Moretta Diaz v 313-315 West 125th Street
2014 NY Slip Op 32098(U)
July 2, 2014
Sup Ct, Bronx County
Docket Number: 308547/11
Judge: Jr., Kenneth L. Thompson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX IA 20

STANLEY MORETTA DIAZ,

Plaintiff,

-against-

313-315 WEST 125TH STREET, "JOHN DOE" CONTRACTOR, KATSELNIK & KATSELNIK GROUP, INC., KATSELNIK & KATSELNIK, INC., and ESTATE OF LILLIAN GOLDMAN,

Defendants.

Index No. 308547/11

DECISION/ORDER

Present:
HON. KENNETH L. THOMPSON, Jr.

KATSELNIK & KATSELNIK GROUP, INC.

Third Party Plaintiff,

-against-

Third Party Index No.:
Index No.: 83900/13

CS BRIDGE CORP.

Third Party Defendant.

The following papers numbered 1 to _14__ read on this motion, $ for summary judgment and to sever.

No On Calendar of 04/30/14	PAPERS NUMBERED
Notice of Motion-Order to Show Cause - Exhibits and Affidavits Annexed	1,7,9,11
Answering Affidavit and Exhibits	8,12
Replying Affidavit and Exhibits	4,14
Affidavit	
Memorandum Of Law	2,5,6,10
Notice Of Cross Motion	13
Filed papers	3

Upon the foregoing papers and due deliberation thereof, the Decision/Order on this motion is as follows:

Third-party defendant, CS Bridge Corp., (Bridge), moves pursuant to CPLR 3211(a)5 and (7) to dismiss the third-party complaint. Pursuant to CPLR 3211 (c), this Court issued an interim order dated March 28, 2014, notifying the parties herein that the motion to dismiss will be treated as a motion for summary judgment. Subsequent to the interim order, Bridge made a motion for summary judgment. Bridge moves pursuant to CPLR 1010 to sever the third party action. Plaintiff moves pursuant to CPLR 3212 for partial summary judgment on the issue of liability under Labor Law 240(1) and 241(6) against defendants, 313-315 West 125th Street LLC, (owner) and Katselnik & Katselnik Group Inc., Katselnik and Katselnik, Inc., (collectively, GC).

GC cross-moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's Labor Law 240(1) and 241(6) causes of action. The aforementioned motions and cross-motions are hereby consolidated for purposes of decision and disposition.

This action arose as a result of personal injuries sustained by plaintiff when he fell from a scaffold that was under construction. Bridge was plaintiff's employer.

Preliminarily, while in its early papers on this series of motions, GC argues that the party to the scaffolding contract is Colgate Scaffolding, not CS Bridge Corp. It is clear from GC's own submissions that Colgate Scaffolding is a d/b/a. Exhibit C of GC's Memorandum of Law in Opposition is the Certificate of Liability Insurance provided by CS Bridge Corp. d/b/a Colgate Scaffolding,

THIRD-PARTY ACTION

There are three causes of action in the third-party complaint, as against the third party defendant, Bridge. GC asserts claims for 1) common law indemnity, 2) contractual indemnity and 3) breach of contract for failure to procure insurance.

Worker's Compensation Law 11 provides that: "[a]n employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an

acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Plaintiff has responded to Interrogatories indicating that his injuries do not constitute a "grave injury" as defined by Worker's Compensation Law 11. Moreover, there is no evidence, whatsoever that plaintiff has suffered a "grave injury." Accordingly, GC's claim for common law negligence is dismissed.

GC seeks contractual indemnification and damages for breach of contract for failure to procure insurance based upon language in the "Rider to the Terms and Conditions of the Purchase Order" which was signed on June 3, 2010 and integrated into a "Final Contract" with Bridge's proposal that was signed June 2, 2010. The Proposal provided in paragraph 3 that the "parties agree that the Customer's timely furnishing of said certificate of property insurance shall constitute an **absolute** condition precedent to **any** obligation of Colgate and/or its liability insurer to provide contractual indemnity to **anyone** or insurance coverage to **any** additional insured with respect to **any** claims for personal injury or property damage arising out of this project. The Customer's [GC's] failure to furnish said certificate of property insurance within 30 days of the Customer executing this contract **shall entirely extinguish** any obligation of Colgate or its liability insurance company to provide contractual indemnity and/or additional insured coverage to **any person or entity** for any past, present or future claim for personal injury or property damage arising out of this project." (emphasis added). It is undisputed that GC did not provide the required property insurance that is an unambiguous condition precedent for Bridge to provide indemnity or insurance coverage under paragraph 3. "[T]he construction of a plain and unambiguous contract is for the court to pass on, and that circumstances extrinsic to the

agreement will not be considered when the intention of the parties can be gathered from the instrument itself." (*West, Weir & Bartel v Mary Carter Paint Co.*, 25 N.Y.2d 535, 540 [1969]).

"Conditions [precedent] can be express or implied. Express conditions are those agreed to and imposed by the parties themselves. Implied or constructive conditions are those "imposed by law to do justice" (Calamari and Perillo, Contracts § 11-8, at 444 [3d ed]). Express conditions must be literally performed…

Since an express condition ... depends for its validity on the manifested intention of the parties, it has the same sanctity as the promise itself. Though the court may regret the harshness of such a condition, as it may regret the harshness of a promise, it must, nevertheless, generally enforce the will of the parties unless to do so will violate public policy." (*Oppenheimer & Co. v Oppenheim, Appel, Dixon & Co.*, 86 N.Y.2d 685, 690-691 [1995].

In the case at bar, paragraph [3] of the Proposal unambiguously provides for an express condition precedent that has not been performed. There is no need to interpret the terms of the express condition precedent.

There is no case law support for the notion that the latter signed Rider takes "precedence" over the earlier signed Proposal. Nor is there language in the contract, that the Rider takes precedence over the provisions of the Proposal. Furthermore, paragraph 13 of the Proposal provides that "in the event of a conflict between the terms of this document and any other contract document, the terms of the Colgate form contract shall control." GC's public policy argument that to enforce paragraph 3 reduces incentives for Bridge to provide for the safety and security of their employees is unavailing. The policy shift as broad as suggested by GC is one for the legislature not the Courts to make.

GC argues that Bridge waived the condition precedent by furnishing a certificate of insurance and commencing with the project. However, there is no evidence or case law that holds that in the act of providing an insurance certificate Bridge intentionally relinquished a known right. (*Madison Ave. Leasehold, LLC v Madison Bentley Assoc. LLC*, 30 A.D.3d 1 [1st Dept 2006]).

GC's argument that Bridge's motion should be denied because it has not had discovery is unavailing. The contract terms are unambiguous, and no parole evidence is needed to interpret the contract.

Accordingly, the motion of CS Bridge Corp. to dismiss the third-party complaint against it is granted and the motion of CS Bridge Corp. to sever the third-party action is denied as moot.

LABOR LAW 240(1)

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 or 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." Labor Law 240(1).

> Labor Law §240 (1) applies even in those situations when the scaffold which is alleged to have failed was in the process of being dismantled or constructed (*see, e.g., Reed v State of New York*, 249 AD2d 719 [partially dismantled scaffold tipped, causing plaintiff to fall]; *Pritchard v Murray Walter, Inc.*, 157 AD2d 1012 [plaintiff fell to his death through floor of scaffold he was in the process of dismantling]; *Engel v Nedwidek*, 91 AD2d 794.
>
> *Kyle v City of NY*, 268 AD 2d 192, 197-198 (1st Dept 2000).

Defendants argue that plaintiff was the sole proximate cause of his injuries. At the time of plaintiff's fall, he was wearing a safety harness with a five foot line. The line was not attached to any hook or to a roof line.

It is uncontroverted that no roof line was available to plaintiff to which a line could be attached. Furthermore, it is uncontroverted that plaintiff was directed by his foreman to detach his line to travel from the fourth floor of the scaffold to the second floor of the scaffold. He fell while walking on the second floor scaffolding when he had encountered floor boards that had been untied creating loose floorboards. Moreover, defendants' argument also fails on grounds that in walking 50 feet from one end of the scaffold to the other end, prevented plaintiff from tying his five foot line to any hooks, even if hooks were available. The only testimony about the availability of hooks allowing plaintiff plaintiff to tie his safety line to at the time of plaintiff's fall is that the clips had been removed. Mr. Crecco of GC, testified that he did not know if the hooks had been removed at the time of plaintiff's fall.

Since plaintiff's use of the scaffold and safety harness and line "was consistent with his employer's instructions, any negligence on his part cannot be deemed to be the sole proximate cause" (*Cuentas v Sephora USA, Inc.*, 102 A.D.3d 504, 505 [1st Dept 2013]).

LABOR LAW 241(6)

Plaintiff alleges violation of Industrial Code 12 NYCRR § 23-5.1 [e] to support his Labor Law 241(6) claim. Section NYCRR § 23-5.1 [e] requires the planking in a scaffold to be "laid tight." Whether this section was violated rests on, at a minimum, the factual issue of whether the boards were untied prematurely in the dismantling of the scaffold.

CONCLUSION

Accordingly, plaintiff's motion for partial summary judgment on liability on its Labor Law 240(1) claim is granted. The plaintiff's motion is denied with respect to his Labor Law 241(6) claim. The cross-motion of defendant, Kattselnik & Katselnik Group, Inc. is denied. The motion of CS Bridge Corp. to dismiss the third-party complaint against it is granted and the motion of CS Bridge Corp. to sever the third-party action is denied as moot.

The foregoing constitutes the interim order of the Court.

Dated: JUL 0 2 2014

J.S.C.

KENNETH L. THOMPSON, JR.