

Hay v Lower Manhattan Dev. Corp.
2012 NY Slip Op 32772(U)
November 9, 2012
Supreme Court, New York County
Docket Number: 103179/09
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JAFFE BARBARA JAFFE
J.S.C.
Justice

PART 5

Index Number : 103179/2009
HAY, ALLEN
vs.
LOWER MAHATTAN DEVELOPMENT
SEQUENCE NUMBER : 003
DISMISS CAL HAY

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). 1

Answering Affidavits — Exhibits _____ | No(s). 2

Replying Affidavits _____ | No(s). 3

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

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

FILED

NOV 15 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 11/9/12
NOV 09 2012

BARBARA JAFFE, J.S.C.

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

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

-----X
ALLEN HAY and APRIL HAY,

Index No. 103179/09

Plaintiffs,

Argued: 5/29/12

Motion seq. no.: 003

-against-

DECISION AND ORDER

LOWER MANHATTAN DEVELOPMENT
CORPORATION, *et al.*,

Defendants.

FILED

NOV 15 2012

-----X
BARBARA JAFFE, JSC:

NEW YORK
COUNTY CLERK'S OFFICE

For TRC:

Allyson Avila, Esq.
Wilson Elser *et al.*
3 Gannett Dr.
White Plains, NY 10604
914-323-7000

For LMDC defendants:

Michelle Yuen, Esq.
Lester Schwab *et al.*
120 Broadway
New York, NY 10271-0071
212-964-6611

By notice of motion dated February 15, 2012, defendant TRC Environmental Corporation (TRC) moves pursuant to CPLR 3211(a)(7) and 3212 for an order summarily dismissing the complaint and all cross claims against it. Only defendants Lower Manhattan Development Corporation (LMDC) and Lower Manhattan Construction Command Center (collectively, LMDC) oppose.

I. PERTINENT BACKGROUND

A. Plaintiffs' claim

This action arises from a fire that occurred on August 18, 2007 at the Deutsche Bank Building at 130 Liberty Street in Manhattan (the premises), in which two firefighters were killed

and other firefighters, including plaintiff Allen Hay, were injured. At the time of the fire, the building was undergoing abatement and deconstruction as a result of damage it had sustained during the September 11, 2001 terrorist attacks. The cause of the fire was determined to be a discarded lit cigarette, and a contributing factor was the removal or deconstruction of a standpipe in the building's basement that was thereby rendered inoperable, preventing water from being pumped into the building's upper floors during the fire. (Affirmation of Allyson Avila, Esq., dated Oct. 28, 2011 [Avila Aff.], Exh. A).

On or about March 6, 2009, plaintiffs commenced the instant action and asserted the following claims on plaintiff Allen Hay's behalf: (1) negligence by defendants in their ownership, operation, management, control, maintenance, supervision and repair of the premises and the work/labor being performed thereat; (2) public and private nuisance related to conditions at the premises; and (3) a violation of General Municipal Law (GML) § 205-a (the firefighter's rule) based on various statutory and regulatory violations. (*Id.*).

On June 1, 2011, plaintiff testified at an examination before trial that, as pertinent here, when he entered the premises to fight the fire and while inside the 14th floor of the building, he slipped on plastic sheeting or wall covering which had been cut down during the fire, and landed on some debris, injuring himself. (*Id.*, Exh. C).

B. TRC's role

By agreement dated March 7, 2005, TRC and LMDC entered into a contract pursuant to which TRC agreed to provide environmental and consulting services at the premises, and which contains the following pertinent provision:

[TRC] shall be responsible for all injuries to persons, including death, or damage

to the property sustained while performing or resulting from the work under this Agreement, if and to the extent the same results from any act, omission, negligence, fault or default of [TRC] or subconsultants, or their employees, agents, servants, independent contractors or subcontractors retained by [TRC] pursuant to this Agreement.

(Affirmation of Michelle Yuen, Esq., dated Apr. 5, 2012 [Yuen Aff.]; Exh. 1).

By work order dated February 27, 2007, TRC agreed to provide additional services as part of its general environmental consulting services: "review of contractor submittals . . . oversight of the contractor and its subcontractors to monitor compliance with established environmental and health and safety protocols and procedures; recommendations concerning the means and methods to safely effectively implement the [deconstruction of the premises] . . ." (*Id.*).

At a criminal trial related to the fire, TRC employee Arnal Javal testified that, as pertinent here, TRC was hired by LMDC as an independent monitor at the premises to collect air samples as part of the premises' deconstruction and asbestos abatement. He worked at the premises as a project monitor and coordinated with LMDC to assign monitoring work to TRC employees working there. After other contractors were hired, TRC oversaw the contractors' abatement work and monitored all aspects of the abatement process to make sure the work complied with applicable regulations. TRC reported any violations associated with the abatement work to LMDC, and had the authority to stop work if it observed any violations. (Avila Aff., Exh. D).

In 2004, TRC had approximately five to 10 people working at the site. Its employees daily tested the air in the premises as part of the asbestos abatement work, and collected additional samples in the building as requested by LMDC. TRC was also responsible for inspecting the floors of the premises to ensure that people working there were following

Department of Labor (DOL) protocols related to asbestos abatement such as wearing proper respirators and personal protection, performing the abatement properly, and cleaning the floors as required by DOL regulations. Javal attended daily "toolbox talks" at the site involving most of the workers there. His role was determining where work was being performed at the premises so he could assign TRC employees accordingly. TRC employees were not responsible for fire safety or building code enforcement. (*Id.*).

Javal inspected the basement of the premises once or twice weekly for purposes of asbestos abatement. At the time, Javal observed employees of The John Galt Corporation (Galt) removing all the materials from the basement, including pipes, by cutting the materials into smaller, more manageable pieces and removing them. Galt employees determined whether pipes were to be removed; TRC had no role in deciding which pipes were removed or in ensuring that the fire suppression system was maintained in the premises. TRC's only role with respect to the pipes was to inspect them to ensure they were free of asbestos debris.

Javal also saw to it that whenever asbestos work was being performed the workers sealed off stairwells in the premises with solid wooden barriers and plastic sheeting per applicable safety regulations, but the barriers had hatches in them that could be opened in an emergency. (*Id.*). He did not know that there was a working standpipe in the basement that needed protection, nor did he know what a standpipe looks like.

In December 2006, TRC inspected the basement and prepared a report for final clearance. It inspected the floor, walls and ceiling, as well as other mechanical areas such as pipes or beams, to ensure they were free of any visible debris or dust and that the floor was not wet. The basement failed TRC's visual inspection on December 8, 2006, partly because some basement

pipes and beams had residual material on them and were not clean. Once the pipes were cleaned, TRC passed the basement inspection sometime during the third week of December 2006. On December 18, 2006, a regulatory inspection performed by the Environmental Protection Agency (EPA), the Department of Labor (DOL), and the Department of Environmental Preservation (DEP) passed the basement. After December 2006, TRC performed no more work in the basement. (*Id.*).

II. CONTENTIONS

TRC maintains that it may not be held liable to plaintiff as it owed him no duty of care related to its work at the premises, which work was limited to asbestos abatement. It denies having had any duty to ensure the safety of the premises, and argues that it even if it had such a duty, that duty alone is insufficient to hold it liable for the negligence of a third party. TRC also contends that plaintiff's common law negligence claim is barred by the firefighter's rule as set forth in GML § 205-a and that plaintiff cannot maintain a claim for public or private nuisance against it. (*Avila Aff.*).

LMDC argues that TRC may be held liable as it had direct control over the means and methods of the abatement work at the premises, and that TRC had a contractual duty to supervise Galt employees and direct them to take corrective action. It contends that TRC may have caused or contributed to plaintiff's accident by permitting wooden barriers to be constructed on floors undergoing abatement, thereby exacerbating the fire, and by failing to notice the missing standpipe. Finally, it maintains that the motion is premature absent a deposition of TRC and the exchange of further document discovery. (*Yuen Aff.*).

In reply, TRC observes that LMDC does not address TRC's arguments regarding

plaintiff's claims based on the firefighter's rule or for nuisance, again denies that it was negligent, and asserts that LMDC's claim that further discovery is needed is conclusory and baseless. (Reply Affirmation, dated Apr. 18, 2012).

III. ANALYSIS

At issue is whether triable issues exist as to LMDC's cross claim for both contractual and common law indemnification and/or contribution against TRC. As it is undisputed that the parties' agreement limits TRC's duty to indemnify LMDC to those circumstances where TRC may itself have been negligent, the issue is further limited to whether there are triable issues as to TRC's alleged negligence.

A contractor will not be held liable in common law negligence for failing to provide a safe place to work for any alleged injuries arising out of the method and manner of the work being performed unless it had the authority to supervise or control that work. (*Burkoski v Structure Tone, Inc.*, 40 AD3d 378 [1st Dept 2007]; *Nevins v Essex Owners Corp.*, 276 AD2d 315 [1st Dept 2000], *lv denied* 96 NY2d 705 [2001]).

Here, it is undisputed that TRC was hired by LMDC to perform asbestos abatement work throughout the premises, that its responsibility and work was limited to performing asbestos abatement, that it inspected the premises daily solely to ensure that its work was being performed adequately and safely, and that while even if it may have observed unsafe conditions in the premises, including the missing pipe piece, it had no duty to report such conditions or that, even if had such a duty, it had no additional duty to take any action and could not control whether any other party had such a duty and failed to do so. TRC has also demonstrated that it had no authority to supervise or control Galt's work in dismantling the basement.

Thus, no triable issues exist as to TRC's liability for plaintiff's common law negligence claim. (See *Fiorentino*, 95 AD3d at 426 [fact that contractor had authority to stop work if it observed subcontractor engaged in unsafe work insufficient to establish requisite supervision or control for liability for common law negligence]; *Geonie v OD & P NY Ltd.*, 50 AD3d 444 [1st Dept 2008] [claim dismissed against general contractor as project supervisor only coordinated work of trades, conducted weekly safety meetings with contractors and regular walk-throughs, and had authority to stop work if he observed unsafe condition]; *Hughes v Tishman Construction Corp.*, 40 AD3d 405 [1st Dept 2007] [site-safety contractor role on site was to perform safety-related tasks and it had no authority over subcontractors' work; irrelevant whether it had authority to stop work for safety reasons]; see also *Martinez v 342 Prop. LLC*, 89 AD3d 468 [1st Dept 2011] [dismissing contractor's contractual indemnification claim against subcontractor as subcontractor's sole role was to advise contractor on site safety matters and there was no evidence it was negligent]).

Moreover, TRC's alleged failure to fulfill a safety-related condition of its contract with LMDC may not be the basis for holding it liable to plaintiff. (See *Smith v McClier Corp.*, 22 AD3d 369 [1st Dept 2005] [subcontractor had only general contractual obligation to ensure compliance with safety regulations, which was insufficient to impose liability for common law negligence]).

LMDC's assertion that further discovery may lead to relevant evidence is speculative and without evidentiary basis. (CPLR 3212[f]; see *Flores v City of New York*, 66 AD3d 599 [1st Dept 2009] ["the mere hope that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process is insufficient to deny such a motion"]). The opinion in

Cedar and Washington Assoc., LLC v Bovis Lend Lease, LMB Inc., et al., Index No.

621123/2010 (Sup Ct, NY Co., Tingling, J.), is not considered.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant TRC Environmental Corporation's motion for an order dismissing the complaint and all cross claims against it is granted, and the complaint is hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant; and it is further

ORDERED, that the remainder of the action shall continue.

ENTER:


Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: November 9, 2012
New York, New York

NOV 09 2012

FILED

NOV 15 2012

NEW YORK
COUNTY CLERK'S OFFICE