

Contino v 340 Madison Owner LLC

2013 NY Slip Op 30406(U)

January 24, 2013

Supreme Court, New York County

Docket Number: 116392/07

Judge: Paul Wooten

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN

PART 7

ANTHONY J. CONTINO and SANDRA CONTINO,

Plaintiffs,

INDEX NO. 116392/07

-against-

MOTION SEQ. NO. 003

340 MADISON OWNER LLC and McGRAW HUDSON
CONSTRUCTION CORPORATION,

Defendants.

340 MADISON OWNER LLC and McGRAW HUDSON
CONSTRUCTION CORPORATION,

Defendants/Third-Party Plaintiffs,

THIRD-PARTY INDEX NO. 590336/08

-against-

SAGE ELECTRICAL CONTRACTING,

Third-Party Defendant.

FILED
FEB 27 2013
NEW YORK
COUNTY CLERK'S OFFICE

The following papers numbered 1 to 2 were read in this motion by the petitioner to reargue, pursuant to CPLR 2221.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits (Memo)	<u>2</u>
Replying Affidavits (Reply Memo)	

Cross-Motion: Yes No

In this action which arises from an accident at a construction site, third-party defendant Sage Electrical Contracting (Sage) moves for an order, pursuant to CPLR 2221(d), granting it leave to reargue this Court's decision and order, under motion sequence 002, dated March 28, 2012 (Prior Order), and upon reargument, granting Sage summary judgment in its favor, pursuant to CPLR 3212 and Workers' Compensation Law § 11, on its counterclaim for

contribution or common-law indemnification.¹

BACKGROUND

On October 4, 2005, plaintiff Anthony J. Contino (plaintiff), an electrician then in the employ of Sage, slipped and fell on a slick of grease/oil and water at the base of a staircase in premises located at 340 Madison Avenue in Manhattan. Defendant 340 Madison Owner LLC (340 Madison) owned the premises, and defendant McGraw Hudson Construction Corporation (McGraw Hudson) was the general contractor for the construction project. Sage was a subcontractor hired by McGraw Hudson to perform electrical work at the site. Plaintiff was aware of the puddle, as he had walked past it several times prior to the accident. McGraw Hudson's laborers were responsible for keeping the work site clean.

The complaint consists of three causes of action, the first two sounding in negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The third cause of action is a derivative claim brought by plaintiff's wife for loss of consortium. 340 Madison and McGraw Hudson's third-party complaint asserts four causes of action for contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance. In its third-party answer, Sage asserts a counterclaim for contribution/common-law indemnification.

STANDARDS

Reargument Standard

CPLR 2221(d) provides, in relevant part, that a motion to reargue must be identified as such and "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion." A motion for reargument "addressed to the discretion of the court, is

¹ A motion in a companion case pending before this court, *340 Madison Owner LLC v Sage Electrical Contracting, Inc.*, Index No. 115000/08, is being decided along with this one, in a separate decision.

designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law" (*Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]; see CPLR 2221[d] [2]). A reargument motion is based solely on the papers submitted in connection with the prior motion. It is not a means by which an unsuccessful party can obtain a second opportunity to argue one or more issues previously decided, nor is it an opportunity to submit new or additional facts not previously submitted as part of the motion (see *McGill v Goldman*, 261 AD2d 593, 594 [2d Dept 1999]; *15 E. 63 St. Co. v Cook*, 120 AD2d 442, 443 [1st Dept 1986]; *Foley v Roche*, 68 AD2d 558, 567 - 568 [1st Dept 1979]).

Summary Judgment Standard

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "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]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth*

Century-Fox Film Corp., 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Sage bases its summary judgment motion in large part on the deposition testimonies of plaintiff, Robert Avitabile (McGraw Hudson's superintendent), Richard Conti (McGraw Hudson's labor foreman), and Carlo Pannone (Sage's superintendent). 340 Madison and McGraw Hudson argue that these deposition transcripts, while certified, are unsigned and unsworn, and thus, cannot be considered admissible evidence, citing *Lo Cicero v Frisian* (150 AD2d 761 [2d Dept 1989] [unsigned and unsworn transcripts of examinations before trial inadmissible]). However, more recent Appellate Division, Second Department, case law states that "the transcript of [the] examination before trial was certified and, hence, in admissible form" (*Felberbaum v Weinberger*, 40 AD3d 808, 809 [2d Dept 2007]).

More frequent statements of the law indicate that unsigned, unsworn deposition transcripts can be admissible if the defendant forwarded the deposition to the deponent for consideration and review, but the deponent failed to sign or return it within 60 days (see CPLR 3116[a]; see e.g. *Franzese v Tanger Factory Outlet Ctrs., Inc.*, 88 AD3d 763, 763-764 [2d Dept 2011]; *R.M. Newell Co. v Rice*, 236 AD2d 843, 844 [4th Dept 1997]), or that "[a]n unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion" (*Morchik v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999] [emphasis added]; see also *R.M. Newell Co. v Rice*, 236 AD2d at 844).

However, the facts of this matter do not fall within any of the situations discussed above.

Here, Sage uses unsworn, unsigned, but certified deposition transcripts as a basis for its summary judgment motion, and fails to give any indication that its use of the transcripts falls within CPLR 3116(a). Yet, 340 Madison and McGraw Hudson, even while attacking Sage's use of them, use these same transcripts as a basis for their opposition. This situation falls more within the context of *Morchik* (257 AD2d at 535), where the Court found that, "[plaintiff's] transcript here, though unsigned, had been certified by the court reporter. Moreover, plaintiff himself used portions of it in his opposition papers. We find that the court erred in denying the motion on these grounds . . ." The Court finds that the deposition transcripts used by Sage in its summary judgment motion are admissible. Therefore, the Court will consider Sage's motion.

Workers' Compensation Law § 11

"Workers' Compensation Law § 11 prohibits a third-party action for common-law indemnification or contribution against an employer except in the case where, inter alia, the employee has sustained a grave injury" (*Cocom-Tambriz v Surita Demolition Contr., Inc.*, 84 AD3d 1300, 1301 [2d Dept 2011]). The definition of "grave injury" is set by statute, and those conditions listed, and only those conditions listed, constitute a "grave injury" (see *Fleming v Graham*, 10 NY3d 296, 300 [2008] ["the list, both 'exhaustive' and 'not illustrative,' is 'not intended to be extended absent further legislative action' (Governor's Approval Mem at 55)"]).

It is undisputed that plaintiff was employed by Sage and that he did not sustain a "grave injury." Therefore, that part of Sage's motion which seeks summary judgment dismissing 340 Madison and McGraw Hudson's contribution and common-law indemnification claims is granted.

Contractual Indemnification

[A] party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances. [A] party seeking contractual indemnification must prove itself free from negligence,

* 6]

because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. Where a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature [internal quotation marks and citations omitted](*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 2012 NY Slip Op 00315, *2 [2d Dept 2012]).

340 Madison and McGraw Hudson contend that paragraphs 7(a) and (c) of the March 15, 2004 McGraw Hudson/Sage Trade Contract entitle them to be indemnified by Sage if they are found liable to plaintiff in this action. However, the Court finds 340 Madison and McGraw Hudsons' argument on this point to be unavailing. Paragraph 7(a) provides indemnification "against all penalties for violation" of Sage's "covenants and warrants that it [would] perform the work in a safe and proper manner and so as to comply with all laws, rules, regulations, codes and ordinances referring to such work." Since there is no evidence that Sage failed to perform its work in a safe and proper manner, or that it failed to comply with any laws or rules, etc., it cannot be held liable for contractual indemnification under this provision.

Paragraph 7(c) requires indemnification if 340 Madison and McGraw Hudson are found liable for damages for bodily injuries "sustained by any person or persons *other than employees of [Sage]* [emphasis added]." Since plaintiff was an employee of Sage, no contractual indemnification based on this provision lies. Therefore, the part of Sage's motion which seeks summary judgment dismissing 340 Madison and McGraw Hudson's claim for contractual indemnification is granted.

Breach of Contract by Failure to Obtain Insurance

The parties do not discuss this cause of action in their motion papers. Thus, Sage has failed to meet its burden on its summary judgment motion, and the part of its motion which

seeks summary judgment dismissing this claim is denied.²

Sage's Counterclaim for Contribution or Common-Law Indemnification

It is well settled that the right of common-law indemnification belongs to parties determined to be vicariously liable without proof of any negligence or active fault on their part. [W]here one is held liable solely on account of the negligence of another, indemnification, not contribution, principles apply to shift the entire liability to the one who was negligent. ... Conversely, where a party is held liable at least partially because of its own negligence, contribution against other culpable tort-feasors is the only available remedy (*Siegl v New Plan Excel Realty Trust, Inc.*, 84 AD3d 1702, 1703 [4th Dept 2011][interior quotation marks and citations omitted]).

There is no evidence that Sage had anything to do with creating the grease/water hazard, or that it failed to clean the puddle up. There is also no evidence that Sage had any obligation to clean the area where plaintiff fell, or that it acted negligently in any way. Therefore, summary judgment in Sage's favor is granted on its counterclaim against 340 Madison and McGraw Hudson for contribution or common-law indemnification.

CONCLUSION

Accordingly, it is

ORDERED the motion by Sage Electrical Contracting, pursuant to CPLR 2221(d), granting it leave to reargue this Court's decision and order, under motion sequence 002, dated March 28, 2012 is granted; and it is further,

ORDERED that the portion of Sage Electrical Contracting's motion which seeks summary judgment dismissing 340 Madison Owner LLC and McGraw Hudson Construction Corporation's contribution, common-law and contractual indemnification claims is granted; and it is further

ORDERED that the part of Sage Electrical Contracting's motion which seeks summary

²Although a copy of the policy which Utica National Assurance Company issued to Sage is appended to the motion papers in the related case of *340 Madison Owner LLC v Sage Electrical Contracting, Inc.*, Index No. 115000/08 before this court, the court declines to search the record of a related case.

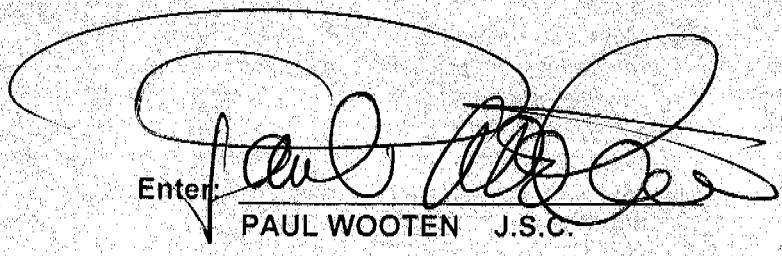
judgment dismissing 340 Madison Owner LLC and McGraw Hudson Construction Corporation's breach of contract claim is denied; and it is further

ORDERED that the portion of Sage Electrical Contracting's motion which seeks summary judgment on its counterclaim against 340 Madison Owner LLC and McGraw Hudson Construction Corporation for contribution or common-law indemnification is granted; and it is further,

ORDERED that Sage Electrical Contracting is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

Dated: 1/24/13

Enter: 
PAUL WOOTEN J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: : DO NOT FILE REFERENCE

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