Serpa v Bovis Lend Lease LMB, Inc.
2015 NY Slip Op 31186(U)
June 26, 2015
Supreme Court, Queens County
Docket Number: 701510/2012
Judge: Valerie Brathwaite Nelson

Short Form Order

NEW YORK SUPREME COURT - QUEEN COUNTY

Present: **HONORABLE VALERIE BRATHWAITE NELSON** IA Part 7
Justice

EDGAR SERPA and BELLA M. GUANGA, x

Plaintiff,

-against-

BOVIS LEND LEASE LMB, INC. ET AL.,

Defendants. x

Index No.: 701510/12

Motion Seq. No.: 4
Motion Date: March 2, 2015
Motion Cal. No.: 109

Motion Seq. No.: 5
Motion Date: March 2, 2015
Motion Cal. No.: 110

Motion Seq. No.: 6
Motion Date: March 23, 2015
Motion Cal. No.: 115

Motion Seq. No. 8
Motion Date: March 2, 2015
Motion Cal. No.: 112

The following papers numbered 1 to 83 read on these motions by defendant, M.A. Angeliades, Inc. (M.A. Angeliades); defendant, Bovis Lend Lease LMB, Inc. (Bovis); plaintiff, Edgar Serpa; third-party defendant, Remy Builders Corp. (Remy); and cross motion by defendant, Navtech Construction Corp. (Navtech), all seeking summary judgment, among other things, pursuant to CPLR 3212. By stipulation, dated May 29, 2014, plaintiff, Bella M. Guanga, discontinued her action against all defendants, with prejudice.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	1-16
Notice of Cross Motion - Affidavit - Exhibits.....	17-20
Answering Affidavits - Exhibits	21-65

Reply Affidavits - Exhibits..... 66-83

Upon the foregoing papers it is ordered that these motions are consolidated for the purpose of disposition and are determined as follows:

Plaintiff seeks damages for personal injuries sustained when he was allegedly caused to trip and fall while working as a mason/bricklayer, while an employee of third-party defendant, Remy, at a property owned by the New York City Housing Authority (NYCHA). NYCHA had hired Bovis as a construction manager at a multi-building renovation project. Bovis hired M.A. Angeliades as a general manager for the work to be performed on 13 of the buildings in the project, including the building in which plaintiff was working. M.A. Angeliades hired plaintiff's employer, Remy, to perform masonry work, and hired defendant, Navtech, to construct sidewalk sheds (also called sidewalk bridges) at the subject building. Such sidewalk bridges were erected to protect occupants of the sidewalk from falling material.

Plaintiff alleges that, while in the course of carrying two 50-pound buckets of cement across the top of the sidewalk bridge, toward a motorized scaffolding platform, he was caused to trip and fall on an approximately two-foot high, elevated step, created to accommodate a protruding tree branch, which was built onto the surface of the sidewalk bridge, resulting in his injuries. Plaintiff contends that the step constituted a dangerous condition, created by, or on notice to, the negligent defendants, the existence of which violated multiple sections of the Industrial Code Plaintiff's complaint includes causes of action for common-law negligence and for violations of Labor Law §§ 200, 240(1) and 241(6).

Defendant, M.A. Angeliades (Seq. 4), moves for summary judgment dismissing plaintiff's complaint, and for contractual and common-law indemnification against defendants, Navtech and Remy. Defendant, Bovis (Seq. 8), moves for summary judgment dismissing plaintiff's complaint, and for contractual and common-law indemnification against defendants, M.A, Angeliades, Navtech and Remy. Third-party defendant, Remy (Seq. 5), moves for summary judgment dismissing plaintiff's complaint as against defendants, M.A. Angeliades and Bovis, and for dismissal of the third-party action as against it. Defendant, Navtech (Seq. 5), cross-moves for summary judgment dismissing plaintiff's complaint. Plaintiff (Seq. 6), moves for summary judgment on liability against all defendants.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d

1062, 1063, citing *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *see Schmitt v Medford Kidney Center,* 121 AD3d 1088 [2014]; *Zapata v Buitriago*, 107 AD3d 977 [2013]). On defendants' motions for summary judgment, the evidence should be liberally construed in a light most favorable to the non-moving plaintiff (*see Boulos v Lerner-Harrington*, 124 AD3d 709 [2015]; *Farrell v Herzog*, 123 AD3d 655 [2014]). Credibility issues regarding the circumstances of the subject incident require resolution by the trier of fact (*see Bravo v Vargas*, 113 AD3d 579 [2014]; *Martin v Cartledge*, 102 AD3d 841 [2013]), and the denial of summary judgment.

The Court's function on a motion for summary judgment is "to determine whether material factual issues exist, not to resolve such issues" (*Lopez v Beltre*, 59 AD3d 683, 685 [2009]; *Santiago v Joyce*, 127 AD3d 954 [2015]). As summary judgment is to be considered the procedural equivalent of a trial, "it must clearly appear that no material and triable issue of fact is presented .... This drastic remedy should not be granted where there is any doubt as to the existence of such issues ... or where the issue is 'arguable' [citations omitted] (*Sillman v. Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]; *see also, Rotuba Extruders v.Ceppos*, 46 NY2d 223 [1978]; *Andre v. Pomeroy*, 35 NY2d 361 [1974]; *Stukas v. Streiter*, 83 AD3d 18 [2011]; *Dykeman v. Heht*, 52 AD3d 767 [2008]. Summary judgment "should not be granted where the facts are in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (*Collado v Jiacono*,, 126 AD3d 927 [2014]), citing *Scott v Long Is. Power Auth.*, 294 AD2d 348, 348 [2002]). The burden is on the party moving for summary judgment to demonstrate the absence of a material issue of fact. Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Gilbert Frank Corp. v. Federal Ins. Co.*, 70 NY2d 966 [1988]; *Winegrad v. New York Med. Ctr.*, 64 NY2d 851 [1985]).

The evidence herein, echoed in each motion and opposition thereto, contained material factual issues regarding the participation and duties of the parties, and the manner in which this accident allegedly occurred, in sufficient quantity to deny summary judgment. Each party insisted, in its moving papers, that no material issue of fact existed, and, with equal fervor, argued the existence of material factual issues in its opposition papers. In some instances, the party's own papers raised credibility issues warranting denial of the motion. From plaintiff's diverse narrations as to the specific activity which he alleged caused his injury, to defendants' denials of participation in, creation and/or notice of, or responsibility for the condition of plaintiff's workplace, questions of fact abound. Tellingly, the failure of the parties to agree on whether a "step" even existed at the location of the accident, along with the lack of any tangible evidence to prove or disprove its existence, obviates the granting of summary judgment to any party defendant

herein.

Consequently, defendant movants and cross movant have failed to tender sufficient evidence to show the absence of any material issue of fact and the right to judgment as a matter of law (*see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Winegrad v. New York Univ. v. Medical Center,* 64 NY2d 851), and the branch of each motion seeking to dismiss the complaint, is denied.

With respect to the branches of the defendants' motions seeking summary judgment on the ground of contractual indemnification, Article 9 of both the subcontract between M.A. Angeliades and Navtech, dated December 18, 2006, and the subcontract between M.A. Angeliades and Remy, dated December 19, 2006, state that the subcontractor will indemnify and defend "[t]o the extent permitted by law ... Owner, Contractor ... and agents and employees of any of them from and against all claims, damages, losses and expenses ... arising out of or from the performance of the agreement, provided any such claim, damage, loss, or expense ... is caused in whole or in part by any act or omission of the Subcontractor or anyone directly or indirectly employed by it". Such clause demonstrates an intention to indemnify which is clearly expressed in the language and purpose of the agreement, entitling M.A. Angeliades to contractual indemnification from Navtech and Remy (*see Drzewinski v Atlantic Scaffold & Ladder Co., Inc.*, 70 NY2d 774 [1987]). While a party seeking full contractual indemnification must demonstrate freedom from its own negligence, as it cannot be indemnified to the extent that its negligence contributed to the accident (*see Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660 [2009]), the use of the language "to the extent permitted by law" in the instant clause, "limits rather than expands a promisor's indemnification obligation", and, therefore, does not violate General Obligations Law §5.322.1, because it does not require the promisor to indemnify the promisee for promisee's own negligence (*Brooks v Judlau Contr., Inc.*, 11 NY3d 204, 210 [2008]; *Goryev v Tomchinsky*, 114 AD3d 723 [2014]). However, where, as here, a triable issue of fact exists regarding the promisee's negligence, summary judgment on a contractual indemnification claim must be denied as premature (*see McLean v 405 Webster Ave. Associates,* 98 AD3d 1090 [2012]; *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2009]). Further, as Navtech and Remy are not insurers, their duty to defend is no broader than their duty to indemnify (*see Sawicki v GameStop Corp.*, 106 AD3d 979 [2013], so that branch of the motions is also denied as premature. Similarly, the branches of the motions seeking common-law indemnification are denied as premature, as plaintiff's injury has not yet been shown to be attributable solely to Navtech or Remy (*see Arrendahl v. Trizechahn Corp.*, 98 AD3d 699 [2012]).

Plaintiff's motion seeks summary judgment on liability against defendants. On

this motion, plaintiff has the initial burden of demonstrating the lack of a triable issue of fact, and the evidence is to be liberally construed in a light most favorable to defendants. On the facts presented, plaintiff has failed to establish *prima facie* entitlement to summary judgment as a matter of law, in that plaintiff has not shown himself to be free of comparative negligence, nor has he demonstrated any defendant's alleged actions to have been the sole proximate cause of the accident (*see Sanchez v Mapp,* 127 AD3d 844[2015]; *Gardner v. Smith*, 63 AD3d 783 [2009]). The questions of comparative negligence, and proximate and intervening cause, are properly issues for the trier of fact (see *Jiminez v Batista,* 123 AD3d 668 [2014]; *Berish v Vasquez,* 121 AD3d 634 [2014]; *Bah v. Benton*, 92 AD3d 133 [1st Dept 2012]). Consequently, a triable issue of fact, sufficient to defeat summary judgment, exists herein (*see Sanchez v Mapp,* 127 AD3d 844).

The parties' remaining contentions and arguments either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, all of the instant motions, and the cross motion, seeking, among other things, summary judgment either dismissing the complaint or on liability, are denied.

Dated: 6/26/15

VALERIE BRATHWAITE NELSON, J.S.C.