Southern Tier Crane Servs., Inc. v Dakksco Pipeline Corp.
2015 NY Slip Op 31213(U)
July 15, 2015
Supreme Court, Tioga County
Docket Number: 41644
Judge: Eugene D. Faughnan

At a Special Term of the Supreme Court of the State of New York held in and for the Sixth Judicial District at the Tioga County Courthouse, Owego, New York, on the 10TH day of June, 2015.

PRESENT: HON. EUGENE D. FAUGHNAN
Justice Presiding

STATE OF NEW YORK
SUPREME COURT : TIOGA COUNTY

SOUTHERN TIER CRANE SERVICES, INC.,

Plaintiff,

-vs-

DAKKSCO PIPELINE CORP. and ELWYN & PALMER CONSULTING ENGINEERS, PLLC,

Defendants.

DECISION AND ORDER

Index No. 41644
RJI No.

EUGENE D. FAUGHNAN, J.S.C.

This matter comes before the Court on Dakksco Pipeline Corp.'s ("Defendant's") Motion for Summary Judgment pursuant to CPLR §3212 (with exhibits) dated March 4, 2015. Defendant submitted affidavits of Donald Feola, Richard L. Applebaum, P.E., Daniel D. Morin, and Christopher R. Paolini, P.E. dated February 27, 2015, March 4, 2015, March 3, 2015 and March 4, 2015 respectively. Defendant also submitted Memoranda of Law dated March 4, 2015 and June 8, 2015. Southern Tier Crane Services. Inc. ("Plaintiff") submitted an Affirmation in Opposition to the Motion for Summary Judgment (with exhibits) dated April 16, 2015.

This case arises out of a project in which Defendant contracted with the Village of Spencer ("Village") to perform various services including the dredging of Nicholas Park Pond. The

Defendant engaged the services of Plaintiff to provide crane services as part of the dredging. The parties had no detailed contract but merely a work order specifying the lift capacity of the crane to be provided and hourly rate for the provision of a crane and operator. The remaining responsibilities of the parties were unspecified in this or any other document.

On October 14, 2009, Plaintiff's employee, Richard Matt visited the job site and inspected the area for a place to locate the crane. There was an area described by Defendant as a "staging area" and by Plaintiff as a "pad" which was adjacent to the pond and ultimately selected as the area to locate the crane. There are significant factual disputes between the parties as to whether this was intended to be a crane pad and whether it was represented as appropriate as a crane pad. In any event, on October 19, 2009, Charles T. Hendrickson ("Hendrickson"), the assigned crane operator, located the crane in the designated area. The crane was repositioned within the area on October 23, 2009. Hendrickson began a lift and was advised by a co-employee that one of the outriggers had begun to sink. The crane ultimately tipped over and fell into the pond.

Plaintiff filed a Summons and Verified Complaint on March 28, 2011 and a Supplemental Summons and Verified Complaint on June 13, 2011 in which it alleges Breach of Contract, Negligence and Gross Negligence on the part of Defendant.

Defendant now seeks Summary Judgment alleging that there was no contract that was breached with Plaintiff, as the only "contract" was the work order provided by Plaintiff. Additionally, Defendant argues that it was not negligent or grossly negligent as it owed no duty to Plaintiff and no claim for negligence can arise from a contractual matter. Plaintiff argues that it was the third party beneficiary of Defendant's contract with the Village of Spencer and that Defendant breached that contract based upon its failure to ensure the safety and protection of persons and equipment utilized on the job site. In addition, Plaintiff argues that Defendant was responsible for ensuring the appropriateness of the crane pad pursuant to industry standards and/or made material misrepresentations regarding the crane pad it detrimentally relied upon and as such, it breached its duty of care and was negligent.

Summary Judgment

When seeking summary judgment, the movant must make a *prima facie* case showing its entitlement to judgment as a matter of law, by offering evidence which establishes there are no material issues of fact. *Amedure v. Standard Furniture Co.*, 125 AD2d 170 (3rd Dept. 1987); *Bulger v. Tri-Town Agency*, 148 AD2d 44 (3rd Dept. 1989). Once this burden is met, the burden shifts to the respondent to establish that a material issue of fact exists. *Dugan v. Sprung*, 280 AD2d 736 (3rd Dept. 2001); *Sheppard-Mobley v. King*, 10 AD3d 70, 74 (2nd Dept. 2004) *aff'd as mod.* 4 NY3d 627 (2005); *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Winegrad v. N.Y. Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985).

Breach of Contract

There is little doubt that, to the extent that the work order between the parties represents a contract, its scant provisions merely provide for the lift capacity of the crane to be provided and an hourly rate for the crane and operator. Nowhere in this document is there any delineation of the parties' relative responsibility for the construction or provision of a crane pad. Defendant has submitted a *prima facie* case for Summary Judgment with regard to any breach of this contract and the Plaintiff has submitted no evidence to rebut the Defendant's case in this regard. Therefore, to the extent that there is any claim for breach of the contract between the parties, the Defendant's Motion for Summary Judgment is **Granted.**

However, the Court's analysis cannot stop there. The Plaintiff alleges a breach of Defendant's contract with the Village and alleges that it is a third party beneficiary of that contract. Parties asserting third-party beneficiary rights under a contract must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit and (3) that the benefit to [it] is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost" *Burns Jackson Miller Summit & Spitzer v. Lindner*, 59 N.Y.2d 314, 336 (1983).

Although the validity of the contract between Defendant and Village has not been questioned, the Plaintiff has failed to "identify any provision in the contracts that contain language evincing an intent to benefit it beyond its status as an incidental beneficiary" *IMS Engineers-Architects, P.C. v. State of New York*, 51 AD3d 1355, 1357 (3rd Dept. 2008); *see Fourth Ocean Putnam Corp. v. Interstate Wrecking Co.*, 66 NY2d 38, 44 (1985); *Aymes v. Gateway Demolition Inc.*, 30 AD3d 196, 196, (1st Dept. 2006). Similarly, the Plaintiff has failed to "point to anything supporting the conclusion that the contracts were intended for its benefit and that the benefit to claimant is immediate and not merely incidental so "as to evince an intent to permit enforcement by [claimant], and the best evidence of this is to be found in the language of the contract[s] [themselves]" *Binghamton Masonic Temple v. City of Binghamton*, 213 AD2d 742, 745-746 (3rd Dept. 1995) *lv denied* 85 NY2d 811 (1995).

Article 6 of the contract between the Defendant and the Village details the responsibilities of the Defendant regarding job site safety and places the sole responsibility for "initiating, maintaining and supervising all safety precautions and programs in connection with the work". *Contract* at §6.13 (A). §6.13(3) expressly includes "other property at the site or adjacent thereto". However, reading these provisions in context with the rest of §6.13, these provisions provide that the Defendant, and not the Village, shall be liable for any damages "caused directly or indirectly...by contractor [or] any subcontractor" §6.13(C). Nowhere in the contract does the Village either expressly or impliedly extend this protection to subcontractors or others and the Plaintiff fails to identify any provision of the contract evincing an intent on the part of the Village to benefit the Plaintiff.

Therefore, the Court finds that the Plaintiff is not a third party beneficiary of the contract between the Defendant and the Village, other than, perhaps, incidentally. The Plaintiff cannot claim breach of any duty under a contract to which it was not a party and is not a third party beneficiary. Therefore, with regard to the breach of contract cause of action, the Defendant's motion for Summary Judgment is **GRANTED.**

Negligence

Initially, it should be noted that Defendant argues that no claim for negligence can lie in a matter involving a breach of contract. "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpatrick, Inc. v. Long Island Rail Road Company*, 70 NY2d 382, 389 (1987), *see also Meyers v Waverly Fabrics*, 65 NY2d 75, 80, n 2 (1968); *North Shore Bottling Co. v. Schmidt & Sons*, 22 NY2d 171, 179 (1968); *Rich v. New York Cent. & Hudson Riv. R. R. Co.*, 87 NY 382, 390 (1882). Any "legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract" *Id.* at 389.

In the present matter, the Defendant has successfully argued that there has been no breach of its "contract" with Plaintiff and that the Plaintiff was not a third party beneficiary of the contract between it and the Village. However, as previously noted, the terms of the contract between the parties, as evidenced by the work order, merely addresses the lift capacity of any crane and the hourly rate for the crane and operator. Therefore, it can readily be said that any legal duty owed to the Plaintiff arises from circumstances extraneous to, and not constituting elements of, the contract.

In order for a plaintiff to establish a prima facie case of negligence, he must prove that: (1) the defendants owed [it] a duty of care; (2) the defendants breached that duty of care; and (3) the breach was the proximate cause of [its] injuries. *Solomon v. City of New York*, 66 NY2d 1026 (1985). "In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff." *Gilson v. Metropolitan Opera*, 5 NY3d 574 (2005). Evidence of industry practice and standards is admissible to establish a duty of care. *Phillips v. McClellan Street Assocs.*, 262 AD2d 748, 749 (3rd Dept. 1999), *see, Guldy v. Pyramid Corp.*, 222 AD2d 815, 816; *French v. Ehrenfeld*, 180 AD2d 895, 896.

Neither party disputes that the "crane pad" utilized was insufficient to support the weight of the crane and any load. Both parties appear to agree that a duty of care is imposed by the industry standards promulgated by the American Society of Mechanical Engineers[1]. The crux of the dispute is upon whom that duty fell, and secondarily whether the Plaintiff improperly placed the crane on the pad that was utilized.

Defendant's expert, Charles Paolini, P.E. ("Paolini"), is a registered professional engineer with over 13 years of experience and specializing in, among other areas, geotechnical, soil and foundation evaluation. Paolini opines that it is the industry standard that as a specialty contractor, it was the Plaintiff's responsibility to provide a safe and satisfactory crane pad. He further submits that the relative responsibilities of contractors is delineated under the American Society of Mechanical Engineers (ASME) standards which are the industry standards. He asserts that under ASME B30.5-2007, the entity that operates a crane is responsible for ensuring that the area for the crane is properly prepared including ensuring that the area is level and the subsurface is capable of supporting the crane and any load. He further opines that under ASME standards, the general contractor bears no responsibility to ensure the appropriateness of a crane pad.

Donald Feola is offered by the Defendant as an expert in crane operation having 30 years experience in the crane business. He likewise opines that under ASME standards it was Plaintiff's responsibility to ensure the ground and subsurface conditions in the area where the crane was being placed. He also believes that the crane was improperly placed in relation to the slope of the shoreline and that this contributed to the accident.

Defendant's expert, Richard Applebaum, P.E. ("Applebaum") is a professional engineer with 37 years of experience with extensive experience working with soils engineers on the design and construction of retaining walls, drainage, foundations and engineered soils for construction

---

[1]Defendant asserts that ASME standards actually place the duty on the Plaintiff.

purposes. Applebaum opines that the "staging area" should not have been utilized by Plaintiff as a crane pad and that the crane was placed by the operator in a manner that did not allow the crane to operate with its outriggers at a safe distance from the shoreline. In viewing photographs of the accident, he concluded that the operator did not have the outriggers fully extended. He concludes that the accident was caused by the outriggers not being fully extended and the outriggers being placed too close to the bank of the pond.

The Defendant, through its experts, has submitted a *prima facie* case for Summary Judgment. Both Applebaum and Feola opine that ASME standards place the responsibility for ensuring the appropriateness and stability of any crane pad on the party providing the crane and operator. As such, Defendant's experts support the conclusion that Defendant owed no duty to Plaintiff with regard to the location, construction or subsurface conditions of the crane pad. Absent a duty, there is no claim for negligence. Further, the cause of the accident is attributed to Plaintiff's failure to ensure the crane pad was appropriate for the proposed lift and/or the crane operator's set-up and operation of the crane.

Having submitted a *prima facie* case for Summary Judgment, the Court now turns to whether the Plaintiff has rebutted the Defendant's offer by showing that there are material issues of fact that would preclude a summary finding. *Dugan, supra*; *Sheppard-Mobley, supra*; *Alvarez v. Prospect Hosp., supra*; *Winegrad , supra.*

Plaintiff's expert Edward Zemeck, P.E. ("Zemeck") is a professional engineer with over 40 years of experience in construction and design and has experience in project site safety, crane placement and crane rigging. Zemeck is also experienced in working with soils engineers in designing retaining walls, underpinning, grading, drainage, foundations and engineered soils. Zemeck opines that the Defendant was the site supervisor under both AMSE and OSHA standards and as such was responsible for ensuring that the crane pad was appropriate for the project. He further asserts that Defendant was responsible for obtaining soil samples and

compaction tests for the area of the pad. Zemeck points to ASME B30.5-2007 §5-3 1.3 as supporting the proposition that a general contractor is responsible for all site safety regardless of whether it considers itself a "non-crane contractor". He concludes that by failing to have soil testing in the area of the pad and otherwise failing to ensure the appropriateness of the site for the crane, Defendant is responsible for the accident in question.

Plaintiff's expert, Thomas R. Barth ("Barth"), is accredited with the United States Department of Labor/OSHA and has over 38 years of experience as a crane operator, trainer, inspector and accident investigator. Barth has investigated more than 100 crane accidents in his career. Barth visited the accident site after the incident and inspected the crane and site. Barth opines that the placement of the crane and the deployment of outriggers was within all parameters of crane setup based upon both industry practice. In inspecting the site, he noted that the outriggers were fully extended at the time of the accident and opined that the accident was caused by the outriggers sinking into the ground due to poor crane pad construction. Barth also dismisses the suggestion that the outriggers were overhanging the shore line based upon the experience of the operator and the position of the crane when inspected.

Plaintiff's expert, James P. Stewart, Ph.D, P.E. ("Stewart") is a Geotechnical Engineer/Civil Engineer with a Doctorate and Masters of Science in Geotechnical Engineering. Stewart is experienced in working with soils on design and construction of crane pads, retaining walls, hillside stabilization, underpinning, grading, drainage, foundations, and engineered soils. Stewart opines that the subsurface soils were weak and comprised of organic peat and silt and that the borings taken for a nearby project placed Defendant on notice regarding these conditions. Stewart asserts that the accident was caused by Defendant's failure to properly construct the crane pad given the known soil conditions.

In sum, the Plaintiff's experts opine that under applicable industry standards including ASME and OSHA, the Defendant, as site supervisor, was responsible for properly constructing a crane

pad and failed to properly consider soil conditions in constructing the pad utilized. They further opine that the crane was properly placed on the pad with the outriggers fully extended. They agree that the cause of the accident was Defendant's failure to properly construct a crane pad.

Based upon the opinions of Plaintiff's experts, the Court does find that the Plaintiff has rebutted Defendant's *prima facie* case for Summary Judgment and that there are material issues of fact regarding which party was responsible for constructing a crane pad and whether the Plaintiff properly set-up and operated of the crane. Therefore, Defendant's motion seeking Summary Judgment regarding Plaintiff's claim for negligence is **DENIED**.

Gross Negligence

It is settled that "[g]ross negligence differs in kind, not only in degree, from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or smacks of intentional wrongdoing." *Finsel v. Wachala*, 79 AD3d 1402, 1404 (2010) (internal quotation marks and citations omitted); *see Abacus Fed. Sav. Bank v. ADT Sec. Servs., Inc.*, 18 NY3d 675, 683 (2012). Plaintiff alleges that Defendant was grossly negligent in its construction of the crane pad and in alleged representations made to Plaintiff's employees about the fitness of the pad and soil conditions in general. It alleges that Defendant was responsible for the construction of the pad and ensuring that the subsurface conditions were sufficient to support the weight of the crane. They also allege that Defendant's employee directed its' employee to the pad and failed to advise them about nearby soil testing.

However, what is lacking is any evidence of wanton or reckless conduct on the part of the Defendant that would elevate this matter beyond simple negligence. Although Plaintiff's position, if proved, certainly rises to the level negligence, it is not "so flagrant as to transcend mere carelessness" or so wantonly reckless as to evince a conscious disregard for the rights of others". *Rey v. Park View*

Nursing Home, Inc., 262 AD2d 624, 627 (3rd Dept. 1999); *see Harrell v. Champlain Enters.*, 222 AD2d 876, 876(3rd Dept. 1995).

Therefore, Defendant's motion for Summary Judgment regarding the claim for gross negligence is **GRANTED**.

Defendant is directed to submit a Proposed Order, on notice, within 30 days of the date of this Decision and Order.

Dated: July 15, 2015
Owego, New York

HON. EUGENE D. FAUGHNAN
Supreme Court Justice