

Edelstein v Hudson Riv. Park Trust

2015 NY Slip Op 30702(U)

April 28, 2015

Supreme Court, New York County

Docket Number: 157968/12

Judge: Joan M. Kenney

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 8

-----X
ALAN EDELSTEIN,

Plaintiff,

- against -

Index No. 157968/12

HUDSON RIVER PARK TRUST, SKANSKA USA
BUILDING, INC., MANAFORT BROTHERS,
INCORPORATED, M.L. BENJAMIN ENTERPRISES,
INC., PRIMA PAVING CORP., EAST COAST MINES
& MATERIALS CORP., EAST COAST MINES
& MATERIALS CORP. II, EAST COAST MINES, LTD,
and EAST COAST MINES LTD. II,

Defendants.

-----X
HUDSON RIVER PARK TRUST,

Third-Party Plaintiff

- against -

Index No. 590377/13

MANAFORT BROTHERS, INCORPORATED,
Third-Party Defendant.

-----X
HUDSON RIVER PART TRUST and SKANSKA USA
BUILDING, INC.,

Second Third-Party Plaintiffs,

- against -

Index No. 157968/12

M.L. BENJAMIN ENTERPRISES, INC., PRIMA
PAVING CORP., EAST COAST MINES
& MATERIALS CORP. II, EAST COAST MINES, LTD,
and EAST COAST MINES LTD. II,

Second Third-Party Defendants.

-----X
KENNEY, J.:

Motion sequence numbers 004, 005 and 006 are consolidated for disposition.

Plaintiff was injured next to a construction site. East Coast Mines & Materials Corp. and East Coast Mines Ltd. (collectively, East Coast) move for summary judgment dismissing all claims against them (motion sequence number 004). Hudson River Park Trust (Hudson), Skanska USA

Building Inc. (Skanska), and Manafort Brothers Incorporated (Manafort) move for summary judgment dismissing all claims against them and, alternatively, for an order granting conditional contractual and/or common-law indemnification against M.L. Benjamin Enterprises, Inc. (Benjamin), and for summary judgment against Benjamin for breach of promise to procure insurance (motion sequence number 005). Prima Paving Corp. (Prima) moves for summary judgment dismissing all claims against it (motion sequence number 006).

The construction site project is referred to as the Pier 26 project. East Coast (defendant/second third-party defendant) delivered fill-in materials, such as sand and soil to the site for Prima (defendant/second third-party defendant), a contractor. Prima was responsible for site clearing and demolition, pursuant to a contract with Hudson. Hudson (defendant/third-party plaintiff/second third-party plaintiff) was the owner, Skanska (defendant/second third-party plaintiff) the construction manager, and Manafort (defendant/third-party defendant) the general contractor. Manafort's job was to construct the core and shell of the restaurant and boathouse. Benjamin (defendant/second third-party defendant) provided security pursuant to a contract with Manafort.

Plaintiff was at work until midnight on September 3, 2012. That was the Monday of a Labor day weekend. He left work and was bicycling to the Staten Island Ferry, by which time it was September 4 and still night. He was riding on the bicycle path near the Hudson River on the West Side Highway. East Coast was making a delivery to the construction site, which was bounded by a metal fence with gates. Benjamin's employee, the security guard, opened the gates so that the truck could come in. George Bischoff, the truck driver and East Coast employee, got out of his truck and began to fill in a sign in sheet as the guard had asked him to do. Bischoff then heard the accident but did not see it.

The gate was opened outward so that it was across the bicycle path. Plaintiff did not notice the gate until he was almost upon it. He hit his brakes, stopping short, and catapulted over the handlebars of the bicycle and his body crashed into the gate. Plaintiff testified that lighting conditions were “average.” Bischoff testified that the truck and the lights at the site brightly lit the area. The security guard made an incident report which stated that the gate flew open in the wrong direction onto the bike path. When the accident happened, the truck driver and the security guard were the only people at the construction site.

Brian Joseph, Skanska’s project superintendent was deposed. He said that Skanska was the manager of the Pier 26 project. Joseph testified that Manafort did not supervise Prima. As agent of the owner, Skanska coordinated Prima’s activities. Benjamin provided the guards and did not attend safety meetings.

Joseph stated that contractors notified Skanska when they needed deliveries and Skanska coordinated and scheduled the deliveries. Skanska was not otherwise involved with deliveries for contractors. Contractors, such as Prima, were supposed to notify Skanska of deliveries. Contractors were responsible for supervising their own deliveries. The usual time for work and deliveries was from 7 a.m. to 4 p.m. Some deliveries were made at other times. A security guard was provided for off-hours, not normal work hours from 7 to 4. But at some point, Manafort instituted 24-hour security.

Joseph testified that East Coast made deliveries from 7 a.m. to 4 p.m., and had a special delivery time of 6 a.m. for Prima’s deliveries. After Skanska began working at the site, all of East Coast’s deliveries were for Prima. Before that, East Coast made deliveries for other contractors as well as Prima. The procedure was that Prima would let Skanska know about an early morning

delivery and Prima would have someone at the site to receive it.

Skanska ran weekly safety meetings. Joseph said that at every meeting “we” discussed that a flagman had to be there for deliveries because of heavy bike and pedestrian traffic. Joseph said that every week “there was a procedure” that was gone over with the supervisors, that the gates were to remain closed at all times unless for construction business. If there was a delivery, the contractors were supposed to have a flagman to control the gate and make sure that the public was not affected by the gate. The contractor receiving the delivery was supposed to provide the flagman. The flagman was supposed to direct bicyclists or alert them to the gate being opened. There was a requirement to open the gate inward. At the meetings, “we always went over” that rule. The gate is not supposed to be left in an open position.

East Coast did not contact Skanska to coordinate and schedule the delivery on the accident date, and neither did Prima. Skanska was never notified. The delivery on the occasion of the accident was not scheduled. After the accident, it was Joseph’s “understanding” that Prima was surprised about a delivery turning up in the middle of the night on a holiday weekend.

Benjamin testified that its security guard was supposed to hold the gates open while the truck was passing through and close the gates after the truck was in. The guard had to keep a watch out for traffic. The truck drivers were not responsible for opening or closing the gates.

Bischoff testified for East Coast. He testified that normal practice was to deliver only on weekdays. It was not standard to deliver on holidays or weekends. Before the accident, there were no procedures for delivery. Before the accident, East Coast would make deliveries between midnight and 6:00 a.m. No one from Prima was ever there when he delivered materials. No one was there when he delivered for other contractors, which was before he started delivering for Prima. Night

delivery was convenient for East Coast and for Prima, so that materials would be there when needed for the workday. The East Coast dispatcher would tell him the day before to make the delivery the next day, unless the next day was a Saturday. In that case, he would deliver on Monday.

At the deposition, the questioner read to Bischoff the part of the security guard's report where she wrote that Bischoff got out of the truck to push the gate. Bischoff was asked if there was ever a time that he physically handled the gate before the accident occurred and he said that he did not recall.

Alan Burghardt testified for Prima, his employer. Burghardt was a construction superintendent for the Pier 26 project. On August 31, 2012, he placed an order with East Coast to deliver materials to the work site on September 5, 2012. He informed East Coast that it could only deliver during work hours, between 6 a.m. and 3 p.m. The reason was so that Prima could have employees there to receive the delivery and direct traffic to ensure pedestrian safety. No Prima employee was present when a security guard for Benjamin allowed a delivery from East Coast. No Prima employee, including Burghardt, directed any employee of Benjamin to allow deliveries to the worksite before the 6 a.m. start time. He did not expect a delivery to be made around midnight right after Labor Day.

East Coast claims entitlement to summary judgment on the grounds that it has no duty to plaintiff, it did not engage in negligence, its conduct was not a proximate cause of the accident, and it did not control or maintain the gate. It did not have the responsibility of opening or closing the door and did not have a key.

Hudson, Skanska, and Manafort claim entitlement to summary judgment on the grounds that they had no knowledge of a delivery, they had no control over the fact that East Coast chose that time

to make the delivery and over the fact that Benjamin's security guard allowed a delivery and opened the gate outward. They had no reason to anticipate that a gate would block the bicycle path in the middle of the night on a Labor Day weekend. Such a thing never happened before. They claim that East Coast and Benjamin are liable, and that plaintiff also bears some responsibility for his accident.

Prima claims entitlement to summary judgment on the grounds that it informed East Coast that deliveries could only be made during work hours between 6 and 3:00, so that Prima could have employees there to receive the delivery and ensure pedestrian safety. Prima did not know that East Coast would make that particular delivery.

Benjamin opposes the motion of East Coast on the ground that the latter made an unauthorized delivery, contrary to instructions from Prima and site rules. As a result, no flagman was present and the delivery was the direct cause of the accident.

It is well established that "[t]he proponent of summary judgment must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law" (*O'Halloran v City of New York*, 78 AD3d 536, 537 [1st Dept 2010]). "Once this showing has been made, the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]). When deciding a motion for summary judgment, the court views facts in the light most favorable to the party opposing the motion (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

It is well settled that landowners and business proprietors have a duty to exercise reasonable care in maintaining their properties in a reasonably safe condition (*Di Ponzio v Riordan*, 89 NY2d 578, 582 [1997]; *Basso v Miller*, 40 NY2d 233 [1976]). "A property owner, or one in possession

or control of property, has a duty to take reasonable measures to control the foreseeable conduct of third parties on the property to prevent them from intentionally harming or creating an unreasonable risk of harm to others" (*Jaume v Ry Mgt. Co.*, 2 AD3d 590, 591 [2d Dept 2003]; see *DeRyss v New York Cent. R.R. Co.*, 275 NY 85, 91-92 [1937]). "However, this duty only arises when there is an ability and opportunity to control such conduct, and an awareness of the need to do so" (*Jean v Wright*, 82 AD3d 1163, 1164 [2d Dept 2011]).

"The existence and scope of an alleged tortfeasor's duty is, in the first instance, a legal question for determination by the court" (*Di Ponzio*, 89 NY2d 578, 583 [1997]). Hudson, Manafort, Skanska, and Prima make a prima facie showing that they did not owe a duty to plaintiff. They did not schedule and were not aware of the nighttime delivery by East Coast. They had no opportunity to control the delivery. However, East Coast's evidence successfully opposes the prima facie showing of the other moving parties. The truck driver stated that he made other night deliveries and that no one from a contractor was there to receive the deliveries. Therefore, there is a question of fact as to whether East Coast made such deliveries at night, whether it was common practice, whether it was common practice for the contractor who ordered the delivery not to be present, whether the other moving parties knew or should have known of East Coast's practice of making such deliveries, and whether such practice involved a risk of harm to plaintiff.

East Coast is not entitled to summary judgment, as it does not show that it had no liability at all in regard to plaintiff's accident. It is alleged that East Coast made the delivery contrary to instructions from Prima. Hudson, Manafort, and Skanska point out that East Coast's driver may have handled the gates.

Benjamin does not deny that it failed to procure insurance coverage for Hudson, Manafort,

and Skanska. Summary judgment on liability may be granted on that issue. Summary judgment cannot be granted on any claims for conditional indemnification, because whether anyone is not liable is not known yet.

In conclusion, it is

ORDERED that the motion for summary judgment by East Coast Mines & Materials Corp. and East Coast Mines Ltd. (motion sequence number 004) is denied; and it is further

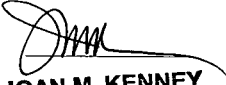
ORDERED that the motion for summary judgment by Prima Paving Corp. (motion sequence number 006) is denied; and it is further

ORDERED that the motion for summary judgment by Hudson River Park Trust, Skanska USA Building Inc., and Manafort Brothers Incorporated (motions sequence number 005) is granted as against M.L. Benjamin Enterprises, Inc. on the issue of liability for breach of contract to procure insurance coverage, and the motion is otherwise denied; and it is further

ORDERED that the parties proceed to mediation/trial forthwith.

Dated: April 28, 2015

ENTER:



JOAN M. KENNEY
J.S.C.