

Matter of Ignacio v New York City Health & Hosps. Corp.
2015 NY Slip Op 31758(U)
August 20, 2015
Supreme Court, Bronx County
Docket Number: 23535/2004
Judge: Alison Y. Tuitt
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NEW YORK SUPREME COURT-----COUNTY OF BRONX

PART IA - 5

In the Matter of JULIO IGNACIO, as Administrator
of the Estate of LUZ FERNANDEZ, Decedent,

INDEX NUMBER: 23535/2004

Plaintiff,

-against-

Present:

HON. ALISON Y. TUITT

Justice

NEW YORK CITY HEALTH AND HOSPITALS
CORPORATION, THE CITY OF NEW YORK,
SOULA PRIOVOLOS, M.D., AYOOLA O. ALI,
M.D., JOSEPH DANIEL AYERS, M.D.,
RAMINATH D. KAPOOR, M.D., ERICA JEAN
SILVESTRI and CABLEVISION SYSTEMS
NEW YORK CITY CORPORATION D/B/A
CABLEVISION, ANTHONY YANG, M.C. and
SARGINE BRUTUS, M.D.,

Defendants.

CABLEVISION SYSTEMS NEW YORK CITY
CORPORATION,

Third-Party Plaintiffs,

-against-

CORBEL COMMUNICATIONS, INC.,

Third-Party Defendant.

CORBEL COMMUNICATIONS, INC.,

Second Third-Party Plaintiff,

-against-

ALL COUNTY COMMUNICATIONS, INC.,

Second Third-Party Defendant.

The following papers numbered 1 to 3,

Read on this Motion for Reargument

On Calendar of 7/21/14

Notice of Motion-Exhibits and Affirmation _____ 1

Affirmation in Opposition _____ 2

Reply Affirmation _____ 3

Upon the foregoing papers, Corbel Communication Inc.'s (hereinafter "Corbel") motion to reargue Cablevision Systems New York City Corporation d/b/a Cablevision's (hereinafter "Cablevision") motion for indemnification and to assume the defense and fully indemnify Cablevision pursuant to the contract between Cablevision and Corbel and for common law indemnification is granted. Upon reargument, Cablevision's motion for contractual indemnification against Corbel is denied as premature as there is a question of fact regarding whether Cablevision negligently performed work at the sidewalk where plaintiff's decedent sustained her fall.

The within action involves plaintiff's claim that Luz Fernandez, deceased, (hereinafter "Fernandez") sustained serious injuries when she was caused to trip and fall on June 22, 2003 at the sidewalk in front of 270 East 165th Street, Bronx, New York. Plaintiff alleged that Fernandez was caused to trip and fall as a result of Cablevision, its agents, servants and/or employees in creating, allowing and/or permitting a hazardous and condition to exist. Plaintiff settled all claims against New York City Health and Hospitals Corporation (hereinafter "NYCHHC") and the causes of action against the individually named doctors were discontinued. The only claims that remained were those of Cablevision against Corbel and the second third-party action.

Cablevision commenced a third-party action against Corbel alleging that Corbel breached its contract with Cablevision in the performance of construction, excavation, installation and/or repair work at or near the sidewalk in front of 270 East 165th Street, Bronx, New York. Corbel commenced a second third-party action against All County Communications, Inc. (hereinafter "All County") on the grounds that it subcontracted

the work to be performed on the sidewalk to All County. As it relates to the instant motion, this Court granted Cablevision's motion to the extent that it granted summary judgment on its third-party claims against Corbel by Order dated January 15, 2014. Corbel seeks to reargue the grant of summary judgment to Cablevision on its indemnification claim.

Delia Ignacio, Fernandez's daughter-in-law, testified that she was present when Fernandez fell and she was familiar with the condition of the subject sidewalk before and after the work since she would take the bus every morning from the bus stop which was located at the site of the accident. Ms. Ignacio testified that the sidewalk had been broken by Cablevision and some material left behind. She testified that Cablevision had broken the sidewalk because she saw Cablevision trucks at the site and when she was going to take the bus, she would see red cones with a sign indicating that Cablevision was performing the work.

Randy Reed, a construction supervisor, testified at a deposition on behalf of Cablevision. Mr. Reed testified that Cablevision contracted with Corbel to perform installation work on the sidewalk in the general vicinity of Fernandez's accident in 2003. Cablevision obtained a permit to install a large metal box on the public sidewalk on the south side of East 165th Street between Morris Avenue and College Avenue. The permit allowed Cablevision to open the roadway or sidewalk at the aforementioned location, pursuant to its franchise agreement with the City of New York. Corbel installed a pedestal, a cabinet, conduits and replaced the concrete. Mr. Reed testified that Corbel was hired by Cablevision to install a fiber optic node that was to provide service for up to 500 homes. In order to install the conduit, Corbel excavated a trench within the sidewalk and then replaced the excavated flags with new cement. The work was performed on East 165th Street and Morris Avenue. Mr. Reed testified that the sidewalk on East 165th Street consisted of three rows of sidewalk flags and Corbel's work was located solely within the center of the three rows. Mr. Reed further testified that the work performed by Corbel was performed in the center of the three rows of flags and would not affect, alter or damage any of the adjacent flags located to either the right or left. All of the work performed on behalf of Cablevision was performed by Corbel and all of the equipment associated with the work was provided by Corbel. Mr. Reed testified that Cablevision did not supervise and/or control the methods or means in which Corbel performed its work. Mr. Reed had no involvement with the actual site of the work. He also testified that Cablevision had "tossed out" any progress reports a couple of months after the project.

In support of its motion for summary judgment, Cablevision argued that the work that was

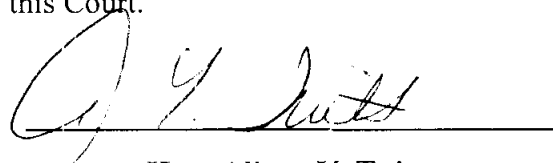
performed by Corbel is in the vicinity of where plaintiff's accident occurred and that the condition that caused decedent's fall was not created by Cablevision. Cablevision further argued that even if the Court found that there was a question of fact regarding Cablevision performing work at the site, Corbel was under contract to perform the work on behalf of Cablevision and, therefore, Corbel was responsible for defending and indemnifying Cablevision for any claims arising out of the work performed on behalf of Cablevision.

C.P.L.R. Rule 2221 permits a party to move for reargument where it is shown that the Court overlooked or misapprehended any matters of fact or law in issuing the underlying Order. Reargument of a motion is not designed to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted. Massey v. City of New York, 672 N.Y.S.2d 679 (1st Dept. 1998); Pahl Equipment. v. Kassis, 588 N.Y.S.2d 8 (1st Dept. 1992).

Reargument must be granted because this Court incorrectly found that even if there was a question of fact regarding Cablevision itself performing work at the subject location, it should be indemnified by Corbel. In order for Cablevision to be entitled to full indemnification from Corbel, Cablevision must show that they are free from negligence and that the accident arose out of Corbel's work at the site. Since there is a question of fact as to whether Cablevision performed work at the site which was raised by Ms. Ignacio's testimony, the Court should not have granted full indemnification to Cablevision and this was error. Pursuant to General Obligations Law §5-322.1, a clause in a construction contract which purports to indemnify a party for its own negligence is against public policy and is void and unenforceable. See, Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co., 89 N.Y.S.2d 786 (1997). However, an indemnification agreement that authorized indemnification "to the fullest extent permitted by law" is enforceable. Landgraff v. 1579 Bronx River Ave., LLC, 796 N.Y.S.2d 58 (1st Dept. 2005); Dutton v. Pankow Bldrs., 745 N.Y.S.2d 520 (1st Dept. 2002), *lv denied*, 99 N.Y.S.2d 511 (2003). If the trier of fact finds Ms. Ignacio's testimony credible and finds Cablevision was negligent in connection with the happening of the accident, Cablevision will not be entitled to indemnification for its own negligence. Accordingly, Cablevision's motion for contractual indemnification is denied as premature as there is a question of fact as to whether Cablevision was negligent.

This constitutes the decision and order of this Court.

Dated: 8/20/15


Hon. Alison Y. Tuitt