

Noseworthy v F.J. Sciame Constr. Co., Inc.
2015 NY Slip Op 32079(U)
February 3, 2015
Supreme Court, New York County
Docket Number: 109822/10
Judge: Donna M. Mills
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SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

MICHAEL J. NOSEWORTHY,

INDEX No. 109822/10

Plaintiff,

MOTION DATE _____

-v-

MOTION SEQ. No. ~~004~~ 05

F.J. SCIAME CONSTRUCTION CO., INC., and 160
FIFTH OWNER, LLC,

MOTION CAL No. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion for _____.

PAPERS NUMBERED

Notice of Motion/Order to Show Cause-Affidavits- Exhibits....

1, 2

Answering Affidavits- Exhibits _____

FILED

3

Replying Affidavits _____

FEB 04 2015

CROSS-MOTION: _____ YES

NEW YORK
COUNTY CLERK'S OFFICE

Upon the foregoing papers, it is ordered that this motion is:

RECEIVED
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GENERAL CLERK'S OFFICE
SUPREME COURT - CIVIL

DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM

DECISION.

Dated: 2/13/15

DM
J.S.C.

Check one: _____ FINAL DISPOSITION

NON-FINAL DISPOSITION

DONNA M. MILLS, J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 58

MICHAEL J. NOSEWORTHY,

INDEX NO.
109822/10

Plaintiff,

- against -

F.J. SCIAME CONSTRUCTION CO., INC. and
160 FIFTH OWNER, LLC,

DECISION/ORDER

Defendants.

F.J. SCIAME CONSTRUCTION CO., INC. and
160 FIFTH OWNER, LLC,

Third-Party Plaintiffs,

- against -

MASPETH WELDING, INC. and STRUCTURAL
SYSTEMS, INC.,

Third-Party Defendants.

FILED

FEB 04 2015

NEW YORK
COUNTY CLERK'S OFFICE

DONNA M. MILLS, J.:

In this labor law action, plaintiff, Michael Noseworthy, and the defendants have settled. The only remaining issue in this matter is defendants/third party plaintiffs, F.J. Sciam Construction Co., Inc. and 160 Fifth Owner, LLC's motion for summary judgment, seeking recovery of attorney's fees.

The underlying action was for personal injuries allegedly sustained by plaintiff on July 8, 2009 in the elevator pit at the building located at 160 Fifth Avenue, New York, New York. At the time of the accident, plaintiff was employed as an ironworker by third-party defendant, Structural System Inc. ("Structural"). Plaintiff's accident allegedly occurred when he fell from a scaffold in the aforementioned building which was owned by defendant/third-party plaintiff, 160 Fifth Owner, LLC. F.J. Sciam Construction Co., Inc., was the construction manager. Defendants/third-party plaintiffs now move for summary judgment

seeking contractual and common law indemnification from Structural.

Defendants/third-party plaintiffs maintain that the evidence establishes that it did not direct, supervise, or control plaintiff's activities that caused the alleged accident, nor did they create the condition that caused plaintiff's alleged injuries. It is undisputed that the scaffolding provided to plaintiff was owned and erected exclusively by Structural, and as such, defendants/third-party plaintiffs claim that they are entitled to full contractual and common law indemnification from Structural.

On or about January 1, 2008, Structural entered into a Blanket Subcontract Agreement with Maspeth Welding. The agreement was entered into by the parties for "any and all work done for, with, or on behalf of Maspeth Welding Inc., for the period starting January 1, 2008 and running until canceled." The hold harmless section of the agreement reads in relevant part as follows:

To the fullest extent permitted by law, Structural Systems Inc, will indemnify and hold harmless the interest of Owner, Construction Manager, General Contractor, Contractor, Maspeth Welding Inc. ... and naming each as an Additional Insured on a primary non-contributory basis from and against any claims, suits, liens, judgments, damages, losses and expenses, including legal fees and all court costs and liability arising in whole or in part and in any manner from injury and/or death of person or damage to or loss of any property resulting from any such acts, omissions, breach, or default of Subcontractor ... in connection with the performance of any work by or for Subcontractor pursuant to any contract Purchase Order and/or related Proceed Order/Verbal Order etc. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against Maspeth Welding, Inc., and/or Owner, ... arising in whole or in part out of

any such acts, omission, breach or default. The foregoing indemnity shall include injury or death of any employee of the Contractor or Subcontractor and shall not be limited in any way by an amount or type of damage, compensation, or benefits payable under any applicable workers compensation, disability benefits or other similar employees benefits act.

Structural does not dispute that it entered into the Agreement with Maspeth, or that the Agreement was in full force and effect on the date of plaintiff's accident. In opposition to the motion, Structural contends that there is a question of fact as to whether FJ Sciame was negligent.

A party is entitled to contractual indemnification where the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (*Torres v LPR Land Dev. & Constr., Inc.*, 54 AD3d 668, 670 [2d Dept 2008]). Moreover, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2009]).

Plaintiff testified at his deposition that the surface that he was supposed to set the scaffolding up on was filled with rubble, broken pieces of wood, blocks, and paper. Plaintiff subsequently brought this to the attention of FJ Sciame employee, Arthur Bowen. Plaintiff testified that FJ Sciame, the general contractor would direct and coordinate Structural's work while at the site. Plaintiff further testified that after Mr. Bowen instructed a laborer to clean up the area, he informed Mr. Bowen that he was still concerned about erecting the scaffolding in the area given its condition. Plaintiff stated that Mr. Bowen then instructed

plaintiff to “do the best that he could” and did not take any further action to remedy the situation. Plaintiff stated that he continued to try and level the scaffold, but while on the scaffold he felt it shift, thus causing him to fall. Based upon the deposition testimony, there are questions of fact as to whether the defendants/third-party plaintiffs were free from negligence with regard to the underlying accident. As such, summary judgment on the cause of action for contractual indemnification is not warranted.

As to the branch of defendants/third-party plaintiffs motion for summary judgment on the issue of common law indemnification, “an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits” (*Fleming v. Graham*, 10 N.Y.3d 296, 299, 857 N.Y.S.2d 8, 886 N.E.2d 769; see *Rubeis v. Aqua Club, Inc.*, 3 N.Y.3d 408, 412, 788 N.Y.S.2d 292, 821 N.E.2d 530). However, when an employee sustains a “grave injury,” as enumerated in Workers' Compensation Law § 11, “a primary defendant may commence a third-party action against the injured plaintiff's employer for common-law indemnification and/or contribution” (*Fleming v. Graham*, 10 N.Y.3d at 299, 857 N.Y.S.2d 8, 886 N.E.2d 769). In opposition to the defendants/third-party plaintiffs' motion, Structural submitted, inter alia, the plaintiff's deposition testimony and bill of particulars, which established that the plaintiff did not sustain a “grave injury” (see *Spiegler v. Gerken Bldg. Corp.*, 35 A.D.3d 715, 826 N.Y.S.2d 674; *Angwin v. SRF Partnership*, 285 A.D.2d 568, 729 N.Y.S.2d 151). Therefore, Structural cannot be held liable for plaintiff's accident in common law indemnification to defendant/third-party plaintiffs, as such a claim is barred by New York Workers' Compensation Law § 11.

Accordingly, it is

ORDERED that defendants/third-party plaintiffs' motion for summary judgment,
is denied in its entirety.

Dated: 2/3/15

ENTER: *Donna M. Mills*
J.S.C.

DONNA M. MILLS, J.S.C.

FILED
FEB 04 2015
NEW YORK
COUNTY CLERK'S OFFICE