

Lashley v New York Convention Ctr. Operating Corp.
2018 NY Slip Op 30323(U)
February 22, 2018
Supreme Court, New York County
Docket Number: 152259/2013
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
JusticePART 13SHERWYN LASHLEY,

Plaintiff,

INDEX NO. 152259/2013

- against -

MOTION DATE 02/07/2018MOTION SEQ. NO. 004

MOTION CAL. NO. _____

NEW YORK CONVENTION CENTER OPERATING CORPORATION
and NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION,
TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,
ATLANTIC HOISTING & SCAFFOLDING, LLC and
ENCLOS CORP.,

Defendants.

NEW YORK CONVENTION CENTER OPERATING CORPORATION
and NEW YORK CONVENTION CENTER DEVELOPMENT CORPORATION,
and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third-Party Plaintiffs,

- against -

ENCLOS CORP.,

Third-Party Defendant.

The following papers, numbered 1 to 12 were read on this motion and cross-motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1-3; 4 - 6
Answering Affidavits — Exhibits _____	4 - 6; 7 - 8; 9 - 10
Replying Affidavits _____	11; 12
Cross-Motion: ☒ Yes ☐ No	

Upon a reading of the foregoing cited papers, it is Ordered that Defendants New York Convention Center Operating Corporation and New York Convention Center Development Corporation ("Owner"), and Tishman Construction Corporation of New York's ("Tishman," herein collectively the "Moving Defendants") motion for summary judgment pursuant to CPLR §3212, is granted to the extent that the Owner is entitled to summary judgment on its cross-claims for contractual indemnification and defense costs against Defendant Atlantic Hoisting & Scaffolding, LLC ("Atlantic"). The remainder of the motion is denied. Defendant Enclos Corp.'s ("Enclos") cross-motion for summary judgment pursuant to CPLR §3212, is denied.

On March 16, 2012 from approximately 2:00pm to 2:45pm Plaintiff sustained injuries when he was struck by a bolt that fell from above him. Plaintiff, a school teacher, was sitting on a bench one level below street level when he was struck on the right shoulder while inside the Javits Center, located at 655 W. 34th Street, New York, New York.

At the time of the accident a renovation project was underway at the Javits Center to re-clad the entire building ("Renovation Project"). Defendant Owner is the owner of the Javits building and contracted Tishman to act as the general contractor for the Renovation Project ("Owner Contract"). Tishman contracted with multiple contractors, including Atlantic and Enclos. Atlantic was hired to install scaffolding above public areas to offer protection for the public beneath the work and eliminate the need to close

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

off an area. Enclos was hired to install a new facade on the Javits building while the building was operational.

The Moving Defendants now move for summary judgment pursuant to CPLR §3212 to grant their cross-claims for contractual indemnification and defense costs against Defendants Enclos and Atlantic. Enclos and Atlantic oppose the motion. Enclos cross-moves for summary judgment pursuant to CPLR §3212 to dismiss the Moving Defendants' claims and cross-claims against it.

On October 18, 2017 a settlement between the Plaintiff and Defendants was reached leaving outstanding issues concerning the cross-claims between co-defendants (Mot. Seq. 003 Enclos Opposition Papers Ex. A).

To prevail on a motion for summary judgment, 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*, 81 NY2d 833, 652 NYS2d 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 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]). The drastic remedy of summary judgment should not be granted when there is any doubt as to the existence of a triable issue of fact or where such an issue is even arguable (*Holender v Fred Cammann Productions*, 78 AD2d 233, 434 NYS2d 226 [1st Dept. 1980]).

"A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433, 839 NE2d 357, 805 NYS2d 299 [2005]). "A court must also be careful not to interpret a contracted indemnification provision in a manner that would render it meaningless" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 832 NYS2d 470, 864 NE2d 600 [2007]). "When the intent is clear, an indemnification agreement will be enforced" (*Id*).

The relevant portion of the Owner Contract states:

3.7 CM [Tishman] shall furnish at all times an ample supply of workers and materials necessary to meet the requirements of the Contract Documents. Provided that Owner acknowledges and agrees that CM is not guaranteeing time or budget of the Project, the CM shall manage the workers, materials, and Project in such a manner that the Project can be safely and successfully completed within the Project Schedule and the Project Budget.

3.8 CM [Tishman] shall manage, direct, supervise, coordinate, and cooperate with all contractors retained for the Project, in furthering the best interests of CCOC [Owner] with respect to the Project and shall cause the entire Work described in the Contract Documents to be executed in accordance with the very highest standards of care and skill for trade contractors experienced and specialized in the construction of major,

superior facilities operated in comparable settings.

3.10.2 CM [Tishman] is able to furnish the plant, tools, materials, supplies, equipment and labor required to complete the Services (and obtain Contractors to furnish the Work) and perform its obligations hereunder and has sufficient experience and competence to do so; (Atlantic Opposition Papers Ex. B).

The Owner and Tishman have identical indemnification provisions within their Contracts with Atlantic and Enclos. The relevant portion of both Contracts state:

7. To the fullest extent permitted by law, the Contractor [Enclos/ Atlantic] shall indemnify, defend, and hold harmless the Owner, Construction Manager [Tishman], such other Indemnitees as may be defined herein, and their respective parent companies, members, limited liability companies and/or partnerships and their owned, controlled, associated, affiliated and subsidiary companies, corporations, members, limited liability companies, and/or partnerships, and the respective agents, consultants, principals, members, partners, servants, officers, stockholders, directors and employees thereof, from and against all claims or causes of action, damages, losses and expenses (collectively, "Claims"), arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor may be liable, in connection with the Contract Documents, the performance of the obligations set forth in this clause. To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether caused in part by the passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee (Moving Papers Exs. H, I).

The indemnity clause in this Contract does not require a finding of negligence or fault on Atlantic or Enclos' part (Ezzard v One E. River Place Realty Co., LLC, 137 AD3d 648, 27 NYS3d 562 [1st Dept. 2016]). The Contract expressly contemplates the absence of fault on their part with language stating "...arising out of or resulting from the acts or omissions of [Atlantic/Enclos]..." (See e.g. DiPerna v Am. Broad. Cos., 200 AD2d 267, 612 NYS2d 564 [1st Dept. 1994]). The indemnity clause does not run afoul New York General Obligations Law §5-322.1 as the statute permits a partially negligent general contractor to seek contractual indemnification from its subcontractor so long as the indemnification provision does not purport to indemnify the general contractor for its own negligence" (Brooks v Judlau Contracting, Inc., 11 NY3d 204, 869 NYS2d 366, 898 NE2d 549 [2008] *citing* N.Y. Gen. Oblig. Law §5-322.1).

The Owner makes a prima facie showing that it is entitled to indemnification and defense costs from Atlantic. Atlantic agreed to erect a scaffold protection platform at the Javits Center to offer protection to occupants of the building during the Renovation Project. It established overhead protection directly above the area where the accident occurred. Hugh Ennis, a general foreman for Atlantic, testified that Atlantic would provide their own materials for the construction of the protection platform, designed the platform, and stated that it went wall to wall or glass to glass (Moving Papers Ex. F). Plaintiff's injury arose out of Atlantic's work, irrespective a finding of actual negligence on Atlantic's part.

The Owner established that it was not solely negligent in Plaintiff's injury. It did not create the dangerous condition, nor did it have actual or constructive

notice of the alleged defective condition which led to Plaintiff's injury (*Rodriguez v N.Y.C. Transit Auth.*, 118 AD3d 618, 988 NYS2d 617 [1st Dept. 2014]). Pursuant to the Owner Contract, the Owner relinquished any control or supervisory role to Tishman for the Renovation Project. Since Atlantic's act of erecting the scaffolding led to Plaintiff's injury, and the Owner was not solely negligent, the Owner is entitled to contractual indemnification and defense costs from Atlantic.

Tishman is not entitled to summary judgment on its cross-claims for contractual indemnification and defense costs against Atlantic. While general supervisory control by a general contractor is insufficient for the imposition of negligence (*Foley v Consol. Edison Co. of N.Y., Inc.*, 84 AD3d 476, 923 NYS2d 57 [1st Dept. 2011]), issues of fact remain as to the actual control Tishman exerted in the Renovation Project due to conflicting testimony and evidence (*McFadden v Bruno*, 37 AD3d 177, 829 NYS2d 74 [1st Dept. 2007]).

The Owner Contract gave Tishman responsibility for safety during the Renovation Project and exclusive control as to what areas to block off within the Javits Center (Atlantic's Opposition Papers Ex. B). Mr. Ennis testified that Atlantic coordinated its work as per the directions from Tishman's head superintendent, Roger Santina (Moving Papers Ex. F). Tishman allegedly oversaw the work by Atlantic and inspected the platform after it was erected (*Id*). Furthermore, Richard Nolan, regional superintendent for Enclos, testified that Tishman was responsible for installing netting, scaffolding, or any other overhead protection at the site to prevent small objects from falling through (*Id* at Ex. G). Issues of fact remain as to the percentage of negligence that can be attributed to Tishman, if any. This Court notes that Atlantic can only evade the contractual indemnification clause pertaining to Tishman if Atlantic is able to establish that Tishman was 100% negligent for Plaintiff's injury. However, summary judgment is premature since the liability of the parties has not been determined (*McAllister v Constr. Consultants L.I., Inc.*, 83 AD3d 1013, 921 NYS2d 556 (2nd Dept. 2011)).

The Moving Defendants are not entitled to summary judgment on their cross-claims for contractual indemnification and defense costs against Enclos. Alan Tan, project superintendent for Tishman, testified that Enclos had employees assigned to work on the scaffolding above the Plaintiff at the time of the accident (Moving Papers Ex. E). According to Tishman's daily report, on March 16, 2012, there were 154 employees from numerous companies at the Renovation Project, including 25 employed by Enclos who were assigned to work on the scaffold using the same type of bolt that injured the Plaintiff (Moving Papers Ex. K). However, Mr. Nolan stated in an affidavit that on the day of the accident, Enclos employees were not working in the area located directly above where Plaintiff was sitting, and that the distance between any area where Enclos employees were using similar bolts to the one that injured the Plaintiff, were at least 100 feet away (Cross-Motion Papers Ex. J). The conflicting testimony raises triable issues of fact (*McFadden, supra*) as to whether Enclos actually had employees working in the area that led to Plaintiff's injury.

Enclos' cross-motion for summary judgment to dismiss the Moving Defendants' cross-claims for contractual indemnification and defense costs must be denied for the same reason. Issues of fact remain as to whether Plaintiff's injury arose out of Enclos' employees work, or whether it was other employees from different subcontractors who caused the bolt to fall and injure the Plaintiff.

Accordingly, it is ORDERED, that Defendants New York Convention Center Operating Corporation and New York Convention Center Development Corporation, and Tishman Construction Corporation of New York's motion for summary judgment pursuant to CPLR §3212, is granted to the extent that Defendant New York Convention Center Operating Corporation and New York Convention Center Development Corporation is entitled to contractual indemnification and defense costs from Defendant Atlantic Hoisting & Scaffolding, LLC, and it is further,

ORDERED and ADJUDGED and DECLARED, that Defendant Atlantic Hoisting & Scaffolding, LLC has a duty to defend and indemnify Defendant New York Convention Center Operating Corporation and New York Convention Center Development Corporation in this action, and it is further,

ORDERED, that the remainder of the Moving Defendants' motion is denied, and it is further,

ORDERED, that Defendant Enclos Corp.'s cross-motion for summary judgment pursuant to CPLR §3212 is denied, and it is further,

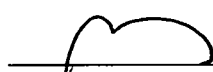
ORDERED, that within twenty (20) days from the date of entry of this Order the Moving Defendants shall serve a copy of this Order with Notice of Entry on all parties appearing, the Trial Support Clerk located in the General Clerk's Office (Room 119) and upon the County Clerk (Room 141B), and it is further,

ORDERED, that the Clerk of the Court enter Judgment accordingly.

ENTER:

MANUEL J. MENDEZ
J.S.C.

Dated: February 22, 2018


Manuel J. Mendez
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE