Escalante v 112-1400 Trade Props., LLC
2015 NY Slip Op 32145(U)
October 7, 2015
Supreme Court, Bronx County
Docket Number: 306311/2010
Judge: Mary Ann Brigantti
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[* 1] FILED Oct 14 2015 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX TRIAL TERM - PART 15

Present: Hon. Mary Ann Brigantti

X

JORGE ESCALANTE,

Plaintiff,

-against-

112-1400 TRADE PROPERTIES, LLC., et als.,

Defendants.

X

DECISION/ORDER

Index No.: 306311/2010

The following papers numbered 1 to 7 read on the below motion noticed on March 9, 2015 and duly submitted on the Part IA15 Motion calendar of **June 11, 2015**:

Papers Submitted	Numbered
Whitestar's Affirmation in Support of Motion, with Exhibits	1,2
Zapata's Cross-Motion, Exhibits	3,4
112-1400's Opp. To Motion, Exhibits	5,6
Whitestar's Reply Aff.	7

Upon the foregoing papers, defendant Whitestar Consulting & Contracting, Inc. ("Whitestar") moves for an Order (1) dismissing the complaint of the plaintiff Jorge Escalante ("Plaintiff") against Whitestar, with prejudice, as Plaintiff failed to seek entry of a judgment within one year after Whitestar's "default," (2) dismissing defendants/third party plaintiffs 112-1400 Trade Properties, LLC's ("112-1400") and Cohen Brothers Realty Corporation's ("Cohen") third-party complaint against Whitestar seeking common law indemnity, with prejudice, upon the grounds that Plaintiff has not suffered a "grave injury"; and (3) dismissing defendants/third party plaintiffs 112-1400 and Cohen's third-party complaint against Whitestar seeking contractual indemnity, with prejudice, as there was no indemnification agreement in existence at the time of the subject accident. Defendants/third-party plaintiffs 112-1400 and Cohen oppose the motion. Defendants Zapata Construction, Inc. ("Zapata") and Component Assembly Systems, Inc. ("Component") cross-move for an Order (1) extending their time for this summary judgment motion to be heard; (2) for summary judgment, dismissing Plaintiff's complaint and all cross-claims asserted against Zapata and Component. No opposition has been filed to the cross-

motion.

I. Background

This matter arises out of an alleged construction site accident that occurred on March 11, 2008. Plaintiff alleges that on that date, he was working on the 16th floor of a building located at 1400 Broadway in New York, New York, when he fell from an elevated platform and/or scaffold. Plaintiff testified that after the accident, he was transported to a hospital where he complained of pain in his neck, back, right elbow, and wrist. At the time of his deposition, he had no future treatment scheduled. According to Plaintiff's bill of particulars, as a result of this accident, he sustained injuries to his arm and hand including a right radial head comminuted fracture with intraarticular extension, and injuries to his cervical and lumbar spine with the possibility of additional surgery and injections.

Plaintiff testified that his friend, Carlos Acha, who worked for co-defendant Zapata, told him about the job and advised that Plaintiff would be working for Whitestar. Plaintiff described Mr. Acha as the "in-between" person between the workers and Whitestar. Plaintiff had worked at the subject premises for two or three days before the accident. Mr. Acha would call Plaintiff's cell phone and explain whatever work that had to be done on the premises. Mr. Acha told Plaintiff that he would be paid in cash, but Plaintiff testified that he was never paid for any work he performed at the premises. Carlos Acha testified that he was employed by Zapata as a drywall finisher/taper as of March 2008. He testified that, in March 2008, an individual named "Tyrone" told him that he needed individuals to perform construction work at 1400 Broadway. As a favor, Mr. Acha found Plaintiff and two other individuals to perform the work. Mr. Acha told Plaintiff to mention "Whitestar" when he showed up. Mr. Acha had never been to 1400 Broadway, either before or after the subject accident.

According to the defendants/third-party plaintiffs' supplemental bill of particulars, at the time of this accident, Plaintiff was performing work pursuant to a purchase order and contract between Whitestar and 112-1400/ Cohen, dated April 4 and April 14, 2008, respectively. 112-1400/Cohen served a Notice to Admit upon Whitestar, demanding that Whitestar admit certain facts, including that the purchase order dated April 4, 2008, was a "true and accurate copy of a

contract that was in effect on the date of plaintiff's accident, March 13, 2008." Whitestar denied the truth of that assertion. 112-1400/Cohen then served a second Notice to Admit upon Whitestar, demanding various admissions. In response, Whitestar moved for a protective order. That motion was granted on default, and the second Notice to Admit was stricken.

The building where this accident allegedly occurred is owned by 1400 Broadway Associates, LLC. Newmark Grubb Knight Frank ("Newmark"), a property management company, is the managing agent for the owner. 112-1400 is the ground lessor for the land upon which the building sits, and Cohen owns 112-1400. An employee of Newmark, Jessica Boeckel, testified that in March 2008, Newmark hired Whitestar as the general contractor for pre-built/renovation work to be performed on the 16th and 23rd floors of the property. She identified, among other things, an AIA contract between Newmark and Whitestar, dated April 4, 2008, for work to be performed on the 16th floor. Ms. Boeckel, who was not employed by Newmark at the time these documents were executed, testified that "the purpose of the purchase order is to say that, this is the work that we have agreed on that is going to be done, this is the amount to be paid for the work. Its like a mini contract." The parties usually agree to the terms of the purchase order including the work description and price, prior to starting the work described in the order. Ms. Boeckel could not locate any other contract for work performed by Whitestar on the 16th floor. Despite the fact that the purchase order was dated April 2008, Ms. Boeckel believed that the work had commenced in March 2008, although she had no firsthand knowledge.

Joe Caponigro, the owner and president of Whitestar, testified that Whitestar performed work at 1400 Broadway from 2007 to 2009, and then again in 2012. He noted, however, that Whitestar never began performing work on a project before Newmark issued a purchase order. Mr. Caponigro conceded that he had no personal knowledge of whether Whitestar had done any work at the premises in March 2008. He testified that Whitestar never hired non-union workers, or paid workers in cash, with respect to the work being done at 1400 Broadway.

On or about August 10, 2010, Plaintiff commenced this action against the defendants, alleging *inter alia*, violations of Labor Law §§240(1), 200 and 241(6). 112-1400/Cohen thereafter filed a third-party action against Whitestar, seeking *inter alia*, common law and contractual indemnification. By decision filed on January 7, 2014, the Workers' Compensation

Board affirmed a decision by an Administrative Law Judge, who determined that there was an employer-employee relationship between Whitestar and Plaintiff as of the date of this accident, and awarded workers' compensation benefits to Plaintiff.

Whitestar now moves for dismissal and/or summary judgment. Whitestar argues initially that Plaintiff's complaint must be dismissed as abandoned. Plaintiff filed its summons and complaint, naming Whitestar as a defendant, in 2010. Whitestar states, "upon information and belief," it was never served with the summons and complaint, and therefore Whitestar never served an answer. Since over a year has passed since Whitestar's "default," and Plaintiff did not move for leave to enter a default judgment, his complaint must be dismissed pursuant to CPLR 3215(c).

Whitestar also alleges that it is entitled to dismissal of the third-party complaint insofar as it asserts claims seeking common law indemnification. The Workers' Compensation Board determined that Whitestar was Plaintiff's "employee" and thereafter awarded Plaintiff workers' compensation benefits. Since it cannot be said that Plaintiff sustained a "grave injury," the third-party complaint seeking common law indemnity must be dismissed pursuant to Workers' Compensation Law §11. Whitestar also seeks dismissal of 112-1400/Cohen's claims of contractual indemnification. The purchase order at issue was dated several weeks after this accident occurred, and there is no indication that the parties' agreed that the indemnification provision found in the agreement would be retroactive. Whitestar also argues that there is no admissible evidence that it performed any work on in the building's 16th floor or performed any work pursuant to the purchase order in March 2008. An allegation to the contrary is purely speculative.

112-1400/Cohen opposes those branches of the motion seeking dismissal of their common law and contractual indemnification claims. They argue, initially, that Whitestar has not established definitely that it performed no work on the 16th floor of the building in March 2008 that was pursuant to the purchase order that was issued post-accident. Mr. Caponigro essentially admitted that he did not know whether such work had taken place. Further, Ms. Boeckel specifically testified that it was common practice for Whitestar to commence work before the purchase order was issued. Regarding their common law indemnification claims,

112-1400/Cohen argue that the decision of the Workers' Compensation Board does not have collateral estoppel effect because 112-1400/Cohen did not participate in the underlying hearing. Moreover, Whitestar is taking a different position now than it did at the hearing, when it strenuously argued that Plaintiff was not its employee. 112-1400/Cohen argues that there are factual issues as to Plaintiff's employee status, as Mr. Caponigro testified that it did not employ Plaintiff but would have employed subcontractors to perform the work that had to be done.

Defendants Zapata and Component cross-move for and extension of time to serve their motion for summary judgment, and for summary judgment, dismissing the complaint and all cross-claims. The cross-motion is unopposed. Zapata and Component argue that they had no connection to this accident or to the premises at issue at any time.

II. Standard of Review

To be entitled to the "drastic" remedy of summary judgment, the moving party "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 from the case." (*Winegrad v. New York University Medical Center*, 64 N.Y.2d 851 [1985]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395 [1957]). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. (*Id.*, see also *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 [1986]). Facts must be viewed in the light most favorable to the non-moving party (*Sosa v. 46th Street Development LLC.*, 101 A.D.3d 490 [1st Dept. 2012]). Once a movant meets his initial burden, the burden shifts to the opponent, who must then produce sufficient evidence, also in admissible form, to establish the existence of a triable issue of fact (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). When deciding a summary judgment motion the role of the Court is to make determinations as to the existence of bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499 [2012]). If the trial judge is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied. (*Bush v. Saint Claire's Hospital*, 82 N.Y.2d 738 [1993]).

III. Applicable Law and Analysis

Dismissal of the Complaint pursuant to CPLR 3215[c]

Whitestar alleges that Plaintiff's complaint must be dismissed as abandoned, because Plaintiff failed to move for a default judgment within one year of Whitestar's default (CPLR 3215[c]). Whitestar, however, did not establish that it was ever properly served with the summons and complaint, and indeed denies receipt of the papers. If Whitestar was not properly served, their obligation to serve a responsive pleading never arose (*see Schilt v. Matherson*, 104 A.D.3d 668 [2nd Dept. 2013]). Whitestar's failure to answer the complaint, under these circumstances, would not constitute a default, and Plaintiff therefore could not have obtained a valid default judgment against them under CPLR 3215[a] (*Id.* [internal citations omitted]). On these papers, therefore, Plaintiff did not abandon his claims against Whitestar by failing to timely seek a default judgment against Whitestar. Notably, Whitestar did not submit any affidavit from an individual with personal knowledge to attest as to whether it did or did not receive the summons and complaint. Whitestar only sought dismissal of Plaintiff's direct claims on these grounds. In light of the foregoing, Whitestar's motion to dismiss the complaint as abandoned is denied, without prejudice, with leave to renew upon a proper evidentiary showing.

Dismissal of Third-Party Complaint Seeking Common Law Indemnification

On December 13, 2012, after a hearing on the issue, an Administrative Law Judge determined that defendant Whitestar was the Plaintiff's employer, and awarded workers' compensation benefits to Plaintiff. Whitestar appealed that decision, and the Workers' Compensation Board ("WCB") affirmed. Defendants 112-1400 and Cohen did not participate in the hearing, and there is no indication that they were ever notified of the proceedings. Based upon the WCB determination, Whitestar now moves for summary judgment, dismissing 112-1400/Cohen's third-party complaint that sought, *inter alia*, common law indemnification. Whitestar essentially argues that the WCB determination should be given preclusive effect on the issue of whether Whitestar is Plaintiff's employer. Since Plaintiff has not suffered a "grave injury" in accordance with Workers' Compensation Law §11, Whitestar contends that it is

entitled to dismissal of 112-1400/Cohen's claims seeking common law indemnification.

The doctrine of collateral estoppel "precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same" *(Ryan v. New York Tel. Co.*, 62 N.Y.2d 494, 500 [1984]). This doctrine has been applied to the determinations of administrative agencies, "where the issue a party seeks to preclude in a subsequent civil action is identical to a material issue that was necessarily decided by the administrative tribunal and where there was a full and fair opportunity to litigate before that tribunal" (*see Auqui v. Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246 [2013]). In determining if privity exists between the parties, "courts must carefully analyze whether the party sought to be bound and the party against whom the litigated issue was decided have a relationship that would justify preclusion, and whether preclusion, with its severe consequences, would be fair under the particular circumstances" (*Baten v. Northfork Bancorporation, Inc.*, 85 A.D.3d 697 [2nd Dept. 2011], citing *Buechel v. Bain*, 97 N.Y.2d 295, 304-305 [2001], *cert. den.*, 535 U.S.1096 [2002]).

Here, it is undisputed that 112-1400/Cohen did not participate in the prior proceedings, and Whitestar does not argue that 112-1400/Cohen was in privity with a party who litigated the issue of Plaintiff's employer before the WCB. Since112-1400/Cohen "was not afforded the opportunity to cross-examine witnesses or present evidence at the prior hearing[s]," the WCB determination cannot be given preclusive effect as to 112-1400/Cohen in the current action (*see Baten v. Northfork Bancorporation, Inc., supra., compare Vogel v. Herk Elevator Co., Inc.*, 229 A.D.331 [1st Dept. 1996][administrative law judge determination as to employee-employer relationship given preclusive effect where the defendant's counsel was given notice of the proceeding, and defendant's counsel and corporate officers were all present at the hearing]). Accordingly, Whitestar cannot obtain summary judgment as to 112-1400/Cohen's common law indemnity claims on these grounds.

Dismissal of the Third-Party Complaint Seeking Contractual Indemnity

Whitestar argues that 112-1400/Cohen's claims for contractual indemnification must be

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dismissed because no indemnification agreement existed between the parties on the date of the accident. This accident allegedly occurred on March 13, 2008. On that date, Plaintiff was allegedly performing work pursuant to a purchase order and contract dated April 4 and April 14, 2008, respectively. Whitestar notes that the purchase order post-dates this accident by more than three weeks. The April 14, 2008 AIA document concerns work only on the 23rd floor of the building. Newmark's witness testified that she was not aware of any other contracts or agreements between Newmark and Whitestar for work to be performed on the 16th floor of the premises in 2008.

112-1400/Cohen argues that Whitestar has failed to eliminate all questions of fact as to whether it was performing work on the 16th floor in March 2008, pursuant to a purchase order that was issued post-accident. 112-1400/Cohen points to certain evidence, including the deposition testimony of Ms. Boeckel, who testified that it was her belief, based upon custom and practice, that the work of Whitestar began prior to the execution of the purchase order.

Indemnity agreements must be strictly construed, and a promise to indemnify should not be found unless clearly implied in the language of the agreement (*see Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487 [1989]). In this matter, the April 4, 2008 purchase order does contain a provision obligating Whitestar to indemnify Newmark and its agents for claims arising out of *inter alia*, its negligence, acts, omissions, or breach of the terms of the agreement. However, there is no language demonstrating an intention by the parties that the agreement or its indemnification provision would be applied retroactively (*see Temmel v. 1515 Broadway Assoc., L.P.*, 18 A.D.3d 364 [1st Dept. 2005]). In the absence of such an explicit agreement, "no basis for contractual indemnification [can] be found on the day of plaintiff's accident," even assuming that Whitestar had in fact commenced work on the 16th floor prior to the date of the agreement (*Id.*, citing *Rosado v. Proctor & Schwartz*, 66 N.Y.2d 21, 27 [1985]). Accordingly, that branch of Whitestar's motion seeking dismissal of 112-1400/Cohen's third-party complaint seeking contractual indemnification, is granted, and those claims are dismissed with prejudice.

Zapata and Component's Cross-Motion for Summary Judgment

Zapata and Component's cross-motion for summary judgment, seeking a dismissal of

Plaintiff's complaint and all cross-claims, is granted unopposed. The Court notes that by Order dated February 20, 2015, all parties were permitted additional time to file summary judgment motions, and the instant cross-motion is therefore timely. On the merits, Zapata and Component have demonstrated that they had no connection to work taking place at 1400 Broadway at the time of this accident. Accordingly, the complaint and all cross-claims asserted against the cross-movants are dismissed with prejudice.

IV. Conclusion

Accordingly, it is hereby

ORDERED, that Whitestar's motion to dismiss Plaintiff's complaint as abandoned, pursuant to CPLR 3215(c), is denied without prejudice, with leave to renew upon a proper evidentiary showing, and it is further,

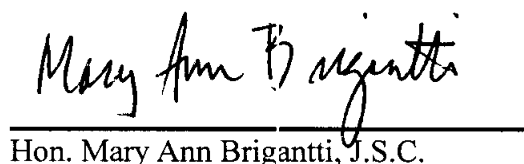
ORDERED, that Whitestar's motion for summary judgment, dismissing the defendant/third party plaintiffs' claims seeking common law indemnification, is denied, and it is further,

ORDERED, that Whitestar's motion for summary judgment, dismissing the defendant/third party plaintiffs' claims seeking contractual indemnification, is granted, and those claims are dismissed with prejudice, and it is further,

ORDERED, that Zapata and Component's cross-motion for summary judgment is granted, and Plaintiff's complaint and all cross-claims asserted against Zapata and Component are dismissed with prejudice.

This constitutes the Decision and Order of this Court.

Dated: 10/7/15



Hon. Mary Ann Brigantti, J.S.C.