

Barros v Arthur Kill, LLC
2011 NY Slip Op 32843(U)
October 14, 2011
Supreme Court, New York County
Docket Number: 109338/07
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

JOSE BARROS,
Plaintiff,

INDEX NO. 109338/07

MOTION SEQ. NO. 006

- v -

ARTHUR KILL, LLC, NRG ARTHUR KILL
OPERATIONS and CONSOLIDATED EDISON
OF NEW YORK,
Defendants.

MOTION CAL. NO. _____

ARTHUR KILL POWER, LLC,
Third-Party Plaintiff

FILED
OCT 24 2011
NEW YORK
COUNTY CLERK'S OFFICE

- v -

WING ENVIRONMENTAL, INC.
Third-Party Defendant.

The following papers, were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits (Memo) _____
Replying Affidavits (Reply Memo)

PAPERS NUMBERED	
1	_____
2, 3, 4	_____
5	_____

Cross-Motion: Yes No

Motion sequence numbers 006 and 007 are consolidated for purposes of disposition. In this action, plaintiff seeks to recover monetary damages for alleged workplace injuries. In motion sequence 006, defendant Consolidated Edison of New York, Inc. (Con Ed) seeks summary judgment, pursuant to CPLR 3212, dismissing plaintiff's complaint, as well as all cross-claims/counterclaims against it.

In motion sequence 007, defendant/third-party plaintiff NRG Energy s/h/a Arthur Kill Power, LLC and NRG Arthur Kill Operations¹ (Arthur Kill) seeks: (1) summary judgment against

¹ Although the movant in motion sequence 007 is named NRG Energy s/h/a Arthur Kill Power, LLC and NRG Arthur Kill Operations, in their answer, defendant is denominated as Arthur Kill Power, LLC

third-party defendant Wing Environmental, Inc. (Wing) for breach of contract for failure to procure insurance; and (2) a declaration that Wing is obligated to defend and indemnify NRG in the instant action. For the reasons stated below, both motions are denied.

BACKGROUND

Plaintiff seeks to recover monetary damages for an alleged February 26, 2006 workplace accident, in which plaintiff, an employee of third-party Defendant Wing, slipped and fell while performing asbestos abatement at the 4401 Victory Boulevard, Staten Island, New York power plant (the premises). Plaintiff alleges that he slipped and fell on grease that had fallen to the floor of the loading dock area of the power plant.

Specifically, in his verified Bill of Particulars, plaintiff maintains, "[t]he defect or condition which caused the accident consisted of grease which was allowed to accumulate on the flooring of the docks which came from overhead pipes that Con Edison workers have been working on" (Verified BP, ¶ 4a).

In his complaint, plaintiff seeks recovery against Con Ed and Arthur Kill based upon negligence. Wing cross-claims against Con Ed in its third-party answer,² seeking indemnification and contribution.

In its answer, Con Ed cross-claims against Arthur Kill Power LLC and NRG Arthur Kill Operations for common-law indemnification.

Further, in its third-party complaint against Wing, Arthur Kill seeks: (1) contractual indemnification and defense in the main action; and (2) common-law indemnification and contribution in the main action; as well as damages for breach of contract for failure to procure insurance.

and NRG Arthur Kill Operations, LLC s/h/a NRG Arthur Kill Operations. No explanation has been provided for this difference/change.

² Con Ed has not been named as a defendant in the third-party action.

STANDARD

To obtain summary judgment dismissing a complaint, a movant must make a prima facie showing of entitlement to judgment in its favor as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). The motion may only be granted where it "clearly appear[s] that no material and triable issue of fact is presented," because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when an issue is even arguable. (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; *see Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

DISCUSSION

Con Ed

Con Ed seeks summary judgment dismissing plaintiff's claim of negligence, based upon the fact that the property was transferred to NRG in 1999. According to Con Ed, at the time of plaintiff's alleged accident, Con Ed neither owned, operated, maintained, nor controlled the loading dock of the premises.

However, Con Ed's Director of Real Estate, Candida Canizio (Canizio), admitted that after the 1999 sale of the Arthur Kill Plant, Con Ed held easements on the property (*see Canizio EBT at 7*). Additionally, she attested that she was unaware of the extent of Con Ed's right to control work beyond the easements after the sale (*Id. at 15*). Finally, Canizio stated that the sale of Arthur Kill included licenses to repair, operate, inspect, and replace certain telecommunications equipment and revenue meters, as well as maintenance and repair of certain electric feeders and gas supply mains (*Id. at 25*).

It is not only Con Ed's fee ownership, that forms the basis of plaintiff's contentions. According to the complaint, plaintiff contends that the grease that he slipped on was from overhead pipes that may have been included in the easements for maintenance and repair that were left to Con Ed after the sale.

Material issues of fact exist as to whether Con Ed was negligent in the performance of any maintenance or repair on the premises, and, if so, whether such negligence was a proximate cause of plaintiff's alleged accident (*see Buralassi v Mandell Mech. Corp.*, 38 AD3d 363 [1st Dept 2007]). Therefore, as to plaintiff, that portion of Con Ed's motion is denied.

Additionally, Con Ed seeks dismissal of third-party Wing's cross-claims for indemnification and contribution. However, because Con Ed does not address Wing's cross-claims in any of its supporting papers, this court will not treat it separately. Therefore, Con Ed's motion to dismiss plaintiff's claims and all cross-claims and counterclaims is denied.

Arthur Kill

Arthur Kill first seeks summary judgment for breach of contract for Wing's failure to procure insurance for the benefit of Arthur Kill. Arthur Kill bases its entitlement to such coverage on a Purchase Requisition, attached to its Notice of Motion, as Exhibit A. Exhibit A also contains a document entitled "GENERAL TERMS AND CONDITIONS OF PURCHASE ORDER." Pursuant to a February 9, 2010 Decision and Order by Justice Michael D. Stallman in the related action, *Arthur Kill Power, LLC v American Cas. Safety Ins. Co.*, (Index No. 102943/2008), under Georgia Law (the applicable law governing the contract between the parties) the "GENERAL TERMS AND CONDITIONS OF PURCHASE ORDER" is included within the contract between Arthur Kill and Wing.³

The first paragraph of the "GENERAL TERMS AND CONDITIONS OF PURCHASE

³ *See Arthur Kill Power, LLC v American Cas. Safety Ins. Co.*, 26 Misc 3d 1228(A) (Sup Ct, NY County 2010), *affd as mod* 80 AD3d 502 (1st Dept 2011).

ORDER" states the following: "1. Acceptance agreement. The Supplier signing and returning the Purchase Order acknowledgment, the Supplier's commencement of performance of the Work, or shipment of goods subject to the Purchase Order, whichever occurs first, shall be deemed an effective acceptance of the Purchase Order."

Pursuant to that paragraph, at the time the work commenced, the contract was deemed accepted and that, therefore, its terms were binding on both parties.⁴ Within the General Terms and Conditions of the contract, paragraph 11, which deals with insurance, states:

INSURANCE. Supplier shall purchase and maintain such insurance as will protect Supplier and Buyer for the losses or claims set forth below which may arise out of or result from Supplier's performance or obligations to perform under this Purchase Order, whether such performance be by Supplier or by anyone directly or indirectly employed by Supplier, or by anyone whose acts Supplier may be liable.

* * *

- (a) (1) (a)***
 - (b) Employer's Liability (EL)—\$1,000,000
 - (2) Commercial General Liability (GL)—\$ 1,000,000 per occurrence ... \$2,000,000 aggregate.

Many of the arguments proffered in the papers both in this action and the one presided over by Justice Stallman have focused on the CGL policy and Arthur Kill's status under that policy. However, the First Department has held that any liability that might be assessed against Arthur Kill as the result of plaintiff's alleged accident arose from the work referred to in the above contract, and that, therefore, Arthur Kill was an additional insured under Wing's CGL policy (*see Arthur Kill Power, LLC v American Cas. Safety Ins. Co.*, 80 AD3d 502 [1st Dept 2011]).

According to the First Department, however, the CGL policy's "employer's liability exclusion" excluded coverage for Arthur Kill in plaintiff's alleged accident, because Arthur Kill's

⁴ However, as Justice Stallman previously held, to become an additional insured under Wing's commercial general liability (CGL) policy, the date that the written contract was executed was determinative.

claim for coverage was due to bodily injury of plaintiff "arising from and in the course of employment by" Wing (*Arthur Kill Power, LLC*, 80 AD3d at 503). Therefore, Wing's CGL insurer was not required to defend or indemnify Arthur Kill under the CGL policy.

The question to be determined herein is whether the insurance Wing obtained complied with the requirements of the above contract. Based upon the requirements of Paragraph 11 as quoted above, as well as the requirement in Paragraph 11 (b),⁵ the January 20, 2011, decision of the First Department, and the Certificate of Insurance dated February 9, 2006, this Court holds that the insurance requirements have been satisfied (see Affirmation in Opposition, Ex. A⁶; see *Arthur Kill Power, LLC v American Cas. Safety Ins. Co.*, 80 AD3d 502 [1st Dept 2011]). Therefore, the portion of Arthur Kill's motion seeking summary judgment for breach of contract based upon Wing's failure to procure insurance is denied.

The question that remains is whether Arthur Kill is entitled to indemnification and defense from Wing in the main action, under the contract. Pursuant to Paragraph 1, as stated above, the contract was in force at the time of plaintiff's alleged accident.

Pursuant to Paragraph 9 of the contract, the Indemnity provision:

[t]he Supplier shall defend, indemnify and hold Buyer, and its parent company, subsidiaries, affiliates, divisions, and their respective directors, officers, shareholders, employees, agents, representatives, successors, and assigns harmless from and against all claims, suits, or proceedings asserted by a third party (or parties) and related damages, losses and expenses, including attorneys' fees, arising out of or resulting from the Supplier's performance or failure to perform under this Purchase Order.

This provision clearly spells out Wing's obligations regarding indemnity and defense, and under its terms Wing is required to indemnify and defend Arthur Kill in the main action

⁵ In Paragraph 11 (b), NRG Energy, Inc. "and Buyer shall be added as Additional Insureds on the GL, AL [automobile liability] and Umbrella policies for injury or damage resulting from Supplier's performance of this Purchase Order."

⁶ "A certificate of insurance is only evidence of a carrier's intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists" (*Tribeca Broadway Assocs., LLC v Mount Vernon Fire Ins. Co.*, 5 AD3d 198, 200 [1st Dept 2004]).

regardless of the CGL insurer's obligations under its policy. No mention is made of limitations on defense or indemnification if Arthur Kill is found to have been negligent in any claim, suit or proceeding.

General Obligation Law, Section 5-322.1, "declares void agreements purporting to indemnify contractors against liability for injuries 'contributed to, caused by or resulting from' their own negligence" (*Brown v Two Exchange Plaza Partners*, 146 AD2d 129, 137 [1st Dept 1989], *affd* 76 NY2d 172 [1990] quoting GOL 5-322.1). Although the General Obligations Law, does "permit a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence," paragraph 9 does not contain such savings language (*Brooks v Judlau Contracting, Inc.*, 11 NY3d 204, 207 [2008]). Therefore, should Arthur Kill be found partially negligent, Paragraph 9 would be void. However, should Arthur Kill be found not to be negligent in this action, Paragraph 9 would not violate GOL 5-322.1 and its terms would be valid as against Wing (*see Minorczyk v Dormitory Authority of State*, 74 AD3d 675 [1st Dept 2010]).

A finding of fact has yet to be made regarding Arthur Kill's negligence, and as a result this Court will not make a declaration of entitlement to defense and indemnification from Wing in the main action. As such, that portion of Arthur Kill's motion that seeks contractual indemnification and defense is denied as premature.⁷

Accordingly, it is hereby

ORDERED that Motion Sequence #006, Consolidated Edison of New York, Inc.'s motion for summary judgment dismissing plaintiff's complaint and any cross-claims and counterclaims

⁷ Arthur Kill has not proffered any arguments in its motion papers that it is entitled to common-law indemnification and contribution, and therefore this court does not address it herein.

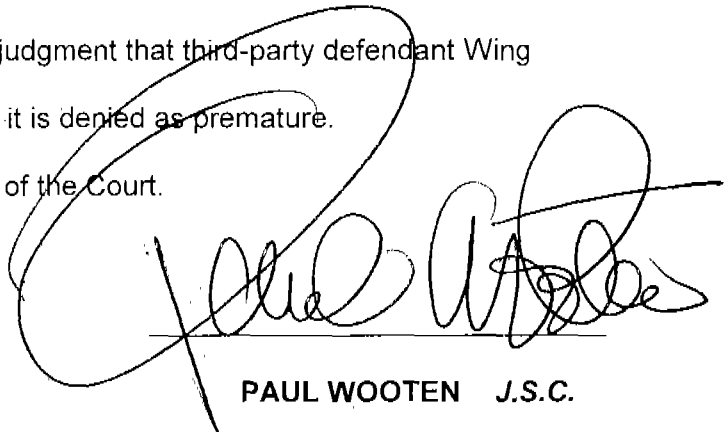
asserted against it is denied; and it is further,

ORDERED that the portion of Motion Sequence #007, Arthur Kill Power, LLC and NRG Arthur Kill Operation's motion for summary judgment as against third-party defendant Wing Environmental, Inc. is denied; and it is further,

ORDERED that the portion of Motion Sequence #007, Arthur Kill Power, LLC and NRG Arthur Kill Operation's motion for a declaratory judgment that third-party defendant Wing Environmental, Inc. must defend and indemnify it is denied as premature.

This constitutes the Decision and Order of the Court.

Dated: 10-14-11



PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

FILED
OCT 24 2011
COUNTY CLERK