

Downes v Conmet 380
2011 NY Slip Op 32722(U)
October 14, 2011
Supreme Court, New York County
Docket Number: 114633/2007
Judge: Oing
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

JEFFREY K. OING
J.S.C.

PRESENT: _____

PART _____

Index Number : 114633/2007
DOWNES, THOMAS
vs.
COMMET 380
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

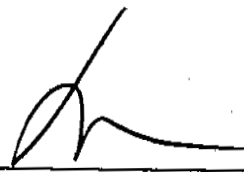
Upon the foregoing papers, it is ordered that this motion

FILED
OCT 24 2011
NEW YORK
COUNTY CLERK'S OFFICE

"This motion is decided in accordance with the annexed decision and order of the Court."

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

Dated: 10/14/11


JEFFREY K. OING J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x

THOMAS DOWNES,

Plaintiff,

-against-

CONMET 380, CUSHMAN & WAKEFIELD, INC.,
COLLINS BUILDING SERVICES, INC., and
TAG 380, LLC,

Defendants.

Index No.: 114633/07

Mtn Seq. No.: 003

DECISION AND ORDER

-----x

JEFFREY K. OING, J.:

Defendant, Cushman & Wakefield, Inc. ("Cushman"), moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint and the cross-claims asserted against it. In the alternative, Cushman seeks summary judgment on its indemnification claim against defendants Collins Building Services Inc. ("Collins"), ComMet 380 Inc. ("ComMet"), and TAG 280, LLC ("TAG").

Facts

On June 7, 2007, at approximately 6:30 pm, plaintiff, an Investment Technology Group ("ITG") employee, slipped on a wet floor outside the fourth floor freight elevator in the building, which is located at 380 Madison Avenue (the "building"). Security video captured plaintiff's fall, as well as the presence of two individuals - an unidentified temporary Collins employee and Maximo Alvarado ("Alvarado"), an employee of Solow Management

Company ("Solow"). Solow is the parent company of ComMet and TAG.

Discussion

I. Liability

Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third person, except when a contractor undertakes a service pursuant to a contract and negligently creates or exacerbates a dangerous condition by launching a force or instrument of harm (Grant v. Caprice Mgt. Co., 43 AD3d 708 [1st Dept 2007]). Further, separate and apart from this principle is the theory that liability for a dangerous condition on property may be predicated on ownership, occupancy, control or special use (Minott v. City of New York, 230 AD2d 719, 720 [1996]).

Here, the dispute is whether Cushman supervised and controlled the Collins and Solow employees in some capacity such that it would be exposed to liability for plaintiff's alleged injuries.

Cushman argues that it did not supervise the Collins employees because they are independent contractors, or the Solow employees, and that its contractual responsibilities are limited to financial matters for the building, such as collecting rents and day-to-day business affairs (Tr., May 13, 2011, at pp. 6-7). These arguments are unavailing for the following reasons.

Alvarado worked at the building for 18 years, first for Collins, then Solow. When Alvarado viewed the video he observed, "I saw myself. I was with the Collins worker or I was showing [the] job to the Collins worker and then I left and he stayed doing the job" (Alvarado, January 8, 2010 EBT, at p. 43). Alvarado went on to testify that he was telling the Collins employee to do, "the foreman's job because the foreman wasn't there so he has to do the garbage and those things" (Id.). He then testified that "I gave him a list of the floors I have garbage, to go there with the signs to-okay, I will tell him, I would tell him to go to the elevator with the mop and the signs and check if there was any garbage and later on I would check it" (Id. at 44). Alvarado was wearing his blue Solow uniform, but offered that when it got cold he wore a jacket that bore Cushman's name (Id. at 44, 51). As to why Alvarado had a Cushman jacket, Cushman's counsel did not provide a sufficient explanation at oral argument (Tr., May 13, 2011, at p. 23). Indeed, there was no inquiry on that issue during Alvarado's EBT (Id.).

At his EBT, Raymond Cuddy, a Cushman employee, testified as follows:

Q: If there's a problem when something needs to be cleaned up, water leaking, toilet flooding, does the tenant contact you if they observe it or do they call [Collins] directly?

* * *

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A: They would usually call us.

Q: What would you do then?

A: Dispatch whoever it is to take care of the problem.

Q: Do employers of [Collins] communicate to you on a regular basis, on a daily basis?

A: Not necessarily a daily basis.

Q: Do you have means of contacting them by a two-way radio if there's a problem to rectify?

A: Yes.

Q: Who's the [Collins] employee in charge of the building?

* * *

Q: If there is one.

A: I don't recall.

Q: Kevin Gardener, does he come to the building?

A: Sometimes.

Q: When you have a problem, is that the person you contact, generally?

A: For instance, I would call a porter.

(Cuddy, December 7, 2009 EBT, at pp. 18-19).

Further, the Management Agreement entered into by TAG and Cushman, that was in effect on June 7, 2007, provides in section 2.1:

Owner [TAG] hereby engages Managers [Cushman] as the exclusive Manager to manage, operate, maintain, direct and supervise the Project [building] and perform its duties hereunder in a diligent, careful and vigilant

manner so as to manage, operate, maintain, service and repair the Project [building].

(Moving Papers, Ex. D).

Also, section 3.1(d) provides:

Manager [Cushman] shall also provide, cause to be provided, or contract to have provided, upon such terms and conditions as Manager [Cushman] deems reasonable (and, in all events, on terms and conditions which are competitive), electricity, gas, water, telephone, rubbish hauling, cleaning, repairs, preventative maintenance, elevator maintenance, repairs and maintenance, including normal capital replacements, remodeling and alteration and other similar services, to the extent such services are necessary for the proper maintenance of the Project.

(Id.).

Although arguing that their employees worked from 9 a.m. to 5 p.m., Cushman's counsel was unable to demonstrate that Cushman did not have an after business hour responsibility to manage and oversee building operations. Specifically,

THE COURT: When Mr. Cuddy and Mrs. Su (sic) leaves, who is running the building? If something happens, do they call them?

MR. LEWIS: Sorry?

THE COURT: If something happens in the building, who gets the call?

MR. LEWIS: You know, I don't know what the arrangements are. To be quite candid.

(Tr., May 13, 2011, at p. 19).

Based on the foregoing, a factual issue exists as to whether Cushman had supervision and control over the janitorial services

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in the building such that it could be held liable for plaintiff's alleged injuries.

II. Indemnification

Cushman seeks from Collins common law indemnification by arguing that if liable it would only be vicarious. Such relief is premature given that resolution of this issue requires a determination of the factual issue of whether Cushman had supervision and control over the Collins employee.

As to Cushman's claim for contractual indemnification against ComMet and TAG, section 10.1(a) of the Management Agreement provides:

OWNER [TAG] agrees to indemnify and save harmless MANAGER [Cushman] ... from any action, cause of action, suit, debt, cost, expenses, claim or demand whatsoever brought or asserted by and third person or entity whomsoever, at law or in equity ... in connection with the performance by MANAGER [Cushman] of any and all of its obligations under this agreement, including, without limitation, from any damage or injury whatsoever to any employees or other persons or to any personal property arising out of the use, management, administration or control of the Project or any other assets of OWNER [TAG] during the term of this Agreement, provided that such indemnification obligation shall not apply to any matter as to which MANAGER [Cushman] is required to indemnify OWNER [TAG] pursuant to Section 10.1(b) hereof.

(Moving Papers, Ex. D). Although this section appears to provide for such coverage, when read in context with section 10.1(b), such indemnification coverage is not available:

MANAGER [Cushman] agrees to indemnify and save harmless OWNER [TAG] ... from any claims arising out of (i) the ... negligence of MANAGER [Cushman] ... agents,

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contractors, subcontractors or employees (except for gross negligence of OWNER and its employees).

(Id).

Accordingly, it is

ORDERED, defendant Cushman's motion for summary judgment dismissing the complaint and cross-claims is denied; and it is further

ORDERED, that branch of the motion seeking summary judgment on the issue of indemnification is also denied; and it is further

ORDERED that counsel are directed to telephone Part 48 to schedule a status conference.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 10/14/11


HON. JEFFREY K. OING, J.S.C.
JEFFREY K. OING
J.S.C.

FILED
OCT 24 2011
NEW YORK
COUNTY CLERK'S OFFICE