

Kapcio v Pipeline Constr. Corp.
2011 NY Slip Op 32605(U)
October 5, 2011
Supreme Court, New York County
Docket Number: 106313/2009
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106313/2009
KAPCIO, ROSEANNE
VS.
PIPELINE CONSTRUCTION CORP
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 7/27/11
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1-3
4-5
6-7

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the enclosed memorandum decision and order.

NB 11-7-11 Conference at 11 AM
Between Pipeline + Verizon only.

FILED

OCT 06 2011

Dated: 10/5/11 NEW YORK COUNTY CLERK'S OFFICE
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION 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):

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X
ROSEANNE KAPCIO,

Plaintiff,

-against-

PIPELINE CONSTRUCTION CORP. d/b/a
TRIUMPH CONSTRUCTION CORP., CONSOLIDATED
EDISON COMPANY OF NEW YORK, INC.,
VERIZON NEW YORK, INC., PAWLO
PRYJMAK, MARIA PRYJMAK, and
S&M PLUMBING & HEATING, INC.,

Defendants.
-----X

Index No. 106313/09

DECISION and ORDER

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**NEW YORK
COUNTY CLERK'S OFFICE**

SOLOMON, J.:

Plaintiff Roseanne Kapcio (Kapcio) alleged that she tripped and fell on a sidewalk on Second Avenue in Manhattan. She commenced lawsuits that were consolidated in the above index number. The action was severed and dismissed against defendant Consolidated Edison of New York, Inc. Principally at issue here is the status of a cross-claim by defendant Verizon New York, Inc. (Verizon) against defendant Pipeline Construction Corp. d/b/a Triumph Construction Corp. (Pipeline). Plaintiff's counsel has informed the court that her claim has been settled by the non-moving defendants, and she no longer has any role in this lawsuit.

Verizon moved for summary judgment dismissing the complaint as against it, and for summary judgment on its cross-claim against Pipeline sounding in common law and contractual indemnification. Verizon also seeks to vacate Kapcio's note of

issue, and to compel Pipeline to appear for a deposition. Pipeline moves separately for summary judgment dismissing the complaint and all cross-claims against it.

Both motions for summary judgment dismissing the complaint are granted without opposition. That part of Verizon's seeking to vacate the note of issue is denied as moot because, even though Kapcio served a note of issue on Verizon, she apparently never filed it, and it was not served on Pipeline.

Verizon has four cross-claims against Pipeline: contribution, common law indemnification, contractual indemnification, and breach of contract arising from an alleged failure to procure insurance naming Verizon as an additional insured on the policy (see Verizon Cross Claims Against Pipeline, Aff. Of Matthew S. Matera, Esq., Exh. C).

Verizon hired Pipeline pursuant to an "as ordered" contract spanning five years (Contract, Matera Aff., Exh. G), meaning that Verizon would send Pipeline work orders to perform specific tasks during the term of their agreement, and the Contract set forth the conditions of their engagement. Paragraph 22.1 of the Contract provides that Pipeline agrees to indemnify Verizon for losses, damages (including reasonable attorney's fees), liabilities or claims that may be a result of Pipeline's actual or *alleged* acts or omissions. Pipeline also warranted its work to be free of defects for five years after its

completion (Contract, Paragraph 42.3).

Paragraph 24.1 of the Contract states that Pipeline shall procure commercial general liability insurance, and under paragraph 24.3, Pipeline is required to have Verizon named as an additional insured on the policy.

Kapcio alleges that she tripped and fell while crossing the sidewalk on her way to a store to buy a lottery ticket. She fell approximately five feet from the entrance to a restaurant known as "Nomad", located at 78 Second Avenue. In discovery, it was learned that, one year before the accident, Pipeline had performed work for Verizon that involved digging up and replacing four sidewalk flags, and installing a "fishplate" upon which a Verizon phone booth was installed. This work was done approximately fifty feet from the spot where Kapcio fell. It is clear that she was not caused to fall by this work, so neither Verizon nor Pipeline can be liable to Kapcio. For the same reason, Verizon is not entitled to contribution or common law indemnification from Pipeline, because Pipeline's conduct was in no way responsible for Kapcio's injury, or for Verizon's potential liability to her.

Verizon contends that it is nonetheless entitled to contractual indemnification and coverage as an additional insured on Pipeline's insurance policy. Verizon wants to recover its attorney fees and litigation expense.

Pipeline argues that Verizon is not entitled to contractual indemnification because Paragraph 22.1 in the Contract is overbroad, and therefore void under General Obligations Law (GOL) § 5-322.1. That statute provides that an agreement made in connection with the construction, alteration, repair or maintenance of a building or structure that exempts an owner or contractor from liability for its own negligence, "is against public policy and is void and unenforceable." The Court of Appeals has held that a contract provision which contemplates full indemnification in favor of an owner or contractor promisee, where the accident is caused in whole or in part by the promisee, is void where there is a finding that the promisee was actually negligent (*Tri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., Inc.*, 89 NY2d 786, 795 [1997]).

Here, the Contract is covered by GOL 5-322.1 because it is made in connection with the construction, repair and maintenance of structures, but there is no indication that Verizon or Pipeline were negligent. Since Verizon is not seeking indemnification from liability for its own negligence, the evil envisaged by the legislature in wording GOL 5-322.1, i.e., a party seeking indemnification from its own negligence, is not presented. Paragraph 22.1 expressly contemplates that Pipeline is responsible for Verizon's reasonable attorney's fees and litigation expenses in the absence of fault (see, *DiPerna v Amer.*

Broadcasting Cos., 200 AD2d 267 [1st Dept 1994]). It is enough that a plaintiff allege that her injury arose from Pipeline's work to trigger Pipeline's duty to indemnify, even if, in the end, she is unable to prove it. Kapiro's allegation against Verizon, as evidenced by her bill of particulars (Matera Aff., Ex. B), involves only the negligent repair and maintenance of the sidewalk. There is no dispute as to whether Pipeline performed work on the sidewalk in connection with Verizon's phone booth. Therefore, that part of Verizon's motion that seeks summary judgment on its contractual indemnification claim is granted.

That part of Verizon's motion seeking summary judgment on its breach of contract claim, however, is denied. Pipeline submits un rebutted evidence that it procured insurance, and that Verizon is an additional insured on the policy (Aff. In Partial Opposition of Wendy Garfield, Esq., Exh. A). That part of Pipeline's motion for summary judgment dismissing Verizon's breach of contract counterclaim is granted.

Finally, Verizon's motion to compel Pipeline's deposition is denied because no factual issues remain about Pipeline's conduct. It hereby is

ORDERED that Pipeline's motion for summary judgment dismissing the complaint and all cross-claims against it is granted, except for that part of Pipeline's motion seeking to dismiss Verizon's contractual indemnification claim; and it further is


ORDERED that Verizon's motion for summary judgment is granted to the extent that the complaint is dismissed as against it, and it is entitled to summary judgment as to liability on its contractual indemnification cross-claim against Pipeline, and the motion otherwise is denied; and it further is

ORDERED that counsel for Pipeline and Verizon shall appear in Part 55, 60 Centre Street, Room 432, New York, NY, for a compliance conference on November 7, 2011 at 11 AM, to discuss how to proceed.

Dated: October 5, 2011

Enter:

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J.S.C.
