

Nucarto v 387 Park S. LLC

2017 NY Slip Op 30250(U)

January 27, 2017

Supreme Court, New York County

Docket Number: 152874/13

Judge: Joan A. Madden

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11**

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STEPHEN NUCARTO,

Index No.:152874/13

Plaintiffs,

-against-

387 PARK SOUTH LLC, TF CORNERSTONE, INC,
and CABLEVISION SYSTEMS CORPORATION,
Defendants.

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387 PARK SOUTH LLC, TF CORNERSTONE, INC,

Third-Party Index No.:

Third-Party Plaintiffs

-against-

CABLEVISION LIGHTPATH, INC. HUGH
O’KANE ELECTRICAL CO., INC. And
STERLING PUBLISHING CO. INC.,
Third-Party Defendants

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Joan A. Madden, J.:

Third-party defendant Sterling Publishing Co, Inc. (Sterling”) moves for an order (i) dismissing the third-party complaint and all cross claims and counterclaims against it, (ii) granting summary judgment to Sterling on its counterclaim for contractual indemnification against defendant/third-party plaintiffs 387 Park Avenue South LLC (“387 Park ”) and TF Cornerstone Inc. (“TF”) (together “387 Park defendants”), and (iii) directing the TF defendants to reimburse Sterling for all reasonable attorney’s fees and defense costs incurred to date and imposing sanctions. The 387 Park defendants oppose the motion. Plaintiff takes no position on the motion.

Background

This action arises injuries sustained by plaintiff on April 12, 2010, at approximately 1:00

pm, while working as an electrician employed by third-party defendant Hugh O’Kane Electrical Co, Inc. (“Hugh O’Kane”) at 387 Park Avenue South, New York, NY (“the Building”), which is owned by 387 Park, and managed by TF. Hugh O’Kane had entered into a Purchase Agreement with Cablevision Systems Corp (“Cablevision”) to provide labor for the installation of the cable at the Building. Sterling is a commercial tenant of a space on the fifth floor of the Building pursuant to a lease agreement dated January 25, 2006 between 387 Park and Sterling (“the Lease”). At the time of the accident, plaintiff was on a ladder in the process of installing fiber optic cable in an elevator shaftway in a stairway on the Building’s fifth floor, when a metal access door to the shaftway, which allegedly was not properly secured, dropped causing injury to plaintiff’s shoulder.

While this motion was pending, counsel for the 387 Park defendants efiled a letter stating that the main action had been settled, and that once the settlement was finalized, “we will be filing a Stipulation of Discontinuance of the main action and a Discontinuance of the third-party action against Sterling (which we had previously offered to discontinue).” He further wrote that “[w]e believe that this renders moot Sterling’s pending motion for summary judgment/contractual indemnity/fees, as we don’t believe that Sterling’s counterclaim for indemnity/fees can stand on its own.” Counsel for Sterling efiled a letter in response countering that the settlement did not render Sterling’s motion moot, and writing, *inter alia*, that the motion seeks attorneys’ fees and sanctions for commencing and prosecuting the third-party action. He also noted that Sterling was not notified of the mediation which resulted in the settlement of the main action.

Although the 387 Park defendants are now seeking to discontinue the third-party action,

the court will consider Sterling's motion since the third-party action has not yet been discontinued nor has Sterling agreed to such discontinuance. See CPLR 3217(a). In its summary judgment motion, Sterling argued that there is no basis for the third-party claims against it for contractual indemnification and/or for negligence and recklessness, pointing to the Lease provisions under which 387 Park had the authority (i) to maintain and control the common areas of the Building, including the stairway where plaintiff was injured (Lease ¶'s 4, 44); (ii) to form agreements and grant licenses to telecommunications providers (Id, Exhibit A, rules and Regulations ¶ 24); and (iii) in its "sole judgment to install or cause to install a telecommunications distribution system in the Building." (Id, ¶ 46(b)). Sterling also relies on the affidavit of its Information Technology Manager, Cesar Cardenas ("Cardenas") who denied that he ever requested that the landlord, building manager or telecommunications provider to upgrade Sterling's telecommunications services, or install fiber optics lines in Sterling's offices. In addition, Sterling contends that based on an indemnification provision in the Lease, 387 Park is liable to it.

The 387 Park defendants opposed the motion, arguing, *inter alia*, that it was premature as Sterling has not yet appeared for a deposition, as directed by the preliminary conference order dated October 17, 2013, and subsequent discovery orders. As for Sterling's motion for summary judgment on its own claim for contractual indemnification, the 387 Park defendants asserted that the indemnification clause relied on by Sterling requires a finding that there is a negligent act or omission by the Landlord.

By interim order dated May 19, 2016, the court held Sterling's motion in abeyance pending the deposition of "an employee of...Sterling with personal knowledge of whether

Sterling, its representative, employees or agents accessed the door in the shaftway of the subject fifth floor, which floor was leased to Sterling.” The court directed that the deposition be held on or before June 15, 2016, and provided a schedule for the submission of supplemental and responsive papers. By order dated August 23, 2016, the court denied the 387 Park defendants’ request for the deposition of a second Sterling employee and revised the briefing schedule for supplemental submissions.

In accordance with the court’s interim order, Sterling produced Cardenas for a deposition. In its supplemental papers in support of its summary judgment motion, Sterling points to Cardenas’ deposition testimony in which he denies that any work involving the installation of fiber optic cables occurred within Sterling’s offices or within the electrical closets at Sterling (Cardenas’ Dep., at 39). With respect to Sterling’s personnel accessing the stairway at issue, Cardenas testified that he could not recall a single occasion when Sterling personnel used the stairway at issue which was rigged with an alarm (Id, at 74, 78-79). He also testified that during his twelve years at Sterling he had heard the alarm go off twice and that neither instance involved personnel from Sterling (Id, at 78-79).¹ Sterling notes that Cardenas’ deposition testimony is consistent with the testimony of TF’s director Carol Ann Albrektsen, that the area at issue was a common shaftway that required the permission from the building owner to utilize, and that there is no allegation or evidence that Sterling ever requested to use the space. Sterling argues that based on Cardenas’ testimony, it should be granted summary judgment as well as attorneys’ fees and costs of Cardenas’ deposition, asserting that the third-party claims against Sterling lack a

¹Cardenas testified that he worked from 7:00 am to 9:00 -pm whereas publishing employees worked 9:00 am to 5:00 pm and that the office where he worked was only 25 steps from the stairwell so that he would hear the alarm if it went off (Id, at 74).

good faith basis, and that Sterling was required to pay such costs which were not reimbursed by insurance.

In their supplemental opposition, the 387 Park defendants concede that Cardenas' deposition "does not provide a specific basis for a claim against Sterling," but argue that "there still remains a factual discrepancy between his testimony and that of Ms. Albreksten as to whether Sterling requested the installation." (Silverstein, ¶ 3). They also argue that even if the evidence "does not now prove a claim against Sterling it does not mean the initial claim against Sterling, or that the initial refusal to discontinue the claims against Sterling, was baseless or frivolous" (Id, ¶ 4). The 387 Park defendants also argue that they are entitled to a response to a notice to produce served after Cardenas' deposition based on Cardenas' testimony that he was still in possession of certain emails. As for Sterling's claim for contractual indemnification under the Lease, the Park Avenue defendants argue that it is premature in the absence of a showing of negligence on their part.

Discussion

As a preliminary matter, Sterling has made a prima facie showing that it is entitled to summary judgment based on evidence that it did not contract with plaintiff's employer for the performance of the installation work at issue, that the work did not occur within its leased area and the defect at issue was not caused by its employees. See Butler v. Rafferty, 100 NY2d 265 (2003)(holding that defendant made prima facie showing that it was not liable for plaintiff's injuries based on evidence it did not possess or control part of house where accident occurred); see generally, Zuckerman v. City of New York, 49 NY2d 557, 562-563 (1980). Moreover, the 387 Park defendants have not controverted this showing and their request for discovery of the

emails referred to by Cardenas in his deposition do not provide a ground for denying Sterling summary judgment, in the absence of a non-speculative basis for finding that such discovery would lead to evidence sufficient to raise a triable issue of fact. See First City Nat. Bank and Trust Co. v. Heaton, 165 AD2d 665 (1st Dept 1990)(speculation by opposing party that additional discovery would raise triable issue of fact was insufficient to defeat summary judgment motion). Accordingly, Sterling is entitled to summary judgment dismissing the third-party claims against it.

As for Sterling's request for sanctions, pursuant to 22 NYCRR 130-1.1(a), a court "in its discretion, may award to any party or attorney in any civil action or proceeding before the court ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." Section 130-1.1(c) provides that conduct is frivolous conduct if:

- (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification and reversal of existing law;
- (2) it is undertaken primarily to delay or prolong the resolution of litigation, or to harass or maliciously injure another; or
- (3) it asserts material factual statements that are false.

At issue here is whether the 387 Park Avenue defendants' conduct in pursuing the third-party claims against Sterling was without merit in law such that imposition of sanctions is warranted. Under the circumstances here, the court finds that the pursuit of the third-party claims against Sterling was not frivolous. That said, however, the court does not condone the 387 Park Avenue defendants' continuing to pursue these claims after Cardenas' deposition.

Sterling also seeks summary judgment on its counterclaim seeking indemnification for its attorneys' fees based on paragraph 8(f) of the Lease which provides:

Landlord (i.e. 347 Park) hereby covenants and agrees to indemnify and hold harmless tenant from and against any and all claims, actions....for which Tenant (Sterling) is not reimbursed by insurance, including without limitation reasonable attorney's fees and disbursements, paid, suffered or incurred as a result of or in connection with damage to property or injury or death to persons in, on or about the lobby and other common areas of the Building, provided and to the extent same are caused by the negligent act or omission of Landlord, its agents employees or representatives, or any breach by Landlord or Landlord's representatives of any covenant or condition of this Lease.

In arguing that it is entitled to indemnification under the above provision, Sterling asserts that it will not be reimbursed by insurance for the costs of defending the third-party action. In this connection, Sterling asserts that although it is a wholly owned subsidiary of Barnes & Noble, and is included as a "Named Insured" on Barnes & Nobles policy, the policy has a "Retained Limit" of \$500,000 before the policy is triggered so that the expenses of this litigation have been paid by Sterling out-of-pocket, and Sterling submits documentary evidence to support this assertion. However, even assuming, that Sterling's losses were not reimbursed by insurance, the record is insufficient to grant Sterling summary judgment on its counterclaim since 387 Park's duty to indemnify Sterling is not triggered unless it can be shown that plaintiff's injuries were "caused by the negligent act or omission of [387 Park], its agents employees or representatives, or any breach by [387 Park] or [387 Park's] representatives of any covenant or condition of [the] Lease," and, at this juncture, these triggering conditions have not been established. Accordingly, Sterling's motion for summary judgment on the counterclaim is denied, and the court encourages the parties to settle this dispute.

In view of the above, it is

ORDERED that Sterling's motion for summary judgment is granted to the extent of dismissing the third-party complaint against it and is otherwise denied ; and it is further

ORDERED that Sterling's counterclaim is severed and shall continue; and it is further

ORDERED that Sterling's motion for sanctions is denied.

DATED: January 24, 2017


HON. JOAN A. MADDEN
J.S.C.