

**Parra v Trinity Church Corp.**

2011 NY Slip Op 34122(U)

June 13, 2011

Sup Ct, New York County

Docket Number: 114956/08

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 36

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RAFAEL PARRA,

Plaintiff,

Index No.: 114956/08  
DECISION/ORDER

-against-

Motion Seq. No.: 002

TRINITY CHURCH CORPORATION, PARISH OF  
TRINITY CHURCH and THE RECTOR,  
CHURCHWARDENS and VESTRYMEN OF  
TRINITY CHURCH IN THE CITY OF NEW YORK,  
Defendants.

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TRINITY CHURCH CORPORATION, PARISH OF  
TRINITY CHURCH, and THE RECTOR,  
CHURCHWARDENS and VESTRYMEN OF  
TRINITY CHURCH IN THE CITY OF NEW YORK,  
Third-Party Plaintiffs,

**FILED**

**JUN 15 2011**

**NEW YORK  
COUNTY CLERK'S OFFICE**

-against-

Third-Party Index No.  
590350/09

BOWNE & COMPANY, INC., BOWNE OF NEW  
YORK, INC. and BOWNE OF NEW YORK, LLC,  
Third-Party Defendants.

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**HON. DORIS LING-COHAN, J.S.C.:**

**RECEIVED**

**JUN 15 2011**

**MOTION SUPPORT OFFICE  
NYS SUPREME COURT - CIVIL**

In this personal injury/negligence action, the defendants/third-party plaintiffs move for partial summary judgment on a portion of the third-party complaint, as well as to dismiss the underlying complaint and the cross claims asserted against them (motion sequence number 002).

For the following reasons, this motion is denied.

**BACKGROUND**

On November 7, 2005, plaintiff Rafael Parra (Parra) suffered injuries to his hands while performing repair work on an air conditioning unit in a building (the building) located at 345

002

Hudson Street, in the County, City and State of New York. *See* Notice of Motion, O’Gorman Affirmation, ¶ 9. The defendants/third-party plaintiffs Rector, Churchwardens and Vestrymen of Trinity Church in the City of New York, a religious corporation registered to do business as “the Parish of Trinity Church” (hereinafter, the Trinity defendants), are the owners of the building.<sup>1</sup> *See* Notice of Motion, Exhibit J (Jedlicka Affidavit), ¶ 2. The third-party defendants Bowne & Company, Inc., Bowne of New York, Inc. and Bowne of New York, LLC (hereinafter, the Bowne defendants) leased the building from the Trinity defendants pursuant to a lease (the Bowne lease) dated June 7, 1991. *Id.*; Exhibits C, J-2. The Bowne defendants were also Parra’s employers. *See* Notice of Motion, O’Gorman Affirmation, ¶ 9.

The relevant portions of the Bowne lease provide as follows:

22. **Indemnity By Tenant.** The Tenant [i.e., the Bowne defendants] hereby indemnifies and agrees forever to save harmless the Landlord [i.e., the Trinity defendants] against any and all liabilities, penalties, claims, damages, expenses (including reasonable attorney’s and counsel fees) or judgments, arising from injury to person or property of any kind, occasioned wholly or in part by the Tenant’s failure to perform or abide by any of the covenants of this lease or occasioned wholly or in part by any act or acts, omission or omissions of the Tenant, or of the employees ... of the Tenant, or based on any matter or thing growing out of the Tenant’s use or occupation of the premises or any part of the building

Rider No. 2

41. The Tenant shall at its expense operate, maintain and repair all air conditioning machinery, connections, wiring and controls and all other portions of any air conditioning systems in the premises installed or supplied by Landlord or others in good, safe and serviceable condition.

*See* Notice of Motion, Exhibit J-2.

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<sup>1</sup> The Trinity defendants assert that there is no such entity affiliated with them as the named defendant Trinity Church Corporation, and that they are incorrectly sued herein under that entity’s name. *See* Notice of Motion, Exhibit J (Jedlicka Affidavit), ¶ 3.

Regarding the circumstances of his injury, Parra's bill of particulars states that his hands were injured when they were exposed to a "corrosive substance," which he believed to be Freon gas, while he was performing repairs on the building's air conditioning system. *Id.*; Exhibit G, ¶ 9, 28. The Trinity defendants assert that this occurrence is sufficient to trigger the indemnity provision in the Bowne lease. *See* Notice of Motion, O'Gorman Affirmation, ¶ 14. The Bowne defendants dispute this, and also assert that no determination of negligence can be made because discovery is not yet complete in this action. *See* D'Erasmus Affirmation in Opposition, ¶¶ 2-5. Parra also contests the Trinity defendants' allegations. *See* O'Gara Affirmation in Opposition, ¶¶ 3-5. The court notes that a note of issue has not yet been filed in this action.

Parra commenced this action on October 30, 2008, by filing a complaint that sets forth one cause of action for negligence. *See* Notice of Motion, Exhibit A. Later, in his bill of particulars, Parra stated that his negligence claim is based on theories of common-law negligence, and violations of Labor Law §§ 200 and 241 (6). *Id.*; Exhibit G, ¶ 10. The Trinity defendants filed an answer on December 3, 2008, and on March 31, 2009, impleaded the Bowne defendants by serving a third-party complaint that sets forth causes of action for: 1) common-law indemnification; 2) contractual indemnification; and 3) breach of contract. *Id.*; Exhibits B, C. On February 4, 2010, the Bowne defendants filed an answer to the third-party complaint that included one counterclaim against the Trinity defendants for common-law indemnification. *Id.*; Exhibit D. The Trinity defendants now move for partial summary judgment on the issue of liability only on their contractual indemnification claim against the Bowne defendants, as well as for summary judgment to dismiss both Parra's complaint, and the Bowne defendants' counterclaim (motion sequence number 002).

## DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64, 69-72 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 560 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340, 342 (1<sup>st</sup> Dept 2003). Here, the court finds that the Trinity defendants have failed to meet their burden of proof.

The first branch of the Trinity defendants' motion seeks partial summary judgment on the issue of liability only on their contractual indemnification claim. In order to sustain a claim for contractual indemnification, the proponent must first prove some quantum of negligence on the defendant's part. *See e.g. Knight v City of New York*, 225 AD2d 355, 356 (1<sup>st</sup> Dept 1996). Regarding this burden, the Appellate Division, First Department, has articulated the general rule as follows:

It is possible to establish both negligence and causation through circumstantial evidence, but to do so a plaintiff must show facts and conditions from which the negligence of the defendant, and causation of the accident by that negligence, may be reasonably inferred. The plaintiff need not exclude every other possible cause of the accident, but must offer proof that causes other than defendant's negligence are sufficiently "remote" or "technical" to allow a jury to base its verdict on logical inferences to be drawn from the evidence, rather than speculation [internal citations omitted].

*Feder v Tower Air, Inc.*, 12 AD3d 190, 191 (1<sup>st</sup> Dept 2004). Here, the Trinity defendants argue

that they committed “no active negligence.” See Notice of Motion, O’Gorman Affirmation, ¶¶ 16-23. They submit the affidavit of Trinity vice president, Peter St. John (St. John), who alleges that “Bowne installed the air conditioning system in its leased premises,” and that the Trinity defendants “received no notice of complaints of Freon discharge” during the two-year period immediately prior to Parra’s accident. *Id.*; Exhibit K (St. John Affidavit), ¶ 3. The Trinity defendants then cite the Appellate Division, First Department’s, decision in *Macedo v J.D. Posillico, Inc.* (68 AD3d 508, 510 [1<sup>st</sup> Dept 2009]) for the proposition that they should be permitted to enforce the Bowne lease’s indemnity provision because the foregoing evidence (i.e., the St. John affidavit) demonstrates that their only possible liability to Parra herein would be statutory. See Notice of Motion, O’Gorman Affirmation, ¶ 22.

The Bowne defendants respond that the Trinity defendants’ evidence (i.e., the St. John affidavit) “is insufficient ... to establish, as a matter of law, how the underlying accident and injury to the plaintiff occurred.” See D’Erasmus Affirmation in Opposition, ¶ 14. The Bowne defendants present an affidavit from their insurer’s claims manager, Cheryl Curtis (Curtis), who states that there are no records that confirm St. John’s contention that the Bowne defendants installed the subject air conditioning system at the building. *Id.*; Exhibit E (Curtis Affidavit), ¶ 7. The Bowne defendants then cite the Appellate Division, Second Department’s, holding in *Ramos v DEGI Deutsche Gesellschaft Fuer Immobilienfonds MBH* (37 AD3d 802, 803 [2d Dept 2007]) that “summary judgment [on a cause of action for contractual indemnification] would have been premature since substantial discovery remained outstanding.” The Trinity defendants reply that the Bowne defendants’ arguments fail to raise an issue of fact, because they do not constitute evidence that the Trinity defendants either failed to furnish Parra with safety equipment, or were

in any other way negligent toward him. *See* O’Gorman Reply Affirmation, ¶¶ 6-7. Neither party, however, has presented conclusive factual evidence for this court to rule, at this juncture, as a matter of law.

The Trinity defendants’ reliance on *Macedo v J.D. Posillico, Inc.* is misplaced. In *Macedo*, the First Department reviewed the trial court’s factual findings regarding negligence that were clearly based on completed discovery and a full evidentiary record. In this case, however, discovery is incomplete and no note of issue has been filed. In fact, this motion was prepared prior to the preliminary discovery conference being held and filed less than one month after the preliminary conference was held. Thus, the court is unable to determine the nature and extent, if any, of the Trinity defendants’ alleged negligence toward Parra, as a matter of law. Further, the court agrees with the Bowne defendants that the St. John self-serving affidavit is inconclusive because it is unsupported by any documentary evidence regarding the Bowne defendants’ purported ownership and maintenance of the subject air conditioning system. Also, it is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Serv. Indus.*, 295 AD2d 218 (1<sup>st</sup> Dept 2002). Here, neither St. John, nor Parra (nor any other party), has yet been deposed, much less cross examined.

Finally, the Trinity defendants’ reply argument, that the Bowne defendants have failed to establish any issues of fact regarding their purported negligence, is also meritless. On a motion for summary judgment, the Trinity defendants clearly bear that burden of proof in the first instance. The Trinity defendants have failed to establish as a matter of law, by the submission of evidence in admissible form, that they were free of negligence toward Parra, or that the Bowne defendants were guilty of some quantum of such negligence. In *Hurley v Best Buy Stores, L.P.*

(57 AD3d 239, 239-240 [1<sup>st</sup> Dept 2008]), the Appellate Division, First Department, held that, because “defendants never moved for summary judgment dismissing the common-law negligence and Labor Law § 200 causes of action against them, or otherwise established their freedom from negligence as a matter of law ... there is a possibility plaintiff could prevail on [either such] theory,” and, consequently, it would be improper to grant defendants’ motion for contractual indemnification against third-party defendants. Here, as will be discussed, the Trinity defendants’ request for summary judgment to dismiss the complaint fails. As a matter of law, the possibility still exists that Parra may prevail on his negligence claim against them on any of the three theories that he specified in his bill of particulars - common-law negligence, violation of Labor Law § 200 or violation of Labor Law § 241 (6). The existence of this possibility, precludes the court from granting the Trinity defendants’ request for summary judgment on their contractual indemnification claim against the Bowne defendants at this juncture. Therefore, the first branch of the Trinity defendants’ motion is denied.

The second branch of the Trinity defendants’ motion seeks summary judgment to dismiss Parra’s complaint. Parra notes that the Trinity defendants’ moving and reply papers are both devoid of any specific arguments as to why his negligence claim against them should be dismissed. See O’Gara Affirmation in Opposition, ¶ 2. Parra is correct. The Trinity defendants fail to discuss any of Parra’s asserted bases for his negligence claim - i.e., common-law negligence, violation of Labor Law § 200 or violation of Labor Law § 241 (6). Because they have failed to do so, the court deems that the Trinity defendants have abandoned their request for summary judgment to dismiss the complaint. Therefore, the second branch of the Trinity defendants’ motion is denied.

The third branch of the Trinity defendants' motion seeks summary judgment to dismiss the Bowne defendants' counterclaim for common-law indemnification. However, once again, the Trinity defendants' moving papers are completely devoid of any argument on this point. Thus, the court deems that the Trinity defendants have abandoned their request. Therefore, the third branch of the Trinity defendants' motion is denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is

ORDERED that the motion, pursuant to CPLR 3212, of the defendants/third-party plaintiffs Rector, Churchwardens and Vestrymen of Trinity Church in the City of New York, and the Parish of Trinity Church is denied; and it is further

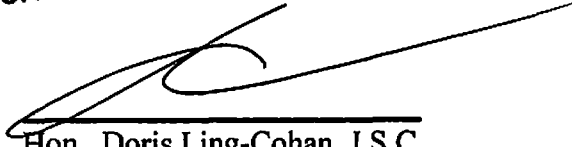
ORDERED that within 30 days of entry of this order, third-party defendants shall serve a copy upon all parties with notice of entry.

Dated: New York, New York  
June 13, 2011

**FILED**

JUN 15 2011

NEW YORK  
COUNTY CLERK'S OFFICE



Hon. Doris Ling-Cohan, J.S.C.