Orgeat v 301-303 W. 125th LLC

2018 NY Slip Op 30428(U)

March 13, 2018

Supreme Court, New York County

Docket Number: 153069/2013

Judge: Shlomo S. Hagler

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

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GUILENE ORGEAT, GILBERT METELLUS and ZACHARY VINES, **Index No.: 153069/2013**

Plaintiffs,

-against-

301-303 WEST 125TH LLC, HARCO CONSULTANTS CORP., DISANO DEMOLITION CO., INC. and EMPIRE SCAFFOLDING SYSTEMS, INC., **DECISION/ORDER**

Defendants.

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HON. SHLOMO S. HAGLER, J.S.C.:

This is an action to recover damages for personal injuries allegedly sustained by three bus passengers on September 20, 2011, when a portion of a sidewalk bridge collapsed onto a bus, while it was passing in front of a demolition site located on the northwest corner of Frederick Douglas Boulevard and West 125th Street, New York, New York (the "Site").

Defendant Harco Consultants Corp. ("Harco") cross-moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Guilene Orgeat, Gilbert Metellus and Zachary Vines's (collectively, plaintiffs) complaint and all cross-claims against it, as well as for summary judgment in its favor on its cross-claims for common-law and contractual indemnification and breach of contract for failure to procure insurance as against defendant Disano Demolition Co., Inc. ("Disano").

It should be noted that defendant 301-303 West 125th LLC ("West 125th") moved, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and all cross-claims against it, as well as for summary judgment in its favor on its cross claims for common-

law and contractual indemnification as against Disano. As said motion was unopposed, in an Order, dated August 10, 2017, this court granted said motion in all respects.

Disano has neither appeared in this action nor opposed Harco's cross-motion.

BACKGROUND

On the day of the accident, West 125th was an owner of the Site where the accident occurred. Pursuant to a contract, West 125th retained Harco to serve as the general contractor on a project at the Site (the "West 125th/Harco Contract"), which entailed the demolition and rebuild of a retail development (the "Project"). Pursuant to a subcontract, Harco hired Disano to furnish labor, materials, equipment and services in connection with the demolition phase of the Project (the "Harco/Disano Contract"). Disano's contractual duties also included furnishing a sidewalk bridge and pipe scaffolding, which were necessary for the demolition work. In turn, Disano hired defendant Empire Scaffolding Systems, Inc. ("Empire") to erect the subject sidewalk bridge and scaffolding.

At the time of the accident, plaintiffs were passengers on the New York Transit Authority BX15 Bus, also known as MTA Bus # 5658 (the "Bus"). The Bus was stopped at a bus stop located adjacent to the Site, when a portion of a wall collapsed, causing the sidewalk bridge and scaffolding to be pushed into the street and onto the Bus.

Deposition Testimony of Elzbieta Obara (Harco's Project Manager)

Elzbieta Obara ("Obara") testified that she was Harco's project manager for the Project on the day of the accident. She explained that the Project entailed demolishing a building and then rebuilding it. Harco hired Disano to obtain permits and to perform said demolition because Harco doesn't "do demolition" (Obara tr at 54).

Obara testified that Disano determined how its demolition work was to be conducted, "follow[ing] all rules and safety," without any guidance from Harco (*id.* at 62). She explained that Harco did not have a project manager assigned to the demolition phase of the Project, nor did it have any supervisory involvement with the same. In addition, Harco did not perform any inspections of Disano's work. In fact, Obara only visited the Site to check for updates, monitor the Project's progress and gauge the Project for payment requisition. If she observed Disano employees doing anything "unsafe," she would notify "[Disano's] foreman" (*id.* at 63). Obara testified that the collapse occurred when demolition debris from an elevator shaft "push[ed] the outside wall [of the building]" (*id.* at 44).

Deposition Testimony of George Ungur (Empire's General Manager)

George Ungur ("Ungur") testified that he was Empire's general manager on the day of the accident. He explained that Empire is in the business of providing, installing and dismantling scaffolding for construction sites. Disano hired Empire to install a sidewalk bridge and some scaffolding at the Site, in order to accommodate the demolition phase of the Project. Ungur testified that the accident occurred when "a portion of the building collapsed and pushed the scaffold on the street" (Ungur tr at 15). Empire did not have any workers present at the Site on the day of the accident, as they had left "a few weeks before" (*id.*).

Affidavit of Steven Feldman (Member of Sigfeld Group)

In his affidavit, Steven Feldman ("Feldman") stated that, on the day of the accident, he was a member of Sigfeld Group, one of the owners of the Site. On behalf of West 125th, he hired Harco, a general contractor, to construct and develop the Site for retail purposes. Feldman stated that he "did not instruct, direct, or supervise any of the employees or workers at the Site,

including any of the Disano . . . employees" (Feldman aff). In addition, "no one from or on behalf of [West 125th] instructed, directed, or supervised any of the employees or workers at the site for this project . . . [or] provided any materials, supplies, or equipment for . . . the demolition work" (*id.*).

The West 125th/Harco Contract

Harco's work on the Project is described on the first page of the West 125th/Harco Contract, as follows:

> "Construction of the core and shell for an approximately 80,000 square foot retail development consisting of three stories above-ground and a basement level at [the Site] (hereinafter, referred to as 'Project')"

(Plaintiffs' opposition, Exhibit A, West 125th/Harco Contract).

Pursuant to the West 125th/Harco Contract, Harco was required to supply copies of the Project's plans and schedules to West 125th for its approval. In addition, West 125th retained the right to approve all subcontractors, as well as to object to Harco's choice of project manager for the Project. Harco also needed to obtain the approval of West 125th before using its own employees on the Project. West 125th had the right to directly purchase or lease any of the material or equipment to be utilized by Harco's workers, and it had the authority to authorize any changes in Harco's work that might affect price and scheduling.

A review of "Exhibit 'A'" to the West 125th/Harco Contract, entitled "Contractor General Conditions" ("General Conditions"), reveals that, among other things, Harco had to obtain approval from West 125th before substituting any materials or equipment (*id.*). In addition, West 125th could also demand an inspection of the work, and then reject it if it found it to be sub par. Further, West 125th could stop work and issue change orders whenever it deemed it necessary,

and it had the right to perform maintenance or other work on the Project, using its own employees.

The General Conditions also stated, in pertinent part, that Harco

> "shall supervise and direct the Work competently and efficiently, . . . be responsible for verifying that all completed Work complies with the Contract Documents[,] . . . [and] be responsible for all acts and omissions of [Harco's] employees, Subcontractors, Suppliers or any other persons or organizations furnishing or performing any of the Work on [Harco's] behalf"

(*id.*). Harco was also "solely responsible for its means, methods, [and] techniques . . . used for the construction of the Work" (*id.*).

Further, the General Conditions required that "[d]uring the progress of the Work, [Harco] shall keep the premises free from accumulations of waste materials, rubbish or other debris resulting from the Work" (*id.*). If Harco failed to clean up during construction, West 125th retained the right to do so, at a cost charged to Harco.

New York City Department of Buildings Violations

The New York City Department of Buildings issued multiple violations to Disano for its failure to properly safeguard its workers during its demolition activities, as well as for its failure to perform its work activities according to approved contract documents, proper procedure and plans.

DISCUSSION

"'The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden

then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Harco's Cross-Motion To Dismiss The Complaint Against It

Harco cross-moves to dismiss the complaint against it, on the ground that no negligence on its part caused or contributed to the accident. To that effect, Harco did not physically perform any of the demolition work at the Site, rather, it subcontracted the entirety of said work to Disano, including the installation and maintenance of the subject sidewalk bridge and scaffolding that fell onto plaintiffs' bus. Harco also argues that it is entitled to dismissal of the complaint against it, because it did not owe a duty of care to plaintiff, in the first instance.

"To maintain a negligence cause of action, plaintiff must be able to prove the existence of a duty, breach and proximate cause" (*Kenney v City of New York*, 30 AD3d 261, 262 [1st Dept 2006]). As "a finding of negligence must be based on the breach of a duty, a threshold question . . . is whether [Harco] owed a duty of care to [plaintiffs]," nonparties to the contractual arrangement between Harco and West 125th (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]; *see Church v Callanan Indus.*, 99 NY2d 104, 110 [2002]). "[A] contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party" (*Espinal*, 98 NY2d at 138).

In *Espinal*, the Court identified three sets of circumstances, which serve as exceptions to this general rule (*id.* at 140; *Church,* 99 NY2d at 111). The first set of circumstances, and the only one that may arguably apply to the instant case, arises "where the promisor, while engaged affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk" (*Church*, 99 NY2d at 111, citing *Espinal*, 98 NY2d at 139, 141-142; *Colon v Corporate Bldg. Groups, Inc.*, 116 AD3d 414, 415 [1st Dept 2014]). This conduct has also been described as "'launch[ing] a force or instrument of harm'" (*Church*, 99 NY2d at 111, quoting *Moch Co. v Rensselaer Water Co.*, 247 NY 160, 168 [1928]).

Here, the evidence in the record establishes that Harco did, in fact, subcontract to Disano the entirety of the demolition work, as well as the sidewalk bridge and scaffolding installation work. Therefore, as Harco did not perform any of the subject work giving rise to the accident, it cannot be said that any action on its part created an unreasonable risk to plaintiff or increased any such risk (*see Miller v Infohighway Communications Corp.*, 115 AD3d 713, 715 [2d Dept 2014] [defendant fiber optic company did not owe a duty of care to a plaintiff who fell on a roadway condition, where the defendant had subcontracted the roadway construction and excavation work to another company]).

In opposition, plaintiff argues that Harco de facto launched an instrument of harm, in that, despite its contract with West 125th, Harco did nothing to supervise or monitor Disano's demolition work at any time prior to the collapse. In support of this argument, plaintiffs put forth the case of *Hahn v Tops Mkts., LLC* (94 AD3d 1546 [4th Dept 2012]). In that case, the plaintiff was injured when, while pushing a shopping cart down an aisle, the front wheel of the cart got stuck in a small uncovered hole in the floor, which contained an electrical box. Plaintiff sued the

store owner, the general contractor and two subcontractors, who were allegedly responsible for leaving the hole uncovered. The Court in *Hahn* held that a question of fact existed as to whether the general contractor owed a duty of care to the plaintiff, a noncontracting third party to the contract between the owner and the general contractor, by "failing to ensure that the hole was covered or that the dangerous condition was cured, thereby 'launch[ing] a force or instrument of harm'" (*id.* at 1548 [citation omitted]).

However, as the Court of Appeals in *Church* reasoned, it is well settled that

> "tort liability for breach of contract will not be imposed merely because there is some safety-related aspect to the unfulfilled contractual obligation. If liability invariably follows nonperformance of some safety-related aspect of a contract, the exception would swallow up the general rule against recovery in tort based merely upon the failure to act as promised"

(*Church*, 99 NY2d at 112 [guardrail installer owed no duty of care to nine-year-old passenger plaintiff who sustained serious spine injuries when the vehicle careened off the highway and down an embankment. Court held that guardrail installer's "failure to install the additional length of guardrail did nothing more than neglect to make the highway . . . *safer*–as opposed to less safe–than it was before the repaving and safety improvement project began"]). Therefore, Harco does not owe a duty of care to plaintiffs on this ground.

"The second set of circumstances giving rise to a promisor's tort liability is where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant's continuing performance of a contractual obligation" (*Church*, 99 NY2d at 111, citing *Espinal*, 98 NY2d at 140). Here, it is not disputed that plaintiffs, as passengers on a passing bus, did not rely on Harco's continuing performance of its general contracting duties on the Project.

"Third, [Courts] have imposed tort liability upon a promisor 'where the contracting party

has entirely displaced the other party's duty to maintain the premises safely'" (*id.* at 112, citing *Espinal*, 98 NY2d at 140, 141 [liability for the plaintiff's slip and fall injuries were not imposed on a snow removal contractor, where the owner effectively "at all times retained its landowner's duty to inspect and safely maintain the premises"]; *Palka v Service Mgt. Servs. Corp.*, 83 NY2d 579, 588 [1994] [liability for plaintiff's injuries imposed upon a maintenance company, where its contract with the hospital was "comprehensive and exclusive" in regard to the inspection and repair of the defectively maintained fan that fell on her]).

Here, a review of the West 125th/Harco Contract reveals that it was clearly not the type of contract that was "comprehensive and exclusive," so as to qualify under the requirements of the third Espinal exception. As Harco never completely displaced the owner of the Site's common-law duty to maintain the Site safely, Harco owed no cognizable duty to plaintiffs, so as to be held liable in negligence for their injuries on this ground.

Thus, as Harco did not owe a duty of care to plaintiffs, Harco is entitled to dismissal of the complaint against it.

It should be noted, however, that Harco does not put forth any arguments or evidence whatsoever, in support of its request to dismiss all cross-claims against it. Thus, Harco is not entitled to dismissal of the same.

Harco's Cross-Claim for Common-Law Indemnification Against Disano

Harco cross-moves for summary judgment in its favor on its cross claim for common-law indemnification against Disano. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some

negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; *Priestly v Montefiore Med. Ctr./Einstein Med. Ctr.*, 10 AD3d 493, 495 [1st Dept 2004]). "It is well settled that an owner who is only vicariously liable under the Labor Law may obtain full indemnification from the party wholly at fault" (*Chapel v Mitchell*, 84 NY2d 345, 347 [1994]).

Initially, it should be noted that Disano has not opposed that part of Harco's cross-motion seeking summary judgment in its favor on its cross-claim against it. Thus, Harco is entitled to judgment in its favor on said cross-claim.

In any event, a review of the testimonial evidence in the record reveals that the accident was caused by Disano's demolition work that was underway at the Site at the time of the accident. In addition, there is no evidence in the record establishing that Harco had any involvement with the demolition phase of the Project, as it subcontracted out the entirety of said work to Disano. Moreover, Harco had no involvement in the installation and maintenance of the subject sidewalk bridge and scaffolding that collapsed onto the Bus.

Thus, Harco is entitled to summary judgment in its favor on its cross-claim for common-law indemnification against Disano.

Harco's Cross-Motion For Contractual Indemnification Against Disano

Harco cross-moves for summary judgment in its favor on its cross-claim for contractual indemnification against Disano.

Additional Facts Relevant To This Issue:

The indemnification provision contained in section 4.6.1 of the Harco/Disano Contract

(the Disano Indemnification Provision), states, in pertinent part, as follows:

> "To the fullest extent permitted by law, [Disano] shall indemnify and hold harmless the Owner, Contractor, Architect . . . and agents and employees of any of them from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from [the] performance of the [Disano's] Work under this Subcontract, provided that any 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 Subcontractor, the Subcontractor's subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable . . . regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder"

(Plaintiffs' opposition, exhibit B, the Harco/Disano Contract, ¶ 4.6.1, the Disano Indemnification Provision).

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

With respect to contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability, and "'[w]hether or not the proposed indemnitor was negligent is a non-issue and irrelevant'" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003] [citation omitted]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Here, as discussed previously, it has not been established that any negligence on the part of Harco caused or contributed to the accident, but that Disano was solely responsible for the

demolition work at the Project, which allegedly led to the collapse of the building's wall and scaffolding.

Thus, Harco is entitled to summary judgment in its favor on its cross claim for contractual indemnification against Disano.

Harco's Cross Claim for Breach of Contract for Failure to Procure Insurance Claim Against Disano

Harco cross-moves for summary judgment in its favor on its cross-claim against Disano for breach of contract for failure to procure insurance.

Additional Facts Relevant To This Issue:

Pursuant to the Harco/Disano Contract, Disano was obligated to purchase and maintain general liability insurance covering any claims that might "arise out of, or result from, [Disano's] operations" as the demolition subcontractor on the Project (Plaintiffs' opposition, exhibit B, the Harco/Disano Contract, ¶ 13.1). Disano was also required to maintain excess liability insurance, with $5 million dollar limits for each occurrence. Further, Disano was required to name Harco as an "additional insured for claims caused in whole or in part by [Disano's] negligent acts or omissions during [Disano's] completed operations" (*id.*, ¶ 13.4).

In support of its cross motion for summary judgment in its favor on the breach of contract for failure to procure insurance claim against Disano, Harco offers a letter from Disano's insurance company (the "Letter"), First Mercury Insurance Company ("First Mercury"), wherein First Mercury "disclaim[ed] any duty to defend or to indemnify [West 125th] for [the] claim based upon the 'Exclusion of Specific Operations' endorsement contained within the Policy" (the Endorsement) (West 125th's notice of motion, Exhibit S, the Letter). Notably, in the Letter, it is

stated that the Endorsement modifies the commercial general liability coverage part to exclude "[a]ll street, road and bridge work" and "[a]ll work over 1 story in height" (*id.*).

Here, it appears that Disano failed to obtain proper additional insured coverage on behalf of Harco, so as to cover claims caused by Disano's negligence in regard to the subject demolition work and sidewalk shed and scaffolding duties on the Project, as required under the Harco/Disano Contract. Thus, Harco is entitled to summary judgment in its favor on its cross claim against Disano for breach of contract for failure to procure insurance.

CONCLUSION AND ORDER

For the foregoing reasons, it is hereby

ORDERED that the part of defendant Harco Consultants Corp.'s ("Harco") cross-motion, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs Guilene Orgeat, Gilbert Metellus and Zachary Vines's complaint against it is granted, and the complaint is dismissed as against Harco, and the Clerk is directed to enter judgment accordingly in favor of Harco; and it is further

ORDERED that the part of Harco's cross-motion for summary judgment in its favor on its cross-claims for common-law and contractual indemnification and breach of contract for failure to procure insurance is granted as against defendant Disano Demolition Co.,; and it is further

ORDERED that the remainder of the action shall continue.

Dated: March 13, 2018

ENTER:

J.S.C.

SHLOMO HAGLER
J.S.C.