Sentinal Ins. Co. v 260-261 Madison Ave. LLC
2018 NY Slip Op 32863(U)
November 2, 2018
Supreme Court, New York County
Docket Number: 450310/18
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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IN RE: 260 MADISON AVENUE HVAC UNIT COLLAPSE

DECISION/ORDER

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This Decision/Order Relates To:

Sentinal Insurance Co. v. 260-261 Madison Ave. LLC *et al.*

Ind. No. 450310/18
Mot Seq. No. 002

-and-

Admiral Indemnity Co. v. 260-261 Madison Ave. LLC *et al.*

Ind. No. 162167/15
Mot Seq. No. 006

Present:
Hon. Lynn R. Kotler, J.S.C.

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These actions arise from a crane accident which occurred on May 31, 2015 at 261 Madison Avenue, New York, New York, when an HVAC chiller unit fell while being hoisted by the crane to the 30th floor of the subject premises. Its alleged that one of the straps on a sling was used to secure the HVAC unit snapped while it was being hoisted which caused property damage and personal injuries.

In both motions referenced above under index numbers 450310/18 and 162167/15, defendant Bay Crane Service Inc. ("Bay Crane") moves for summary judgment pursuant to CPLR § 3212 dismissing the complaint and all cross-claims against it. Defendant 260-261 Madison Avenue LLC ("260-261 Madison") and plaintiffs Admiral Indemnity Co. ("Admiral") and Sentinel Insurance Co. ("Sentinel") oppose the motions. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order.

The relevant facts are as follows. Bay Crane leased a mobile crane to Skylift Contractor Corp. which Skylift used to hoist an air conditioning unit up into the building at 260-261 Madison

Avenue, New York, New York on May 31, 2015. The air conditioning unit became loose from the rigging straps and fell to the ground. The Standard Rental Agreement for the subject crane provides in pertinent part that "no liability for loss or damage on account of accidents...", "you the lessee agree to hire a competent licensed crew to operate said equipment" and Skylift "assume[s] full responsibility for equipment during the rental period". NYC Department of Buildings approved the application for the crane and issued a CN number 015315 for the installation of the crane at the project site. A post-accident third party inspection of the crane was performed in June 2015 and found one deficiency, a crack in the windshield, but otherwise found that that the crane was free from defects. These subrogation matters ensued.

Bay Crane argues that the complaint against it must be dismissed because it had no responsibility for the accident or the operations that led to the accident. It further argues that the crane was safe for its intended operations, that DOB declared immediately after the accident that the crane supplied to Skylift was safe, and that DOB and third-party testing confirmed that the crane functioned properly and was not defective prior to and even after the accident. Moreover, Bay Crane alleges that the Standard Rental Agreement provides that its only obligation was to provide the crane to Skylift, that it had no personnel at the site nor did a Bay Crane employee operate the crane or monitor or supervise the work of Skylift or any other contractor or vendor at the site. Finally, Bay Crane claims that it did not own the hoisting material that purportedly failed, nor did it have any responsibility or role with the hoisting operation that led to the accident.

Defendant 260-261 Madison argues that Bay Crane's motion should be denied as premature because there is outstanding discovery, that Bay Crane did not satisfy its burden of proof as the proponent of a summary judgment motion and that there exist triable issues of fact, more specifically the denial that Chris Crosban was not an employee of Bay Crane. Plaintiffs, in both actions, have essentially adopted the arguments advanced by defendant 260-261 Madison

in opposition to the motions for summary judgment.

Discussion

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). The party opposing the motion must then come forward with sufficient evidence in admissible form to raise a triable issue of fact (*Zuckerman, supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, to the extent that the defendant 260-261 Madison and plaintiff contend that summary judgment is premature because there is outstanding discovery from expert witnesses, depositions and responses to discovery demands that may reveal relevant information regarding Bay Crane and/or its relationship with Skylift, this argument fails. Summary judgment is premature when "facts essential to justify opposition may exist but cannot then be stated" (CPLR 3212[f]). Here, aside from pointing to general categories of information, 260-261 Madison and plaintiffs they have failed to identify what specific information is in Bay Crane's possession which would enable them to defeat the motion. In the "Admiral" action, which has

been pending since 2015, Bay Crane responded to the preliminary conference order as well as provided responses to plaintiff's notice for discovery and inspection which it denied that it had any relevant documents, photographs, names of witnesses and statements etc. There is nothing in the record to suggest that additional discovery would lead to a different result. Finally, 260-261 Madison didn't even sue Bay Crane in its own action under index number 157898/17. Therefore, the motions are not premature.

Substantively, Bay Crane argues that it merely leased the crane to Skylift, that Skylift was required to retain its own team to operate the crane, that Bay Crane had no employees at the job site and that pursuant to the rental agreement it "did not and was not required to, supervise or monitor the work of Skylift or any other contractor or vendor at the site." Therefore, it argues, it had no responsibility or duty for any other contractor or other individual or entity at the accident site. 260-261 Madison and plaintiff oppose the motion claiming there was a question of fact as to "the relationship between Bay Crane, Skylift and Christopher Crosban and their respective direction, supervision and control of the instrumentalities purportedly giving rise to the alleged incident".

Here, there can be no dispute that the crane was not defective prior to the accident, or that any act or omission by Bay Crane was the cause of the accident. On March 6, 2017, NYC DOB Inspector John Moran testified under oath at the New York City Office of Administrative Trials and Hearings (OATH) hearing in the Matter of NYC Department of Buildings v. Brad Allecia, that he was present at the job site as Supervisor, Cranes and Derricks and that there were no issues with the crane on the date of the accident. In addition, NYC DOB John Damiani, employed as Chief Inspector, testified that it's the master rigger's responsibility how the load should be slung. Brad Allecia is listed on the permit submitted to NYC DOB that he was the master rigger for the project at 261 Madison Avenue. Christopher Crosban also testified under oath that he was the crane operator and that he was working for Skylift on May 31, 2015. The

fact that Christopher Crosban was a crane operator who has worked with many different rigging companies during his career is insufficient to create an issue of fact that he was an employee of Bay Crane on the date of the accident. Moreover, the alleged "Crosban affidavit" is not signed by Crosban nor is it notarized. Therefore, it is not in admissible form and cannot create a triable issue of fact.

As the record shows, based upon the Bernardo affidavit and the Standard Rental Agreement, Bay Crane was no more than a lessor of the crane. It had no personnel at the site; nor did it control or direct the operation of the crane. No evidence was offered in opposition to Bay Crane's showing that it merely leased the crane to Skylift and did not supervise the crane operator or have any on-site responsibility. Based upon the foregoing, Bay Crane is entitled to summary judgment dismissing all claims and cross-claims against it in the aforementioned actions.

Conclusion

In accordance herewith, it is hereby

ORDERED that defendant Bay Crane's motions for summary judgment are granted in their entirety and the complaints and cross-claims against Bay Crane, are severed an dismissed.

Dated: New York, New York
November 2, 2018

So Ordered:

Hon. Lynn R. Kotler, J.S.C.