

Perloff v Huntington Hosp.

2015 NY Slip Op 32207(U)

November 17, 2015

Supreme Court, Suffolk County

Docket Number: 37644/2010

Judge: James Hudson

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Supreme Court of the State of New York
Suffolk County J.A.S. Part XL

COPY

PRESENT:

Hon. JAMES HUDSON
Acting Justice of the Supreme Court

-----X

MURRAY PERLOFF,

Plaintiff,

- against -

HUNTINGTON HOSPITAL, HUNTINGTON
HOSPITAL ASSOCIATION and NOUVEAU
ELEVATOR INDUSTRIES, INC.,

Defendants.

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INDEX NO.: 37644/2010
SEQ. NO.: 006-MD
SEQ. NO.: 007-XmotD
SEQ. NO.: 008-XmotD

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Upon the following papers numbered 1 to 51 read on these motions to Strike Pleadings, to Dismiss Cross Claims and for Summary Judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-11, 12-20; Notice of Cross Motion and supporting papers 21-33; Answering Affidavits and supporting papers 34-36, 37-44; Replying Affidavits and supporting papers 45-48, 49-51; Other 0; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (006) by Defendant Nouveau Elevator Industries, Inc. and the motion (007) by Plaintiff Murray Perloff are consolidated for the purposes of this determination; and it is

ORDERED that the motion by Defendant Nouveau Elevator Industries, Inc. seeking an order, pursuant to CPLR § 3126, dismissing the cross claims against it is denied; and it is

ORDERED that the motion by Plaintiff Murray Perloff for an order striking the answer of Defendants Huntington Hospital and Huntington Hospital Association, or directing an adverse inference charge be given against said Defendants at the trial of this action, is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the cross motion by Defendants Huntington Hospital and Huntington Hospital Association for summary judgment on their cross claims against Defendant Nouveau Elevator Industries, Inc. is granted to the extent indicated herein and is otherwise denied.

Plaintiff Murray Perloff commenced this action to recover damages for personal injuries allegedly sustained on January 26, 2010, when he was struck by the malfunctioning doors of an elevator located on the ground floor of the Huntington Hospital. At the time of the accident, Plaintiff was trying to make his way to the third floor of the hospital to visit his mother-in-law in the facility's intensive care unit. When the elevator failed to move, Plaintiff made several attempts to re-open and close the elevator's door, hoping it would finally engage. Following several unsuccessful attempts, Plaintiff's left shoulder allegedly was struck by the door as he was exiting the elevator. By way of his complaint, Plaintiff alleges, inter alia, that Defendants Huntington Hospital and Huntington Hospital Association (herein collectively referred to as "Huntington Hospital") were negligent in their ownership and operation of the hospital, and in failing to ensure that the elevator was properly maintained and safe for use. The complaint also names as a Defendant to the action Nouveau Elevator Industries, Inc. ("Nouveau"), the contractor retained by Huntington Hospital to maintain its elevators.

Defendants joined issue denying Plaintiff's claims and asserting affirmative defenses and cross claims against each other for contribution and indemnification. During discovery, Huntington Hospital received several demands for, among other things, the production of any incident reports or surveillance material in its possession which relate to the subject accident. In its initial response to the demand, Huntington Hospital denied that it had any such evidence in its possession. However, in its supplemental response to Plaintiff's discovery demands served approximately 2 ½ years later on June 19, 2013, Huntington Hospital attached an incident report recording the subject accident. The report, which was prepared by a member of Huntington Hospital's security department, also revealed there was a video recording of the accident which had been reviewed by its personnel. Nevertheless, by way of a further supplemental discovery response dated July 15, 2013, Huntington Hospital reiterated it was not in possession of any such recording. A compliance conference was held on September 24, 2014. At that time the parties entered into a so-ordered stipulation certifying that discovery was complete, and Plaintiff was ordered to file a note of issue on before October 29, 2014. The so-ordered stipulation also indicated that Plaintiff's pending discovery motions were withdrawn and that a pre-trial conference would be held on December 3, 2014. Subsequently, Plaintiff filed the note of issue on October 2, 2014.

Nouveau now moves, pursuant to CPLR 3126, for an order dismissing Huntington Hospital's cross claims against it as a sanction for the alleged spoliation of key evidence in the case, namely the loss or destruction of the video recording of the alleged accident.

Plaintiff moves on a similar basis, seeking an order striking Huntington Hospital's answer to the complaint or directing a negative inference charge be given against Huntington Hospital at trial. Huntington Hospital opposes Plaintiff's cross motion on the grounds the video recording of the accident was inadvertently taped over, and that Plaintiff failed to demonstrate how the loss of the recording will prejudice the prosecution of his action.

Huntington Hospital also opposes Nouveau's motion and cross-moves for an order granting it conditional summary judgment on its cross claims. Huntington Hospital argues that Nouveau's motion should be denied, as both entities would be equally affected by the loss of the recording, the alleged spoliation was inadvertent, and Nouveau's ability to defend itself was not compromised, since its experts had a chance to inspect the elevator in question. Huntington Hospital further asserts that it is entitled to conditional summary judgment on its cross claims, as there is no evidence that its negligence caused the accident, and that Nouveau, by way of its service agreement, contractually assumed the obligation to defend and indemnify Huntington Hospital for any claims of injury arising out of or resulting from the performance of Nouveau's work. Nouveau opposes Huntington Hospital's cross motion, arguing that it failed to establish its prima facie entitlement to either common law or contractual indemnification, as there has been no showing that Nouveau's negligence caused the alleged accident, and that it was Huntington Hospital's failure to replace and modernize the outdated elevator which caused the accident. Additionally, Nouveau asserts that the parties' agreement, which attempts to insure Huntington Hospital against its own negligence, is unenforceable, and that Huntington Hospital failed to establish that the alleged accident arose out of the scope of Nouveau's work.

A party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of crucial evidence before it had a chance to inspect it, and that such disposal fatally comprised its ability to defend the action (*see Kirschen v Marino*, 16 AD3d 555, 792 NYS2d 171 [2d Dept 2005]). "Recognizing that striking a pleading is a drastic sanction to impose in the absence of willful or contumacious conduct, courts will consider the prejudice that resulted from spoliation to determine whether such drastic relief is necessary as a matter of fundamental fairness" (*Iannucci v Rose*, 8 AD3d 437, 438, 778 NYS2d 525 [2d Dept 2004]; *see Favish v Tepler*, 294 AD2d 396, 397, 741 NYS2d 910 [2d Dept 2002]). The court has discretion to impose sanctions for the spoliation of evidence by striking a party's pleadings or instructing the jury that it may draw a negative inference from the missing evidence (*see CPLR 3126; Lawrence Ins. Group v KPMG Peat Marwick*, 5 AD3d 918, 773 NYS2d 164 [3d Dept 2004]). "Although spoliation sanctions may be appropriate even for the negligent, rather than intentional, destruction or disposal of evidence, 'in the absence of pending litigation or notice of a specific claim, a Defendant should not be sanctioned for discarding items in good faith and pursuant to its normal business practices'" (*Steuhl v Home Therapy Equip., Inc.*, 23 AD3d 825, 826-827, 803 NYS2d 791 [3d Dept 2005], *quoting Conderman v Rochester Gas & Elec. Corp.*, 262

AD2d 1068, 1070, 693 NYS2d 787 [4th Dept 1999]; see *Weiss v Bellevue Maternity Hosp.*, 121 AD3d 1480, 995 NYS2d 640 [3d Dept 2014]).

Here, there is no evidence that Huntington Hospital intentionally or negligently destroyed the video recording of the alleged accident, as an affidavit by Huntington Hospital's security director indicates that Huntington Hospital's video equipment automatically tapes over itself within 20 to 30 days after a recording is made (see *Scansarole v Madison Sq. Garden, L.P.*, 33 AD3d 517, 827 NYS2d 1 [1st Dept 2006]; *Abbadessa v Sprint*, 291 AD2d 363, 736 NYS2d 880 [2d Dept 2002]; *Herd v Town of Pawling*, 244 AD2d 317, 663 NYS2d 665 [2d Dept 1997]; *Goens v Vogelstein*, 146 AD2d 606, 536 NYS2d 525 [2d Dept 1989]). Further, there is no evidence that Huntington Hospital received a contemporaneous request to preserve the video recording, and absent such request, the recording would have been taped over prior to the commencement of the action on October 12, 2010. Moreover, Plaintiff failed to demonstrate that the video recording was a crucial piece of evidence, such that its loss would be fatal to the prosecution of the action (see *Jackson v Whitson's Food Corp.*, 130 AD3d 461, 13 NYS3d 71 [1st Dept 2015]; *Jennings v Orange Reg'l Med. Ctr.*, 102 AD3d 654, 958 NYS2d 168 [2d Dept 2013]; *Cuevas v 1738 Assoc., LLC*, 96 AD3d 637, 946 NYS2d 576 [1st Dept 2012]; *Thomas v City of New York*, 9 AD3d 277, 779 NYS2d 480 [1st Dept 2004]). Indeed, Plaintiff and his wife will both be able to testify as to the occurrence of the accident and present evidence relating to the alleged defective operation of the elevator. Accordingly, Plaintiff's cross motion for an order striking Huntington Hospital's answer to the complaint or directing a negative inference charge be given against Huntington Hospital is denied.

The motion by Nouveau seeking dismissal of Huntington Hospital's cross claims based on its alleged spoliation of the video recording is denied. As discussed above, there is no evidence that Huntington Hospital deliberately and intentionally destroyed the video recording of the alleged accident. Moreover, Nouveau failed to adduce any proof that it would be unable to defend itself as a result of the loss of the video recording (see *E.W. Howell Co. v S.A.F. La Sala Corp.*, 36 AD3d 653, 828 NYS2d 212 [2d Dept 2007]; *Cameron v Nissan 112 Sales Corp.*, 10 AD3d 591, 781 NYS2d 661 [2d Dept 2004]). Significantly, the record indicates that Nouveau has been provided with multiple opportunities to inspect the allegedly defective elevator, and it will be able to depose its own employees, as well as employees of Huntington Hospital, as to the maintenance and operation of the subject elevator. Furthermore, where, as here, Huntington Hospital and Nouveau will be equally prejudiced by the spoliation of the video recording, the drastic sanction of dismissing Huntington Hospital's cross claims is not warranted (see *Foley v Consolidated Edison Co. of N.Y., Inc.*, 84 AD3d 476, 923 NYS2d 57 [1st Dept 2011]; *De Los Santos v Polanco*, 21 AD3d 397, 799 NYS2d 776 [2d Dept 2005]).

As to the cross motion by Huntington Hospital for conditional summary judgment on its cross claims against Nouveau for defense and indemnification of the underlying claim, the parties' elevator maintenance agreement states, in relevant part, as follows:

The contractor hereby agrees, to the fullest extent permitted by law, to assume the entire responsibility and liability for the defense of and to pay and indemnify the owner, their agent and employees against any loss, cost, expense, liability or damage and will hold each of them harmless from and pay any loss, cost, expense, liability or damage including without limitation, judgment, attorneys fees, court costs...which the owner incurs because of sickness, injury or death of any person...or any other claim arising out of, in connection with or as a consequence of the performance of the services or the furnishing of the equipment and supplies and/or any other acts or omissions.

"A court may render a conditional judgment on the issue of contractual indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed provided there are no issues of fact concerning the indemnitee's active negligence" (*see George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of...statutory [or vicarious] liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; *see Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612, 934 NYS2d 437 [2d Dept 2011]). Moreover, General Obligations Law §5-322.1 does not prohibit contractual indemnification where the parties' agreement requires indemnification "[t]o the fullest extent of the law," thereby prohibiting the indemnitee from being indemnified against its own negligence (*see Brooks v Judlau Contr. Inc.*, 11 NY3d 204, 869 NYS2d 366 [2008]; *Ulrich v Motor Parkway Props., LLC*, 84 AD3d 1221, 924 NYS2d 493 [2d Dept 2011]).

Here, Huntington Hospital established, prima facie, its entitlement to summary judgment on its cross claims for defense and contractual indemnification by submitting evidence that Nouveau agreed to defend and indemnify it against any personal injury claims arising out of or in connection with the performance of the elevator maintenance work, that it had no actual notice of any defects with the elevator's door, and that its liability, if any, is vicarious under the circumstances of this case (*see Mas v Two Bridges Assocs.*, 75 NY2d 680, 555 NYS2d 669 [1990]; *Goodlow v 724 Fifth Ave. Realty, LLC*, 127 AD3d 1138, 8 NYS3d 375 [2d Dept 2015]; *Talapin v One Madison Ave. Condominium*, 63 AD3d 909, 882 NYS2d 161 [2d Dept 2009]; *Burhan Ruli v Hiro Enter.*, 298 AD2d 256, 748 NYS2d

373 [1st Dept 2002]; *Ortiz v Fifth Ave. Bldg. Assoc.*, 251 AD2d 200, 674 NYS2d 360 [1st Dept 1998]). In particular, Huntington Hospital submitted a copy of the parties' agreement as well as the deposition transcript of its director of engineering which states, among other things, that Nouveau's employees were exclusively responsible for the maintenance of the subject elevator, and that he was unaware of any complaints relating to the opening and closing of the elevator's doors prior to Plaintiff's accident.

In opposition, Nouveau failed to raise any triable issues warranting denial of the motion (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Contrary to Nouveau's assertion regarding the invalidity of the indemnification provision of the parties' agreement, where, as here, the provision requires indemnification only to the "fullest extent of the law," it does not violate the prohibition against agreements which attempt to indemnify an indemnitee for its own negligence (see *Brooks v Judlau Contr. Inc.*, supra; *Moyano v Gertz Plaza Acquisition, LLC*, 110 AD3d 612, 973 NYS2d 623 [1st Dept 2013]). Furthermore, Nouveau's conclusory assertion that Huntington Hospital's failure to modernize the subject elevator may have been a proximate cause of the accident is insufficient to raise a triable issue, as it is well established that constructive notice of an elevator's defect does not bar an owner from indemnification when it has entered into a comprehensive and exclusive elevator maintenance contract (see *Kelly v Newmark & Co. Real Estate, Inc.*, 51 AD3d 1247, 1250, 858 NYS2d 439 [3d Dept 2008], quoting *Rogers v Dorchester Assoc.*, 32 NY2d 553, 562-563, 347 NYS2d 22 [1973]). Therefore, the branch of Huntington Hospital's cross motion for conditional summary judgment on its cross claims against Nouveau for a defense and contractual indemnification is granted.

However, inasmuch as there has been no finding of negligence on the part of Nouveau for the happening of the subject accident, the remaining branch of Huntington Hospital's motion seeking conditional summary judgment on its cross claim for common law indemnification is denied. A party seeking common law indemnification "must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (*Correia v Professional Data Mgmt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]; see *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 790 NYS2d 25 [2d Dept 2005]; *Priestly v Montefiore Med. Ctr., Einstein Med. Ctr.*, 10 AD3d 493, 495, 781 NYS2d 506 [1st Dept 2004]).

DATED: NOVEMBER 17, 2015
RIVERHEAD, NY


HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION