

Hester v Turner Constr. Co.
2015 NY Slip Op 31174(U)
June 8, 2015
Supreme Court, Bronx County
Docket Number: 306375/2011
Judge: Julia I. Rodriguez
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**SUPREME COURT STATE OF NEW YORK
COUNTY OF BRONX - PART: IA- 27**

PRESTON HESTER and SHAKIMA HESTER,

Index 306375/2011

Plaintiffs,

DECISION & ORDER

-against-

TURNER CONSTRUCTION COMPANY, JET BLUE
AIRWAYS CORPORATION, LJC DISMANTLING CORP.
and LJ ENTERPRISES, INC.,

Defendants,

LJC DISMANTLING CORP. and LJ ENTERPRISES, INC.,

Third-Party Index No.:
83838/2012

Third-Party Plaintiffs,

-against-

PAL ENVIRONMENTAL SERVICES, INC.,

Third-Party Defendant.

PAL ENVIRONMENTAL SERVICES, INC.,

Second Third-Party Index:
83795/2014

Second Third-Party Plaintiff,

-against-

CREATIVE ENVIRONMENT SOLUTIONS CORP.,

Second Third-Party Defendant.

Recitation, as required by CPLR 2219 (a), of the papers considered in review of Defendants motion and cross-motion for summary judgment:

<u>Papers Submitted</u>	<u>Numbered</u>
Notice of Motion by Turner & JetBlue, Affirmation & Exhibits	1, 2, 3
Notice of Cross-motion by LJC & LJ, Opposition & Exhibits	4, 5, 6
Reply Affirmation	7

Upon the foregoing papers, Defendants **Turner Construction Company** and **JetBlue Airways Corporation** move for an Order granting them partial summary judgment on their contractual indemnification claim(s) against Defendant **LJC Dismantling Corp.**

Defendant **LJC Dismantling Corp.** opposes the motion by Turner and JetBlue, and Defendant **LJ Enterprises Inc.** cross-moves for an Order pursuant to CPLR 3211(a)(7) dismissing the complaint, all cross-claims and counterclaims asserted against it.

The instant action was commenced as a result of personal injuries sustained by Plaintiff on July 13, 2011 at terminal 6 of JFK International Airport. In paragraph 12 of his Bill of Particulars Plaintiff alleges that while he was working at the premises:

he was caused to fall from an elevated work area by reason of the negligence of the Defendants Turner Construction Company and JetBlue Airways Corporation...

It is undisputed that JetBlue was the owner of Terminal 6 and that JetBlue hired Turner Construction to perform general construction services that included the demolition of Terminal 6. In turn, Turner hired LJC Dismantling as a subcontractor, who in turn, hired PAL Environmental Services to provide asbestos abatement work; Plaintiff was PAL's employee.

At issue is the written contract between Turner Construction and LJC Dismantling. After the depositions of numerous personnel, Turner now seeks a determination on its claim for contractual indemnity against LJC, contending that LJC is required to defend and indemnify Turner and JetBlue against any lawsuits arising out of LJC's work. The relevant section of Article XXIII reads:

The Subcontractor hereby assumes entire responsibility and liability for any and all damages or injury of any kind or nature whatever (including death resulting therefrom) to all persons, whether employees of any tier of the Subcontractor or otherwise, and to all property caused by, resulting from, arising out of or occurring in connection with the execution of the Work, or in preparation for the Work, or any extension, modification, or amendment to the Work by change order or otherwise. . . .

. . . The Subcontractor agrees to indemnify and save harmless Turner and the Owner, their offices, agents, servants and employees from and against any and all such claims and further from and against any and all loss, cost, expenses, liability, damage, penalties, fines or injury, including legal fees and disbursements, that Turner and the Owner, their officers, agents, servants and employees may directly

or indirectly sustain, suffer or incur as a result thereof. . .

. . . The Subcontractor agrees to and does hereby assume, on behalf of Turner and the owner, their officers, agents, servants, and employees, the defense of any action at law or in equity which may be brought against Turner and/or the Owner .

..

LJC opposes Turner's motion for summary judgment on its claims for indemnification on the ground(s) that said request is premature as there has been no finding that Turner and JetBlue are free from negligence. LJC points out that Turner "has never moved for summary judgment as to its own negligence and there have been no findings and determinations with regard to their liability" [¶25 Rothenberg Affirmation]. Turner argues that "a showing of negligence" is not required because "the agreement to indemnify is triggered by a finding that the accident arose 'out of or occurring in connection with the execution of the Work.'" [¶44 of moving affirmation]. In any event, Turner further contends that there can be no finding of negligence by Turner and JetBlue because JetBlue did not have any employees involved in the actual physical demolition or abatement work, and neither Turner or JetBlue exercised any supervisory role over PAL's employees, and the laborers involved with the actual demolition worked for LJC. *However*, "the only potential liability for TURNER or JETBLUE, if any, would be on the basis of statutory liability under the Labor Law" [¶42 of moving affirmation].

The proponent of a motion for summary judgment must tender sufficient evidence to show the absence of any material issues of fact and the right to judgment as a matter of law. *Alvarez v. Propect Hospital*, 68 N.Y..2d 320, 508 N.Y.S.2d 923 (1986); *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985). After consideration of the parties' submissions, the Court finds that Turner and JetBlue failed to establish entitlement to summary judgment as to their claims for indemnification in the first instance, since they *concede* that there exists the "potential" for liability . . . on the basis of statutory liability under the Labor Law," which has not yet been determined. Moreover, movants failed to establish as a matter of law that there exist no issues of fact and credibility as to whether Turner exercised direction, actual supervision and/or control over the work performed by Plaintiff. Consider: at his deposition, **Don Lomanto**, Turner's superintendent at the site, was responsible for coordinating

with LJC and PAL and making “sure that the plans that we have implemented for demolition and abatement pertaining to whether it be safety or just logistical were in place” [Lomanto Tr. Pg.8]; he watched LJC dismantle the building “throughout the day, every day” [Lomanto Tr. Pg.240]; he was responsible for making sure that all subcontractors were in compliance with safety precautions and protocols [Lomanto Tr. Pg.239]; he had authority to stop all work by laborers if he encountered a safety issue [Lomanto Tr. Pgs.47 & 240]; and he was responsible for making sure that PAL followed Turner’s safety plan and protocols and was in compliance thereto [Lomanto Tr. Pg. 284]. Under these circumstances, the issue of movants’ negligence remains unresolved. See *Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dep’t 2011) (enforceability of the contractual indemnification clause cannot be decided until the issue of the contractor’s negligence has been litigated); *Barracks v. Metro North Commuter Railroad, et al*, 8 Misc.3d 1024(A), 803 N.Y.S.2d 17, 2005 WL 1919100 (Sup. Ct. N.Y. Co. 2005) (until the issue of negligence is determined at trial claims based on contractual and common law indemnification are premature).


For the foregoing reasons, motion by Defendants **Turner Construction Company** and **JetBlue Airways Corporation** for an Order granting them partial summary judgment on their contractual indemnification claim(s) against Defendant **LJC Dismantling Corp.** is **denied** in its entirety.

Cross-motion by Defendant **LJ Enterprises Inc.** for an Order pursuant to CPLR 3211(a)(7) dismissing the complaint, all cross-claims and counterclaims asserted against it is **granted** in its entirety as it was not opposed. Therefore, it is

ORDERED that the Complaint and all cross-claims and counterclaims are dismissed as to Defendant **LJ Enterprises, Inc.** and it is further

ORDERED that the Clerk of the Court shall forthwith amend the caption accordingly to omit LJ Enterprises, Inc.

Dated: June 8, 2015



Hon. Julia I. Rodriguez, J.S.C.