SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

CHRISTOPHER BROWN

INDEX NO. 163017/15

MOT. DATE

- v -

MOT. SEQ. NO. 005

ESRT EMPIRE STATE BUILDING, LLC et al.

The following papers were read on this motion to/for summary judgment

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s). 75-88

Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s). 89, 92-100

Replying Affidavits NYSCEF DOC No(s). 101-103

The main action arises from an alleged slip and fall. Third-party defendant First Quality Maintenance II, LLC d/b/a First Quality Maintenance ("First Quality") moves for summary judgment dismissing the third-party complaint by defendant/third-party plaintiffs ESRT Empire State Building, LLC and Empire State Realty Trust, Inc. (collectively "ESRT") pursuant to CPLR § 3212. Issue has been joined and the motion was timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The relevant facts are largely undisputed. The following facts are based upon plaintiff's own testimony. On Monday, April 20, 2015, plaintiff was hired by First Quality to be a replacement employee which, as First Quality's counsel explains, is a temporary employee requested by a client to replace a vacationing or ill permanent employee. First Quality assigned plaintiff to go to the Empire State Building (the "building") to work the night shift from 12am to 8am, Monday through Friday. Plaintiff was directed to report to Kenny Garcia, night supervisor for ESRT at the building. Plaintiff was instructed to clean various floors within the building. Garcia gave plaintiff certain tools to perform his job, including rubber waterproof boots.

Later that week, plaintiff was assigned by Garcia to assist another ESRT employee with power washing the sidewalk on the 34th Street side of the building. One of plaintiff's responsibilities was to rewind the hose for the power washer and bring the power washer back to the garage in the loading dock area on the 33rd Street side of the building. Near this garage area was a metal ramp where plaintiff's accident occurred.

Plaintiff's accident occurred on Friday, April 24, 2015. Plaintiff was allegedly directed by Garcia to refuel the power washer from drums that were in the garage. During his deposition, Garcia denied directing plaintiff to refuel the power washer. While wearing the rubber waterproof boots and after walking through fuel plaintiff claimed he spilled, plaintiff slipped while descending the metal ramp.

Dated: 8/28/17

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is ☒ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

3. Check if appropriate: ☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

According to his bill of particulars, plaintiff sustained the following injuries as a result of his accident: ruptured quadriceps tendon with surgery, right knee quadriceps tendon tear, low-riding patella, patella baja, restriction of motion of right leg, surgical scar to right leg/knee and swelling, pain and stiffness to right left knee. Plaintiff underwent surgery on May 11, 2015 involving repair of the right knee quadriceps tendon tear, repair of the medial and lateral retinaculum, infiltration of local anesthetic, drilling holes to patella and supplemental fixation with Fiberwire.

As for his theory of negligence, plaintiff alleges that the "ramp was not in a reasonably safe condition, was worn, excessively steep, slippery, uneven, not compliance with applicable codes and regulations, not skid resistant, broken, dangerous and hazardous... [and] that the location of the ramp exposed it to natural elements of moisture and humidity and that such natural elements further increased the hazardous condition of the ramp..." Plaintiff further claims violations of the Labor Law.

At the time of plaintiff's accident, there was a Consulting Agreement dated January 1, 2015 between First Quality, as "Consultant", and Empire State Realty OP, L.P. ("ESRO") as "Client"), for several properties, listing defendant/third-party plaintiff ESRT Empire State Building, LLC as the respective representitive of ESRO in connection with the building (the "Agreement"). Pursuant to the Agreement, First Quality was to provide, *inter alia*, consulting services regarding employees and services needed at the building for cleaning and janitorial work. First Quality was further required to prepare work schedules for the cleaning and janitorial staff and assign work to the cleaning and janitorial staff. The Agreement also required First Quality to provide replacement employees, but expressly stated that all employees providing cleaning and janitorial services as defined in the Agreement are employees of ESRO, with the exception of the replacement workers.

The replacement worker provision of the Agreement, Section 4, states in relevant part:

> (a) Services. ... CONSULTANT shall provide replacement cleaning and janitorial employees (the "Replacement Employees") to CLIENT, as needed by CLIENT, to provide adequate coverage for CLIENT's cleaning and janitorial employees that are unavailable form time to time due to vacation, sick leave, or other time off. In connection with this Section 4(a), CONSULTANT shall provide experienced, trained to be familiar with the [building], and qualified personnel to adequately perform the duties required of such employee. ... CONSULTANT shall defend, indemnify and hold CLIENT harmless from and against all costs, losses, expenses, actions or demands therewith, resulting or arising from CLIENT's rejection of any replacement employee.

Section 10 of the Agreement, entitled Indemnification, provides that First Quality will indemnify ESRT as follows:

> (a) CONSULTANT shall indemnify and hold CLIENT... harmless from and against any and all liabilities, claims, losses, lawsuits, judgments and expenses, including but not limited to, attorneys' fees, arising out of or in connection with this Agreement, including, without limitation, any act or incorrect advice concerning the firing or discharge of any employee or omission of CONSULTANT or any of its officers, directors, employees, agents or partners in connection with this Agreement.

The third-party complaint asserts four causes of action: contribution (first COA), common-law indemnification (second (COA), contractual indemnification (third COA) and breach of contract for failing to procure insurance coverage (fourth COA).

Parties' arguments

First Quality argues that the common-law contribution and indemnification claims fail because ESRT cannot demonstrate that plaintiff sustained a grave injury within the meaning of Workers' Compensation Law § 11 or that plaintiff's injuries arose out of First Quality's negligence. First Quality argues

that the contractual indemnification claim fails because plaintiff's accident was caused by a dangerous condition which did not arise from First Quality's provision of services under the Agreement. Finally, First Quality argues that the fourth cause of action fails because "the insurance provision has not been an issue in this matter."

In turn, ESRT contends that First Quality's motion with respect to contractual indemnification should be denied because the record shows that plaintiff was "placed upon this work site with no formal training and experience in power washing... [or] safety protocols." ESRT also opposes the motion seeking summary judgment on the common-law indemnity claim. ESRT argues that there is a question of fact as to First Quality's negligence in hiring plaintiff as a replacement employee given his "lack of training" and "serious medical conditions." Finally, ESRT states that "it is extremely unclear if a [First Quality] supervisor was making sure that their workers were properly and safely working."

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of NewYork*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

The court finds that First Quality's motion must be granted in its entirety. At the outset, ESRT does not oppose First Quality's motion with respect to the first and fourth causes of action, for contribution and breach of contract respectively. Therefore, that portion of the motion has been conceded and is granted on default. Otherwise, First Quality has demonstrated its entitlement to judgment as a matter of law on the contractual and common-law indemnity claims.

"The right to contractual indemnification depends upon the specific language of the contract" (*Trawally v. City of New York*, 137 AD3d 492 [1st Dept 2016]). In determining whether the parties intended to provide for contractual indemnification, courts examine the language and purpose of the agreement together and in the context of the surrounding facts and circumstances (see *Drzewinski v. Atlantic Scaffold & Ladder Co.*, 70 NY2d 774 [1987]). There are two independent indemnification provisions contained in the Agreement. The first provision is located within Section 4a, and requires First Quality to "defend, indemnify and hold [ESRT] harmless from and against [claims] resulting or arising from CLIENT's rejection of any replacement employee." There can be no dispute that this indemnification clause is not triggered since plaintiff's claims did not arise from the rejection of any replacement employee.

The second indemnification provision is contained in Section 10(a) requires First Quality to indemnify and hold ESRT harmless "from and against any and all liabilities, claims, losses, lawsuits, judgments and expenses, including but not limited to, attorneys' fees, arising out of or in connection with this Agreement, including, without limitation, any act or incorrect advice concerning the firing or discharge of any employee or omission of [First Quality]..." The court finds that this second indemnification clause has not been triggered since plaintiff's personal injury claims do not arise from any of First Quality's obligations under the Agreement. Rather, the nature of plaintiff's personal injury claim is that the ramp was worn, excessively steep and slippery. First Quality was not obligated to maintain the ramp. Accordingly, First Quality has demonstrated that it is entitled to summary judgment on the contractual indemnification claim.

The court rejects, as mere speculation, ESRT's argument that a First Quality supervisor may or may not have ensured that their workers were properly and safely working. There is no evidence on this record that anyone other than ESRT's own employees directed and supervised plaintiff's work at the building.

It is of no moment in connection with this motion whether plaintiff was directed to refuel the power washer, since ESRT maintains that plaintiff was not directed to do so. That plaintiff was not trained in "power washing" is not a legitimate dispute nor can ESRT demonstrate that such a requirement was contingent upon plaintiff's hiring as a replacement employee as the parties intended within the meaning of the Agreement. Therefore, ESRT"s argument about plaintiff's lack of training with power washers is rejected.

In any event, plaintiff was not directed to power wash the sidewalk prior to his accident, but rather, transport the power washer from the garage to the sidewalk. ESRT has failed to show what First Quality was required to do under the Agreement which would have prevented or otherwise impacted plaintiff's accident. ESRT does not argue that First Quality was required to train plaintiff on how to walk down a ramp. Indeed, ESRT, not First Quality, provided plaintiff with the rubber boots which he had on when he fell.

Nor has ESRT demonstrated a genuine factual dispute as to whether plaintiff's medical condition caused and/or contributed to his underlying accident such that plaintiff was not qualified to work the job functions he was hired for as a replacement employee. Indeed, there is no admissible evidence in support of this claim; rather, it is supported solely by ESRT's counsel's unsubstantiated assertions. Therefore, this argument is also rejected by the court.

As for the claim for common-law indemnification, that claim must be dismissed as well. First Quality has established as a matter of law that it is free from negligence. Common-law indemnification permits a party who is free from negligence to seek indemnification from the proposed indemnitor whose negligence contributed to the causation of the accident (*Martins v. Little 40 Worth Associates, Inc.*, 72 AD3d 483 [1st Dept 2010]). Since First Quality did not contribute to the causation of plaintiff's accident, the third cause of action must also be dismissed.

Accordingly, First Quality's motion for summary judgment is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED third-party defendant First Quality's motion for summary judgment dismissing the third-party complaint is granted and the third-party complaint is hereby severed and dismissed; and it is further

ORDERED that the clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 8/24/17
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.