Klamka v Brooks Shopping Ctrs., LLC
2012 NY Slip Op 33446(U)
March 5, 2012
Supreme Court, New York County
Docket Number: 114494/2008
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Index Number : 114494/2008
KLAMKA, STANLEY
vs.
BROOKS SHOPPING CENTERS
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 9.23.2011
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

Motion sequence 005 is decided in accordance with the annexed Memorandum Decision. It is hereby

ORDERED that defendants/third-party plaintiffs Brooks Shopping Center, LLC, Benenson Capital Partners, LLC and The Whiting Turner-Company Company's joint motion for contractual indemnification against third-party defendant Titan Contracting Group, Inc. is granted as to Brooks Shopping Center, LLC and the Whiting-Turner Company, but denied as to Benenson Capital Partners, LLC; and it is further

ORDERED that third-party defendant Titan Contracting Group, Inc.'s cross motion to dismiss the third-party complaint is granted only as against defendant/third party plaintiff Benenson Capital Partners, LLC; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that counsel for Brooks Shopping Centers shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: 3.5.2012

J.S.C.
HON. CAROL EDMEAD

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

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: PART 35

----------X

STANLEY KLAMKA,

Plaintiff,

-against-

BROOKS SHOPPING CENTERS, LLC, BENENSON CAPITAL PARTNERS, LLC, THE WHITING-TURNER CONTRACTING COMPANY and INFINITY CONSTRUCTION SERVICES, INC.,

Defendants.

----------X

THE WHITING-TURNER CONTRACTING COMPANY, BROOKS SHOPPING CENTER, LLC and BENENSON CAPITAL PARTNERS, LLC,

Third-Party Plaintiff,

-against-

TITAN CONTRACTING GROUP,

Third-Party Defendants.

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Index №.: 114494/08
Motion Seq. Nos. 005

DECISION AND ORDER

Third-Party Index №.: 591077/08

CAROL R. EDMEAD, J.:

In a case involving a laborer who fell through a roof, defendants/third-party plaintiffs Brooks Shopping Center, LLC (Brooks), Benenson Capital Partners, LLC (Benenson) and The Whiting-Turner Contracting Company (Whiting-Turner) move for summary judgment, pursuant to CPLR 3212, on their contractual indemnification claims against third-party defendant Titan Contracting Group, Inc. (Titan). Titan cross-moves for summary judgment dismissing the third-party complaint.

BACKGROUND

On May 7, 2007, plaintiff fell through a roof while working on a renovation project at Cross County Shopping Center in Yonkers, New York. At the time, he was employed by Titan. Brooks owns the shopping center, while Whiting-Turner was the construction manager on the project.

Plaintiff testified that while carrying out demolition work on a roof at the shopping center, he was standing in a hole where all of the roof had been removed, except the pressboard moisture barrier, which crumpled, causing plaintiff to fall approximately 12 feet (Plaintiff's Deposition Transcript, at 64). Plaintiff also stated that in other areas where he and other Titan employees carried out demolition work on the roof, the moisture barrier was reinforced with plywood, but not where he fell (*id.*, at 57, 65).

By a decision and order dated November 15, 2011, this court granted plaintiff summary judgment as to liability on his Labor Law §§ 240 (1) and 241 (6) claims against Brooks and Whiting-Turner, dismissed plaintiff's Labor Law § 200 and common-law negligence claims, and dismissed all claims and cross claims as against Benenson (November 2011 Decision).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, *regardless of the sufficiency of the opposing papers* (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]).

Brooks, Whiting-Turner, and Benenson argue that they are entitled indemnification from Titan based on Whiting-Turner's contract with Titan. The agreement's indemnification provision provides, in relevant part:

> (E) the Subcontractor hereby assumes entire responsibility and liability for any and all damage or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of any tier of the Subcontractor or otherwise and to all property caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work, any extension, modification or amendment to the Work by change order or otherwise. Except to the extent, if any, expressly prohibited by statute and excluding from this indemnity such acts or omissions, if any, of the party indemnified for which it is not legally entitled to be indemnified by the Subcontractor under applicable law, should any claims for such damage or injury (including death resulting therefrom) be made or asserted, whether or not such claims are based upon Whiting-Turner's or the Owner's alleged active or passive negligence or participation in the wrong or upon any alleged breach of any statutory duty or obligation on the part of Whiting-Turner or the Owner, the Subcontractor agrees to indemnify and save harmless Whiting-Turner and the Owner, their officers, agents, servants and employees from and against any and all such claims and further

> from and against all loss, cost, expense, liability, damage, penalties, fines or injury, including legal fees and disbursements ...

(Whiting-Turner/Titan Contract, Article 9 [e]).

Here, it is clear that the accident arose out of Titan's demolition work, triggering the indemnification provision in the Whiting-Turner/Titan agreement. However, since the court determined that Benenson is not an owner of the subject property in the November 2011 Decision, Benenson is not entitled to indemnification under the agreement, and its claim for contractual indemnification from Titan is dismissed (*see* November 2011 Decision, at 3-4).

Brooks and Whiting-Turner submit other provisions from the Whiting-Turner/Titan agreement that show that it was Titan's responsibility to provide fall protection to its workers:

> As required by the work, [Titan] shall be responsible to cover and/or barricade any roof openings, floor openings, wall openings, excavations, or other fall hazards that are created by performing the scope of the work

(*id.* at Exhibit B, § B [13]).

Moreover, the agreement provides that while Whiting-Turner would provide scaffolding,

> [i]t will be the responsibility of the subcontractor to provide any further work platforms, ladders, fall protection, etc. in accordance with OSHA guidelines, that may be required to complete the work beyond what is being provided by Whiting-Turner without compromising the safety of other workers or the public

(*id.* at Exhibit B, Specific Scope of Work, Item 9).

[* 6]

Titan argues that Maryland law should determine the applicability of the indemnification provision, and that the provision is unenforceable under Maryland law. The Whiting-Turner/Titan agreement provides that: "This Subcontract shall be governed by the laws of the State of Maryland, without regard to principles of conflict of laws" (*id.* at Article 9 [u]).

Maryland Courts and Judicial Proceedings Code § 5-401 (a) (1) provides:

> A covenant, promise, agreement, or understanding in, or in connection with or collateral to, a contract or agreement relating to architectural, engineering, inspecting, or surveying services, or the construction, alteration, repair, or maintenance of a building, structure, appurtenance or appliance, including moving, demolition, and excavating connected with those services or that work, purporting to indemnify the promisee against liability for damages arising out of bodily injury to any person or damage to property caused by or resulting from the sole negligence of the promisee or indemnitee, or the agents or employees of the promisee or indemnitee, is against public policy and is void and unenforceable.

The Court of Appeals of Maryland has stated that this statute "renders unenforceable a contract provision only insofar as it embodies an agreement providing for indemnity to the promisee when the promisee is solely negligent. To the extent that the same contract provision reflects the parties' intent concerning concurrent negligence, the statute is inapplicable" (*Bethlehem Steel Corp. v G.C. Zarnas & Co.*, 304 Md 183, 195 [1985]).

The provision at issue here does not purport to indemnify

Brooks and Whiting-Turner when they are solely negligent. Instead, it specifically carves out indemnification in circumstances "expressly prohibited by statute," and excludes "acts or omissions, if any, of the party indemnified for which it is not legally entitled to be indemnified by the Subcontractor under applicable law." As such, Maryland Courts and Judicial Proceedings Code § 5-401 (a) (1) is inapplicable to the subject indemnification provision, and the provision is enforceable.

This is the same result that an analysis of New York law would have yielded. General Obligations Law § 5-322.1 (1) provides that:

> "[a] covenant, promise, agreement or understanding in, or in connection with ... a contract or agreement relative to the construction, alteration, repair or maintenance of a building ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable."

The Court of Appeals has held that this statute "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" (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 207 [2008]). Here, as the court determined in the November 2011 Decision, neither Brooks nor

Whiting Turner was negligent in plaintiff's accident (November 2011 Decision, at 4-7). Moreover, the limiting language in the indemnification provision would prevent Brooks and Whiting-Turner from being indemnified for any of their own negligence. Thus, the subject indemnification provision would pass muster under General Obligations Law § 5-322.1 (1).

As plaintiff's accident arose from Titan's demolition work, and as neither Brooks nor Whiting-Turner was negligent in plaintiff's accident, both Brooks and Whiting Turner are entitled to contractual indemnification from Titan.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants/third-party plaintiffs Brooks Shopping Center, LLC, Benenson Capital Partners, LLC and The Whiting Turner-Company Company's joint motion for contractual indemnification against third-party defendant Titan Contracting Group, Inc. is granted as to Brooks Shopping Center, LLC and the Whiting-Turner Company, but denied as to Benenson Capital Partners, LLC; and it is further

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ORDERED that counsel for Brooks Shopping Centers shall serve a copy of this order with notice of entry within twenty (20) days of entry on all counsel.

Dated: March 5, 2012

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD