

McCloskey v Vornado Realty Trust
2014 NY Slip Op 30772(U)
March 28, 2014
Supreme Court, New York County
Docket Number: 104672/09
Judge: Jeffrey K. Oing
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: JEFFREY K. OING
J.S.C. _____
Justice _____

PART 48

Index Number : 104672/2009
MCCLOSKEY, ROBERT V.
vs.
VORNADO REALTY TRUST
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

"This motion is decided in accordance with the annexed decision and order of the Court."

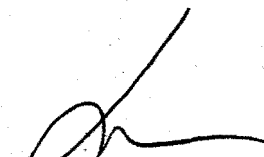
FILED

MAR 31 2014

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 3/28/14



JEFFREY K. OING
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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48

-----x
ROBERT V. MCCLOSKEY,

Plaintiff,

-against-

VORNADO REALTY TRUST, MERCHANDISE MART
PROPERTIES, INC., MMPI PIERS, LLC,
ENK INTERNATIONAL, LLC, GLOBAL
EXPERIENCE SPECIALISTS, INC. F/K/A
GES EXPOSITION SERVICES, INC.,
CITADEL SECURITY AGENCY, and
GUARDSMARK, LLC,

Defendants.

Index No.: 104672/09

Mtn Seq. Nos. 002,
003, 004 and 005

DECISION AND ORDER

-----x
VORNADO REALTY TRUST, MERCHANDISE MART
PROPERTIES, INC., and MMPI PIERS LLC,

Third-Party
Plaintiffs,

-against-

PORT PARTIES, INC., CITADEL SECURITY
AGENCY, AND GES EXPOSITION SERVICES, INC.

Third-Party
Defendants.

FILED

MAR 31 2014

NEW YORK
COUNTY CLERK'S OFFICE

-----x
T & H SECURITY, INC. D/B/A CITADEL
SECURITY AGENCY S/H/A CITADEL
SECURITY AGENCY,

Second Third-Party
Plaintiff,

-against-

GUARDSMARK, LLC,

Second Third-Party
Defendant.

-----x

JEFFREY K. OING, J.:

Background

On February 22, 2009, between approximately 5:40 a.m. and 6:00 a.m., plaintiff, Robert V. McCloskey, sustained injuries when he allegedly tripped and fell over a chain-link rope at a pedestrian entranceway to the parking lot in front of Pier 94, located in Manhattan at 54th Street and 12th Avenue. At the time of the accident, plaintiff was reporting for work with third-party defendant Port Parties, Inc. ("Port Parties") at Pier 94. At his EBT, plaintiff testified that he had worked approximately ten to fifteen times prior to the accident at Pier 94 in the past, and almost every time he worked there he would use the same entranceway in which the chain-link rope at issue was suspended between two concrete dividers ((McCloskey 2/17/10 EBT, pp. 32-33). The earliest plaintiff had reported for work for Port Parties at Pier 94 was 7:00 a.m. (Id., p. 35). Plaintiff could not remember the chain between the two dividers being up on any previous morning he had reported to Pier 94 (Id., p. 34).

Plaintiff's testimony concerning the accident is as follows: "one of my shins rubbed against the chain that is attached to the two pillars and then I tripped and fell over", and that "I didn't see the chain until I felt one of my legs hit it" (Id., p. 21). Plaintiff also testified that at the time of his accident it was dark and that he could only see one to two feet in front of him (Id., p. 47). He also gave testimony that he did not see an

orange cone on the ground at time of his accident, nor had he ever seen one prior to his accident (Id., p. 39).

Pier 94, a venue for trade shows, is owned by the City of New York and leased to defendant MMPI Piers LLC ("MMPI"). MMPI is owned by defendant Vornado Realty Trust ("Vornado"). MMPI licenses the space to other entities for trade shows. MMPI also hires other companies to perform services for them at Pier 94. For example, MMPI hired Port Parties to handle lighting, and defendant Guardsmark, LLC ("Guardsmark") to handle the building security, including the opening and closing of the chain barriers in the parking lot entrances and pedestrian walkways.

For several days in February 2009, including February 22, 2009, the date of plaintiff's accident, MMPI licensed the location to defendant ENK International, LLC ("ENK") for a trade show on women's apparel known as the Coterie Show. ENK hired Port Parties for cleaning. ENK also hired defendant Global Experience Specialist, Inc. f/k/a GES Exposition Services, Inc. ("GES") to construct vendor booths, and defendant Citadel Security Agency ("Citadel") to provide security during the trade show in the interior of the building at Pier 94 and to direct vehicular traffic in the parking lot.

Citadel's Motion

In motion sequence no. 002, Citadel moves, pursuant to CPLR 3212, for an order granting it summary judgment: 1) dismissing

Index No. 104672/09
Mtn Seq. Nos. 002, 003, 004, 005

Page 4 of 22

plaintiff's complaint, and 2) dismissing any and all cross-claims against it.

As noted, supra, ENK hired Citadel to provide security during the Coterie Show in the interior of the building, and to direct vehicular traffic in the parking lot while the show was open. Citadel asserts that it owed no duty to plaintiff by arguing that as a contracting party it may only be held liable in tort to a third party, such as plaintiff, if it assumed a duty of care in the following three instances: "(1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, 'launches a force or instrument of harm'; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely" (Espinal v Melville Snow Contractors, Inc., 98 NY2d 136 [2002]). In that regard, Citadel argues that its contract with ENK does not give rise to tort liability against it concerning plaintiff's injuries because none of Espinal's three exceptions to non-liability apply.

Regarding the first and second exceptions, Citadel claims that it demonstrated care in the performance of its security duties, and had no responsibilities for the chain-link rope over which plaintiff allegedly tripped. Further, there is no proof of detrimental reliance by plaintiff and defendant MMPI, the owner

of the premises, and MMPI's security contractor, defendant Guardsmark, on Citadel's continued performance of its duties.

With respect to the third exception, Citadel argues that it had no control over the chain, and no prior notice that it was up on the morning of the accident. In that regard, the chain could only be taken down with keys, and only Guardsmark or MMPI had the keys to the chain-link rope. Citadel claims that all it could do was request that the chain be taken down by defendant Guardsmark.

Citadel's reliance on Williams v Stevenson Commons Associates, 31 AD3d 289 (1st Dept 2006) to support its argument that it owed no duty to plaintiff is misplaced. In Williams, the plaintiff brought a claim against the company that provided security at the apartment complex where she tripped and fell. The Appellate Division reversed Supreme Court, and granted the defendant security company's motion for summary judgment dismissing the complaint. In doing so, the Appellate Division found an absence of evidence or even allegations that the plaintiff's fall was in any way causally related to negligence in the defendant security company's performance of the security services agreement it had with the apartment complex (Id.). The Appellate Court also found that there was no evidence "that might support a finding that [the security company] owed a duty of care to third parties in the performance of its contract" (Id.).

Here, there is ample testimonial and documentary evidence to demonstrate that there may be a causal nexus between the claimed

negligence and Citadel's performance of its contractual obligations. At the time of plaintiff's accident in February 2009, Thomas Pivarnik was a MMPI consultant, and at the time of his EBT in November 2011, he was MMPI's director of operations. Pivarnik testified at his EBT that Citadel "controlled the parking lot, because that's part of the lease with the venue" (Pivarnik 11/8/11 EBT, p. 48). Pivarnik also testified that MMPI "worked hand and hand with Citadel", and that Citadel "would let [MMPI] know the previous night what time they wanted the lot open the next morning" (Id.).

Joanne Mohr, ENK's Coterie Show director, provided an affidavit stating that she prepared a plan of operations for the February 2009 Coterie Show at Pier 94 (Mohr 4/24/12 Aff., ¶ 2-3). Mohr further stated that the plan of operations was distributed to GES, Citadel, and Port Parties (Id., ¶ 4). The operations plan clearly shows that many activities were scheduled to begin at 6:00 a.m. on February 2, 2009, including cleaners (i.e., Port Parties) beginning work at 6:00 a.m. at Pier 94 (Medic Affirm., Ex. 1).

Drew McDowell, vice president of operations at Port Parties in February 2009, testified that based on his experience working at Pier 94, the chain-link rope at the subject entrance to Pier 94 would be removed by security at ENK's instructions (McDowell 11/15/11 EBT, p. 75). McDowell further testified that Guardsmark would normally be responsible for putting up or taking down the

chain, but during the ENK show, Citadel controlled the subject rope chain (Id., pp. 76-77). When asked which security company, Guardsmark or Citadel, was responsible for putting the chain-link rope up or taking it down, McDowell responded that his understanding was "that Citadel would -- if Guardsmark had the key for that chain, Citadel would contact Guardsmark and say we need the chain up or down" (Id., pp. 78-79). He further testified that "Citadel and Guardsmark knew when to take the chain down because Citadel and Guardsmark had a production schedule" or the operations plan (Id., pp. 80-81). Further, McDowell testified that on the date of plaintiff's accident if any Port Parties employee was scheduled to start work at 6:00 a.m. Citadel would have been in charge of removing the chain, and that Citadel would either remove the chain itself, or have Guardsmark remove the chain (Id., p.85). McDowell also testified that Citadel would take the chain-link rope down approximately 15 minutes before the lock was supposed to be opened (Id., p. 187). In addition, McDowell heard Tommy Ferrara, Citadel's director of trade shows, "practically screaming at Guardsmark to have the chains down because work is about to start" about half a dozen times prior to the Coterie Show (Id., pp. 185-186).

Ferrara testified at his EBT that he received the operations plan for the Coterie Show from ENK, and that he read it prior to the start of the move-in for the show (Ferrara 1/11/12 EBT, p. 67). Ferrara further testified that the operations plan included

the times that the laborers, including plaintiff, would be showing up at Pier 94 for work during the course of the February 2009 Coterie Show, and that he was aware of those times (Id., pp. 67-68). Mr. Ferrara also testified that the chain-link rope at issue would be up at times across the pedestrian entranceway that laborers from Port Parties would use to gain entrance to Pier 94 to start their workday (Id., pp. 69-70).

Suleyman Ansari, Citadel's night supervisor at Pier 94 for the entire Coterie Show, testified that Citadel's work for ENK at the Coterie Show included telling Guardsmark what time to drop the chain-link ropes (Ansari 12/8/11 EBT, pp. 16, 30, 178-179). Ansari testified that Citadel would tell Guardsmark the time the chains needed to be dropped to allow laborers or workers in the following day based on the "call time," i.e., the time that workers were reporting for work (Id., pp. 87-88).

Lastly, Gary Harris, Guardsmark's shift supervisor at Pier 94, testified that Guardsmark would lower the chains if workers were scheduled to arrive if Guardsmark was told to do so (Harris 8/23/12 EBT, p. 22).

Based on the foregoing, triable issues of fact exist as to whether Citadel failed to exercise reasonable care in the performance of its contractual duties thereby launching a force or instrument of harm, i.e., the chain-link rope, and whether plaintiff detrimentally relied on Citadel's continued performance

of its duties of directing that the chain-link rope be lowered, and illuminating the area at issue at Pier 94.

Citadel next argues that plaintiff's complaint should be dismissed because the chain plaintiff tripped over was open and obvious and not inherently dangerous. This argument is unavailing. Whether the chain-link rope was open and obvious merely raises an issue of fact given that plaintiff testified that it was dark outside when his accident occurred, that he could only see one to two feet in front of him, and that the area was not illuminated. Thus, the facts do not compel a finding as a matter of law that the chain rope was open and obvious (Westbrook v WR Activities-Cabrera Markets, 5 AD3d 69 [1st Dept 2004]). Further, the question of whether a condition is dangerous and is open and obvious goes to the issue of a property owner's duty to warn, but does not preclude a finding of liability for negligence (Id.).

Accordingly, that branch of Citadel's motion for summary judgment dismissing plaintiff's complaint is denied. For these same reasons, that branch of Citadel's motion for summary judgment dismissing the cross-claims against it is denied.

Cross-motion by Vornado, Merchandise Mart, MMPI Piers, and ENK

Defendants/third-party plaintiffs Vornado, Merchandise Mart, MMPI, and ENK (collectively, "movants"), cross-move, pursuant to CPLR 3212, for an order granting them summary judgment: 1)

dismissing the complaint, and 2) dismissing all cross-claims against them.

As noted, supra, Vornado and MMPI leased the property at Pier 94 from the City of New York. In November 2008, MMPI and Merchandise Mart executed a management agreement whereby Merchandise Mart would manage the property (Medic Affirm., Ex. 4).

Merchandise Mart managed the venue for trade shows such as ENK's Coterie Show. As such, Merchandise Mart managed the entire property, including the subject entrance where plaintiff's accident occurred at Pier 94. In February 2009, Merchandise Mart entered into a licensing agreement with defendant ENK to use and occupy Pier 94 for the purpose of conducting the Coterie Show. Defendant ENK retained defendant Citadel, and Merchandise Mart employed defendant Guardsmark for security at the Pier 94 for the trade shows.

In their cross-motion, defendants Vornado, Merchandise Mart, MMPI, and ENK claim that they are entitled to summary judgment dismissing the complaint because they owed no duty to plaintiff; the chain-link rope plaintiff allegedly tripped over was open and obvious and not inherently dangerous; and movants exercised no control over the chain-linked rope and had no prior notice it was up on the morning of the accident.

In support of their argument that they owed no duty to plaintiff, movants rely on Espinal v Melville Snow Contractors,

Inc., 98 NY2d 136, supra. Movants' reliance is misplaced.

Espinal deals with the tort liability of a contracting party to certain persons outside of the contract. Here, the allegations against movants are based on their roles as lessors, licensors, and licensee of Pier 94, namely, that Vornado and MMPI leased the property from the City of New York and Merchandise Mart managed Pier 94, that Vornado owns MMPI and Merchandise Mart, and that MMPI entered a licensing agreement with ENK to use and occupy Pier 94 to conduct the Coterie Show.

The principle is well settled that "[l]iability for a dangerous condition on property may only be predicated upon occupancy, ownership, control or special use of such premises" (Yong v City of New York, 41 AD3d 212 [1st Dept 2007]). Lessees have a duty to maintain their property in a reasonably safe condition (Waiters v Northern Trust Company of New York, 29 AD3d 325 [1st Dept 2006]). Vornado and MMPI, as the entities that leased Pier 94 from the City of New York, and Merchandise Mart, as the entity that managed Pier 94, owed a duty to plaintiff to maintain Pier 94 in a reasonably safe condition. In addition, under its contract with MMPI, ENK had certain obligations to keep the entranceway to Pier 94 clear (see Medic Affirm., Ex. 5, ¶ 24).

Movants also claim that only defendant Guardsmark had the keys to take the chain-link rope down, and that because movants did not have keys to the chain-link rope, liability cannot be

imposed upon them for the failure to take down the chain. Movants' claim that they had no control over the chain-link rope, however, is clearly contradicted in this record. As Pivarnik of MMPI testified at his EBT, MMPI worked "hand in hand with Citadel Security to put up or take down the subject chain-link rope" (Pivarnik 11/8/11 EBT, p. 48). In addition, Mohr of ENK testified at her EBT that her understanding was that ENK had the responsibility of keeping passageways, including openings in the barrier where the chain-link rope was located, clear (Mohr 11/8/11 EBT, pp. 64-65).

Movants' remaining argument that the chain-link rope was open and obvious is also unavailing. As previously discussed, whether the chain-link rope was open and obvious is a question of fact that goes to the duty to warn, and does not negate movants' duty to maintain the premises in a reasonably safe condition (Francis v 107-145 West 135th Street Associates, 70 AD3d 599 [1st Dept 2010]).

Based on the foregoing, movants' cross-motion is denied in its entirety.

GES's Motion

In motion sequence no. 003, GES moves, pursuant to CPLR 3212, for summary judgment: 1) dismissing the complaint, 2) dismissing all cross-claims and third-party claims against it, and 3) directing defendant ENK to assume GES's defense and granting GES contractual indemnification against ENK.

GES did not have a contractual relationship with plaintiff or Port Parties. Furthermore, absent from the record is any evidentiary proof to indicate that GES had any control or responsibility over the chain-link rope at issue. Plaintiff was reporting to work for ENK at the time of his accident, not GES. Nor is there any facts in this record to indicate that GES had any control or responsibility for the lighting in the subject area where plaintiff's accident occurred, and plaintiff fails to raise a material issue of fact as to GES's liability.

Accordingly, those branches of GES's motion for summary judgment dismissing the complaint, all cross-claims, and third-party claims against it are granted, and they are hereby dismissed.

Turning to GES's claim for defense costs against ENK, section 17, entitled "Insurance", of GES's contract with ENK provides as follows:

Each party shall maintain for the Term:...(2)
commercial general liability insurance covering all
operations.

...

Each party shall name the other party ... as additional insured's and shall be primary and non contributing with respect to any insurance carried by the other party. The additional insured coverage applies only to the extent provided by the indemnity provisions of this Agreement and is applicable only when the additionally insured is alleged or found to be liable to a third party as a result of the other party's negligence or intentional acts or omissions.

Section 18 of the parties' contract, entitled "Promise to Protect," provides as follows:

[E]ach party agrees to indemnify and hold the other party harmless from any and all claims, demands, costs and expenses, including reasonable attorney's fees for the defense thereof, arising from the indemnifying party's ... wrongful or negligent act or omission in or about the Venue(s). In case of any action or proceeding brought against either party by reason of any such claim, upon notice from such party, the indemnifying party covenants to defend such action or proceeding ... unless such action or proceeding alleges the joint or concurring wrongful or negligent act or omission of both parties.

(Mascolo Affirm., Ex. Ak [emphasis added]).

In plaintiff's verified complaint against defendants ENK, GES, and Citadel, filed on September 15, 2010, plaintiff alleges, inter alia, that "it was the duty of the Defendant, [GES] to maintain the ... premises in a reasonably safe condition", and that the "premises were in a dangerous and unsafe condition and had been in such dangerous and unsafe condition for a long time prior thereto, the Defendant, [GES], having negligently and carelessly permitted said, premises to be and remain in said dangerous and unsafe condition" (Mascolo Affirm., Ex. H, ¶ 33).

Based on the allegations in plaintiff's complaint, plaintiff's action alleges joint or concurring negligent acts or omissions by both ENK and GES. As such, that branch of GES' motion to direct ENK to assume GES's defense is denied.

Guardsmark's Motion

In motion sequence no. 005, Guardsmark moves, pursuant to CPLR 3212, for an order granting it: 1) summary judgment

dismissing plaintiff's action, along with all cross-claims and third-party claims against it; and 2) contractual indemnification over and against Merchandise Mart and ENK for all fees and costs expended by Guardsmark in its defense of this action.

In support of its summary judgment motion, Guardsmark argues that it had no independent obligation to unilaterally lock or unlock, and remove or place the subject chain-link rope. In fact, in order to perform these duties at Pier 94, which was leased to defendant MMPI and licensed to defendant ENK, and controlled in whole or in part, by defendants MMPI, Merchandise Mart, Vornado, and ENK, Guardsmark maintains that it must have been specifically: 1) directed to do so; and 2) advised as to the exact time the chain-link rope should be locked or unlocked and removed or put in place.

Lorenz Hassenstein, Merchandise Mart's former general manager and vice president of Piers 92 and 94, testified at his EBT that Guardsmark would take direction of when the building was to be opened and closed from whomever was the building's licensee (Hassenstein 7/13/12 EBT, p. 22). Hassenstein described the procedure in February 2009 for having the chain-link rope taken down at any given time as follows:

- A. Somebody from the show, the show organizer or their security company would tell us the day before, the day of, or they would send us sometimes a schedule in writing when they wanted the building opened and closed. In the ENK case, sometimes they would send us a schedule via e-mail and that would go to somebody like Tom Pivarnik. I may have seen a copy of it....If something

changed and they needed the lot open later or they wanted it open earlier the next day, it was a verbal communication.

Q. From whom to whom?

A. It would be from either ENK or Citadel to Guardsmark or MMPI or both.

(Id., pp. 28-29). Hassenstein additionally testified that:

Q. With respect to the removal of the chain, just tell us what the procedure was for a chain being taken down in the a.m. hours of a typical day such as February 22, 2009 when a trade show was in progress.

* * *

A. There would have been a schedule delivered to MMPI which would have gone to Guardsmark that would have detailed when the chains or the building should be opened or closed on a daily basis or there could have been a verbal communication. If there was a change to that schedule from ENK and/or Citadel [amending] that schedule, it wouldn't necessarily go directly through MMPI because we weren't - MMPI employees weren't at the building at six, seven, sometimes eight in the morning. It would go directly to the [Guardsmark] security guard and they would potentially call one of us to ask if that was okay.

* * *

Q. If it didn't come from MMPI, would it come from Citadel or ENK directly to Guardsmark?

A. Yes. The request would originate from either ENK, an employee of ENK or Citadel on behalf of ENK and would come either directly to MMPI at that time, either Thomas Pivarnik or myself, or it would go directly to the Guardsmark guard that was on duty at that time.

Q. How would that communication take place? Would it be directly by word of mouth or would it be by some electronic device or telephone?

A. It could be face to face. It could be an e-mail.
It could be a telephone call.

(Id., pp. 48-49).

In addition, Pivarnick, Merchandise Mart's director of operations testified to the following:

Q. What was the procedure of when it would be put up and taken down back on February 22, 2009?

A. We worked hand and hand with Citadel Security. They would let us know the previous night what time they wanted the lot open the next morning.

Q. That would be based on Citadel Security when the lock should be open?

A. Yes, because they controlled the parking lot, because that's part of the lease with the venue.

* * *

Q. Who from Citadel would tell you that?

A. They had supervisors there.

* * *

Q. Would they tell you that?

A. I would work with them. They would tell me and I would relay it to our security. If there was a change, they would call us on our phone. Get it open a little earlier. I call down to security. They knew some of our security, they would just ask them and they would open it.

Q. During the time this trade show was being set up, until the time it was completely done, until February 18, 2009, February 25, 2009, Guardsmark would put up and take down the chain-link rope...based on what they were told by you or directly by someone from Citadel Security; is that correct.

A. Correct.

(Pivarnick 11/8/11 EBT, pp. 48-50).

Thus, Guardsmark maintains that there is nothing in this record indicating that it was negligent in performing its duties by failing to remove the subject chain-link rope from the premises on the morning of February 22, 2009. Guardsmark points out that either ENK or Citadel provided Merchandise Mart with a schedule which established the time frame that the chain-link rope needed to be removed and the building exterior unlocked in preparation for the arrival of employees and equipment.

Guardsmark asserts that this schedule clearly required the removal of the chains from each of the access areas on the subject premises at 6:00 a.m. on February 22, 2009 (Rice Affirm., Ex. E). Guardsmark claims that further evidence is provided by ENK's schedule for the Pier 94 Coterie Show which similarly shows that on February 22, 2009 cleaners were to arrive at 6:00 a.m. (Rice Affirm., Ex. F).

Guardsmark points out that plaintiff's accident occurred at approximately 5:40 a.m. Yet, Guardsmark argues there has been no evidence produced that it was notified of a change in the schedule previously provided to it, and nothing to show that Guardsmark failed to comply with any changed directives (Rice Affirm., ¶ 39).

Guardsmark's argument is unpersuasive. Guardsmark does not deny that it was in possession of ENK's plan of operations. Indeed, Guardsmark claims that there is nothing in this record to show that it was informed of any change to ENK's schedule (Rice

Index No. 104672/09
Mtn Seq. Nos. 002, 003, 004, 005

Page 19 of 22

Affirm., ¶ 39; Ex. F). ENK's plan of operations, however, shows that cleaners were to "begin" work at 6:00 a.m., not "arrive" at 6:00 a.m., as Guardsmark argues. Indeed, Drew McDowell, a Port Parties' employee, testified at his EBT that the chain-link rope would be taken down "about 15 minutes before the lock was supposed to be opened" (McDowell 11/15/11 EBT, p. 187).

Based on the foregoing, factual issues exist as to whether Guardsmark had the plan of operations, was aware that workers would be beginning their work at Pier 94 at 6:00 a.m., rather than arrive at that time, and thus should have taken the chain-link rope down before 6:00 a.m. in anticipation of people arriving for work.

Accordingly, that branch of Guardsmark motion dismissing plaintiff's complaint, cross-claims and third-party claims against it is denied.

As for that branch of Guardsmark motion for contractual indemnification over and against Merchandise Mart and ENK for all fees and costs expended by Guardsmark in its defense of this action, it is unopposed, and therefore it is granted.

Port Parties' Motion

In motion sequence no. 004, Port Parties moves, pursuant to CPLR 3212, for summary judgment: 1) dismissing all common law claims for contribution and common law indemnity against it as plaintiff has not sustained a grave injury under the Workers' Compensation Law, 2) dismissing the contractual indemnification

claims of Citadel and GES against it, and 3) dismissing the claim for breach of contract asserted against it by Vornado, Merchandise Mart, MMPI, and Citadel.

As for those branches of Port Parties' motion to dismiss all common law claims for contribution and common law indemnity against it, it is granted. Plaintiff did not sustain a grave injury under Workers' Compensation law § 11 (see Fleming v Graham, 10 NY3d 296 [2008]).

That branch of Port Parties motion to dismiss Citadel's and GES's contractual indemnification claims against it is also granted. The record demonstrates that there was no contract or agreement in effect at the time of loss between Port Parties and Citadel or GES.

That branch of Port Parties' motion to dismiss the breach of contract claim of Citadel is granted. Citadel fails to proffer evidentiary proof to demonstrate that it had a contract or agreement with Port Parties.

That branch seeking dismissal of the breach of contract claim of Vornado, Merchandise Mart, MMPI is denied. Section 7 of Port Parties' agreement with Merchandise Mart provides that Port Parties:

agrees to indemnify, defend and hold [MMPI, Merchandise Mart, and Vornado] ... harmless from any and all claims, losses, costs, expenses and fees, including reasonable attorneys' fees, which may arise from injuries to persons or property damage as a consequence of [Port Parties'] services under this Agreement or arising out of the negligent acts or omissions of [Port

Index No. 104672/09
Mtn Seq. Nos. 002, 003, 004, 005

Page 21 of 22

Parties], its employees and/or agents in conjunction with the foregoing.

(Toquica Affirm., Ex. Q). Whether plaintiff's injuries were a "consequence of [Port Parties'] services under [the] Agreement or [arose] out of the negligent acts or omissions of [Port Parties]," however, has not yet been determined.

Accordingly, it is hereby

ORDERED that Citadel's motion for summary judgment dismissing plaintiff's complaint and cross-claims against it is denied; and it is further

ORDERED that the cross-motion by Vornado, Merchandise Mart, MMPI Piers, and ENK is denied in its entirety; and it is further

ORDERED that branch of GES's motion for summary judgment dismissing plaintiff's complaint, cross-claims, and third-party claims against it is granted, and they are hereby dismissed; and it is further

ORDERED that branch of GES's motion for an order directing ENK to assume GES's defense is denied; and it is further

ORDERED that branch of Guardsmark motion for summary judgment dismissing plaintiff's complaint, cross-claims, and third-party claims against it is denied; and it is further

ORDERED that branch of Guardsmark motion for contractual indemnification against Merchandise Mart and ENK is granted without opposition; and it is further

ORDERED that Port Parties' motion for summary judgment dismissing all common law claims for contribution and

Index No. 104672/09
Mtn Seq. Nos. 002, 003, 004, 005

Page 22 of 22

indemnification against it is granted, and they are hereby dismissed; and it is further

ORDERED that branch of Port Parties' motion for summary judgment dismissing Citadel and GES's contractual indemnification claim against it is granted, and they are hereby dismissed; and it is further

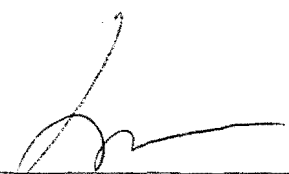
ORDERED that branch of Port Parties' motion for summary judgment dismissing the breach of contract claim is granted as to Citadel, and denied as to Vornado, Merchandise Mart, and MMPI; and it is further

ORDERED that plaintiff serve a copy of this order with notice of entry upon counsel for defendants and upon the Clerk of the Trial Support Office, and said Clerk is respectfully directed to place this matter on the Part 40 calendar for trial.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 3/29/14

FILED


HON. JEFFREY K. OING, J.S.C.

MAR 31 2014

NEW YORK
COUNTY CLERK'S OFFICE