, LLC,

Third-Party Defendants.

-----x
ONE HAND REALTY, LLC,

Second Third-Party Plaintiff,

-against-

ZURICH AMERICAN INSURANCE COMPANY,

Index No.:112747/05

Motion Seq. 009, 010
& 011

Index No.:109870/06

FILED

APR 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Index No.:590131/07

Index No.:590686/07

Second Third-Party Defendant.

-----X
ONE HAND REALTY, LLC,

Plaintiff,

Index No.:104438/08

-against-

TWO TONE CONTRACTING CORP.,

Defendant.
-----X

LING-COHAN, J.:

Plaintiffs Michael and Tanya Katz commenced this action to recover damages for injuries which Michael Katz allegedly suffered as a result of a trip and fall while walking in a pedestrian walkway. Motion sequence numbers 009, 010 and 011 have been consolidated for disposition.

In motion sequence 009, Second Third-Party Defendant, Zurich American Insurance Company (Zurich), moves pursuant to CPLR 3212, for summary judgment and to declare that Zurich has no obligation to defend or indemnify One Hand Realty, LLC (One Hand) in the underlying personal injury action. Defendant/Third-Party Plaintiff/Second Third-Party Plaintiff, One Hand, cross-moves, pursuant to CPLR 2221, to renew the Honorable Karen S. Smith's September 12, 2008 decision¹, which denied One Hand's prior motion for summary judgment. Upon renewal, One Hand moves, pursuant to CPLR 3212, for an order granting summary judgment and declaring that Zurich is required to defend One Hand in the underlying lawsuit.

In motion sequence number 010, RC Dolner (Dolner), third-party defendant, moves, pursuant to CPLR 3212, for an order granting summary judgment and dismissing all cross claims against it. Dolner also moves, pursuant to CPLR 3212, granting summary judgment on its cross

¹ Hon. Karen Smith has retired.

claims against Urban Foundation/Engineering, LLC (Urban). Urban has moved (motion sequence number 011) and cross-moved, pursuant to CPLR 3212, dismissing the cross claims of Dolner and One Hand seeking contractual indemnification.

FACTUAL ALLEGATIONS

On March 30, 2005, plaintiff Michael Katz suffered personal injuries after he allegedly tripped and fell while walking in a pedestrian walkway abutting a construction site on West 28th Street and Sixth Avenue in Manhattan. Plaintiff allegedly tripped on a piece of slate which was protruding from under a temporary pedestrian barricade.

The owner of the site where plaintiff's accident took place was One Hand. One Hand hired Dolner to be the general contractor in charge of constructing a building at the site. After being named the general contractor, Dolner entered into an agreement with Urban to be a subcontractor for the project. Urban was responsible for constructing the pedestrian barricades surrounding the site. Work at the site commenced in June of 2004. However, Dolner alleges that the work was not completed, because One Hand instructed it to stop working in October of 2004 due to financial difficulties and problems obtaining construction loans.

In November of 2005, plaintiffs filed a complaint alleging personal injuries against several defendants, including Dolner. Plaintiffs allege that defendants negligently constructed, or caused to be constructed, the temporary sidewalk where plaintiff fell. Plaintiffs also filed a complaint against One Hand, who commenced a third-party action against Dolner and Urban.

In May of 2008, One Hand, the owner of the property, moved for summary judgment seeking a declaration that Zurich is obligated to defend One Hand. Zurich cross-moved for

summary judgement seeking a declaration that it is not obligated to defend or indemnify One Hand. On September 8, 2008, the Honorable Karen S. Smith denied both One Hand and Zurich's motions for summary judgment and held that an issue of fact exists as to whether Dolner, had "ongoing operations" taking place at the time of the accident. Such decision was rendered approximately two (2) years ago, before this motion was brought.

Urban also previously moved for summary judgment to dismiss plaintiffs' complaint as well as any cross claims and counterclaims. On April 2, 2009, the Honorable Karen S. Smith granted Urban's motion for summary judgement, dismissing plaintiffs' direct claims. In such April 2, 2009 decision, the court held that there was no evidence that Urban caused or created the defective condition on which plaintiff Michael Katz tripped. Such court also held that Urban had no duty to maintain the premises at the time of Katz's alleged accident and that there was no evidence that Urban put slates under the barricade. The prior court denied, without prejudice, Urban's request to dismiss defendants' cross claims for contractual and common-law indemnification, because discovery remained outstanding.

DISCUSSION

At the outset, as further detailed below, Zurich's motion for summary judgment and One Hand's cross-motion to renew its prior motion for summary judgment are denied, as consistent with the September 8, 2008 decision by Justice Smith², factual issues *still exist* as to whether Dolner, the general contractor, had "ongoing operations" taking place a the time of the subject accident. Further, One Hand's cross-motion is defective in that renewal is sought yet all

² As indicated, Hon. Karen Smith has retired.

previously submitted papers on its prior motion have not been supplied to the Court. *See People v Jenkins*, 39 AD2d 924, 925 (2d Dept 1972); *Rubin v Dondysh*, 147 Misc 2d 221, 222 (Civ Ct, Queens County 1990), *rearg denied* 147 Misc 2d 221 (Civ Ct, Queens County 1990), *app dismissed* 153 Misc 2d 657 (App Term 2d Dept 1991); *Wekar v. City of New York*, NYLJ, Feb. 29, 2000, at 26 col 3 (Sup Ct, New York County). Moreover, in seeking renewal, One Hand fails to specify the new facts it is offering which were not previously supplied and a valid excuse for not submitting the alleged additional facts upon its original application for summary judgment. *See Foley v. Roche*, 68 AD2d 558 (1st Dept 1979).

In Dolner's motion for summary judgment, Dolner argues that it cannot be held negligent for plaintiff's accident because it did not owe a duty of care to plaintiff, that the slate on which plaintiff fell was not used at the construction site or for the barricades, that Urban was the party that installed the temporary barricades, and that Dolner played no role in the construction of the barricade or in the day-to-day upkeep of the sidewalk. Dolner further contends that it had ceased all operations in October of 2004, and that there is no evidence that it had actual or constructive notice regarding the protruding piece of slate on which plaintiff fell.

Although Dolner maintains that it owed no duty of care to plaintiff because it did not have any involvement in the physical installation of the pedestrian barricades or have notice of the subject condition, the contract entered into between One Hand and Dolner outlines Dolner's responsibilities at the site (See Ackerman Affirm., ex. R). For example, Section 3.3.1 provides that "the Contractor shall be solely responsible for and have control over construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work under the Contract"

Section 3.15.1 of the contract provides that “[t]he Contractor shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At completion of the Work, the Contractor shall remove from and about the Project waste materials, rubbish, the Contractor’s tools, construction equipment, machinery, and surplus materials.” Furthermore, the rider to section 3.15.1 clarifies that, “the Contractor shall maintain streets and sidewalks at the Project site in a clean condition and shall provide all sidewalk sheds and overhead protection as required.”

Along with the above contractual provisions which discuss Dolner’s obligations to maintain the sidewalks around the site, there are also several questions of fact raised by the deposition testimony of representatives of One Hand and Dolner as to whether Dolner’s work and responsibilities at the site had ended before plaintiff’s accident took place.

For example, at his June 19, 2007 deposition, Elmadani Sadek, principal of One Hand, testified that in January of 2005, he verbally notified Roger Chartouni, a principal of Dolner, that he planned to sell the site and that he wished to stop construction (Sadek’s 6/19/07 EBT, at 36). However, at his May 6, 2009 deposition, Sadek testified that he never instructed Dolner, either verbally or in writing, to stop working on the project (Sadek’s 5/6/09 EBT, at 62).

Dolner contends that plaintiff could not have detrimentally relied on its continued performance, because Dolner had ceased all operations at the site several months before plaintiff’s accident. However, William Cahill (Cahill), a senior vice-president at Dolner, testified that, as of March 30, 2005, he did not recall whether or not Dolner had sent a letter to One Hand which terminated the contract (Cahill’s 4/17/09 EBT, at 54-55). Cahill also testified that Dolner

believed that there was a possibility that the work could recommence. Cahill testified:

Q. Did you make any oral communications to the owner that you would not be responsible for the condition at the site?

MR. ACKERMAN: Objection to form.

A. At the time, after October, as far as we knew, the job was still going to move forward, so I don't think there was any official documentation to say we're out, we're no longer responsible because there was still potential for the job to start again as soon as the financing was in place.

(Cahill's 4/17/09 EBT, at 148). Therefore, based upon Sadek and Cahill's testimony, there remains a question as to whether or not Dolner was instructed to stop working at the site before plaintiff's accident and whether Dolner was aware that it would continue to be responsible for maintaining the site because the work could potentially recommence.

There is also a dispute in the testimony as to whether workers were sent by Dolner to take care of the property and clear debris from the sidewalks once the construction at the site had stopped. Sadek testified that between November of 2004 and March of 2005, he would walk through the pedestrian barricades on a daily basis and that he also hired Jose Hernandez to check the pedestrian walkway for debris. Although Cahill testified that no one from Dolner was stationed at the site after October 15, 2004, Sadek testified that:

A. It was during the time when RC Dolner was not - - they were on and off. They would come in and clean whenever. They didn't clean it, I sent a guy part time; he comes in and he cleans it. If we don't, we get a violation from the City of New York.

(Sadek's 5/6/09 EBT, at 54). Therefore, Sadek's testimony raises a question as to whether Dolner was periodically maintaining the property before plaintiff's accident.

There also remains a question as to whether Dolner was removed from the site's permits before or after plaintiff's accident took place. Although Cahill contends that it attempted to get its name off of the permits because it did not want to be responsible for anything that goes on

at the site (Cahill's 4/17/09 EBT, at 129), Cahill testified that he was unsure if Dolner was removed before or after plaintiff's accident (Id. at 42).

The Court of Appeals has held that, "[o]n a motion for summary judgment the court is not to determine credibility, but whether there exists a factual issue, or if arguably there is a genuine issue of fact." *S. J. Capelin Assocs. v Globe Mfg. Corp.*, 34 NY2d 338, 341 (1974); *see also Psihogios v Stavropoulos*, 269 AD2d 295, 296 (1st Dept 2000) (holding issues of credibility should be left for resolution by the trier of fact). Here, Dolner's motion for summary judgment must be denied. Not only does the contract between Dolner and One Hand dictate Dolner's responsibilities for the maintenance of the site, but there are also several issues of fact as to Dolner's potential liability raised by the testimony of Cahill and Sadek including, whether Sadek informed Dolner to stop working at the site, whether Dolner was sending workers to check the premises for debris, and whether or not Dolner was removed from the permits prior to plaintiff's accident.

Urban has moved (motion sequence number 011) and cross-moved for summary judgment, dismissing Dolner and One Hand's cross-claims for contractual indemnification. The indemnification provision, which is found in section 21.1 of the subcontract between Dolner and Urban, provides that Urban will indemnify Dolner and One Hand for injuries which are a result of Urban's work at the project. The subcontract specifically states that Urban:

agrees to indemnify, defend and hold harmless RC Dolner, LLC, Owner . . . from any and all losses, claims, suits, damages, liabilities, attorneys fees and costs . . . arising out of or in connection with or as a consequence of the performance of the Work of the Subcontractor pursuant to this Agreement . . . provided that such loss, claim, suit damage or liability . . . (iii) is caused in whole or in part by any act or omission of Subcontractor . . .

(Ackerman Affirm., ex. S).

Urban maintains that there is no evidence that plaintiff's injury arose out of, or was a consequence of Urban's work at the site. Urban contends that it stopped working at the project several months before plaintiff's accident and that there is no evidence that it placed the slate under the barricade. Urban further maintains that Judge Smith's April 2, 2009 decision, which dismissed the direct claims against Urban, is the "law of the case."

The Court of Appeals has held that "[t]he doctrine of the 'law of the case' is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned." *Martin v City of Cohoes*, 37 NY2d 162, 165 (1975). Here, Judge Smith's earlier decision clearly held that plaintiff's accident was not a result of Urban's work at the site; such decision was never appealed.

Although further discovery has taken place after Judge Smith rendered her decision, there is no new evidence submitted by any party that Urban caused or created the slate to be placed underneath the barricade, or that the accident was caused in whole, or in part, by Urban. David van Leeuwen, vice-president of Urban, and Matt Kusic, superintendent of Urban, testified that Urban did not place slate or any other object under the barricade. Also, the expert report of Christopher Viola, which plaintiffs submit with their opposition papers, was previously discussed in Judge Smith's earlier opinion and was found to be irrelevant and did not raise an issue of fact. Therefore, based upon Judge Smith's April 2, 2009 decision and because Dolner and One Hand failed to provide evidence that plaintiff's accident was caused in whole, or in part by any act or omission of Urban, this court is constrained to grant Urban's motion and cross-

motion for summary judgment dismissing Dolner and One Hand's cross-claims for contractual indemnification.

Finally, One Hand argues that it is entitled to contractual indemnification from Dolner. However, because there exists issues of fact as to whether Dolner or One Hand was responsible for maintaining the site at the time of plaintiff's accident, contractual indemnity cannot be determined at this time.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that Zurich American Insurance Company's motion for summary judgment is denied; and it is further

ORDERED that One Hand Realty, LLC's cross-motion to renew the decision by Justice Smith dated September 12, 2008 is denied; and it is further

ORDERED that RC Dolner, LLC's motion for summary judgment dismissing all claims and cross-claims against it, and granting summary judgment in its favor on its cross claims against Urban Foundation/Engineering, LLC, is denied; and it is further

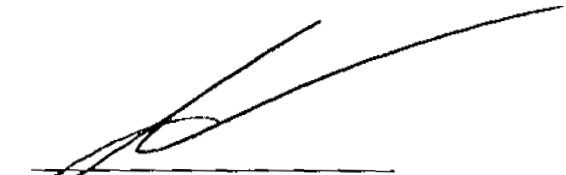
ORDERED that Urban Foundation/Engineering, LLC's motion and cross motion dismissing the cross claims of RC Dolner, LLC, and One Hand Realty, LLC's for contractual indemnification are granted, and those cross-claims are hereby dismissed.

Dated: April 11, 2011

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**NEW YORK
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Doris Ling-Cohan, J.S.C.

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