Wilson v Sea Crest Constr. Corp.
2015 NY Slip Op 30935(U)
May 22, 2015
Supreme Court, Suffolk County
Docket Number: 05-4077
Judge: Jr., Andrew G. Tarantino
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SHORT FORM ORDER

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INDEX No. 05-4077
CAL. No. 14-01336OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 50 - SUFFOLK COUNTY

PRESENT:

Hon. ANDREW G. TARANTINO, JR.,
Acting Justice of the Supreme Court

MOTION DATE 10-7-14 (#008)
MOTION DATE 01-09-15 (#009)
ADJ. DATE 02-17-15
Mot. Seq. # 008 - MD
009 - MD

DONNA JEAN WILSON, Plaintiff, - against - SEA CREST CONSTRUCTION CORP., GIAQUINTO MASONRY, INC, GIAQUINTO MASONRY, LLC and PIKE MECHANICAL, Defendants.	BRODY, O'CONNOR & O'CONNOR Attorney for Plaintiff 7 Bayview Avenue Northport, New York 11768 WELLINGHORST & FRONZUTO Attorney for Sea Crest Construction Corp. 4 Franklin Avenue Ridgewood, New Jersey 07450 JEFFREY S. SHEIN & ASSOCIATES, P.C. Attorney for Giaquinto Masonry 575 Underhill Boulevard, Suite 112 Syosset, New York 11791
PIKE MECHANICAL, Third-Party Plaintiff, - against - WELSBACH ELECTRIC CORP., L.I., Third-Party Defendant.	ANDREA G. SAWYERS, ESQ. Attorney for Pike Mechanical P.O. Box 9028, 3 Huntington Quadrangle Melville, New York 11747 LONDON FISCHER LLP Attorney for Welsbach Electric Corp, L.I.. 59 Maiden Lane New York, New York 10038

Upon the following papers numbered 1 to 81 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17, 18-32 ; Notice of Cross Motion and supporting papers ___; Answering Affidavits and supporting papers 33-36, 37-41, 42-57, 58-62, 63-71 ; Replying Affidavits and supporting papers 72-73, 74-75, 76-77, 78-79, 80-81 ; Other Memoranda of Law ; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (008) by defendant Sea Crest Construction Corp., and the motion (009) by defendant/third-party plaintiff Pike Mechanical are consolidated for the purposes of this determination; and it is

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ORDERED that the motion by defendant Sea Crest Construction Corp. for, inter alia, summary judgment dismissing the complaint against it is denied; and it is

ORDERED that the motion by defendant/third-party plaintiff Pike Mechanical for conditional summary judgment on its third-party complaint is denied.

Plaintiff Donna Wilson commenced this action to recover damages for personal injuries she allegedly sustained on July 23, 2002, while working on a construction project on the premises of the Eastport-South Manor Central High School, located in Manorville, New York. Plaintiff allegedly was injured when she tripped over a pile of debris located near the entrance of one of the buildings under construction at the premises. At the time of the alleged accident, plaintiff was employed by third-party defendant Welsbach Electric Corp., L.I. ("Welsbach"), as an electrician. The premises was owned by nonparty Eastport-South Manor Central School District. Defendant Sea Crest Construction Corp. ("Sea Crest") was one of six prime contractors working on the project. Sea Crest subcontracted defendants Giaquinto Masonry Inc. ("Giaquinto") to perform the masonry work at the construction site. Defendant/third-party plaintiff Pike Mechanical ("Pike") was the construction manager for the project. By way of her complaint, plaintiff alleges causes of action against defendants for common law negligence, and for violations of Labor Law §§ 200 and 240 (1). The complaint also alleges a cause of action under Labor Law § 241 (6) based on the alleged violation of Industrial Code (12 NYCRR) §§ 23-1.5 and 23-1.7.

Following service of the complaint, defendants joined issue, asserting general denials, affirmative defenses, and cross claims against each other for indemnification, contribution, and breach of contract. On January 24, 2011, Pike commenced a third-party action alleging identical causes of action against Welsbach. In its answer to the third-party complaint, Welsbach asserts cross claims for indemnification and contribution against Giaquinto. By order dated June 13, 2012, the Court (LaSalle, J.) granted summary judgment in favor of Pike as to plaintiff's Labor Law § 240 (1) claim and her Labor Law § 241 (6) claim alleging a violation of 12 NYCRR § 23-1.7. The court, however, denied the branch of the motion which sought dismissal of the plaintiff's remaining causes of action under Labor Law §§ 241 (6) and 200, and under the common law. The Court also granted partial summary judgment in favor of Giaquinto, dismissing plaintiff's claims against it under Labor Law §§ 240, 241 (6) and 200, but denied the branch of its motion which sought dismissal of plaintiff's common law negligence claims. The note of issue was filed on August 11, 2014.

Sea Crest now moves for summary judgment dismissing the complaint against it, arguing that Labor Law § 240 (1) is inapplicable under the circumstances of this case. It further argues that plaintiff's Labor Law § 200 claim against it must be dismissed, since it neither exercised control over plaintiff's work nor had actual or constructive notice of the alleged dangerous condition. In addition, Sea Crest asserts that it is immune to plaintiff's Labor Law § 241 (6) claim, as it was merely a prime contractor on the project and had no authority to supervise or control the work being performed at the time of the injury. Alternatively, Sea Crest seeks judgment in its favor over and against Giaquinto for contractual indemnification, as well as an award for costs and attorney fees. Plaintiff partially opposes the motion on the basis a triable issue exists as to whether Sea Crest, which attended weekly site safety meetings held by Pike's project manager, Richard Heller, had notice of a prior accident involving an electrician who also tripped and fell over excess masonry debris near the entrance of the building. Pike and Welsbach oppose Sea Crest's motion for summary judgment, arguing, inter alia, that triable issues exist as to whether Sea Crest had actual or constructive

notice of the alleged dangerous condition. Pike and Welsbach also assert that Sea Crest should not be regarded as a prime contractor for the purposes of determining its liability under the Labor Law, since it had the authority to control and supervise Giaquinto, and was responsible for ensuring that Giaquinto cleared its debris from the worksite. Giaquinto opposes Sea Crest's motion only to the extent that Sea Crest seeks conditional summary judgment on the contractual indemnification cross claim against it. Giaquinto argues, inter alia, that Sea Crest failed to assert a cause of action against it for contractual indemnification in its pleadings, and that, even if such a cause of action had been asserted, Sea Crest would not be entitled to conditional summary judgment, as a triable issue exists as to whether Sea Crest's negligence contributed to the happening of the accident.

Initially, the court grants the unopposed branch of Sea Crest's motion for dismissal of the Labor Law § 240 (1) claim against it, as plaintiff has indicated that she voluntarily withdrew such claim in 2009. In any event, the court notes that where, as here, the accident occurred as a result of a ground level tripping hazard, such a claim fails, as matter of law (*see* ***Spence v Island Estates at Mt. Sinai II, LLC***, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; ***Ortiz v Varsity Holdings, LLC***, 75 AD3d 538, 906 NYS2d 766 [2d Dept 2010]).

Sea Crest failed, however, to establish its prima facie entitlement to summary judgment dismissing the remainder of plaintiff's claims predicated on Labor Law §§ 241 (6), 200 and the common law. Labor Law § 200 codifies the common-law duty of an owner or contractor to provide employees with a safe place to work (*see* ***Comes v New York State Elec. & Gas Corp.***, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Where, as here, the injured plaintiff's accident arose out of an allegedly dangerous condition at the work site, a contractor may be held liable in common-law negligence and under Labor Law § 200 if it had control of the place where the injury occurred and actual or constructive notice of the dangerous condition (*see* ***White v Village of Port Chester***, 92 AD3d 872, 876, 940 NYS2d 94 [2d Dept 2012]; ***Cook v Orchard Park Estates, Inc.***,73 AD3d 1263, 902 NYS2d 674 [3d Dept 2010]; ***Wolfe v KLR Mech., Inc.***, 35 AD3d 916, 826 NYS2d 458 [3d Dept 2006]). "To constitute constructive notice, the defect must be visible and apparent and it must exist for a sufficient length of time before the accident to permit the defendant an opportunity to discover and remedy it" (***Gordon v American Museum of Natural History***, 67 NY2d 836, 837, 492 N.E.2d 774, 501 NYS2d 646 [1986]).

Here, Sea Crest failed to eliminate triable issues as to whether it possessed authority to direct and control the removal of Giaquinto's masonry debris from the front of the building where plaintiff fell, and as to whether it had actual or constructive notice that the failure to adequately remove such debris created the alleged dangerous condition (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v New York***, 49 NY2d 557, 427 NYS2d 595 [1980]). Significantly, the court's previous order already determined that a triable issue exists as to whether Sea Crest's subcontractor, Giaquinto, created the alleged dangerous condition by failing to adequately dispose of an accumulation of masonry debris near the entrance of the building where plaintiff fell. Further, Sea Crest's own submissions include deposition testimony by its project manager, Victor Czartorysky, and an employee of Giaquinto, David Sciarretta, indicating Sea Crest was responsible for ensuring that Giaquinto's masonry debris was adequately disposed from its work area. Additionally, Sciarretta testified that the topic of dangers posed by inadequate masonry debris removal was raised during some of the weekly meetings held by Sea Crest's superintendent, and that Sciarretta personally warned the superintendent of problems relating to the disposal of the debris, including the insufficiency of the dumpsters that were provided to Giaquinto.

Furthermore, since triable issues exists as to whether Sea Crest was responsible for ensuring that Giaquinto adequately disposed of the masonry debris in its work area, and whether such failure created the alleged dangerous condition which caused plaintiff's accident, the court rejects Sea Crest's contention that it is shielded from liability under Labor Law § 241 (6) merely because it was deemed a "prime contractor" for the purposes of the construction project (*see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311,445 NYS2d 127 [1981]; ***Rast v Wachs Rome Dev., LLC***, 94 AD3d 1471, 943 NYS2d 323 [4th Dept 2012]; ***Piazza v Frank L. Ciminelli Constr. Co.***,12 AD3d 1059, 785 NYS2d 207 [4th Dept 2004]). A prime contractor may be held liable as a contractor or the owner's statutory agent for injuries sustained in those areas and activities within the scope of the work delegated to it (*see* ***Piazza v Frank L. Ciminelli Constr. Co., Inc.***, *supra*; ***O'Connor v Lincoln Metrocenter Partners***, 266 AD2d 60, 61, 698 NYS2d 632 [1st Dept 1999]). Therefore, the branch of Sea Crest's motion seeking summary judgment dismissing plaintiff's claims under Labor Law §§ 241 (6) and 200 is denied.

As to the branch of Sea Crest's motion for judgment in its favor over and against Giaquinto for contractual indemnification and an award for costs and attorney fees, while a review of Sea Crest's answer reveals it made a general claim for indemnification, the pleading is bereft of any specific claim for contractual indemnification. However, even assuming, arguendo, that Sea Crest's pleadings sufficiently state a claim for contractual indemnification, Sea Crest's failure, as discussed above, to demonstrate that it was merely vicariously liable and free of negligence for the happening of the alleged accident warrants denial of its motion (*see* GEN. OBLIG. LAW § 5-322.1; *see also* ***Philadelphia Indem. Ins. Co. v AMI Dev., LLC***, 111 AD3d 689, 974 NYS2d 804 [2d Dept 2013]; ***Mikelatos v Theofilaktidis***, 105 AD3d 822, 962 NYS2d 693 [2d Dept 2013]; ***Baillargeon v Kings County Waterproofing Corp.***, 91 AD3d 686, 936 NYS2d 298 [2d Dept 2012]). Accordingly, the branch of Sea Crest's motion for judgment over and against Giaquinto for contractual indemnification and an award of costs and attorney fees is denied.

By way of a separate motion, Pike moves for conditional summary judgment on its third-party complaint against Welsbach, arguing that Welsbach agreed to indemnify it, even in the absence of Welsbach's own negligence, for claims arising out of or in connection with the work of its employees on the construction project. Welsbach opposes the motion, arguing that the court's previous order already determined that Pike failed to establish its entitlement to conditional summary judgment on its indemnification claims, since, among other things, triable issues exist as to whether Pike bore common law and Labor Law liability for the happening of the subject accident.

The right of a party to recover indemnification on the basis of a contractual provision depends on the intent of the parties and the manner in which that intent is expressed in the contract (*see* ***Kurek v Port Chester Hous. Auth.***,18 NY2d 450, 276 NYS2d 612 [1966]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances (*see* ***Hooper Assoc. v AGS Computers***, 74 NY2d 487, 549 NYS2d 365 [1989]). A contract that provides for indemnification will be enforced so long as the intent to assume such role is sufficiently clear and unambiguous (*see* ***Bradley v Earl B. Feiden, Inc.***, 8 NY3d 265, 832 NYS2d 470 [2007]). Moreover, inasmuch as the court's June 2013 order already made determinations with respect to Pike's right to contractual indemnification pursuant to the general construction agreement shared by the parties, the court finds that the law of the case doctrine is applicable. "The law of the case doctrine 'is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned'"

(***Oyster Bay Associates Ltd. Partnership v Town Bd. of Town of Oyster Bay***, 21 AD3d 964, 965-966, 801 NYS2d 612 [2d Dept 2005], *quoting* ***Martin v City of Cohoes***, 37 NY2d 162, 165, 371 NYS2d 687 [1975]). "Under the doctrine, parties or their privies are precluded from relitigating an issue decided in an ongoing action where there previously was a full and fair opportunity to address the issue" (***Carmona v Mathisson***, 92 AD3d 492, 493, 938 NYS2d 300 [1st Dept 2012]).

The contract between Pike and the school district states, in pertinent part, as follows:

> The contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, Construction Manger and agents and employees of them from and against claims, damages, losses and expenses . . . arising out of or related to the performance of the work, including but not limited to claims for bodily injury . . . provided that the Contractor shall not be required to indemnify the Owner, Architect, Architect's consultants, Construction Manager or the agents and employees of them for damages arising out of bodily injuries to persons . . . initiated or proximately caused by or resulting from negligence of the owner, its dependent contractors, agents, employees or indemnities.

Here, as previously determined by this court, Pike failed to demonstrate its entitlement to indemnification under the general construction agreement shared by the parties, as the evidence in the record does not establish that plaintiff's injuries were not "initiated or proximately caused by or resulting from the negligence of the owner, its dependent contractors, agents, employees or indemnities." Moreover, the court's determination that triable issues exist as to whether Pike was negligent in failing to "fulfill its obligation to ensure that the worksite was free from the hazards of accumulated construction debris" precludes any award of summary judgment on Pike's third-party claims for contribution and indemnification (*see* ***Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.***, 89 NY2d 786, 658 NYS2d 903 [1997]; ***Mikelatos v Theofilaktidis***, *supra*; ***Rodriguez v Tribeca 105, LLC***, 93 AD3d 655, 939 NYS2d 546 [2d Dept 2012]; ***Reynolds v County of Westchester***, 270 AD2d 473, 704 NYS2d 651 [2d Dept 2000]; ***17 Vista Free Assocs. v Teachers Ins. & Annuity Assn of Am.***, 259 AD2d 75, 80, 693 NYS2d 554 [1st Dept 1999]; ***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]). Accordingly, Pike's motion for conditional summary judgment on its third-party complaint is denied.

Dated: 5.22.2015

A.J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION