

Medina v 75-76 Third Ave. Assets II, LLC
2018 NY Slip Op 30091(U)
January 17, 2018
Supreme Court, New York County
Docket Number: 155699/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

ERICK MEDINA a/k/a GUSTAVO AVILA,
Plaintiff,
-against-

INDEX NO. 155699/13
MOTION DATE 12-06-2017
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

75-76 THIRD AVENUE ASSETS II, LLC and
DRYBAR HOLDINGS LLC,
Defendants.

75-76 THIRD AVENUE ASSETS II, LLC and
DRYBAR HOLDINGS LLC,
Third-Party Plaintiffs,
-against-

CREATIVE INTERIORS PLUS INC.,
Third-Party Defendants.

The following papers, numbered 1 to 14 were read on this motion and cross-motion to/for Summary Judgment:

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1 - 4</u>
Answering Affidavits — Exhibits _____ cross motion _____	<u>5 - 8, 9 - 10, 11, 12- 13</u>
Replying Affidavits _____	<u>14</u>

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that third-party defendant Creative Interiors Plus Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint in its entirety and dismissing the complaint in its entirety as to the defendants and third-party plaintiffs, is granted only as to dismissing the third-party causes of action for common law indemnification. The remainder of the relief sought is denied. Drybar Holdings Inc.'s cross-motion for summary judgment seeking contractual defense and indemnification from third-party defendant Creative Interiors Plus Inc., is denied.

Plaintiff brought this Labor Law action for injuries sustained on August 24, 2012, when he fell through the first floor of the premises located at 209 East 76th Street, New York, N.Y. (hereinafter referred to as the premises). Plaintiff was working for third-party defendant Creative Interiors Plus, Inc. (hereinafter referred to as "CIP"), the general contractor for the project, during the remodeling of the space for a new Drybar location. Plaintiff alleges that while attempting to remove part of a wood and plywood floor (supported by wooden beams) by hitting it with a pry-bar, the part of the floor he was standing on collapsed, causing him to fall approximately ten (10) feet through a basement room to a cement floor, and land on his back.

Plaintiff claims that no safety equipment was provided. Plaintiff alleges his work was only directed by his CIP co-worker, non-party Jeffrey Sanders. Defendant/third-party plaintiff 75-76 Third Avenue Assets II, LLC (hereinafter referred to individually as "75-76 Third Avenue") is the owner of the premises. Defendant/third-party plaintiff Drybar Holdings, LLC (hereinafter individually referred to as "Drybar") is the lessee of the premises.

The third-party action asserts claims against CIP for contribution, common law indemnification, contractual indemnification, and individually on behalf of 75-76 Third Avenue for breach of contract and failure to procure insurance.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

CIP's motion pursuant to CPLR §3212 seeks an Order granting summary judgment dismissing the third-party complaint in its entirety and dismissing plaintiff's complaint in its entirety as to Drybar and 75-76 Third Avenue.

Drybar opposes CIP's motion and makes a second cross-motion for summary judgment seeking contractual defense and indemnification in the third-party action against CIP.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Summary judgment is a drastic remedy and should not be granted where triable issues of fact are raised and cannot be resolved on conflicting affidavits (Millerton Agway Cooperative v. Briarcliff Farms, Inc., 17 N.Y. 2d 57, 268 N.Y. S. 2d 18, 215 N.E. 2d 341 [1966] and Ansah v. A.W.I. Sec. & Investigation, Inc., 129 A.D. 3d 538, 12 N.Y.S. 3d 35 [1st Dept., 2015]). Inconsistent accounts and conflicting testimony raise credibility issues that cannot be resolved prior to trial and require denial of summary judgment (Berman Brothers-Bloch Furs Inc. v. Fashion Vault Corp., 50 A.D. 3d 450, 856 N.Y.S. 2d 565 [1st Dept., 2008]).

CIP was only sued in the third-party action, and has not shown that it is otherwise entitled to seek summary judgment relief on behalf of the defendants in the underlying action. Alternatively, CIP has not shown on the merits that it is otherwise entitled to summary judgment dismissing plaintiff's case. CIP has not made a prima facie case to obtain summary judgment on the Labor Law §240[1] claims asserted by plaintiff. The conflicting deposition testimony and evidence presented has raised issues of fact of foreseeability due to the condition of the permanent floor, and whether attempts were made to demolish that section of permanent floor plaintiff was standing on before it collapsed.

Plaintiff's Labor Law §241[6] claims regarding violations of Industrial Code sections 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-3.5 cannot be maintained as they do not apply to the facts of this case. Plaintiff has raised issues of fact to maintain his Labor Law §241[6] claim under 12 N.Y.C.R.R. 23-1.7[b][1][iii] applying to hazardous openings and the use of safety equipment, as stated in this Court's Decision and Order filed under Motion Sequence 004. Plaintiff has established that CIP is precluded from arguing lack of notice of the defective condition of the premises under Motion Sequence 002 as a spoliation sanction, and not entitled to summary judgment on the Labor Law § 200 claims.

CIP is entitled to summary judgment against Drybar and 75-76 Third Avenue on its claims for common law indemnification and contribution. Plaintiff has not alleged injuries that would amount to a "grave injury" under Worker's Compensation Law §11. Drybar and 75-76 Third Avenue have not raised any issue of fact under Worker's Compensation Law §11, barring summary judgment on the third-party claims for common law indemnification and contribution. Worker's Compensation Law §11 is not applied to claims for contractual indemnification. (Aramburu v. Midtown West B, LLC, 126 A.D. 3d 498, 6 N.Y.S. 3d 227 [1st Dept., 2015]).

Contractual indemnification involves the parties agreeing to shift liability from the owner to the contractor or subcontractor that proximately caused plaintiff's injuries through its negligence (Amato v. Rock-McGraw, Inc., 297 A.D. 2d 217, 746 N.Y.S. 2d 150 [1st Dept., 2002] and Uluturk v. City of New York, 298 A.D. 2d 233, 748 N.Y.S. 2d 371 [1st Dept., 2002]).

On July 2, 2012 CIP as “Contractor” entered into an AIA standard form agreement for the project with Drybar signing as “owner.” Under Article 9 titled “Contractor, subsection 9.15 titled “Indemnification,” CIP agreed “To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the Owner, and the Owner’s agents and employees from and against claims, damages, losses and expenses, including but not limited to attorney fees, arising out of or resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury,.... but only to the extent caused by the negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable...” (Mot. Exh. F, p. 9).

CIP is not entitled to summary judgment in the third-party action dismissing the claims for contractual indemnification made by Drybar. CIP’s potentially negligent acts resulting from directly controlling and managing plaintiff’s work, and failing to provide adequate protection from a height related risk, maintains Drybar’s third-party claims for contractual indemnification for injuries resulting from CIP’s work. Pursuant to a letter sent by CIP to Drybar’s architects, Lacina-Heitler Architects, stating “CO#2 Replacement of existing floor joists and underlayment: Tues 8/14 structural integrity of the existing floor joists was found to be deficient,” CIP can also be deemed to have had actual or constructive notice of any pre-existing defects in the floor (Plaintiff in Opp., Exhibit B).

This Court’s Decision and Order dated December 22, 2016 filed under Motion Sequence 002 further precluded CIP from arguing lack of notice of the defective condition (Plaintiff in Opp. Exh. A). Although CIP is not liable for its negligence to plaintiff under the Workmen’s Compensation Law, it is potentially contractually liable to the third-party plaintiffs under the contract, warranting denial of summary judgment under those third-party claims asserted on behalf of Drybar (See *Matthews v. Bank of America*, 107 A.D. 3d 495, 968 N.Y.S. 2d 15 [1st Dept., 2013] and *Britez v. Madison Park Owner, LLC*, 106 A.D. 3d 531, 966 N.Y.S. 2d 7 [1st Dept., 2013]).

The insurance policy procured by CIP provides coverage to additional insureds defined as “any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy” (Mot. Exh. H, p. CG 20 33 07 04).

The July 2, 2012 CIP AIA standard form agreement entered into between CIP and Drybar, Article 17 titled “Insurance and Bonds,” §17.1, states in relevant part: “The foregoing Employer’s Liability, Comprehensive General Liability, Auto Liability and Umbrella Liability policies shall name the following entities as additional insureds: Drybar Holdings LLC and 75-76 Third Avenue Assets II, LLC c/o the Parkoff Organization. Coverage afforded to additional insureds under the primary and umbrella policies hereunder shall be primary to and not concurrent with other insurance available to the additional insureds.” (Mot. Exh. F, pgs. 15-16).

CIP’s argument that there is no contractual obligation to 75-76 Third Avenue, relying on the indemnification provisions of the contract with Drybar, ignores the language of Article 17 of the contract. Although contractual indemnification “depends on the specific language of the contract” (*Trawally v. City of New York*, 137 A.D. 3d 492, 27 N.Y.S. 3d 505 [1st Dept., 2016]), 75-76 Third Avenue has raised an issue of fact on the language of Article 17 warranting denial of CIP’s motion for summary judgment on the contractual indemnification, breach of contract and failure to procure insurance claims asserted by 75-76 Third Avenue.

The use of “successive motions” for summary judgment is improper, there cannot be any reservation of issues for subsequent summary judgment motions. The exception to this rule, allowing the “successive motions” to be entertained, is newly discovered evidence or other sufficient justifications (*Jones v. 636 Holding Corp.*, 73 A.D. 3d 409, 899 N.Y.S. 2d 605 [1st Dept., 2010] and *Hoffeld v. Lindholm*, 85 A.D. 3d 635, 925 N.Y.S. 2d 819 [1st Dept., 2011]). Successive motions for summary judgment can be made with

authorization from the Court as when additional discovery is directed (Maggio v. 24 West 57 APF LLC, 134 A.D. 3d 621, 24 N.Y.S. 3d 1 [1st Dept., 2015]).

Drybar's second cross-motion for summary judgment seeking contractual defense and indemnification in the third-party action against CIP, is a successive motion. Drybar provides no justification for this motion, warranting denial of the relief sought.

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 (see Mikelatos v. Theofilaktidis, 105 A.D.3d 822, 962 N.Y.S.2d 693 [1st Dept. 2013]; Mak v. Silverstein Properties, Inc., 81 A.D.3d 520, 916 N.Y.S.2d 592 [1st Dept. 2011]). Drybar's motion for summary judgment would in any case be denied because there remain issues of fact as to Drybar's liability for common law negligence under Labor Law §200 resulting from actual or constructive notice of any pre-existing defects in the floor that collapsed.

Accordingly, it is ORDERED that third-party defendant Creative Interiors Plus Inc.'s motion pursuant to CPLR §3212 for summary judgment dismissing the third-party complaint in its entirety and dismissing the complaint in its entirety as to the defendants and third-party plaintiffs, is granted only as to dismissing the third-party causes of action for common law indemnification, and it is further,

ORDERED that the causes of action for common law indemnification and contribution asserted in the third-party complaint against Creative Interiors Plus Inc., are severed and dismissed, and it is further,

ORDERED that the remainder of the relief sought in Creative Interiors Plus Inc.'s motion is denied, and it is further,

ORDERED that Drybar Holdings Inc.'s cross-motion for summary judgment seeking contractual defense and indemnification from third-party defendant Creative Interiors Plus Inc., is denied.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: January 17, 2018

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE