

Long v Con Edison

2015 NY Slip Op 32068(U)

April 17, 2015

Supreme Court, New York County

Docket Number: 104392/2011

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

FA
4/17/15
E

PRESENT: JUDGE DORIS LING-COHAN
Justice

PART 36

Index Number : 104392/2011
LONG, MARQUIS
vs
CONSOLIDATED EDISON
Sequence Number : 004
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to 6, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3, 4
Replying Affidavits _____ | No(s). 5, 6

Upon the foregoing papers, it is ordered that this motion ~~is~~ for summary judgment
by Con Edison is granted in accordance
with the attached memorandum decision.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED
APR 22 2015
NEW YORK
COUNTY CLERK'S OFFICE

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APR 22 2015
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NYS SUPREME COURT - CIVIL

Dated: 4/17/15

[Signature], J.S.C.
JUDGE DORIS LING-COHAN

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 36

-----X

Marquis Long,

Plaintiff,

Index Number:

-against-

104392/2011

Con Edison and Qualcon
Construction, LLC,

Defendants.

Motion Seq. No.: 004

-----X

Consolidated Edison Company of
New York, Inc.,

Third-Party Plaintiff,

-against-

San Mateo Construction Corp.
and Qualcon Construction, LLC,

Third-Party Defendant

FILED
X

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San Mateo Construction Corp.,

Second Third-Party Plaintiff, APR 22 2015

-against-

NEW YORK
COUNTY CLERK'S OFFICE

Qualcon Construction, LLC,

Second Third-Party Defendant.

-----X

Doris Ling-Cohan, J.:

Defendant Consolidated Edison Company of New York, Inc. (Con Edison) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff's complaint against it and for contractual indemnity as against San Mateo Construction Corp. (San Mateo).

Underlying Allegations

Plaintiff alleges that, on October 6, 2009, he was struck by a backhoe when the operator became distracted, and he was propelled into traffic and struck by a car (Bill of Particulars,

¶¶ 4, 6). At that time, he was working for San Mateo as a flagger directing traffic at the intersection of West 225th Street and Exterior Street, Bronx, New York (the Job Site) (Id., ¶5; Plaintiff EBT at 92).

Con Edison had entered into a contract with Qualcon Construction, LLC (Qualcon) for the installation of piping at the Job Site (the Project). Con Edison entered into a separate contract (the San Mateo Contract) with San Mateo to supply flaggers at the Job Site. The San Mateo Contract includes a provision (the Indemnity Provision) that provided indemnity from San Mateo to Con Edison "from all claims, damage, loss and liability . . . resulting, in whole or in part, from, or connected with, the performance of the Work by [San Mateo]." Notice of Motion, Exh. KK at 9. The backhoe operator was a Qualcon employee. Con Edison had a foreman on the Job Site, but he did not tell plaintiff how to perform his task as a flagger or tell him where to stand prior to the accident (*Plaintiff's EBT* at 101-102, 104, 259-260).

Plaintiff asserts claims under Labor Law §§ 240 (1), 241(6), 200 and common-law negligence.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of

any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

Uncontroverted Facts

"Facts appearing in the movant's papers which the opposing party does not controvert, may be deemed to be admitted" (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *SportsChannel Assoc. v Sterling Mets, L.P.*, 25 AD3d 314, 315 [1st Dept 2006]; *Tortorello v Carlin*, 260 AD2d 201, 206 [1st Dept 1999]).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of common-law negligence and, to be held liable, a party must have the authority to

control the activity that caused the plaintiff's injury (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878 [1993]). There is no liability under this section of the Labor Law for an owner or general contractor that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). "An implicit precondition to [the duty under Labor Law § 200] to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1st Dept 2012]).

Contractual Indemnity

"[T]he right to contractual indemnification depends upon the specific language of the contract" (*Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007] [internal citation omitted]). Moreover, "a contract assuming [the duty to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). A party's right to contractual indemnity "depends on the intent of the parties and the manner in which that intent is expressed in the contract" (*Suazo v Maple Ridge Assoc., L.L.C.*, 85 AD3d 459, 460 [1st Dept

2011)).

Discussion

Con Edison seeks summary judgment dismissing plaintiff's Labor Law § 240 (1) claim against it, since plaintiff has not alleged an elevation related risk (see *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]), and Labor Law § 241 (6) claim against it, asserting the alleged regulatory violations of the New York State Industrial Code are either general safety provisions which are insufficient to support a section 241 (6) claim or are inapplicable to the facts of the claim against it (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]). In his opposing papers, plaintiff fails to dispute these assertions and, therefore, they "may be deemed to be admitted" (*Kuehne*, 36 NY2d at 544). Consequently, the portion of Con Edison's motion that seeks summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 claims against it is granted.

As to that portion of Con Edison's motion which seeks summary judgment with respect to plaintiff's Labor Law § 200 and common law negligence claims, Con Edison has established that it did not exercise control over plaintiff's work at the subject intersection. Plaintiff and San Mateo have opposed dismissal of plaintiff's Labor Law § 200 and common-law negligence claims, based upon the presence of Con Edison personnel at the Job Site.

However, it is "the authority to control the activity bringing about the injury" that governs liability under Labor Law § 200 (*Russin*, 54 NY2d at 317; see also *Comes*, 82 NY2d at 877-878; *Lombardi*, 80 NY2d at 295). Moreover, "the mere presence of Con Edison's personnel on site is insufficient to infer supervisory control" (*Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 477 [1st Dept 2011]; see also *Francis v Plaza Constr. Corp.*, 121 AD3d 427, 428 [1st Dept 2014]). Accordingly, the portion of Con Edison's motion that seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it is granted.

The Indemnity Provision provides that Con Edison is entitled to indemnity from San Mateo for claims "resulting, in whole or in part, from, or connected with" San Mateo's work on the Project. Since plaintiff was an employee of San Mateo, working as a flagger, the Indemnity Provision applies. Upon the within submissions, Con Edison has established no "active culpability in the . . . accident, and, therefore [it] is entitled to summary judgment on its claim for contractual indemnification" (*Cuomo v 53rd & 2nd Assoc., LLC*, 111 AD3d 548, 548 [1st Dept 2013]; see also *Fiorentino*, 95 AD3d at 426-427). Accordingly, the portion of Con Edison's motion that seeks summary judgment against San Mateo on its claim for contractual indemnity is granted.

ORDER

It is, therefore,

ORDERED that the portion of the motion of Consolidated Edison Company of New York, Inc. for summary judgment is granted and the complaint is dismissed in its entirety as against said defendant, with costs and disbursements as taxed by the Clerk of the Court upon submission of an appropriate bill of costs, and the clerk is ordered to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining parties; and it is further

ORDERED that the portion of the motion of Consolidated Edison Company of New York, Inc. for summary judgment as against San Mateo Construction Corp. on its claim for contractual identification is granted and the amount of damages shall be determined at the time of the trial of the remaining action; and it is further

ORDERED that within 30 days of entry of this order, defendant Consolidated Edison shall serve a copy upon all parties, with notice of entry.

Dated: April 17, 2015

FILED
APR 22 2015
NEW YORK
COUNTY CLERKS OFFICE

Doris Ling-Cohan, J.S.C.

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NEW YORK

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