

Dawidowicz v 201 W. 89 Owners Inc.

2018 NY Slip Op 32671(U)

October 17, 2018

Supreme Court, New York County

Docket Number: 155056/2015

Judge: Carmen Victoria St. George

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY -- PART 34

JAN DAWIDOWICZ,

Plaintiff,

Index No.: 155056/2015

- against -

201 W. 89 OWNERS INC., RENOVATIONS
BY MY HOME INC. AND ROBERT OTT,

Defendant.

RENOVATIONS BY MY HOME INC.,

Third-Party Plaintiff,

Motion Sequence No.: 002, 004

- against -

DECISION/ORDER

MK IMPROVEMENTS CORP.,

Third-Party Defendant.

201 W. 89 OWNERS INC.,

Second Third-Party Plaintiff,

- against -

MK IMPROVEMENTS CORP.,

Second Third-Party Defendant.

ST. GEORGE, CARMEN VICTORIA, J.S.C.:

In motion sequence number 002, 201 W. 89th Street Owners, Inc. (201 West) moves for summary judgment 1) dismissing plaintiff's Labor Law § 200 and common law negligence claims against it, and 2) granting judgment on its contractual indemnification claim against Robert Ott (Ott) and Renovations By My Home, Inc. (Renovations). The Court's decision in motion sequence number 003 granted Robert Ott's motion to dismiss all claims and cross-claims asserted against

him, and therefore the second prong of the motion relates only to Renovations' duty to indemnify. In motion sequence number 004, Renovations moved for summary judgment dismissing plaintiff's Labor Law §§ 200 and 240 (1) claims and his common law negligence claim and all cross-claims against it. 201 West opposed Renovations' motion to the extent that the notice of motion sought dismissal of 201 West's indemnification cross-claim against Renovations. This is the only issue remaining in this motion.

Plaintiff did not oppose the dismissal of the challenged Labor Law and common law causes of action. By interim order and pursuant to the parties' stipulation, therefore, the Court dismissed the Labor Law § 200, Labor Law § 240 (1), and common law indemnification claims. Plaintiff's Labor Law § 241 (6) claim remains active and is not the subject of the motions before the Court. The Court reserved decision on the second prong of the motions, which relate to indemnification.

Background

On June 11, 2014, the date of the accident, plaintiff was doing renovation work in apartment 4G at 201 West, in his capacity as an employee of MK Improvement Corporation (MK). The project was a renovation of the master bathroom, and on the accident date plaintiff was removing the old tiles from the bathroom and securing the room with strips of Masonite. While he cut the Masonite with an electric hand saw, the saw "jumped" and injured his finger – which, in turn, caused him to fall and bang his head. According to plaintiff, the saw was missing a guard which would have stopped the saw's operation when it jumped. He commenced this action against 201 West, the owner of the building; Ott, who owns the shares attributed to unit 4G; and Renovations, with whom Ott contracted for the work. Both 201 West and Renovations commenced

third-party actions against plaintiff's employer MK, and 201 West has obtained a default judgment against MK.¹

The Court turns to 201 West's motion for summary judgment on its indemnification claim against Renovations. In support, 201 West submits the deposition transcript of Peter Kral, a production manager for Renovations, the general contractor. Mr. Kral identified Renovations' labor agreement with Mr. and Ms. Ott, Renovations' subcontract with MK, and the alteration agreement. MK contracted to provide its own tools for the work. Also pursuant to the subcontract, MK was responsible for purchasing insurance that

“will protect [MK], all entities that [Renovations] is required to indemnify and hold harmless . . . and Owner, from claims. . . which may arise out of or result from [MK's] operations, work and responsibilities for the Project and for which [MK] may be legally liable” (Subcontractor Agreement, § 9 [A]).

Exhibit A to the alteration agreement requires the general contractor

“to defend, protect, indemnify and hold harmless 201 [West] . . . from and against each and every claim, demand or cause of action against any or all of the Indemnitees with respect to any and all liability, judgment, cost, expense. . . , damage or loss in connection therewith on account of any personal injury or death . . . caused by, arising out of, or in any way incidental to or in connection with the performance of any or all work to be performed by, or on behalf of, the Contractor in the building”

The final deposition transcript upon which 201 West relies is that of Mr. Ott. Mr. Ott also identified his contract with Renovations and the alteration agreement.

All that remains of Renovations' motion, sequence number 004, seeks this relief in motion sequence number 004. Although Renovations commenced this motion three days after the time in which it was required to make a dispositive motion, it argues that good cause exists because the

¹ Renovations requested the same relief but not by way of motion. In addition, Renovations did not explain the delay in seeking default judgment (CPLR § 3215).

issues in dispute are already before the Court. In addition, it argues that counsel’s statuses as a sole practitioner and as his wife’s caregiver following her surgery should be considered good cause. The Court considers the motion, as no party opposes this request and it is a more efficient way to resolve the issues.

Renovations’ notice of motion states that it seeks dismissal of all claims and cross-claims. Its papers, however, only argue for dismissal of the Labor Law §§ 200 and 240 (1) causes of action. Accordingly, 201 West seeks to clarify that Renovations has not sought dismissal of its indemnification claim. Furthermore, 201 West notes, Renovations did not file any papers in opposition to 201 West’s motion for summary judgment on indemnification. It references its motion papers in support of this position and further argues that summary judgment on this issue is not premature. In response, Renovations merely states that “[i]f the Court is inclined to grant 201 [West’s] motion for contractual indemnity against Renovations, it should be conditional and contingent on plaintiff’s recovery against Renovations in the main action” (Renovations’ Reply Aff., ¶ 4).

Case law supports the granting of a conditional order of indemnification (*see Hong-Baao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496-97 [1st Dept 2018]). Accordingly, it is

ORDERED that motion sequences 002 and 004 are granted; and it is further

ORDERED and DECLARED that 201 West has a conditional order of indemnification against Renovations.

Dated:

10/17/2018



ENTER:

CARMEN VICTORIA ST. GEORGE, J.S.C.

**HON. CARMEN VICTORIA ST. GEORGE
J.S.C.**