WB Imico Lexington Fee, LLC v Bovis Lend Lease LMB, Inc.
2016 NY Slip Op 30348(U)
March 2, 2016
Supreme Court, New York County
Docket Number: 150089/2015
Judge: Cynthia S. Kern

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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WB IMICO LEXINGTON FEE, LLC, and EXTELL DEVELOPMENT COMPANY,

Plaintiffs,

Index No. 150089/2015

-against-

DECISION/ORDER

BOVIS LEND LEASE LMB, INC. and
LEND LEASE (US) CONSTRUCTION LMB INC.,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affidavits in Opposition.....	2
Replying Affidavits.....	
Exhibits.....	3

Plaintiffs WB Imico Lexington Fee, LLC ("Imico") and Extell Development Company ("Extell") commenced the instant action against defendants Bovis Lend Lease LMB, Inc. and Lend Lease (US) Construction LMB Inc. ("Bovis") seeking a declaration that they are entitled to contractual indemnification, common law indemnification, common law contribution and recovery for breach of contract in connection with an action commenced by Emanuel Nyarkoh ("Nyarkoh"), who sought recovery for injuries he sustained while working on a construction project, and recovery for any judgment that may be rendered in favor of Nyarkoh and against plaintiffs in the Underlying Action. Plaintiffs now move for an Order pursuant to CPLR § 3212 granting them summary judgment on their claim for contractual indemnification. Plaintiffs' motion for summary judgment is resolved as set forth below.

The relevant facts are as follows. On or about June 7, 2007, Bovis, which changed its

name from Bovis Lend Lease LMB, Inc. to Lend Lease (US) Construction LMB Inc., entered into a contract with Imico (the "contract") for the construction of the Lucida, a mixed-use residential and commercial building located at 151 East 85th Street, New York, New York (the "premises" or the "building"). Pursuant to the contract, Bovis served as the Construction Manager, or general contractor, for the construction of the Lucida. Imico is the owner of the building and Extell was Imico's agent.

Section 13.3 of the contract contains the following indemnification provision:

> To the fullest extent permitted by law, the Construction Manager ("Indemnitor") shall defend, indemnify and hold harmless the Owner, Lender, Landlord, Landlord's Lender and their agents (excluding licensed professionals)...from and against claims, judgments, damages, losses and expense...provided that such claim...is attributable to bodily injury, sickness, disease or death...but only to the extent caused by the negligent acts or omissions of the Construction Manager, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable...

Section 13.4 of the contract contains the following additional indemnification provision:

> The Indemnitor expressly agrees and understands that it is responsible for the safety conditions of the work areas. The Indemnitor agrees that it is fully responsible for the compliance with...any and all applicable state and local health and safety regulations...with regard to the Work, work areas, workmen, and those of the Subcontractors, and agrees to defend, hold and save harmless the Indemnitees from any claim, costs, lawsuits, judgments, losses, damages, expenses or liability, including legal fees, which they might incur by reason of any action, lawsuit or proceeding arising out of a failure to work in accordance with...any and all applicable state and local health and safety regulations...

Section 6.1 of the contract provides that "[a]ll Work...shall be performed by Subcontractors pursuant to written Subcontracts awarded by the Construction Manager...or, at the Owner's option and in consultation with the Construction Manager, awarded by the Owner in its own name." Section 6.6 of the contract, however, provides that "no portion of the Work shall be performed, until such Subcontractor has been approved by the Owner and a Subcontract for the same has been entered into between the Construction Manager and the Subcontractor in

question and a copy of such Subcontract has been delivered to the Owner."

After the building was constructed and some tenants had taken possession, water leaks in the building's façade were discovered and it was evident that the building needed further waterproofing. By agreement between Bovis and Imico and Extell, Bovis retained a waterproofing subcontractor, while Imico and Extell retained a scaffolding subcontractor, to make the repair.

Imico hired Outdoor Installations LLC d/b/a Spring Scaffolding ("Spring") to provide scaffolding for the repair. Nyarkoh was an employee of Spring. On June 14, 2010, Nyarkoh was struck by a falling scaffold pipe while descending the scaffold at the instruction of a supervisor, causing him to fall from the scaffold onto the back of a truck below. Thereafter, Nyarkoh commenced the Underlying Action asserting five causes of action against Imico, Extell and Bovis for negligence, violations of Labor Law §§ 200, 240(1) and 241(6) and negligence in the violation of 12 NYCRR § 23-5.3(f). In the Underlying Action, Justice Mark Friedlander of the Supreme Court of Bronx County granted summary judgment to Nyarkoh on his claims for violations of Labor Law §§ 240(1) and 241(6) against Imico, Extell and Bovis, but dismissed Mr. Nyarkoh's claims for negligence, the violation of Labor Law § 200 and negligence in the violation of 12 NYCRR § 23-5.3(f) against Imico, Extell and Bovis. Justice Friedlander denied Imico's motion for leave to amend its answer to assert cross-claims against Bovis for contractual indemnification, common law indemnification, common law contribution and recovery for breach of contract. Thus, plaintiffs commenced the instant action against Bovis asserting causes of action for contractual indemnification, common law indemnification, common law contribution and recovery for breach of contract. Plaintiffs now move for summary judgment on their claim for contractual indemnification only.

On a motion for summary judgment pursuant to CPLR § 3212, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances." *Smith v. Hunter Roberts Const. Corp., LLC*, 127 A.D.3d 647, 648 (1st Dept 2015). 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. Gealtex Remodeling Corp.*, 58 A.D.3d 660, 662 (2nd Dept 2009).

Plaintiffs have made a *prima facie* showing of entitlement to summary judgment on their claim for contractual indemnification based on § 13.4 of the contract. Section 13.4 clearly expresses the parties' intention that Bovis indemnify Imico and Extell for claims "arising out of a failure to work in accordance with...any and all applicable state and local health and safety regulations..." The claims in the Underlying Action for violation of Labor Law § 240(1) and for violation of Labor Law § 241(6) both arise out of a failure to work in accordance with applicable safety regulations. In the Underlying Action, Justice Friedlander held that Imico, Extell and Bovis were liable for the violation of Labor Law § 240(1) based on the falling pipe

and the failure to provide a ladder for workers to ascend and descend the scaffold. Labor Law § 240(1), which requires protective devices to be provided where there is a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured, is a state safety regulation within the meaning of § 13.4 of the contract. Justice Friedlander also held that Imico, Extell and Bovis were liable for the violation of Labor Law § 241(6) due to the failure to provide a ladder contrary to the requirements of the Industrial Code. The Industrial Code is also a state safety regulation within the meaning of § 13.4 of the contract. Thus, Mr. Nyarkoh's claims arose from a failure to work in accordance with applicable safety regulations. In addition, Justice Friedlander held that Imico and Extell were not liable for negligence in connection with the accident.

In opposition to plaintiffs' *prima facie* showing, Bovis has failed to raise a question of fact. Bovis' argument that plaintiffs' motion should be denied on the ground that Spring was not a subcontractor pursuant to the contract is without merit. Initially, Bovis' indemnification obligation pursuant to § 13.4 is not limited to the failure of subcontractors to work in accordance with applicable safety regulations. Instead, Bovis must indemnify Imico and Extell where work was not performed in accordance with applicable safety regulations, no matter who performed the work.

Moreover, even assuming *arguendo* that Bovis' indemnification obligation was limited to the work of subcontractors, which this court expressly finds is not the case, this court would find that Spring was a subcontractor pursuant to the contract as "the Work" could be performed by all subcontractors, whether hired by Bovis or Imico. Section 6.1 expressly allowed Imico to hire subcontractors to perform the Work. To the extent that Bovis argues that it was not required to

provide contractual indemnification because it was not consulted in the hiring of Spring as required by § 6.1, this contention is without merit. Justice Friedlander found in the Underlying Action that Bovis agreed that Imico would hire the scaffolding subcontractor, and held that "[t]he reference to consultation must be interpreted as some lesser standard of involvement [than a requirement for prior approval of the subcontractor by Bovis], and…it cannot be said that Imico denied Bovis its consultation rights when it merely elicited Bovis' agreement to find a scaffolding company on its own." *Nyarkoh v. WB Imico Lexington Fee, LLC*, 2014 WL 5392993, at *14 (Sup Ct, Bronx County, Oct. 2, 2014). Thus, this issue has already been addressed and Justice Friedlander's determination is law of the case.

Further, still assuming *arguendo* that Bovis' indemnification obligation was limited to the work of subcontractors, Bovis' argument that § 6.6 of the contract, which provides that "no portion of the Work shall be performed, until such Subcontractor has been approved by the Owner and a Subcontract for the same has been entered into between the Construction Manager and the Subcontractor in question and a copy of such Subcontract has been delivered to the Owner," conflicts with § 6.1, raising a disputed issue of fact, is without merit. Section 6.6 is not relevant and does not contradict the interpretation that the work performed by Spring and its employees is within the scope of § 13.4 as § 6.6 is merely intended to protect Imico by requiring that Imico approve and receive copies of any subcontracts entered into by Bovis.

Bovis' assertion that plaintiffs' motion should be denied as premature on the ground that discovery is outstanding is without merit. "A determination of summary judgment cannot be avoided by a claimed need for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2nd Dept 1999). In the present case, Bovis has failed to demonstrate that any

discovery will lead to evidence relevant to interpreting the scope of § 13.4 of the contract.

However, plaintiffs have failed to make a *prima facie* showing of entitlement to summary judgment on their claim for contractual indemnification based on § 13.3 of the contract. Section 13.3 only requires Bovis to indemnify Imico and Extell "to the extent [that injury was] caused by the negligent acts or omissions of the Construction Manager, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable." Justice Friedlander made no determination that any person or entity was negligent in the Underlying Action. He only found that Bovis, Imico and Extell were liable pursuant to Labor Law §§ 240(1) and 241(6), which are strict liability statutes that do not require a finding of negligence. Thus, plaintiffs have not established their entitlement to summary judgment on their claim for contractual indemnification based on § 13.3.

Accordingly, plaintiffs' motion for an Order pursuant to CPLR § 3212 granting them summary judgment on their claim for contractual indemnification is granted as to § 13.4 of the contract but is denied as to § 13.3 of the contract. This constitutes the decision and order of the court.

Dated: 3/2/16

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C