

Barbecho v Atlantic Dev. Group, LLC

2014 NY Slip Op 33406(U)

December 8, 2014

Supreme Court, Bronx County

Docket Number: 307755/2010

Judge: Lucindo Suarez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 19

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MANUEL BARBECHO,

Plaintiff,

DECISION AND ORDER

Index No. 307755/2010

- against -

ATLANTIC DEVELOPMENT GROUP, LLC,
KNICKERBOCKER CONSTRUCTION II, LLC,
KNICKERBOCKER MANAGEMENT, LLC, BORICUA
VILLAGE ASSOCIATES, L.P., U.S. CRANE &
RIGGING, LLC and ELTON AVENUE, LLC,

Defendants.
-----X

ATLANTIC DEVELOPMENT GROUP, LLC, ELTON
AVENUE, LLC, KNICKERBOCKER
CONSTRUCTION II, LLC and KNICKERBOCKER
MANAGEMENT, LLC,

Third-Party Index No.
83742/2011

Third-Party Plaintiffs,

- against -

NEW YORK STEEL FABRICATORS, LLC,

Third-Party Defendant.
-----X

PRESENT: Hon. Lucindo Suarez

Upon the notice of motion dated July 25, 2014 of defendants/third-party plaintiffs Atlantic Development Group, LLC, Knickerbocker Construction II, LLC, Knickerbocker Management, LLC, Boricua Village Associates, L.P., and Elton Avenue, LLC and the affirmation, affidavit and exhibits submitted in support thereof; the affirmation in opposition dated November 6, 2014 of third-party defendant New York Steel Fabricators, LLC and the affidavits and exhibit annexed thereto; the reply affirmation dated November 13, 2014 of defendants/third-party plaintiffs Atlantic Development Group,

LLC, Knickerbocker Construction, LLC, Knickerbocker Management, LLC, Boricua Village Associates, L.P., and Elton Avenue, LLC; and due deliberation; the court finds:

In this Labor Law action, plaintiff, a steel connector employed by third-party defendant New York Steel Fabricators, LLC ("NY Steel"), was struck by a steel beam as it was being hoisted to the tenth floor of a new building under construction. The accident occurred on November 3, 2008 at 3213 3rd Avenue in Bronx County. Defendants/third-party plaintiffs Atlantic Development Group, LLC ("Atlantic") developed the property for Elton Avenue, LLC ("Elton") and Knickerbocker Construction II, LLC ("K-II") as Elton's general contractor. K-II retained NY Steel as its steel subcontractor.¹ Atlantic, K-II, Elton, Knickerbocker Management, LLC ("K-Management") and defendant Boricua Village Associates, L.P. ("Boricua LP") now move pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint against Atlantic, K-Management and Boricua LP and for summary judgment on the contractual and common law indemnification claims in the third-party complaint against NY Steel. The motion is supported by deposition transcripts and an affidavit from Michael Stolper ("Stolper"), among other exhibits. The action against Boricua College ("College") was discontinued as was the College's third-party action against Elton.

Stolper testified that he served as an Executive Vice President and General Counsel for Atlantic and its related entities. Atlantic was in the business of developing real property such as Boricua Village. Boricua Village involved the construction of eight new buildings, seven of which were residential and one which housed the College. Different corporate entities purchased the land for each building, and the College owned the land on which the its new building was situated. Elton retained an ownership interest in the building. Atlantic determined the financing and hired the architect and the general contractor for Elton. Atlantic, though, had no involvement in the construction of the building. K-

¹ In his verified complaint, plaintiff alleged that he was employed by New York Precast but his testimony and verified bill of particulars indicate that he was an NY Steel employee.

Management managed the buildings after the residential tenants moved in and had no involvement during construction. Stolper averred in an affidavit that Boricua LP was the ground lessee on the property and was not involved in the building's construction or management.

Plaintiff testified in pertinent part that he took all his instructions from his foreman "Ricky," another NY Steel employee. Crane operator William King ("King") testified on behalf of defendant U.S. Crane & Rigging, LLC. King stated that he took direction from NY Steel on when and where to lift the steel beams.

A third party who obtains the authority to supervise and control the work becomes the statutory agent of the owner or general contractor. *See Russin v. Louis N. Picciano & Son*, 54 N.Y.2d 311, 429 N.E.2d 805, 445 N.Y.S.2d 127 (1981). Atlantic, K-Management and Boricua LP have demonstrated that they were not owners, general contractors, or statutory agents for purposes of the Labor Law. *Id.*; *see also Keenan v. Simon Prop. Group, Inc.*, 106 A.D.3d 586, 966 N.Y.S.2d 378 (1st Dep't 2013); *Doucoure v. Atlantic Dev. Group, LLC*, 18 A.D.3d 337, 796 N.Y.S.2d 48 (1st Dep't 2005). Plaintiff has submitted no opposition to the motion, and NY Steel fails to raise a triable issue of fact in opposition. The affidavits from construction manager Luis Mello and production manager Joseph J. Bruning, both employees of non-party New York Precast, LLC, primarily pertain to K-II's actions on the project. Atlantic did not own premises nor do the affidavits support a finding that Atlantic had authority to supervise and control the work site.

K-II and Elton move for contractual and common law indemnification against NY Steel. They submit the AIA Document A401-1997 Standard Form of Agreement between Contractor (K-II) and Subcontractor (NY Steel) dated May 7, 2008. The indemnification provision is found in Section 4.6 of the agreement. Section 4.6.1 reads in part that:

To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any

of them 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 any 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.

"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.'" *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 N.Y.2d 774, 777, 515 N.E.2d 902, 904, 521 N.Y.S.2d 216, 217 (1987) (internal citations omitted). The extent to which a party is entitled to indemnification depends on the extent to which each party's negligence is determined to have contributed to the accident, *see Hughey v. RHM-88, LLC*, 77 A.D.3d 520, 912 N.Y.S.2d 175 (1st Dep't 2010), and the party seeking contractual indemnification must establish its freedom from negligence. *See Correia v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60, 693 N.Y.S.2d 596 (1st Dep't 1999).

Here, the indemnification provision was triggered by plaintiff's personal injury claim. *See Fuger v. Amsterdam House for Continuing Care Retirement Community, Inc.*, 117 A.D.3d 649, 987 N.Y.S.2d 322 (1st Dep't 2014). However, there has been no finding of negligence against any party or that such negligence was the proximate cause of plaintiff's injuries. At this juncture, a finding in favor of K-II and Elton would be premature. *See Gomez v. Sharon Baptist Bd. of Directors, Inc.*, 55 A.D.3d 446, 866 N.Y.S.2d 164 (1st Dep't 2008); *D'Angelo v. Builders Group*, 45 A.D.3d 522, 845 N.Y.S.2d 814 (2d Dep't 2007). Since no determination has been made on plaintiff's negligence and Labor Law causes of action, judgment on the common law indemnification claim is also premature.

See McCarthy v. Turner Constr., Inc., 17 N.Y.3d 369, 953 N.E.2d 794, 929 N.Y.S.2d 556 (2011);
Rivera v. Ambassador Fuel & Oil Burner Corp., 45 A.D.3d 275, 845 N.Y.S.2d 25 (1st Dep't 2007).

Accordingly, it is

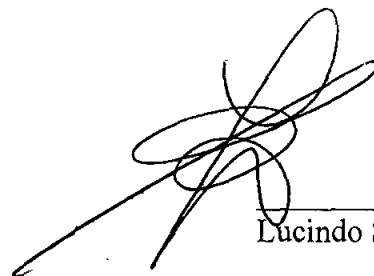
ORDERED, that the branch of defendants/third-party plaintiffs' motion seeking summary judgment dismissing plaintiff's complaint against Atlantic Development Group, LLC, Knickerbocker Management, LLC, and Boricua Village Associates, L.P., is granted; and it is further

ORDERED, that the branch of defendants/third-party plaintiffs' motion seeking summary judgment in favor of Knickerbocker Construction II, LLC and Elton Avenue, LLC on their third-party contractual and common law indemnification claims from third-party defendant New York Steel Fabricators, LLC is denied as premature; and it is further

ORDERED, that the clerk of the court is directed to enter judgment in favor of defendants/third-party plaintiffs Atlantic Development Group, LLC, Knickerbocker Management, LLC, and Boricua Village Associates, L.P. dismissing plaintiff's complaint and the cross-claims asserted against them.

This constitutes the decision and order of the court.

Dated: December 8, 2014



Lucindo Suarez, J.S.C.