

Banassios v Hotel Pennsylvania
2017 NY Slip Op 32354(U)
September 25, 2017
Supreme Court, Queens County
Docket Number: 1994/2013
Judge: Robert J. McDonald
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or

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

----- X

STEFANOS BANASSIOS,

Plaintiff,

- against -

Index No.: 1994/2013

Motion Date: 5/26/17

Motion Seq.: 6 & 7

HOTEL PENNSYLVANIA, 401 HOTEL REIT,
LLC, 401 HOTEL TRS, INC. 401 HOTEL
MANAGEMENT COMPANY LLC AND VORNADO
REALTY TRUST,

Defendants.

----- X

HOTEL PENNSYLVANIA, 401 HOTEL REIT,
LLC, 401 HOTEL TRS, INC. 401 HOTEL
MANAGEMENT COMPANY LLC AND VORNADO
REALTY TRUST,

Third-Party Plaintiffs,

- against -

BOND PAINTING COMPANY, INC.,

Third-Party Defendant.

----- X
The following papers numbered 1 to 19 read on this motion by
defendants/ third-party plaintiffs for an award of summary
judgment on their third-party claims for contractual indemnity,
reimbursement of attorneys fees costs and disbursements associated
with defending the main action and awarding the reimbursement of
the reasonable settlement sum expended by third-party plaintiffs
to resolve the main action and a separate motion by third-party
defendant Bond Painting Company for an award of summary judgment
dismissing the third-party complaint against it.

FILED
OCT 02 2017
COUNTY CLERK
QUEENS COUNTY

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....1-4; 11-14
 Answering Affidavits - Exhibits.....5-7; 15-17
 Reply Affidavits.....8-10;18-19

Upon the foregoing papers it is ordered that the motions are determined as follows:

The plaintiff commenced the underlying action to recover damages for personal injuries he allegedly sustained during a workplace accident. He alleges that he was injured during the course of his work inside defendant Hotel Pennsylvania when he fell after a rubber nosing on the edge the carpeted stairs gave way as he walked down a staircase. The plaintiff had been working in the hotel painting the walls and ceilings in a stairwell there during the course of the 10-12 days prior to the date of the accident. At the time of the accident, the plaintiff was carrying pieces of dismantled scaffolding while in the employ of third-party defendant Bond Painting Company, Inc.

As a result of the foregoing, the plaintiff's complaint asserts allegations of common law negligence and violations of Labor Law §§ 200, 240(1) and 241 (6) against the defendants/third-party plaintiffs.

A third-party action was commenced by defendants/third-party plaintiffs against plaintiff's employer third-party defendant Bond Painting Company. They allege therein that the plaintiff's injuries sustained on the subject premises during the course of his employment with Bond Painting Company constituted a grave injury within the definition of the Workers Compensation Law. Defendants/third-party plaintiffs contend they were free from negligence and assert four causes of action against third-party defendants. The first cause of action is for common law indemnity. The second cause of action is for contribution. The third cause of action seeks contractual indemnification. The fourth cause of action is for breach of contract for failing to procure insurance.

The main action was resolved upon a settlement of the claims therein for the amount of \$900,000 and has been discontinued.

The present motions concern the claims asserted in the third-party action. The defendants/third-party plaintiffs move for an award of summary judgment in their favor on their claim for contractual indemnification and third-party defendant Bond moves to dismiss the third-party action in its entirety. In support of summary judgment the parties submit, among other things, copies of the pleadings, transcripts of the parties' examination before trial

testimony, and affidavits of their expert engineers.

Regarding their third-party claim for contractual indemnification, defendants/third-party plaintiffs assert that the plaintiff's work at the site was being performed pursuant to a purchase order contract between defendant Hotel Pennsylvania and the plaintiff's employer third-party defendant Bond Painting Company. The agreement provided the following provision, which defendants/third-party plaintiffs contend entitles it to contractual indemnity: "You have agreed by your acceptance of this order to hold harmless and indemnify Hotel Pennsylvania from and against any and all claims of property damage or personal injury sustained by third parties arising out of or in connection with, or as a result of any construction or other work performed by you or your employees or other representatives for Hotel Pennsylvania." Defendants/third-party plaintiffs rely on this clause as well as the expert affidavit of civil engineer Bernard P. Lorenz, P.E. to support its claim for contractual indemnity. Mr. Lorenz avers that the subject stair was in good condition and did not present a defective or dangerous condition to persons using the stairway. He asserts that the displacement of the rubber nosing and, consequently, the injured plaintiff's accident were caused by the force of the plaintiff's weight pushing down on the rubber nosing when he stepped on it and was not due to any fault of the defendants/third-party plaintiffs.

Third-party defendant Bond Painting Company claims that recovery cannot be had on the claim for contractual indemnification due to the negligence of the third-party defendants in the underlying action. In support of its claim, third-party defendant heavily relies on the expert affidavit of Scott Silverman, P.E., a civil engineer who avers that he inspected the premises where the accident occurred and determined that the stair where the accident occurred was faulty, the stairway was decrepit and in a state of disrepair, and the plaintiff's fall was occasioned by the defendants' negligence in maintaining the premises.

It is settled-law that "an indemnification clause that purports to indemnify a party for its own negligence is void under General Obligations Law § 5-322.1. [However], even if an indemnification clause purports to indemnify a party for its own negligence, such a clause may be enforced where the party to be indemnified is found to be free of any negligence and its liability is merely imputed or vicarious" (*Balladares v. Southgate Owners Corp.*, 40 AD3d 667 [2007] [citations omitted].) Here, based upon the conflicting affidavits of the parties' expert engineers, a triable issue of fact exists herein as to whether the stair where the accident occurred was properly maintained by defendants/third-party plaintiffs and free of the alleged defect that was claimed to have caused the accident. Since

an issue of fact exists as to whether defendants/third-party plaintiffs are negligent, those branches of the motions seeking summary judgment on the claim for contractual indemnification are denied (see Alvarez v. Prospect Hosp., 68 NY2d 320 [1986]).

Next, the court finds that the claims for common law indemnity and contribution are barred by Section 11 of the Worker's Compensation Law. Pursuant to Workers' Compensation Law § 11: "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." Grave injuries are those injuries that are enumerated in the statute (see Blackburn v. Wysong & Miles Co., 11 AD3d 421 [2007]; Ibarra v. Equipment Control, 268 AD2d 13 [2000]). The injuries claimed by the plaintiff are not injuries listed in the statute. Inasmuch as the plaintiff did not sustain a grave injury as defined by the statute, dismissal of the third-party claims for indemnity and contribution is warranted.

Accordingly, those branches of third-party defendant's motion which seek summary judgment dismissing the claims asserted against it for common law indemnity and contribution are granted and these causes of action are hereby severed and dismissed.

Lastly, inasmuch as there is no evidence that the third-party defendant has breached an agreement between the parties to procure insurance, that branch of third-party defendant's motion which seeks dismissal of the fourth cause of action for breach of contract for failure to procure insurance asserted in the third-party complaint is granted and the cause of action is hereby severed and dismissed.

In light of the foregoing, the defendants/third-party plaintiffs' remaining claims are premature.

Dated: September 25, 2017
Long Island City, N.Y.

ROBERT J. McDONALD
J.S.C.

FILED
OCT 02 2017
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QUEENS COUNTY