Quintana v City of New York
2016 NY Slip Op 32112(U)
July 13, 2016
Supreme Court, Queens County
Docket Number: 701162/13
Judge: Howard G. Lane
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE HOWARD G. LANE** **IA Part 6**
Justice

KATHELIM QUINTANA,

Plaintiff,

-against-

CITY OF NEW YORK, et al.,

Defendants.

Index Number 701162/13

Motion Date April 20, 2016

Motion Seq. No. 8

Motion Cal. No. 134

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

Third-Party Plaintiff,

-against-

E.C.I. BUILDING CORP.,

Third-Party Defendant.

The following numbered papers read on this motion by E.C.I. Building Corp. (ECI), to dismiss the third-party complaint pursuant to CPLR 3212; and cross motion by Mana Construction Group Ltd. (Mana), to dismiss the complaint insofar as asserted against it pursuant to CPLR 3212.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	EF73-EF93
Notice of Cross Motion - Affidavits - Exhibits.....	EF94-EF98
Answering Affidavits - Exhibits.....	EF99-EF105
Reply Affidavits.....	EF106

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff in this negligence action seeks damages for personal injuries sustained on December 27, 2011, on the public street in front of premises known as 34-19 34th Avenue, in Queens. The plaintiff, a pedestrian, was allegedly injured when her foot went into a gap between two metal plates that Con Edison (Con Ed), used to cover a roadway trench. Plaintiff served a Summons and Complaint on defendants City of New York, New York City Department of Transportation, Con Ed and Mana Construction Group, Ltd. Thereafter, Con Ed commenced a third-party action against ECI. The third-party complaint contains three separate causes of action against ECI: common law indemnity, contractual indemnity and breach of contract for ECI's alleged failure to purchase insurance naming Con Ed as an additional insured. In the bill of particulars, plaintiff asserts, inter alia, that defendants negligently permitted the subject metal plates to remain in a broken, defective, cracked, uneven and dangerous condition.

ECI moves to dismiss the third-party complaint on various grounds as discussed below. Mana cross moves for summary dismissal of the claims against it. Plaintiff opposes the motion. The cross motion is unopposed.

Facts

Plaintiff testified at a 50-h hearing as follows: on the date of her accident, she left home around 7:00 a.m, to go to her babysitter's house located at 34-19 34th Avenue. The weather was "good." It was cold but it was not raining or snowing and there was no snow on the ground. That morning she drove to the babysitter's apartment and parked across the street from the babysitter's building. After parking, she got out of her vehicle, carrying her son and started to walk across the street. The fall occurred as she made her way across the street. More particularly, she fell in the roadway close to the sidewalk on the opposite side from where she had parked. Her right leg went down into a "hole" and she fell forward to the ground. Plaintiff described the "hole" as being a gap between "metal things" that were placed over construction work. The gap between the two plates were wide enough so that her right leg fell to about thigh level. Plaintiff clarified that there was construction being done on the street and the two metal plates were partially covering an opening in the roadway. She testified that prior to falling, she was looking straight ahead so she did not see the metal plates before her fall. On the Thursday before her accident, she was picking up her son from the babysitter when she observed a portion of the street blocked off and she observed Con Ed trucks with Con Ed workers doing road work in the area.

Plaintiff testified at her examination before trial as follows: she confirmed her prior testimony that the accident occurred while she was bringing her son to his

babysitter's apartment. She testified that when she was in the area previously, she was unable to drive down 34th Avenue because it was closed due to work being performed by Con Ed. On that prior occasion, she observed that there was a hole in the parking lane of the street. On the morning of her accident, plaintiff did not see any work trucks in the vicinity nor did she see any openings in the street. She testified that she got her son and her belongings from the car and began walking towards the babysitter's apartment. She walked about six to ten feet across the street before the accident happened. Although the area was within her field of vision, she testified that he did not see that the plates were separated as she walked. When asked if she reached the sidewalk, plaintiff testified that she did not, that she got to where the cars were parked and that's when she fell down. She testified that she fell in the opening between the two metal plates.

Gerson Vasquez testified on behalf of Con Ed as follows: he has worked for Con Ed for the last 9 ½ years and has held the position of "gas mechanic" there for the last seven (7) years. In that position, he is responsible for performing anything relating to gas distribution, including roadway/sidewalk openings. Vasquez recalled that on the date of plaintiff's accident, he was working on a gas main project in Astoria in the vicinity of 30th Street between 34th and 35th Avenues. As part of the project, a section of the roadway was opened up. On the subject project, Vasquez was the super and most senior person present from Con Ed. His "crew" consisted of two "B" mechanics from Con Ed, and four laborers from ECI who were present to help out. Con Ed directed the ECI workers as to what they were to perform and, more specifically, Vasquez was the one who told them what work they were to do. Vasquez testified that if the ECI workers arrived at the work site before he did, they were expected to wait until Vasquez arrived before they started working, and at the end of the work day, the ECI crews left before the Con Ed personnel. Thus, the ECI workers would not perform any work at the site unless Con Ed was present. Vasquez testified that at the site, a trench was dug up using a backhoe owned by Con Ed and operated by a Con Ed employee. In fact, only Con Ed employees were permitted to operate the backhoe at the site. On December 27, 2011, the date of plaintiff's accident, the subject trench was already dug at the site. Vasquez was shown a photograph of the site which he identified as depicting the trench, situated in the parking lane, with steel plates covering it. Vasquez testified that the steel plates and the barricades shown in the photograph were owned by Con Ed. He stated that the steel plates were too heavy to be moved by hand and were, therefore, always moved with the backhoe using chains or the backhoe's "scoop". Vasquez testified that at the end of the workday, barricades and orange tape were placed around the plates to "safe off" the area. He specifically recalled that the "safe off" of the area with barricades and orange caution tape was done at the end of the workday on December 26, 2011, the evening before plaintiff's accident. Nonetheless on December 27, 2011, when Vasquez arrived at the site at approximately 8:30 a.m., he recalled observing the steel plates over the trench when he arrived but could not recall if the barricades were still in place at that point. He testified that two of the

plates were not flush together at that point, as depicted in photographs marked as Exhibit "J" . Asked why there was a gap between the two plates, Vasquez explained that Con Ed had to move one of the plates to cover the crosswalk on the corner and did not have enough plates to entirely cover the remainder of the opening. Finally, Vasquez testified that a lady approached him in the afternoon on December 27, 2011 and told him that she had fallen into the hole earlier that morning. He questioned how she fell when the hole was barricaded and she allegedly told him she had moved the barricades to get to her car.

Anibal Fitch testified on behalf of ECI as follows: he has been employed by ECI for the last ten years. His current job title is "gas mechanic", however at the time of the subject accident, he was a laborer. In 2011, ECI did work solely for Con Ed. Once he was sent into the field to a job site, he considered Con Ed to be his supervisor. On the date of plaintiff's accident, Fitch was working at the subject location in Astoria as part of a two-man "crew" from ECI. His own super from ECI told him to go to the site and once there, the Con Ed people told him what to do. Fitch and a co-worker, "Juan" arrived to the site around 8:00 a.m. When they arrived, they did not start work immediately but instead waited for the Con Ed supervisor to arrive. After approximately one-half hour, "Gerson" from Con Ed arrived and told him what he would be doing that day. When asked who was responsible for securing the trenches, Fitch testified that Con Ed was responsible for securing the trenches at the end of the day. After identifying a photograph of the location of the accident, Fitch testified also that the plates and barricades used at the site and shown in the photograph were owned by Con Ed and that ECI had no responsibility for bring such equipment to the work site. Fitch further testified that while waiting for "Gerson" to arrive, he observed a woman pull up in a car with a child. The woman parked and began crossing the street. He saw her move some of the barricades around the plates and then walk across the plates into the adjacent building. The woman then came out of the building and walked back across the metal plates. He did not see her fall or stumble. Fitch testified that after the Con Ed personnel arrived, the woman approached and stated that she had fallen.

Motion

The branch of the motion by ECI which is to dismiss the common law indemnity claim in the third-party complaint, is granted. It is well settled that common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries (*see Hawthorne v South Bronx Community Corp.,* 78 NY2d 433 [1991]; *Richards Plumbing & Heating Co., Inc v Washington Group Intl., Inc.,* 59 AD3d 311 [2009]; *see also Kye Yong Kim v 40th Assoc.,* 306 AD2d 220, 762 N.Y.S.2d 600 [2003]).

It is well settled that common-law indemnification is available to a party that has been held vicariously liable from the party who was at fault in causing plaintiff's injuries

(*Structure Tone, Inc. v Universal Services Group, Ltd.*, 87 AD3d 909, 929 NYS2d 242 [2011]; *Martins v Little 40 Worth Associates, Inc.*, 72 AD3d 483, 899 NYS2d 30 [2010] (Common-law indemnification requires proof not only that the proposed indemnitor's negligence contributed to the causation of the accident, but also that the party seeking indemnity was free from negligence). In this case, plaintiff's underlying claim against Con Ed is based on Con Ed's alleged negligence, if any, and thus, any recovery Con Ed seeks in turn from ECI would not be vicarious, but would necessarily arise out of Con Ed's own negligence (*see Consolidated Rail Corp. v Hunts Point Terminal Produce Co-op. Ass'n, Inc.*, 11 AD3d 41, 783 NYS2d 30 [2004]. Con Ed's claim for common-law indemnification against ECI lacks merit and is dismissed. Here, there is no evidence that ECI was responsible for the metal plates in the street. The undisputed evidence indicates that Con Ed was responsible for placing the metal plates over the trench in the street, and that it simply supervised ECI laborers who merely assisted with the general street opening project. Thus, the branch of the motion which is to dismiss Con Ed's third-party claims for common-law indemnification, is granted (*see Structure Tone, Inc. v Universal Servs. Grp., Ltd.*, 87 AD3d 909, 912 [2011]).

The branch of the motion which is to dismiss Con Ed's contractual indemnification claim is granted. " 'The right to contractual indemnification depends upon the specific language of the contract' " (*Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 722 [2011], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances *(Alayev v Juster Associates, LLC*, 122 AD3d 886, 887 [2014]; *see Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]). The indemnity provision at issue states, in relevant part, that ECI will defend and indemnify Con Ed from and against all claims for injury "resulting in whole or in part from, or connected with, the performance of the Work" by ECI. Here, the indemnity provision of the parties' agreement was not triggered by plaintiff's claim because plaintiff's accident did not "aris[e] out of [or] in connection with [ECI's] performance or failure of performance" of its work under the agreement (*see Dos Santos v Power Auth. of State of N.Y.*, 85 AD3d 718, 721-722 [2011]; *Rosen v New York City Tr. Auth.*, 295 AD2d 126 [2002]; *compare Margolin v New York Life Ins. Co.*, 32 NY2d 149 [1973]). Plaintiff's allegation is that the injury resulted from a hazardous condition, namely, the gap left between the two steel plates used to cover the roadway trench. By all accounts those plates were owned and placed by Con Ed, not by ECI.

Cross Motion

The cross motion by Mana for summary judgment in its favor pursuant to CPLR 3212, on the ground that it did not perform work at the subject accident site is granted as unopposed, and otherwise on the merits (*see Lara v City of New York*, 135 AD3d 712 [2d Dept. 2016]).

Conclusion

The motion by ECI to dismiss the third-party complaint is granted.

The cross motion by Mana to dismiss the complaint, insofar as asserted against it, is granted.

Dated: July 13, 2016

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Howard G. Lane, J.S.C.