

<b>Lashley v New York Convention Ctr. Operating Corp.</b>
2018 NY Slip Op 30324(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 Justice

PART 13

SHERWYN LASHLEY, Plaintiff, - against -

INDEX NO. 152259/2013 MOTION DATE 02/07/2018 MOTION SEQ. NO. 003 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 9 were read on this motion for summary judgment.

Table with 2 columns: Description of papers and PAPERS NUMBERED. Includes rows for Notice of Motion/ Order to Show Cause, Answering Affidavits, Replying Affidavits, and Cross-Motion.

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Atlantic Hoisting & Scaffolding, LLC's ("Atlantic") motion for summary judgment pursuant to CPLR §3212, is granted to the extent that all claims and cross-claims by Defendant Enclos Corp. ("Enclos") are dismissed, and Defendants New York Convention Center Operating Corporation and New York Convention Center Development Corporation ("Owner"), and Tishman Construction Corporation of New York's ("Tishman") cross-claim for breach of contract, is dismissed. The remainder of Atlantic's motion 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 hired Tishman to act as the general contractor for the Renovation Project. Tishman contracted with multiple contractors, including Atlantic and Enclos. Atlantic was hired to install scaffolding above public areas to offer

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

protection for the public beneath the work and eliminate the need to close off an area. Enclos was hired to install a new facade on the Javits building while the building was operational.

Atlantic now moves for summary judgment pursuant to CPLR §3212 to dismiss Plaintiff's Complaint and dismiss all claims and cross-claims by co-Defendants. Defendants Owner and Tishman oppose the motion.

On October 18, 2017 a settlement between the Plaintiff and Defendants was reached leaving outstanding issues concerning the cross-claims between co-defendants (Enclos Opposition Papers Ex. A). As a result, Atlantic withdrew its motion for summary judgment to dismiss Plaintiff's Complaint as moot in its Reply papers after the parties agreed to settle this action (Reply Papers Affirmation).

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 [1<sup>st</sup> 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 [1<sup>st</sup> Dept. 1980]).

The relevant portion of the Contract between the Owners, Tishman and Atlantic states:

7. To the fullest extent permitted by law, the Contractor [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 Ex. Q).

The indemnity clause in this Contract does not require a finding of negligence or fault on Atlantic's part (*Ezzard v One E. River Place Realty Co., LLC*, 137 AD3d 648, 27 NYS3d 562 [1<sup>st</sup> Dept. 2016]). The Contract expressly contemplates the absence of fault on Atlantic's part with language stating "...arising out of or resulting from the acts or omissions of [Atlantic]..." (See e.g. *DiPerna v Am. Broad. Cos.*, 200 AD2d 267, 612 NYS2d 564 [1<sup>st</sup> Dept. 1994]).

Atlantic fails to make a prima facie showing that it is entitled to dismissal of the Owner and Tishman's cross-claims for contractual indemnification and defense costs. Plaintiff's injury arose out of Atlantic's work, irrespective a finding of actual negligence on its part. It agreed to erect a scaffold protection platform at the Javits Center to offer protection to occupants of the building during the Renovation Project. Atlantic had 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. P*). Atlantic further fails to make a prima facie showing that Plaintiff's accident arose solely from the negligence of the Owner or Tishman.

Atlantic does make a prima facie showing that the Owner and Tishman's cross-claim for breach of contract for failure to procure insurance must be dismissed. Under section 8 of the Contract, Atlantic agreed to maintain insurance for the protection of the Owner and Tishman. At the time of the accident Atlantic maintained a commercial general liability coverage policy issued by ACE American Insurance Company, policy number HDO G25533847 (*Moving Papers Ex. Q1, "Policy"*). The Policy named the Owner and Tishman as additional insureds (*Id*). With Atlantic procuring a proper insurance policy according to the limits and coverage required by the Contract, the claims for breach of contract against Atlantic for failing to obtain insurance must be dismissed (*Martinez v Tishman Constr. Corp.*, 227 AD2d 298, 642 NYS2d 675 [1<sup>st</sup> Dept. 1996]). Since the Owner and Tishman did not raise any defense to dismissal of their cross-claim for breach of contract in their opposition papers, they have abandoned them (*Perez v Folio House, Inc.*, 123 AD3d 519, 999 NYS2d 29 [1<sup>st</sup> Dept. 2014]).

Atlantic also makes a prima facie showing that Enclos' cross-claims must be dismissed. Atlantic had no contractual relationship with Enclos. With no contractual relationship, Enclos' cross-claims for breach of contract or defense and indemnity must be dismissed. Enclos, in its opposition papers, voluntarily dismissed their cross-claims against Atlantic (*Enclos Opposition Papers Affirmation*).

Accordingly, it is ORDERED, that Defendant Atlantic Hoisting & Scaffolding, LLC's motion for summary judgment pursuant to CPLR §3212, is granted to the extent that all claims and cross-claims by Defendant Enclos Corp. are dismissed, and Defendants New York Convention Center Operating Corporation and New York Convention Center Development Corporation, and Tishman Construction Corporation of New York's cross-claim for breach of contract, is dismissed, and it is further,

ORDERED, that Defendant Enclos Corp.'s claims and cross-claims against Defendant Atlantic Hoisting & Scaffolding, LLC are hereby severed and dismissed, and it is further,

**ORDERED, that Defendants New York Convention Center Operating Corporation and New York Convention Center Development Corporation, and Tishman Construction Corporation of New York's cross-claim for breach of contract is hereby severed and dismissed, and it is further,**

**ORDERED, that the remainder of Defendant Atlantic Hoisting & Scaffolding, LLC's motion for summary judgment is denied, and it is further,**

**ORDERED, that the Clerk enter judgment accordingly.**

ENTER:

**MANUEL J. MENDEZ  
J.S.C.**

**Dated: February 22, 2018**

  
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**Manuel J. Mendez  
J.S.C.**

**Check one:  FINAL DISPOSITION     NON-FINAL DISPOSITION**

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