Juarez v Rye Depot Plaza, LLC
2015 NY Slip Op 30574(U)
March 30, 2015
Sup Ct, Bronx County
Docket Number: 303069/2009
Judge: Sharon A.M. Aarons
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FILED Apr 01 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

DANIEL PEREZ JUAREZ,
Plaintiff,
-against-

RYE DEPOT PLAZA, LLC, and
IMAJAN RESTAURANT CORP. D/b/a RYE
GRILL & BAR.,
Defendants.

Index No. 303069/2009

DECISION AND ORDER

RYE DEPOT PLAZA, LLC, and
IMAJAN RESTAURANT CORP. d/b/a RYE
GRILL & BAR,
Third-Party Plaintiffs,
-against-

GFX SITE DEVELOPMENT INC. d/b/a
GROUNDSEFFECTS LANDSCAPING, INC.,
Third-Party Defendant.

Hon. Sharon A. M. Aarons:

Defendants/third-party plaintiffs Rye Depot Plaza, LLC (Rye Depot) and Imajan Restaurant Corp. d/b/a Rye Grill & Bar (Rye Grill) move for summary judgment on their claim for contractual indemnity pursuant to CPLR 3212 against third-party defendant GFX Site Development Inc. d/b/a Groundseffects Landscaping, Inc. (GFX) on the third-party complaint. Third-party defendant GFX submits written opposition. Plaintiff Daniel Perez Juarez also submits written opposition. The motion is denied.

On December 10, 2007, the plaintiff, an employee of third-party defendant GFX, allegedly fell while engaged in construction at a building located at 1 Station Plaza in Rye, New York, owned by defendant Rye Depot and leased to defendant Rye Grill. Jan Fabry, one of the owners of Rye Grill, individually acted as the general contractor for the project. The construction consisted of the

demolition of an existing building and the construction of a new building. At the time of the accident, plaintiff, who was constructing a masonry wall, was standing on an unsecured plank without any safety harness or other fall-arresting devices when the plank shifted, causing plaintiff to fall approximately 15 to 25 feet into the basement of the structure. The complaint alleges causes of action under the common law and Labor Law §§ 200, 240(1) and 241(6). The third-party complaint seeks contribution, and common law and contractual indemnity.[1]

In support of the motion, defendants/third-party plaintiffs submit the pleadings; the deposition transcripts of the testimony of testimony of the plaintiff, Mr. Jan Fabry (for third-party plaintiff), and Joseph Bellantoni (for GFX), together with notices of transmittal. At his deposition, Mr. Fabry testified that his insurance agent provided the indemnity form to be executed by the subcontractor, prior to the accident; he did not provide a similar form to be executed on other construction projects, unrelated to the present action, with which Mr. Fabry was involved. The indemnity agreement contains a notation at the top of the page indicating that it was faxed on December 13, 2007 (three days after the accident), to or from a number associated with Mr. Fabry's insurance agent. At his deposition he testified that only GFX was required to sign an indemnity agreement. He later changed his deposition testimony to reflect that the other subcontractors on the present project were required to sign similar indemnity agreements. The affidavit of Nancy McArthur, an employee of Pearl Management (the managing agent of Rye Grill), states that the signed indemnity agreement was obtained "prior to December 10, 2007" (the date of the accident) and "prior to GFX's commencement of its work." The undated agreement recites, "Commencement of any part of the work by subcontractor shall be deemed acceptance of this agreement and for purposes [sic] legally equivalent to execution of same." Joseph Bellantoni, the President of GFX, who signed the undated indemnity agreement, did not recall exactly

[1] The motion seeks summary judgment only on the ground of contractual indemnity.

when the agreement was signed, but he stated that it was "probably after" the work had commenced.

In opposition, third-party defendant GFX submits the same EBT transcripts. GFX argues that the issues of fact exist as to when the contract was in fact executed, which may have been after the date of the accident, and that there is no evidence of an intent that the parties intended the contract to apply as of the commencement of the work. GFX notes that the indemnity agreement was stamped with a date indicating that it was faxed three days after the accident. Further, Mr. Fabry initially testified that the only time he ever employed an indemnity agreement was on this particular project, with this particular subcontractor, albeit he later changed his testimony and indicated that all subcontractors on the project were required to sign an indemnity agreement.

Plaintiff also submits opposition, and argues that issues of fact exist as to whether the third party defendants violated Labor Law § 200 in failing to provide a safe place to work.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404).

Workers' Compensation Law § 11 governs indemnity by subcontractors. Common law contribution or indemnity is barred except in cases in which the plaintiff has suffered a "grave injury" as defined in that section. However, contractual indemnity is specifically permitted by Workers' Compensation Law § 11 if "based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or

indemnification of the claimant or person asserting the cause of action for the type of loss suffered." (Emphasis added.)

Despite the specific language in the statute requiring that the contract be entered into prior to the accident or occurrence, numerous cases have held that an indemnity provision or contract executed after a plaintiff's accident may be applied retroactively where the evidence establishes as a matter of law that the agreement pertaining to the contractor's work was made "as of" a date prior to the accident, and that the parties intended that it apply as of that date. (*Elescano v. Eighth-19th Co., LLC*, 13 A.D.3d 80, 785 N.Y.S.2d 447 (1st Dept. 2004); *Pena v. Chateau Woodmere Corp.*, 304 A.D.2d 442, 443, 759 N.Y.S.2d 451 [1st Dept. 2003], *appeal dismissed* 2 A.D.3d 1488, 774 N.Y.S.2d 851 [2003]; *Stabile v. Viener*, 291 A.D.2d 395, 396, 737 N.Y.S.2d 381 [2d Dept. 2002], *lv dismissed* 98 N.Y.2d 727, 779 N.E.2d 188, 749 N.Y.S.2d 477 [2002]).

Initially, the language in the indemnity agreement that recites "Commencement of any part of the work by subcontractor shall be deemed acceptance of this agreement and for purposes [sic] legally equivalent to execution of same," does not indicate any agreement that he contract would apply retroactively. The clause does not provide that the contract is effective as of the time of commencement of the work. This clause merely reflects that the subcontractor GFX would be bound by the contract even if the contract were not signed. (*Flores v. Lower E. Side Serv. Ctr., Inc.*, 4 N.Y.3d 363, 368-369, 828 N.E.2d 593, 795 N.Y.S.2d 491 [2005] [an unsigned contract may be enforceable for purposes of Workers' Compensation Law § 11 if the objective manifestations of the intent of the parties as gathered by their expressed words and deeds demonstrated that they intended to be bound]). Thus, the indemnity agreement here does not explicitly provide that it was to apply retroactively, such that, if it was signed after the date of the accident, it would not be valid. (*Mikulski v. Adam R. West, Inc.*, 78 A.D.3d 910, 912 N.Y.S.2d 233 [2d Dept. 2010] [an indemnification agreement executed by

a party after the plaintiff's accident occurred will not be applied retroactively in the absence of evidence that the agreement was made as of a date prior to the occurrence of the accident and that the parties intended the agreement to apply as of that date]).

As the agreement is not by its terms retroactive, nor is there any evidence of an a meeting of the minds as to an agreement of indemnity to be effective retroactively, the determinative issue here is when the agreement was signed. The deposition testimony of Mr. Fabry was equivocal, and many of his statements on crucial issues were amended in the errata sheet to his deposition. *(Yefet v. Shalmoni*, 81 A.D.3d 637, 915 N.Y.S.2d 866 [2d Dept. 2011] [conflict between the original transcript of the plaintiff's deposition testimony and the correction she submitted in the errata sheet raised an issue of credibility]). The testimony of Mr. Bellantoni was equally equivocal, in that he stated that he "probably" signed the agreement after the date of the accident. While the affidavit of Nancy McArthur states that the indemnity agreement was signed prior to the accident, her affidavit is made seven years after the event, and she does not provide any detail whatsoever as to how, where, and when the agreement was created, executed, and transmitted to or from GFX. Nor has any party explained the presence of the fax stamp on the document ("12/13/2007 12:17 914-921-8134"), as to whether this stamp indicates that the document was created and sent by the insurance agent after the accident, or whether the document was merely sent to the insurance agent at that time.

In short, issues of fact exist as to when the document was executed.

Accordingly, the motion is denied

Dated: March 30, 2015

SHARON A. M. AARONS, J.S.C.