

Brown v 11 Madison LLC
2014 NY Slip Op 30573(U)
March 10, 2014
Supreme Court, New York County
Docket Number: 102203/2011
Judge: Joan M. Kenney
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
Justice

PART 8

Index Number : 102203/2011
BROWN, DAVID
vs.
11 MADISON
SEQUENCE NUMBER : 001
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

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED

MAR 12 2014

NEW YORK
COUNTY CLERK'S OFFICE

Dated: March 10, 2014

Joan M. Kenney, J.S.C.

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: IAS Part 8

-----X
David Brown,

Plaintiff,

-against-

11 Madison LLC,

Defendant.

-----X
11 Madison LLC,

Third-Party-Plaintiff,

-against-

Credit Suisse, EMCOR Facilities Services, Inc., and
Penguin Air Conditioning Corp.,

Third-Party-Defendants.

-----X
KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion to dismiss.

Papers

Notice of Motion, Affirmation, and Exhibits
Opposition Affirmation, Exhibits, and Memo of Law
Reply Affirmation

FILED

Numbered

1-18
19-20
21

Notice of Motion, Affirmation, and Exhibits
Opposition Affirmation, Exhibits, and Memo of Law
Reply Affirmation

22-35
36
37

In this personal injury action, defendant 11 Madison LLC (11 Madison), moves for an Order, pursuant to CPLR §3212, dismissing plaintiff's Labor Law claims. Movant also seeks conditional summary judgment on its third-party claims for common-law indemnification, as well as summary judgment against third-party defendant EMCOR Facilities Services, Inc. (EMCOR), for breach of contract.

Factual Background

Plaintiff David Brown (Brown) commenced this action on or about February 24, 2011 against 11 Madison seeking to recover monetary damages for personal injuries sustained by plaintiff on December 3, 2010, when he allegedly fell from an "A-frame" ladder at the premises located at 11 Madison Avenue, New York, New York (the accident). Thereafter, 11 Madison commenced a third-party action against Credit Suisse, EMCOR, and Penguin Air Conditioning Corp. (Penguin) for common-law indemnification.

Briefly, on December 3, 2010, plaintiff was working on the 20th floor of the building located at 11 Madison Avenue replacing a motor in a fan. 11 Madison was the owner/lessor of the premises which leased a portion of the building to third-party defendant Credit Suisse. Plaintiff was employed by Penguin as an Operating Engineer and was engaged in replacing a fan motor in one of the units at the time of his accident.

According to plaintiff, on the day of the accident, plaintiff and his co-worker Corey Rothman (Rothman), were on the 20th floor checking a fan power box motor that was blown out. A power box motor distributes air to a certain location on the floor from the chiller system which is attached to a vent system. Plaintiff and co-worker used a ladder that was stored in a mechanical room on that floor. The ladder was originally identified by plaintiff as belonging to EMCOR, but was later clarified as belonging to Penguin. Rothman first went up the ladder to remove the ceiling tiles, but had difficulty removing the motor, and so plaintiff went up to take a second look. Plaintiff spent about 15-20 minutes loosening the motor, which he then handed down to Rothman. After passing the motor to Rothman, plaintiff began his descent down the ladder. As he descended, the ladder tilted to the left and plaintiff fell, missing two steps and landing at the bottom of the ladder in an upright position. According to plaintiff, when his body came to a stop, he was still standing

[* 4]

and facing the ladder. Plaintiff told Rothman that he had hurt his back. They then went downstairs via the elevator and told their supervisor that plaintiff was hurt. Plaintiff was able to complete the rest of his shift.

Michael Tighe (Tighe), the chief engineer of Penguin for the past 23 years, testified on behalf of Penguin. According to Tighe, in 2010, near the time of plaintiff's accident, the motors of the power box fans were being replaced often. The power box fans had been in service since 1996 and most had reached their useful service life. Tighe testified that around the time of the accident there were more boxes failing than usual, and that plaintiff was repairing the fan box motor at issue in response to a house call/tenant complaint that the box was off and that the room was getting hot. There are over three thousand boxes in the building. Tighe further testified that an entry from a Penguin engineering log referencing the repair performed by plaintiff stated that plaintiff "replaced motor due to failure, not project related." He explained that there was a distinction between an ongoing project to replace the fan power box motors that were beginning to fail throughout the building (which was being done as scheduled maintenance) and the repair of a fan motor box that had already failed (which was the task plaintiff was engaged in at the time of incident). (See Tighe EBT, pp. 46-50). It was Tighe's understanding that EMCOR had undertaken all the management duties and responsibilities regarding the HVAC systems in the building.

The lease between 11 Madison and Credit Suisse requires Credit Suisse to obtain primary and non-contributory liability insurance, naming the landlord as an additional insured. The lease additionally requires that, should Credit Suisse engage a contractor to perform work in a building, the contractor must obtain insurance and name the landlord as an additional insured. Credit Suisse did obtain insurance and did list 11 Madison as an additional insured. Credit Suisse retained EMCOR as managing agent for their leased space in the building. The contract between EMCOR

and Credit Suisse required EMCOR to indemnify, defend, and hold harmless Credit Suisse against all losses, liabilities, damages, and claims resulting from negligence or misconduct of EMCOR, which results in any injury of any person (including EMCOR employees), and/or breach of EMCOR's obligations under the contract. The contract also requires that EMCOR purchase and maintain insurance naming Credit Suisse, its landlords, owners of its leased premises, and leasing agents as additional insured. EMCOR did list 11 Madison as an additional insured. EMCOR owns Penguin, which maintains and repairs the HVAC system for the space it occupied.

By correspondence dated April 21, 2011, 11 Madison tendered their defense to EMCOR based on the foregoing. A response dated November 3, 2011, from Continental Casualty Company (insurer for EMCOR) denied 11 Madison's request for indemnification and refused to provide coverage stating there was no contractual relationship between EMCOR and 11 Madison.

Arguments

Defendant 11 Madison argues that plaintiff's Labor Law §240(1), §241(6), and §200 claims should be dismissed because plaintiff was not entitled to the special protections afforded under New York State's Labor Law because plaintiff was not a protected worker as defined statutorily. Defendant 11 Madison further claims it is entitled to common-law indemnification on its third-party claims against EMCOR because any negligence imputed upon 11 Madison is purely vicarious. Defendant 11 Madison also seeks summary judgment against third-party defendant EMCOR for breach of contract for failure to procure insurance.

Plaintiff contends that he is entitled to the statutory protections of Labor Law §240(1) because his accident occurred while performing the type of work specifically protected by the Labor Law statute.

Third-party defendant EMCOR cross-moves to dismiss all contribution and common-law

[* 6]

indemnification claims as against it because EMCOR was not negligent, nor did it supervise or control plaintiff's work. EMCOR further moves to dismiss 11 Madison's breach of contract claim because EMCOR did fully satisfy its contractual obligations by procuring comprehensive general liability insurance naming 11 Madison as an additional insured.

Third-party defendant Penguin cross-moves to dismiss all contribution and common-law indemnification claims as against Penguin because §11 of the Workers' Compensation Law prohibits such claims as against plaintiff's employer. Penguin also moves to dismiss Credit Suisse's cross-claims for contractual indemnification and breach of contract claims because no such contract exists between the Penguin and Credit Suisse.

Discussion

Pursuant to CPLR 3212(b), "a motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and by other available proof, such as depositions and written admissions. The affidavit shall be by a person having knowledge of the facts; it shall recite all the material facts; and it shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision 'c' of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact. If it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The rule governing summary judgment is well established: "The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of

law, tendering sufficient evidence to eliminate any material issues of fact from the case.”

(*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]; *Tortorello v Carlin*, 260 Ad2d 201 [1st Dept 1999]).

Late cross-motions may be considered at the court’s discretion, even in the absence of good cause, when the late motion is dealing with practically identical issues raised by the original timely motion. *Filannino v. Triborough Bridge Tunnel Authority*, 34 A.D.3d 280, 281-282, 824 N.Y.S.2d 244 (1st Dept. 2006)(where timely motion sought summary judgment under statute that governed general duty to protect health and safety of employees and provision of other statute that governed reasonable and adequate protection and safety, and untimely motion sought summary judgment under flooring provision). If separate issues of liability are raised in the untimely cross-motion, the court need not entertain the late motion. *See Bressingham v. Jamaica Hosp. Med. Ctr.*, 17 A.D.3d 496, 497, 793 N.Y.S.2d 176 (2005).

11 Madison served its original motion for summary judgment timely, within thirty days of the filing of the Note of Issue, as per the Judge Kenney’s court rules. It is undisputed that EMCOR and Penguin’s cross-motions were late as it was received more than sixty days after the service of the Note of Issue. The critical issue here is whether EMCOR and Penguin’s cross-motion is sufficiently similar to, or related to, the 11 Madison motion, so as to render it timely. In its timely motion, 11 Madison seeks common-law indemnification on its third party claims against EMCOR and Penguin. Both EMCOR and Penguin cross-move seeking dismissal of those indemnification claims. Accordingly, both cross motions are sufficiently similar to the original motion and will be considered by the Court.

Labor Law §240(1) provides that:

“[a]ll contractors and owners and their agents... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

Generally, routine maintenance of a building or structure outside the context of construction is not viewed as activity that falls within the ambit of Labor Law §240(1). It is not important how parties generally characterize an employee's work, but rather what type of work he was performing at the time of injury. (*See Joblon v. Solow*, 91 N.Y.2d 457, 465, 695 N.E.2d 237, 242 [1998]). Here, whether the plaintiff was engaged in routine maintenance outside the construction context or whether he was engaged in the repair of a blown-out an power box motor has not been established as a matter of law. Defendant 11 Madison contends that plaintiff was performing a scheduled routine maintenance/replacement of worn fan motors throughout the building. Plaintiff argues that he was engaged in the *repair* of the fan box, which entailed first removing tiles from the ceiling, then removing the motor using ratchets, and then sliding the motor out. According to plaintiff, this work was far more extensive than if it were a mere routine maintenance. Furthermore, evidence in the form of an entry from a Penguin engineering log referencing the repair performed by plaintiff states that “replaced motor due to failure, not project related.” Accordingly, defendant has failed to establish as a matter of law that plaintiff's work at the time of injury was not covered by Labor Law §240(1).

Plaintiff consents to defendant 11 Madison's motion to dismiss plaintiff's claims asserted under Labor Law §241(6) and Labor Law §200, as well as those claims asserted under common-law negligence. Accordingly, said claims are dismissed.

A party cannot obtain common-law indemnification unless it has been held to be

vicariously liable without proof of any negligence or actual supervision on their own part. *McCarty v. Turner Coast, Inc.*, 17 N.Y.3d 369, 377-78, 953 N.E.2d 794, 801 (2011). Liability for indemnification may only be imposed against those parties who exercise actual authority over plaintiff's work. *Id.* Here, Credit Suisse hired EMCOR for maintenance services. EMCOR in turn used Penguin, which is owned by EMCOR, to maintain and repair the HVAC air conditioning systems. Defendant 11 Madison argues that EMCOR assumed the responsibility to maintain the ventilation and air conditioning services of the building as evidenced by the contract between EMCOR and Credit Suisse. However, this alone is insufficient to establish that EMCOR actually supervised or directed the injured plaintiff's work, especially in light of the fact that EMCOR outsourced the work that resulted in the plaintiff's injury out to Penguin. However, according to the evidence presented, it is unclear whether EMCOR had absolutely no role in the work being performed by Penguin employees. According to Tighe's testimony, Penguin employees did take direction from EMCOR on certain things, and on the day of plaintiff's injury, an EMCOR supervisory and assistant chief engineer at night was on shift, raising the question of how much direction EMCOR actually did exert over Penguin in performing its work. EMCOR's statement that there is no evidence that EMCOR was negligent or that EMCOR supervised and controlled plaintiff's injury producing work is self-serving. In light of the foregoing, the issue of EMCOR's actual supervisory role is a factual dispute to be resolved at the trial of this matter.

Defendant 11 Madison's motion for summary judgment against EMCOR for breach of contract for failure to procure insurance must fail as a matter of law. Through its contract with Credit Suisse, EMCOR was obligated to purchase and maintain comprehensive general liability insurance, naming Credit Suisse, its landlords, owners of its leased premises, and leasing agents

as additional insured. It is undisputed that EMCOR listed 11 Madison as an additional insured as is evidenced by the insurance policy and certificate of insurance naming 11 Madison as such. EMCOR had a comprehensive general liability insurance policy from Continental Casualty Company which contains a blanket additional insured endorsement, satisfying EMCOR's contractual obligations. While EMCOR's insurance carrier has declined defendant 11 Madison's tender to them for reasons undisclosed to the Court, this does not affect whether or not EMCOR fulfilled its contractual obligations in naming 11 Madison as an additional insured.

New York Workers' Compensation Law Section 11 states that "an employer shall not be liable for contribution or indemnity to any third party person based upon liability for injuries sustained by an employer acting within the scope of his or her employment for such employer unless...such employee has sustained a grave injury." In this case, there is no allegation that plaintiff sustained grave injuries. Therefore, Penguin, as plaintiff's employer, is entitled to the safe harbor in Section 11.

Co-defendant Credit Suisse does not oppose Penguin's cross-motion to dismiss Credit Suisse's cross-claims for contractual indemnification and breach of contract for failure to procure insurance. Accordingly, said claims are dismissed for co-defendant's failure to rebut the arguments made seeking said relief from this Court. Accordingly, it is hereby

ORDERED, that defendant 11 Madison's motion, pursuant to CPLR 3212 dismissing the plaintiff's Labor Law §240(1) claim, is denied; and it is further

ORDERED, that defendant 11 Madison's motion, pursuant to CPLR 3212 dismissing plaintiff's Labor Law §241(6) and Labor Law §200 claims, as well as those claims asserted under common-law negligence, is granted, on consent; and it is further

ORDERED, that defendant 11 Madison's motion, pursuant to CPLR 3212 granting summary judgment on its third party claims for common-law indemnification as against EMCOR, and EMCOR's cross-motion for the same relief, is denied; and it is further

ORDERED, that defendant 11 Madison's motion, pursuant to CPLR 3212 granting summary judgment against third-party defendant EMCOR for breach of contract, is denied;

ORDERED, that third-party defendant EMCOR's cross-motion, pursuant to CPLR 3212 dismissing any and all claims and cross claims asserted against it for contribution and common-law negligence, is denied; and it is further

ORDERED, that third-party defendant EMCOR's cross-motion, pursuant to CPLR 3212 dismissing 11 Madison's third-party claim for breach of contract, is granted; and it is further

ORDERED, that third-party defendant Penguin's motion, pursuant to CPLR 3212 dismissing any and all claims and cross claims asserted against it for contribution and common-law indemnification under Section 11 of the Workers' Compensation Law, is granted; and it is further

ORDERED, that third-party defendant Penguin's cross-motion, pursuant to CPLR 3212 dismissing Credit Suisse's cross-claims for contractual indemnification and breach of contract, is granted; and it is further

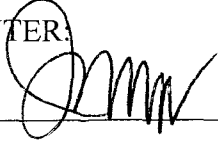
ORDERED, that third-party defendants EMCOR and Penguin's cross-motion to dismiss and sever 11 Madison's third-party complaint and Credit Suisse's cross claims against EMCOR and Penguin, is denied; and it is further

ORDERED, that the parties proceed to mediation/trial forthwith

Dated: March 10, 2014

FILED
MAR 12 2014
NEW YORK
COUNTY CLERK'S OFFICE

ENTER


Joan M. Kenney, J.S.C.