

Willard J. Price Assoc., LLC v Stateside Constr., LLC
2012 NY Slip Op 31650(U)
June 15, 2012
Supreme Court, New York County
Docket Number: 104276/2006
Judge: Saliann Scarpulla
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: Saliann Scarpulla
Justice

PART 19

Index Number : 104276/2006
WILLARD J. PRICE ASSOCS. LLC
vs.
STATESIDE CONSTRUCTION, LLC
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated _____
which disposes of motion sequence(s) no. 002 + 003

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

FILED

JUN 21 2012

NEW YORK
COUNTY CLERK'S OFFICE
Saliann Scarpulla, J.S.C.

Dated: 6/15/12

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

-----X
WILLARD J. PRICE ASSOCIATES, LLC,

Plaintiff,

Index No.: 104276/2006

-against-

DECISION AND ORDER

STATESIDE CONSTRUCTION, LLC
and DAMI CONSTRUCTION,

Defendants.

-----X

For Plaintiff:
McManus, Collura & Richter, P.C.
48 Wall Street
New York, NY 10005

For Defendant Stateside Construction, LLC:
Goldberg & Carlton, PLLC
31 East 32nd Street
New York, NY 10016

For Defendant Dami Construction:
Ryan, Brennan & Donnelly, LLP
131 Tulip Avenue
Floral Park, NY 11001

FILED

JUN 21 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. SALIANN SCARPULLA, J.:

In this contribution/indemnification action, defendant Stateside Construction, LLC (“Stateside”) moves for summary judgment dismissing the complaint and all cross claims asserted against it and plaintiff Willard J. Price Associates, LLC (“Price”) cross moves for partial summary judgment on its claims for common-law and contractual indemnification, and contribution. Dami Construction (“Dami”) moves for summary judgment dismissing the complaint and the cross claim asserted against it.

This action arises out of construction that was performed at 522 Quincy Street, Brooklyn, New York (“the Premises”). Price was the owner of the premises and Stateside was the general contractor at the work site. During the course of the construction, Adrien Flores (“Flores”), an employee of subcontractor Dami, was performing work in Apartment 5H when three of his fingers were amputated while he was using a table saw.

In 2002, Flores brought an action against Price and Price’s property manager, non-party Proto Property Services, LLC (“Proto”), to recover damages for his personal injuries. Price impleaded Stateside and Dami in a third-party action. Price settled with Flores for \$300,000, which was paid to Flores from Price’s insurance policy, and the underlying action was discontinued.

In 2003, Flores brought a separate action against Stateside, alleging that Stateside was negligent in that it allowed a hazardous condition to arise and that it failed to provide proper safety devices to plaintiff. Although Flores filed a complaint, evidently no RJI has been filed. It appears that there has been no resolution to that action.

The complaint in this action contains seven causes of action. In the first cause of action asserted against Stateside, Price seeks full contractual indemnification for the Flores settlement, in addition to attorneys’ fees. In the second cause of action Price pleads common-law indemnification against Stateside. In the third cause of action, Price alleges that Stateside breached its obligation to obtain and keep in force insurance policies naming Price as an additional insured. In the fourth cause of action Price pleads

a contribution claim against Stateside. In the fifth and sixth causes of action, Price seeks common-law and contractual indemnification from Dami. In the seventh cause of action Price alleges a contribution claim against Dami.

In their respective answers, Stateside and Dami bring cross claims against each other, alleging that the other party is responsible to the extent that either of them is found liable to Price.

Prior to Flores's injury, Price and Stateside entered into a contract whereby Stateside was hired to act as general contractor for renovation work at the Price apartments. Although both parties concede that an original contract cannot be produced, Price maintains that the copy of the contract provided to the court on this motion is the parties' final contract.

Price submits a copy of the contract which contains revisions and mark outs. Price alleges that, although the copy is a redlined version, there is also a corresponding final version which mirrors the redlined draft. The copy is signed by both Price and Stateside, and contains an indemnification provision whereby Stateside agrees to indemnify Price for any claim arising out of its acts or omissions or the acts or omissions of its subcontractors. Price alleges that because Flores was injured while working for Dami, a subcontractor of Stateside, Stateside is required to indemnify Price for its losses.

Stateside does not dispute that there was a contract between Stateside and Price to perform renovation work. However, Stateside contends that the contract provided to the

court is a draft, and that the actual contract would not have contained an indemnification provision. Stateside maintains, “[a]ll that has been produced during the course of this litigation are various drafts and corrections of a contract which portions are signed by the various parties here. There has been no testimony that any portion of the hodgepodge of documents produced constitutes a full contract.”

In support of its position, Stateside provides an affidavit from Demetrios Moragianis (“Moragianis”), who is a 25% member of Price and the sole member of Stateside. He explains that portions of the renovation work were performed according to the written agreement while other portions were performed pursuant to oral requests. Moragianis states, “I do not possess an entire executed contract and I am unsure as to whether an executed contract was ever entered into by and between the parties.” Moragianis contends that multiple drafts were suggested and that at no point did the parties agree to an indemnification provision under which Stateside would indemnify Price.

In addition, Stateside alleges that Flores was not even performing work at Stateside’s request. It argues that Dami was performing work for Proto, and Proto allegedly told Dami to perform work at Apartment 5H. Stateside notes that, although Dami sent a bill to Stateside for the work performed, a corrected invoice was allegedly later sent to Proto for the work. Price provides a copy of Dami’s invoice for work performed at Apartment 5H which was sent to Stateside.

Thus, Moragianis attests that the renovation work at 5H was not performed at Stateside's request. He explains, "[a]t no time did [Stateside] own, manage, control nor have any involvement of the replacement of the floor in Apt. 5-H wherein Mr. Flores was injured." Moragianis, who, as previously mentioned is the sole member of Stateside, is also the sole member of Proto.

Stateside also provides an affidavit from Jimmy Guzman ("Guzman"), who is employed by Proto. He claims, "[i]n January, 2002 I was responsible for the oversight of all contracts, as well as work, labor and services performed by Proto Realty Management, LLC in relation to the Willard J. Price project." Guzman states that he contacted Dami and requested that Dami, not Stateside, perform renovation work in Apartment 5H.

Dami maintains that it does not owe any common-law or contractual indemnification to Price because the two entities did not have any contracts or indemnity agreements between them. Dami further alleges that Flores did not suffer a "grave injury" as defined by the Workers' Compensation Law. As such, Dami claims that it is not liable for contribution or to indemnify either Price or Stateside.

Discussion

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v. Waisman*, 39 A.D.3d 303, 306 (1st Dept 2007), citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Upon proffer of

evidence establishing a prima facie case by the movant, “the party opposing a motion for summary judgment bears the burden of ‘produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.’” *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

Procedurally, Dami opposes Price’s cross motion as being untimely. It argues that, pursuant to an order of this court, summary judgment motions were to be made within sixty days after the note of issue was filed. There appears to be a stipulation by the parties, not signed by Dami, that provided Price with an extension to file opposition papers to Dami’s and Stateside’s motions. Regardless, “[a] cross motion for summary judgment . . . may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief nearly identical to that sought by the cross motion [internal quotation marks and citations omitted].” *Filannino v. Triborough Bridge & Tunnel Authority*, 34 A.D.3d 280, 281 (1st Dept 2006). Price’s cross motion for summary judgment will be considered by the court because it addresses the same causes of action that are the subject of Stateside’s and Dami’s timely motions for summary judgment.

Price’s Claim for Contractual Indemnification As Against Stateside:

In support of its claim for contractual indemnification Price submits an alleged contract between Stateside and Price containing an indemnification clause. Both parties concede that an original contract cannot be produced at this time. Stateside argues that it

would not sign a contract with an indemnification provision, given that the sole member of Stateside is also a member of Price. However, Price argues that the “law of the case” doctrine applies here and requires that the court accept the copy of the contract presented to the court as the contract between the parties.

Specifically, in November 2006, Stateside filed a motion to dismiss the complaint based on alleged unauthorized acts of Price’s counsel. In a decision dated June 7, 2007, Justice Edward H. Lehner denied Price’s motion to dismiss and stated the following:

It is ordered that the motion by Stateside . . . to dismiss the complaint based on the argument that plaintiff does not have permission to institute this suit is denied. While Demetrios Moragianis, the sole member of Stateside, has a 25% interest in plaintiff, this does not bar plaintiff’s insurer from commencing this suit under plaintiff’s name as the applicable insurance policy procured by Plaintiff (the “Policy”) permits the insurer to take such action as a consequence of having paid \$300,000 to the injured plaintiff in the underlying action and the existence of indemnity provisions in the contract between plaintiff and Stateside.

The Appellate Division, First Department, upheld Justice Lehner’s decision and noted that “[t]he contract between Price and Stateside contained an indemnity clause in favor of Price” *Willard J. Price Associates, LLC v. Stateside Construction, LLC*, 51 A.D.3d 406, 406 (1st Dept 2008). The Court concluded that “[t]here is no conflict of interest now because new counsel has never represented Stateside or Moragianis personally ... and Moragianis, who signed the Price/Stateside contract on behalf of Stateside but not Price, need not necessarily be called as a witness for Price.”

“The law of the case doctrine is a rule of comity and convenience which states that ordinarily a court of coordinate jurisdiction should not disregard an earlier decision on the same question in the same case.” *Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry*, 128 A.D.2d 467, 469 (1st Dept 1987). Here, Justice Lehner’s decision and the subsequent affirmance by the Appellate Division addressed whether or not Price was required to obtain consent to commence an action against Stateside based on a conflict of interest. As set forth above, in their respective decisions, the courts mentioned the contract and the indemnification provisions.

Justice Lehner’s and the First Department’s reference to the contract and the indemnification provision between Price and Stateside in their decisions does not establish, under the law of the case doctrine, the validity of the proffered version of the contract for summary judgment purposes. The law of the case doctrine is “inapplicable, where, as here, a summary judgment motion follows a motion to dismiss as the scope of review is distinct [internal citations omitted].” *Riddick v. City of New York*, 4 A.D.3d 242, 245 (1st Dept 2004). While a motion to dismiss “addresses merely the sufficiency of the pleadings,” a motion for summary judgment “searches the record and looks to the sufficiency of the underlying evidence.” *Tenzer, Greenblatt, Fallon & Kaplan v. Capri Jewelry*, 128 A.D.2d at 469.

The previous orders discussing the indemnification provision addressed Stateside’s motion to dismiss based on a conflict of interest. In these decisions Justice Lehner and

the First Department were not asked to examine the authenticity or validity of the contract proffered. Moreover, the motions to dismiss and appeal were decided prior to discovery and before either party had the ability to test the authenticity of the proffered contract.

These summary judgment motions have been submitted at the close of discovery, after the parties have exchanged documents and taken depositions. Although a signed copy of the marked-up and allegedly final version of the contract has been provided to the court, it is undisputed that an original contract has not been submitted. Moragianis, a member of Stateside, and the person who executed the contract on behalf of Stateside, swears that there was never an indemnification agreement included as part of the final contract.

Given the conflicting evidence, questions of fact remain as to whether Stateside was required to contractually indemnify Price for the settlement amount paid to Flores for his injury. These questions of fact cannot be resolved on a motion for summary judgment. Price's and Stateside's motions for summary judgment on the first cause of action for contractual indemnification are therefore denied.

Price's Claim for Common-Law Indemnification Against Stateside:

Price argues that it is entitled to common-law indemnification based on Stateside's negligence and breach of contract. Stateside maintains that it was not acting in its scope as general contractor when Flores was injured. Moreover, Stateside claims that it was not negligent.

“Common-law indemnification is available to one who has committed no wrong but is held liable to the injured party because of some relationship with the tortfeasor or obligation imposed by law . . . [internal quotation marks and citations omitted].” *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d 364, 366 (1st Dept 2006). Indemnity involves shifting the entire loss from the one who “is compelled to pay for a loss ... to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer [internal quotation marks and citations omitted].” *Trump Village Section 3 v. New York State Housing Finance Agency*, 307 A.D.2d 891, 895 (1st Dept 2003). Because common-law indemnification is premised on “vicarious liability without actual fault,” the “party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine [internal quotation marks and citations omitted].” *Edge Management Consulting, Inc. v. Blank*, 25 A.D.3d at 367.

Here, Price settled with Flores in the main action and there was therefore no finding of negligence against Price. Similarly, there has never been a finding of negligence on the part of Stateside with respect to its obligations as general contractor under Labor Law § 200.¹

¹ Labor Law § 200 is the “codification of the common-law duty imposed upon an owner or general contractor to maintain a safe construction site.” *Rizzuto v L.A. Wenger Construction Co.*, 91 N.Y.2d 343, 352 (1998). Claims brought pursuant to Labor Law § 200 either involve situations in which a worker was injured as a result of a defective or dangerous condition at a work site, or involve the “manner in which the work is performed.” *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dept 2008).

On this motion, neither Price nor Stateside has shown as a matter of law negligence on the other party's part, and lack of negligence on its own part. As there are questions of fact as to Stateside's and Price's alleged negligence, Price's motion for summary judgment on the second cause of action for common law indemnification and Stateside's motion for summary judgment dismissing the claim are denied.

Price's Claim That Stateside Did Not Procure Insurance Naming Price as Additional Insured:

Stateside moves for summary judgment dismissing the third cause of action in which Price accuses Stateside of failing to procure insurance on its behalf. On this motion Stateside alleges that Price has failed to produce a complete contract which evidences any requirement that Stateside purchase insurance naming Price as an additional insured.

In opposition, Price argues that pursuant to the contract provided Stateside was required to purchase insurance to protect Price. Price also attaches a letter which allegedly demonstrates that Stateside filed a claim for insurance on behalf of Flores, who was working for Stateside's subcontractor at the time of his accident. The letter mentions that Price is listed as the additional insured.

Because questions of fact remain as to whether the submitted contract represents the final and binding agreement between the parties, Stateside is denied summary judgment dismissing the third cause of action.

Price's Contribution Cause of Action Against Stateside:

“Contribution is generally available as a remedy when two or more tort-feasors share in responsibility for an injury, in violation of duties they respectively owe[] to the injured person [internal quotation marks and citations omitted].” *Trump Village Section 3 v. New York State Housing Finance Authority*, 307 A.D.2d at 896. However, a claim for contribution may be viable even if the contributor did not owe a duty to the plaintiff, but owed a duty to the defendant. *Id.* “[T]he breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought [internal quotation marks and citations omitted].” *Id.*

Here, while Stateside concedes that it was the general contractor for the renovations of the Price apartments, Stateside denies involvement in Flores's injury. As such, questions of fact remain as to whether Stateside breached a duty to provide a safe place to work owed to Price or to Flores. Moreover, credibility issues are “properly left for the trier of fact.” *Yaziciyan v. Blancato*, 267 A.D.2d 152, 152 (1st Dept 1999). Accordingly Price's cross motion for summary judgment on its fourth cause of action is denied and Stateside's motion for summary judgment dismissing this cause of action is also denied.

Price's Claims for Indemnification and Contribution from Dami:

In its fifth, sixth and seventh causes of action Price alleges that, pursuant to an agreement between Dami and Price, and the fact that Flores suffered a grave injury, Price

is entitled to indemnification from Dami for all the damages in connection with Flores's injury.

The Court of Appeals has held that:

Workers' Compensation Law § 11 prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a "grave injury," or the claim is "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

Rodrigues v. N & S Bldg. Contrs., Inc., 5 N.Y.3d 427, 429-430 (2005).

Price alleges that the contract between Price and Stateside, which purportedly contained an indemnification provision, would require Dami to also indemnify Price. However, there is no evidence of a contract between Price and Dami, or any evidence that Dami intended to indemnify Price pursuant to any agreement. Because there was no contract between Dami and Price, Price's sixth cause of action for contractual indemnification against Dami is dismissed.

In the absence of contractual indemnification, Dami may only be required to indemnify Price if Flores suffered a grave injury. Workers' Compensation Law § 11 defines "grave injury" as one or more of the following:

[D]eath, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Dami submits the report from its expert, Dr. Peter Langan (“Langan”), an orthopedic surgeon, who, after reviewing the medical records, contends that Flores did not “sustain a permanent and total loss of use of his left hand.” Langan further states that because Flores has all of his fingers reattached to his left hand, he did not sustain a “loss of multiple fingers” or a “loss of index finger” as required by Workers Compensation Law § 11.

Price contends that Flores suffered a grave injury. It refers to a report from an orthopedic surgeon who examined Flores on February 4, 2004 and noted the following, in pertinent part:

The patient is unable to close a fist with the left hand, cannot perform strenuous type activities using the left hand and the injured fingers are very sensitive to any direct contact, which does inhibit the use of the left hand The patient has been unable to return to his previous employment in construction. The patient however is presently employed as a cook with some limitations ... Significant permanent functional impairment involving the left hand remains present. There is restriction of active movement, impairment for the ability to grasp and there is absent sensation involving the left thumb, index and long fingers.

“[I]njuries qualifying as grave are narrowly defined ... [and the w]ords in [the] statute are to be given their plain meaning without resort to forced or unnatural interpretations [internal quotation marks and citation omitted].” *Meis v. ELO Organization*, 97 N.Y.2d 714, 716 (2002). Price incorrectly states that “[w]hile Flores’ fingers were reattached, the fingers were without motion, strength and sensation.” Flores

testified that while he is unable to bend the three affected fingers, he is still able to move them.

None of the medical evidence presented by either party's experts describes Flores as having permanent and total loss of use or amputation of a hand, loss of multiple fingers, or loss of an index finger, as set forth in the Workers' Compensation Law. While Flores's fingers were amputated and he does suffer significant impairment to his hand, his fingers were reattached and he is still able to use his fingers in a limited way. *See e.g. Vincenty v. Cincinnati Inc.*, 14 A.D.3d 392, 392 (1st Dept 2005):

Plaintiff's pinky and ring fingers, although completely amputated in the underlying workplace accident, were shortly after the accident surgically reattached so that plaintiff regained their use, at least partially. Accordingly, because the fingers and their use were not permanently and totally lost, plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11.

In its motion papers Dami has met its burden demonstrating that Flores's injuries were not grave and Price has not met its burden, through medical evidence, of raising an issue of fact as to grave injury. Accordingly, because Flores did not suffer a grave injury, Price's claims for common-law indemnification or contribution from Dami are not viable. Therefore, Dami is granted summary judgment dismissing the fifth and seventh causes of action in Price's complaint and Price is denied summary judgment on these claims.

Dami's Cross Claims Against Stateside:

In its answer, Dami brought two cross claims against Stateside for indemnification and contribution based on the alleged negligence of Stateside. Stateside is seeking to

have any cross claims as against it dismissed. In accordance with the foregoing, Price's complaint is dismissed in its entirety as against Dami. Where, as here, all claims against a defendant are dismissed, "third-party actions and all cross claims are dismissed as a necessary consequence of dismissing the complaint in its entirety." *Turchioe v. AT&T Communications*, 256 A.D.2d 245, 246 (1st Dept 1998).

Accordingly, although Stateside did not address these cross claims in its papers, upon a search of the record Stateside is granted summary judgment dismissing Dami's cross claims as against it.

Stateside's Cross Claim Against Dami:

In its answer, Stateside brought a cross claim against Dami for indemnification and contribution. Dami moved for summary judgment dismissing this cross claim on the basis that Flores did not suffer a grave injury. Stateside did not address Dami's motion. However, as previously discussed, because Flores did not suffer a grave injury, this cross claim against Dami is not viable. Accordingly, Dami is granted summary judgment dismissing this cross claim.

In accordance with the foregoing, it is hereby

ORDERED that Dami Construction, LLC's motion for summary judgment dismissing the complaint against it, as well as the cross claim alleged as against it, is granted and the complaint and cross claims asserted against it are dismissed; and it is further

ORDERED that Stateside Construction, LLC's motion for summary judgment dismissing plaintiff's complaint is denied, and its motion dismissing any cross claims as against it is granted; and it is further

ORDERED that Willard J. Price Associates, LLC's cross motion for partial summary judgment on its claims for common-law and contractual indemnification and contribution is denied; and it is further

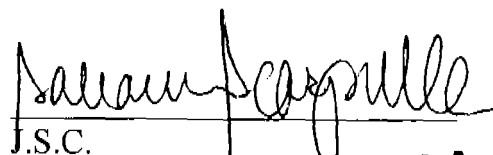
ORDERED that the action is severed as to the remaining defendants and all remaining claims and cross claims shall continue; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: New York, New York
June 15, 2012

ENTER:


J.S.C.

SALIANN SCARPULLA

FILED

JUN 21 2012

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