Boyce v New York City Hous. Auth.

2014 NY Slip Op 33616(U)

February 28, 2014

Supreme Court, Queens County

Docket Number: 23209/2011

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

ORIGINAL

- x

BRENDA BOYCE

Plaintiff,

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant.

Index No.: 23209/2011

Motion Date: 11/13/13

Motion No.: 19

Motion Seq.: 3

- x

NEW YORK CITY HOUSING AUTHORITY,

Third-Party Plaintiff,

-against-

NAVILLUS TILE, INC., d/b/a NAVILLUS CONTRACTING, DANCO ELECTRICAL CONTRACTOR, INC., URS CORPORATION - NEW YORK, and LIRO PROGRAM and CONSTRUCTION MANAGEMENT, P.C.,

Third-Party Defendants.

FILED
MAR 18 2014
COUNTY CLERK
QUEENS COUNTY

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The following papers numbered 1 to 30 were read on this motion by NYCHA for an order striking the matter from the trial calendar or staying the action until discovery is complete; extending the time to move for summary judgment; directing plaintiff to file updated HIPPA compliant authorizations for medical records; directing the plaintiff to appear for an examination before trial and IME; scheduling the depositions and discovery in the third-party action; and the cross-motion of Navillus Tile, Inc., for an order dismissing the third-party complaint as against Navillus pursuant to CPLR 3211(a)(7) for failure to state a cause of action:

Papers Numbered

NYCHA Notice of Motion-Affidavits-Exhibits.....1 - 6
BOYCE Affirmation in Opposition.....7 - 10
NYCHA Reply Affirmation.....11 - 14
NAVILLUS Notice of Cross-Motion to Dismiss.....15 - 19
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NAVILLUS Reply Affirmation.....28 - 30

This is an action for damages for personal injuries allegedly sustained by the plaintiff, BRENDA BOYCE, on December 7, 2010, when she slipped and fell in a parking lot owned by NEW YORK CITY HOUSING AUTHORITY (NYCHA) located at 402 Beach 58th Street, Far Rockaway, New York.

The plaintiff commenced this action against NYCHA on October 11, 2011 asserting a cause of action for negligence premised on the NYCHA'S ownership of the subject premises and on the ground that NYCHA allowed the sidewalk or a raised divider in the parking lot to become broken, cracked, raised, depressed, uneven, dangerous, defective, and unsafe. As a result of the trip and fall the plaintiff allegedly sustained serious physical injuries.

Thereafter, a preliminary conference order was rendered on March 8, 2012, and a compliance conference order was rendered on October 16, 2012. Plaintiff filed a Note of Issue and Certificate of Readiness on February 8, 2013, affirming that all discovery was complete in the main action except that examinations before trial of all parties were outstanding and plaintiff's IMEs were outstanding. The matter appeared in the Trial Scheduling Part on December 12, 2013 at which time Justice Rosengarten vacated the Note of Issue and restored the matter to pre-note of issue status on the ground that significant discovery remained outstanding.

Plaintiff testified at a statutory hearing on June 1, 2011 that there had been ground work and construction around and near the area where she fell. Based upon that testimony, NYCHA, commenced a third-party action against defendants on July 22, 2013. In the third-party complaint, NYCHA alleged that the NYCHA entered into contracts with third-party defendants Navillus Tile, Inc., Danco Electrical Contractor, URS, and LiRo Program and Construction Management, P.C., for construction work at Ocean Bay Apartments and that the plaintiff's injuries occurred as a result of the third-party defendants' performance of their work

at the subject premises. NYCHA asserts that pursuant to the terms of their contracts, third-party defendants are required to indemnify defendant and hold harmless third-party plaintiff for damages incurred by NYCHA. Thus, NYCHA seeks contribution for negligence, contractual and common law indemnification as well as damages for breach of contract for alleged failure to procure insurance.

NYCHA now moves for an order striking the matter from the trial calendar due to outstanding discovery, staying the action until such discovery has been completed; extending the plaintiff's time to move for summary judgment; directing the plaintiff's to serve updated HIPPA compliant authorizations for outstanding medical records, and directing the plaintiff to appear for an examination before trial and physical examination, and scheduling depositions in the third-party action.

Plaintiff filed papers in opposition to the motion.

The motion by NYCHA for an order striking the matter from the trial calendar or in the alternative staying this action until discovery has been completed is denied as academic as the Note of Issue was stricken in the Trial Scheduling Part on December 12, 2013 by order of Justice Rosengarten and the matter was restored to pre-note of issue status.

However, in order to schedule the remaining discovery in the main action as well as the third-party action it is hereby,

ORDERED, that all parties including all third-party defendants shall appear in Room 304 of the Queens County Supreme Court, located at 25-10 Court Square, Long Island City, New York 11101, **at 10:00 a.m on April 4, 2014** for a conference to schedule the remaining outstanding discovery.

CROSS-MOTION TO DISMISS THE THIRD-PARTY COMPLAINT AGAINST NAVILLUS TILE, INC.

Third-party defendant, NAVILLUS TILE, INC., (Navillus) moves to dismiss the third-party complaint against Navillus for contribution or indemnity on the ground that plaintiff Brenda Boyce's claims did not arise out of any work performed by Navillus. Navillus claims that the plaintiff testified at a 50-h hearing that she fell in the middle of the parking lot which was nowhere near or connected to the renovation work performed by Navillus on the Ocean Bay Apartment buildings. Counsel for Navillus asserts that Navillus's work at the premises was relegated to renovation work inside the apartment buildings

whereas the plaintiff allegedly fell 50 feet away from any building. Counsel claims that plaintiff's testimony at the 50-h hearing was to the effect that she tripped and fell due to the presence of asphalt/gravel on an uneven depressed or cracked border in the middle of the parking lot. Counsel asserts that Navillus did not perform any work near the parking lot, did not involve any asphalt work, and did not perform any work near the light post where plaintiff allegedly fell. Counsel contends therefore, that to the extent NYCHA is found liable to plaintiff, Navillus would not owe any contribution or indemnification to NYCHA.

In support of the motion, Navillus submits a contract dated April 25, 2005 between Navillus, NYCHA as owner, and the construction manager - URS Corporation dated April 25, 2005 for the "HOPE VI REVITALIZATION PROGRAM" for renovation work at the Ocean Bay Apartments including exterior work, renovations to the daycare center and upgrades to the electrical system. Counsel also submits a photograph marked at plaintiff's 50-h hearing where the plaintiff marked the location of her accident in the parking lot which marking was at least 50 feet from any building. Plaintiff's notice of claim also delineates the location of the accident as "at or near the raised divider in the parking lot located on 58th Street between Almeda Avenue and Beach Channel Drive specifically abutting the blue Garbage Dumping Bins approximately 9 feet abutting the second light post in the parking lot."

Counsel for Navillus contends that the complaint in the third-party action fails to state a cause of action for contractual or common law indemnification or contribution because the documents submitted with the motion including the contract, deposition testimony, notice of claim and photographs, demonstrate a lack of connection between Navillus's work and the conditions which led to plaintiff's fall in the parking lot. Specifically, counsel argues that plaintiff attributed her accident to construction or "ground work being performed in the parking lot", whereas Navillus only worked inside the Ocean Bay buildings, the closest of which was 50 feet from the area where she allegedly fell. Therefore, counsel argues that Navillus cannot be liable for contractual indemnification as the contract only requires Navillus's indemnification to the extent that the claims arise out of Navillus's negligent acts or omissions (citing Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 71 NY2d 599 [1988][where a plaintiff's injury is not the result of any negligence on behalf of a contractor/defendant and did not arise out of the contractor's performance under its contract, dismissal of third-party claims for indemnification of

a contractor is proper]. Counsel contends therefore, that Navillus did not owe a duty to the plaintiff or to NYCHA to remove or repair any hazardous conditions in the parking lot (citing Jiminez v Shahid, 83 AD3d 900 [2d Dept. 2011]).

In opposition, third-party defendant, LIRO PROGRAM AND CONSTRUCTION MANAGEMENT, P.C. (LiRo) asserts that the motion by Navillus is procedurally improper as it seeks summary judgment on a factual basis rather than setting forth any reason why the matter fails to state a cause of action. Moreover, LiRo states that the motion is premature as discovery has not ben conducted in the third-party action. In addition, LiRo asserts that Navillus has a contractual duty to defend and indemnify LiRo for incidents stemming from Navillus's work and LIRo has asserted a cross-claim against Navillus for same.

Liro asserts that it was hired by NYCHA to provide construction management services with regard to a restoration project at the housing complex. LiRo shared construction management duties with URS. URS contracted with Navillus to perform general construction work in connection with the project. LiRo contends that Navillus is potentially contractually obligated to defend and indemnify LiRo and NYCHA and since LIRo has not yet had a opportunity to conduct discovery in this action the motion is premature. Further, counsel contends that Navillus is potentially liable even if its work was restricted to the buildings if it used the parking lot as a staging area, or if a Navillus employee created the condition by ingress or egress to the project then Navillus owes a defense and indemnification to LIRo and URS.

NYCHA also opposes the motion on the ground that it is premature as discovery in both the main action and the third-party action is still outstanding.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see Fuller v Collins, 2014 NY Slip Op 1149 [2d Dept. 2014]; Treeline 990 Stewart Partners, LLC v RAIT Atria, LLC, 107 AD3d 788 [2d Dept. 2013]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83[1994]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]; Peery v United Capital Corp., 84 AD3d 1201 [2011]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]).

Generally, the test of the sufficiency of the complaint is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (see JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802 [2d Dept. 2010]). Here, this court finds that the third-party complaint sufficiently states a cause of action for indemnification and contribution against third-party defendant Navillus, a contract manager on the premises.

A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). "When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), and the motion has not been converted to one for summary judgment, the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one, and, unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate" (Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]; also see Weill v. East Sunset Park Realty, LLC, 101 AD3d 859 [2d Dept. 2012]).

Here, third-party defendant asserts that the cause of action for contribution, common law indemnification, contractual indemnification contained in the third-party complaint must be dismissed based upon the terms of the contract and the averments of the plaintiff contained in her 50-h hearing and notice of claim.

However, this Court finds that the plaintiff testified at the 50-h hearing that the condition of the ground where she tripped in the parking lot may have been created by construction work and there had been construction trucks in the entire parking lot and near the area where the accident took place. She stated that the construction involved ground work Further NYCHA submits an affidavit from Joseph Swint, supervisor of grounds at Ocean Bay Apartments Development stating that the contractors involved in the subject construction renovation project, including Navillus, set up a "staging area" for their trailers in connection with the construction project in the parking lot at or near the area where the plaintiff alleges her accident occurred. He states that the trench located in the parking lot area on which the plaintiff alleges her accident occurred was created by the contractors involved in the project in order to access power for the trailers which were set up in the parking lot. Therefore,

the evidence submitted creates a question of fact as to whether there was any negligence or wrongful act on the part of Navillus in setting up its trailer in the parking lot which may have been a proximate cause of the plaintiff's accident. As such, the evidence submitted demonstrates that the third-party complaint sets forth a sufficient cause of action for indemnification and contribution against Navillus.

Further, the NYCHA and third-party defendants have not yet been deposed as to whether they had trailers in the parking lot, whether they performed any construction in the parking lot, made any cuts or created a hazardous condition in the parking lot or whether they left any debris in the parking lot. If it is found that the accident was proximately caused by the negligence of the Navillus, than Navillus would be responsible under common law indemnification and contribution and pursuant to the contract to indemnify the NYCHA.

Accordingly, this court finds that the documentary evidence submitted does not resolve all factual issues as a matter of law and does not conclusively establish a defense to the asserted claims. In view of the foregoing, it is hereby,

ORDERED, that the motion by the third-party defendant Navillus to dismiss the third-party complaint for indemnification and contribution for failure to state a cause of action is denied.

Dated: February 28, 2014
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.

FILED
MAR 18 2014
COUNTY CLERK
QUEENS COUNTY