

Iavorne v New York Brush, LLC.

2011 NY Slip Op 31071(U)

April 20, 2011

Supreme Court, Queens County

Docket Number: 27630/2008

Judge: Robert J. McDonald

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ROBERT J. McDONALD
Justice

IA Part 34

PASQUALE IAVORNE and
FILOMENA IAVARONE,

x

Index
Number 27630 2008

Plaintiffs,

Motion
Date January 27, 2011

- against -

NEW YORK BRUSH, LLC., and HOLT
CONSTRUCTION CORP.,

Motion
Cal. Number 23

Motion Seq. No. 6

Defendants.

x

The following papers numbered 1 to 27 read on this motion by NY Brush, LLC (Brush) for leave to reargue that portion of the court's order dated September 3, 2010, which did not address that portion of Brush's motion and cross motion which was for contractual indemnification against Holt Construction Corp. (Holt) and Job Opportunities for Women, Inc. (JOFW); and cross motion by JOFW for leave to reargue the portion of the court's prior decision which granted common law indemnity in favor of Brush and Holt against JOFW and granted contractual indemnity in favor of Holt against JOFW and denied JOFW its counterclaims against Brush and Holt.

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Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

Plaintiffs in this negligence action seeks damages for personal injuries sustained by Pasquale Iavarone on September 2, 2008, in a scaffolding collapse accident while Iavarone was working as a mason tender for JOFW. The action by Filomena Iavarone is derivative. The accident occurred inside premises known as 650 Brush Avenue next to the Bronx toll plaza of the Bronx-Whitestone Bridge. On the date in question, plaintiff was working on a scaffold over ten (10) feet above the ground when the scaffold plank, upon which plaintiff stood, broke in two causing plaintiff to fall to the ground below. Pursuant to the Verified Bill of Particulars, plaintiff sustained a traumatic brain injury, neuropsychological impairment secondary to cerebral dysfunction, severe post traumatic hydrocephalus requiring shunt, and numerous other brain-related injury. Plaintiff also alleges neck, back and right knee injury. Brush was the owner of the project. Holt was the general contractor hired by Brush. JOFW was plaintiff's employer, hired by HOLT to perform masonry work.

Motion by Brush

The motion by Brush to reargue the court's decision dated September 3, 2010, is granted. Upon reargument, the court grants the branch of Brush's motion which is for summary judgment on its claim for contractual indemnification from JOFW. Brush is entitled to summary judgment on its contractual indemnity actions against the JOFW, based on the contractual agreement requiring JOFW to hold harmless and indemnify Brush, the owner (*see Isnardi v Genovese Drug Stores*, 242 AD2d 672 [1997]; *Dawson v Pavarini Constr. Co.*, 228 AD2d 466 [1996]).

Similarly, Brush is also entitled to full contractual indemnification from Holt based upon the provisions in the contract which requires Holt to indemnify Brush for any claims or damages arising out of or resulting from performance of Holt's work whether it was caused by Holt or one of its subcontractors. A party may expressly agree to hold another party harmless for claims brought against it by a third-party (*see General Conference of Seventh-Day Adventis v AON Reinsurance Agency, Inc.*, 860 F. Supp. 983 (SD NY. 1994), *affd.* 50 F.3d 2 [2d Cir., 1995]; *Mas v Two Bridges Associates*, 75 NY2d 680 [1990]). "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 surrounding facts and circumstance'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]). The contract between Brush and Holt does not require any showing of negligence on Holt's part. Instead, the indemnification provision at issue here requires Holt to indemnify Brush for all "claims, damages, losses . . . arising out of or resulting from performance of the work, provided that such claim, damage, loss or expense is attributable

to bodily injury . . . to the extent **caused by the Contractor, a Subcontractor, or anyone directly or indirectly employed by them.**” (Emphasis Added).

Holt’s indemnification obligations to Brush do not depend on a determination that it was actively negligent, as its contract with Brush includes Holt’s express agreement to indemnify Brush for the acts of its subcontractors (*see Walls v Sano-Rubin Constr. Co.*, 4 AD3d 599 [2004]). It is undisputed that the plaintiff’s injury arose out of or resulted from Holt’s performance of its work for Brush and was caused by a subcontractor (JOFW) employed by Holt. Therefore, summary judgment is granted to Brush on its cross claim for contractual indemnification against Holt (*see Brown v Two Exchange Plaza Partners*, 76 NY2d 172 [1990]; *Tkach v City of New York*, 278 AD2d 227 [2000]; *Pope v Supreme-K.R.W. Constr. Corp.*, 261 AD2d 523 [1999]).

JOFW’s response, in opposition, that the contract between Holt and JOFW was not properly authenticated is belied by the record.

The branch of the motion which is for common law indemnification against Holt is denied. In order to establish their claim for common-law indemnification, Brush is required to prove not only that they were not negligent, but also that the proposed indemnitor, Holt, was responsible for negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury. Where, as here, the owners’ alleged liability is purely statutory and vicarious, conditional summary judgment in their favor on the basis of common-law indemnification against Holt, is premature absent proof, as a matter of law, that Holt was negligent or had authority to direct, supervise, and control the work giving rise to the plaintiff’s injury (*see Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681 [2005]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493 [2004]; *Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556 [2003]; *Reilly v DiGiacomo & Son*, 261 AD2d 318 [1999]). Although there is no evidence that Brush was negligent, Brush nevertheless failed to make the required showing concerning Holt. Summary judgment on their common-law indemnification cross claim against Holt is therefore premature (*see Perri v Gilbert Johnson Enters., Ltd., supra*).

Finally, the branch of the motion by Brush which seeks common law indemnity against JOFW is denied in that Brush did request the same upon its original motion. A motion for leave to reargue “shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion” (CPLR 2221[d][2]; *Anthony J. Carter DDS, P.C. v Carter*, 81 AD3d 819 [2011]).

Cross Motion by JOFW

The branch of the cross motion by JOFW which seeks to reargue the court's prior order which granted Holt summary judgment on its claim for common law indemnity against JOFW, is granted. Upon reargument, the motion by Holt for summary judgment on its claim for common law indemnity against JOFW is denied. Admittedly, there was no finding in the earlier decision that plaintiff sustained a "grave injury".

Workers' Compensation Law § 11, reads, in pertinent part, as follows:

"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' "

A "grave injury" is defined, inter alia, as "an acquired injury to the brain caused by an external physical force resulting in permanent total disability" (Workers' Compensation Law § 11). Holt did not demonstrate, through competent medical evidence, that the injured plaintiff sustained a "grave injury" (Workers' Compensation Law § 11; *see Ibarra v Equipment Control*, 268 AD2d 13 [2000]). Indeed, there is an issue of fact as to whether the injured plaintiff sustained a "grave injury" as that term is defined in the statute.

The branches of JOFW's cross motion which seeks to "reargue" the question of summary judgment on its counterclaims against Holt and Brush are denied as JOFW never submitted a motion for summary judgment with respect to its counterclaims against Holt and Brush. Once again, a motion for leave to reargue "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion" (CPLR 2221[d][2]; *Anthony J. Carter DDS, P.C. v Carter, supra*).

Conclusion

The motion by Brush to reargue the court's decision dated September 3, 2010, is granted. Upon reargument, the court grants the branch of Brush's motion which is for summary judgment on its claim for contractual indemnification from JOFW. The branch of the motion which is for common law indemnification against Holt is denied. The branch of the motion by Brush which seeks common law indemnification from JOFW is denied.

The branch of the cross motion by JOFW which seeks to reargue the court's prior order which granted Holt summary judgment on its claim for common law indemnity against JOFW, is granted. Upon reargument, the motion by Holt for summary judgment on its claim for common law indemnity against JOFW is denied. The branches of JOFW's cross motion which seeks to "reargue" the question of summary judgment on its counterclaims against Holt and Brush are denied.

Dated: April 20, 2011

J.S.C.