

Johnson v Chelsea Grand East, LLC
20FHNY Slip Op 3HFÍ Í (U)
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Supreme Court, New York County
Docket Number: 112553/09
Judge: Anil C. Singh
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH
SUPREME COURT JUSTICE
Justice

PART 61

Index Number : 112553/2009
JOHNSON, CHARLES
vs
CHELSEA GRAND EAST 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 in accordance with the annexed memorandum opinion.*

ORDERED IN ACCORDANCE WITH
THE FOLLOWING DECISION / ORDER

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

Dated: 12/12/13

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 1. CHECK ONE: CASE DISPOSED
- 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 61

-----X
CHARLES JOHNSON,

Plaintiff,

DECISION AND
ORDER

-against-

Index No.
112553/09

CHELSEA GRAND EAST, LLC d/b/a HAMPTON
INN MANHATTAN CHELSEA, CHELSEA GRAND
EAST MANAGER, LLC d/b/a HAMPTON INN
MANHATTAN CHELSEA, and MIKESAM
CONSTRUCTION CORPORATION,

Defendants.

-----X

HON. ANIL C. SINGH, J.:

This is a personal injury action arising from a fall on a stairway in a hotel. Defendants Chelsea Grand East, LLC (“Chelsea Grand East”) and Chelsea Grand East Manager LLC (“Grand East Manager”) move pursuant to CPLR 3212 for summary judgment on Chelsea Grand East’s cross-claim for indemnification against defendant Mikesam Construction Corporation (“Mikesam Construction”). In addition, defendants move to dismiss the allegations in plaintiff’s complaint and bill of particulars that plaintiff’s accident was proximately caused by a transitory condition or due to an inadequate handrail. Finally, Grand East Manager moves to dismiss all claims against it, contending that it cannot be liable as a matter of law because it is not the owner of the hotel.

Defendant Mikesam Construction opposes the motion.

Plaintiff did not file a cross-motion for summary judgment pursuant to CPLR 3212(b). However, plaintiff in its opposition papers asks this Court to search the record and to award partial summary judgment in plaintiff's favor pursuant to CPLR 3212(g) on the limited issue that defendants had notice of the unequal riser heights on the steps in issue, so that plaintiff does not have to prove notice at trial. Plaintiff consents to the dismissal of the action as against the defendant Grand East Manager. In addition, plaintiff consents to the dismissal of his claims asserting that the accident was caused by a transitory condition or an inadequate handrail. However, plaintiff opposes the dismissal of his claim that defendants were negligent in providing and maintaining a stairway containing steps with unequal riser height.

Plaintiff commenced the instant action by filing a summons and complaint on April 6, 2010.

The complaint alleges that defendants Chelsea Grand East and Grand East Manager own, operate and manage the Hampton Inn hotel at 108 West 24th Street in Manhattan.

It is undisputed that the twenty-story hotel was constructed between July 2001 and July 2003; that non-party HCS Construction Services ("HCS") served as the general contractor for construction; and that on July 16, 2001, HCS contracted with defendant Mikesam Construction as its subcontractor.

The complaint and verified bill of particulars state that plaintiff Charles Johnson was a guest at the Hampton Inn on June 29, 2009. As he was walking down a stairway leading from the lobby to a laundry room for guests in the basement, he fell on the last two steps and was injured.

The bill of particulars asserts that the steps were negligently constructed and/or maintained in three respects: 1) there is a riser height differential in the last step of the staircase; 2) there is no sufficient handrail in the stairway; and 3) the steps were dirty and/or slippery at the time of plaintiff's accident.

Defendants Chelsea Grand East and Grand East Manager answered the amended complaint, raising six affirmative defenses, including comparative negligence and assumption of the risk. In addition, the defendants asserted three cross-claims against Mikesam Construction. The first cross-claim sounds in negligence. The second cross-claim seeks indemnification. The third cross-claim asserts that Mikesam Construction failed to obtain insurance policies naming Chelsea Grand East and Grand East Manager as additional insureds.

Discussion

The moving defendants rely on a contract between HCS and Mikesam Construction for their second cross-claim seeking indemnification.

Article 4.5.1 of the contract between HCS, as general contractor, and Mikesam Construction, as subcontractor, states as follows:

The Subcontractor [Mikesam Construction] warrants to the Owner [Chelsea Grand East], Architect and Contractor that materials and equipment furnished under this Subcontract will be of good quality and new unless otherwise required or permitted by the Subcontract Documents,¹ that the work of this Subcontract will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Subcontract Documents. Work not conforming to these requirements, including substitutions not properly approved and authorized, may be considered defective. The Subcontractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Subcontractor, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. This warranty shall be in addition to and not in limitation of any other warranty or remedy required by law or by the Subcontract Documents.

(Motion, exhibit N, p. 6).

Article 4.6.1 states in pertinent part as follows:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner [Chelsea Grand East], Contractor [HCS] ... from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

¹At Article 1.1 of the contract between HCS and Mikesam Construction, Subcontract Documents are defined and include Contract Documents enumerated in the contract between Chelsea Grand East and HCS (Motion, exhibit "N"). Article 9.3.3 of the contract between Chelsea Grand East and HCS defines the Contract Documents to include the Drawings, Specifications and other documents prepared by the architect (Motion, exhibit "O").

(Id.).

Mikesam Construction relies upon General Obligations Law (“GOL”) 5-322.1 in support of its contention that the indemnification clause of the construction contract is void and unenforceable because there is an issue of fact as to whether the co-defendants are negligent. GOL 5-322.1 states:

A covenant, promise, agreement or understanding in, or connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving, demolition and excavating connected therewith, 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 the indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

(GOL 5-322.1)

Here, the indemnification provision in the subject contract requires Mikesam Construction to indemnify Chelsea Grand East and HSC from all claims arising out of Mikesam Construction’s negligence or the negligence of its subcontractors. Since it has not been determined whether Mikesam Construction was negligent, an award of summary judgment on the contractual indemnification cross-claim would be premature (Gomez v. Sharon Baptist Board of Directors, Inc., 55 A.D.3d 446, 447 [1st Dept., 2008]).

As we noted above, plaintiff consents to the dismissal of the action as against

Chelsea Grand Manager, as well as the dismissal of his claims asserting that the accident resulted from a transitory condition and/or an inadequate handrail. In light of plaintiff's consent, it is appropriate for this Court to dismiss the complaint in its entirety as against Chelsea Grand Manager. Likewise, it is appropriate to dismiss plaintiff's claim against Chelsea Grand East and Mikesam Construction based on a transitory condition and/or an inadequate handrail.

We decline the invitation of plaintiff to grant it summary judgment on the issue of whether defendants had notice of the unequal riser heights on the stairway. This issue is completely unrelated to the claims addressed in the motion for summary judgment which is before us regarding whether plaintiff's accident was caused by a transitory condition or an inadequate handrail, as well as the issue of indemnification. "A motion for summary judgment addressed to one claim or defense does not provide a basis for the court to search the record to grant summary judgment on an unrelated claim or defense (Frank v. City of New York, 211 A.D.2d 478, 479 [1st Dept., 1995] (internal citation omitted)).

Accordingly, it is

ORDERED that the motion of defendant Chelsea Grand East, LLC for summary judgment is granted to the extent that plaintiff's claim for negligence based upon a transitory condition and/or an inadequate handrail is dismissed; and it is further

ORDERED that the motion for summary judgment on the cross-claim against

Mikesam Construction Corporation is denied; and it is further

ORDERED that the motion of defendant Chelsea Grand East Manager, LLC to dismiss the complaint is granted, and the complaint is dismissed as against said defendant, with costs and disbursements as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

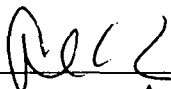
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the Court's records to reflect the change in the caption.

The foregoing constitutes the decision and order of the court.

Date:
New York, New York



Anil C. Singh