Cruz v Moynihan Sta. Dev. Corp.
2019 NY Slip Op 30224(U)
January 25, 2019
Supreme Court, New York County
Docket Number: 159525/2014
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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JUAN CRUZ,

Plaintiff,

Index No. 159525/2014

- against -

Mot. Seq. Nos. 005 - 007

MOYNIHAN STATION DEVELOPMENT CORP., NEW YORK STATE DEVELOPMENT CORP. d/b/a EMPIRE STATE DEVELOPMENT CORP., SKYLIGHT GROUP INC., HTC AMERICA, INC., and PLS STAGING,

Defendants.

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MOYNIHAN STATION DEVELOPMENT CORP., NEW YORK STATE DEVELOPMENT CORP. d/b/a EMPIRE STATE DEVELOPMENT CORP., and SKYLIGHT GROUP INC.,

Third-Party Plaintiffs,

Third Party Index No. 595505/2016

- against -

SUTHERLAND SMITH GROUP LLP, SSG CREATE LTD., and GSS SECURITY SERVICES, INC.,

Third-Party Defendants.

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PLS STAGING,

Second Third-Party Plaintiff,

Second Third Party Index No. 595152/2017

- against -

SUTHERLAND SMITH GROUP LLP, SSG CREATE LTD., and GSS SECURITY SERVICES, INC., and DAVID MCDANIELS,

Second Third-Party Defendants.

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ROBERT D. KALISH, J.S.C.:

Motion sequence nos. 005, 006 and 007 are consolidated for disposition. In motion sequence 005, third-party (and second third-party) defendant GSS Security Services (GSS) moves for summary judgment dismissal of both the third-party and second third-party complaints

against it, pursuant to CPLR 3212, because it argues that the claims against it are barred by the Workers Compensation Law in that plaintiff Juan Cruz did not suffer a grave injury, i.e., a traumatic brain injury.

In motion sequence 006, defendants/third-party plaintiffs Moynihan Station Development Corp., New York State Urban Development Corp. d/b/a Empire State Development, and Skylight Group Inc. (together, the Moynihan defendants) move for summary judgment dismissal of plaintiff's claims, the cross-claims against them, and for summary judgment on their cross-claim for indemnification against defendant/second third-party plaintiff PLS Staging (PLS).

In motion sequence 007, defendant/second third-party plaintiff PLS moves for an order, pursuant to CPLR 3211 and 3212, granting it summary judgment and dismissing the complaint and all cross-claims against it or, in the alternative, granting it summary judgment against second third-party defendant David McDaniels.

For the reasons set forth below, the motions are denied.

BACKGROUND

This action arises out of an accident that took place at the James Farley Post Office Building (the Farley Post Office) on March 24, 2014 when plaintiff, Juan Cruz, employed as a security guard by third-party defendant GSS Security, was struck by a padded rafter or a piece of scenery while working at a product launch event being held at the building. Plaintiff's job that day was to secure the backstage area (Cruz 1/10/2017 EBT, p. 8). When he began his shift that afternoon there was ongoing construction of stages and various rooms with roofs (*id.*, p. 25). Plaintiff testified that there was a gentleman working on one of the roofs. As plaintiff was making his rounds, a man was walking behind him with an upright ladder (*id.*, p. 30). Plaintiff heard someone shout something along the lines of "heads up, watch out," but he did not know

where the warning was coming from or what it referred to; as he continued to walk, an object he described as a padded rafter fell from the roof and hit him in the back of his head (*id.*, pp. 30, 34). Second third-party defendant McDaniels admitted at his deposition that he bumped into the padded rafter or piece of scenery that fell onto plaintiff and caused his injury (Boyar affirmation, exhibit Q, pp. 29-30). McDaniels, allegedly a 'freelance contractor', was brought into the event by defendant PLS. PLS was also the company that brought the scenery that ultimately injured plaintiff into the building.

Defendant/third-party plaintiff Moynihan Station Development Corp. (Moynihan Station) is the owner of the Farley Post Office and a wholly owned subsidiary of the New York State Development Corp. d/b/a Empire State Development Corp., whose primary role is to develop and be responsible for the development of Moynihan Station (Bochner affirmation, exhibit R, p. 8). Sometime prior to the date of plaintiff's accident, defendant Skylight Group Inc. (Skylight) entered into an agreement with Moynihan Station and Empire State Development to be the managing agent to manage events that would take place at the Farley Post Office, including the event that was taking place on the day of the accident (Third-party complaint, ¶ 34).

On the date of the accident, GSS was retained to perform security services for an HTC America, Inc. ("HTC") product launch for a new cellular phone by third-party and second third-party defendant SSG Create Ltd. ("SSG"). HTC, SSG and Sutherland Smith Group LLP have not appeared in this action.

The verified amended complaint in this action asserts one cause of action for negligence (Boyar affirmation, exhibit A). A default judgment has been entered against defendant HTC (Boyar affirmation, exhibit B). The Moynihan defendants commenced an action against Sutherland Smith Group, LLP (Sutherland Smith), SSG and GSS for common law

indemnification and contribution (*id.*, exhibit C). The Moynihan defendants have also asserted cross claims against HTC and PLS for contribution and indemnification. Defendant PLS also commenced a second third-party action against Sutherland Smith, SSG Create LTD, GSS and McDaniels sounding in common law and contractual indemnification and in common law contribution (*id.*, exhibit D).

DISCUSSION

Summary Judgment

To succeed on a motion for summary judgment, the movant must establish its entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*Voss v Netherlands Ins. Co.*, 22 NY3d 728, 734 [2014] [citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The role of the Court in deciding such a motion is to only to make determinations as to the existence of issues of fact, not credibility or issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395 [1957]). Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue of fact (*O'Brien v Port Auth. of N.Y. & N.J.*, 29 NY3d 27, 37 [2017]).

Motion Seq. 005

GSS argues that the causes of action against it based upon common law indemnification and contribution are barred by the Worker's Compensation Law. Section 11 of New York's Worker's Compensation Law prohibits most third-party claims for contribution and indemnification against an employer for injuries sustained by an employee acting within the scope of his or her employment (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 367 [2005]). Under this section, for an employer to be liable for common law contribution and/or indemnification, the employee must sustain a "grave injury," which is defined as, among other

things, "an acquired injury to the brain caused by an external physical force resulting in permanent total disability." GSS argues that plaintiff has not sustained such an injury.

Plaintiff's Verified Bill of Particulars alleges the following injuries: traumatic brain injury, closed head trauma with post concussion syndrome, post traumatic stress disorder, abnormal increased T2/flair signal intensity within the subcortical region of the right frontal operculum differential, significant reduction of FA within the splenium of the corpous collosum, cervical spine herniation at C4-5 with cord impingement, cervical spine herniation at C5-6 with thecal sac indentation, bilateral foraminal stenosis, bulging disc at C6-7, left parasagittal herniation at T10-11 with thecal sac indentation, lower cervical spondylosis with central disc herniations at C4-5 and C5-6, intraforaminal tarlov cyst on right at L1-2, bulging disk at L2-3, left foraminal herniation at L3-4 with impingement upon existing L3 nerve root, left foraminal herniation at L4-5 with impingement upon existing L4 root, left foraminal herniation at L5-S1 with annular tear component impinging upon and posteriorly displacing the originating S1 root, L5-S1 Radiculopathy, 1.5 inch laceration to the head, facial laceration requiring stitches under left eye, cervical derangement, lumbosacral derangement, insomnia, atypical pattern of FA reduction within the splenium of the corpus callousum for patient's age, significant cortical atrophy with clustering and bilateral symmetry with selective involvement of inferior frontal temporal regions, pattern of neuroquant atrophy, left L5-S1 radiculopathy, left peroneal motor neuropathy, abnormal median nerve SSEP study indicative of myelopathy, lumbar decompression discectomy at L5-S1, decompressive lumbar laminectomy. GSS maintains that none of these injuries qualify as a "grave injury" under the statute except, arguably, plaintiff's claims related to head trauma, and, under the Worker's Compensation Law, to be compensable, such a brain injury must render plaintiff permanently and totally disabled. Both experts retained

by third-party plaintiffs and second third-party plaintiffs, however, opined that plaintiff did not suffer any permanent disability from a head injury. The vocational expert, Mr. Capotosto, opined, based on his review of the file and interview and testing of the plaintiff, that in the event that plaintiff is physically unable to work in his previous capacity as a security supervisor, it is his opinion that plaintiff is capable of alternate employment (Boyar affirmation, exhibit U). Accordingly, GSS contends there can be no grave injury.

Plaintiff does not oppose GSS's motion (11/7/2018 oral argument tr., p. 9). The Moynihan defendants and PLS both do, however. Although neither party questions the veracity of their own experts, they argue that any dismissal of their common law contribution and/or indemnification claims would be premature at this juncture because a jury could conclude that plaintiff did sustain a grave injury. In this regard, the Moynihan defendants and PLS rely on a medical report from plaintiff's treating physician, Dr. Aric Hausknecht, dated April 1, 2014 and a Neurobehavioral Screen by Dr. Jason Brown dated May 7, 2014 (Bochner affirmation in opp., exhibits B, C). Dr. Hausknecht states that plaintiff suffered a "mild traumatic brain injury" and is "totally disabled" and that he advised plaintiff "to restrict his activities." Concordantly, the neurobehavioral screen notes plaintiff's "Traumatic Brain Injury," and that "cognitive rehabilitation treatment is recommended."

At his January 10, 2017 EBT, plaintiff stated that Dr. Hausknecht had told him that he cannot work. Specifically, plaintiff stated that Dr. Hausknecht said that "due to the condition that I have, you know, with my brain I have very bad vertigo and I have very limited amount of physical activity from what I used to do which was security work. I cannot go back to work (tr at 88, lines 2-14).

In *Rubeis v Aqua Club Inc.* (3 NY3d 408, 416 [2004]), the Court of Appeals stated that

"[t]he statutory words 'an acquired injury to the brain caused by an external physical force resulting in permanent total disability' [] do not alone answer the question [of] whether a particular injury is a grave injury. That phrase *requires* interpretation." Resolving a split among the Appellate Divisions, the court rejected the Second Department's standard that essentially required a vegetative state and adopted the standard of the Third and Fourth Departments, holding that "a brain injury results in 'permanent total disability' under section 11 when the evidence establishes that the injured worker is no longer employable in any capacity" (*id.* at 413). The court opined that "the term 'disability' generally refers to inability to work" in the context of the Workers' Compensation Law (*id.* at 417).

In *Chelli v Banle Assocs., LLC* (22 AD3d 781 [2d Dept 2005]), the Appellate Division, Second Department modified a trial court's decision which had denied appellant's motion for judgment as a matter of law notwithstanding a verdict that a plaintiff had not suffered a "grave injury" within the meaning of section 11. A neuropsychologist had testified at trial that the plaintiff's brain injury had rendered him "permanently and totally disabled" (*id.* at 783). Based upon this testimony, the only substantive expert testimony offered on the issue at trial, and in light of the then-recent decision from the Court of Appeals in *Rubeis*, the court found that "the appellant [wa]s now entitled to judgment as a matter of law on the issues of 'grave injury' and its claim for common-law indemnification from the third-party defendant-respondent" (*id.*).

Based upon the foregoing, the court finds that, while GSS has shown prima facie that plaintiff may be employable in some alternative capacity to his past work based upon Mr. Capotosto's submission, the Moynihan defendants and PLS have raised a genuine issue of material fact in response by means of the submissions from Dr. Hausknecht and Dr. Brown. Specifically, Dr. Hausknecht's assertion that plaintiff is "totally disabled" is nearly the same as

the testimony that the court in *Chelli* found demonstrated prima facie that the plaintiff had suffered a grave injury. As the Court of Appeals stated, disability generally refers to inability to work. Dr. Hausknecht has opined that plaintiff is totally disabled. As such, there is an issue of fact as to whether plaintiff is employable in any capacity.

As such, GSS's motion is denied.

Motion Seq. 006

On their motion, the Moynihan defendants argue that summary judgment must be granted in their favor because they, aside from owning the premises, had no control over the event space. The Moynihan defendants further argue that they were not responsible for the padded rafter that fell and struck the plaintiff and because they did not create the circumstances that caused it to fall and strike the plaintiff, nor did they have any notice of this condition. The Moynihan defendants further argue that this is not a Labor Law action and that there are no strict liability claims.

The Moynihan defendants argue, in sum and substance, that while they had a duty to maintain the premises in a reasonable condition, the event space was operated in a safe condition and there was no defective or dangerous situation taking place. Specifically, the Moynihan defendants argue that the padded rafter allegedly leaning against a wall where a build-out was being done by PLS was not a dangerous or defective condition that Skylight had any duty to remedy. The Moynihan defendants argue that Skylight's obligation as operator was to make sure that the other personnel that came in per contracts and subcontracts, along with any other related individuals, did not cause damage to the actual property or destry the intrinsic nature of the premises.

The Moynihan defendants then argue that the Skylight representative present on the day of the accident was responsible for making sure people stayed in the space where they were

supposed to be. The Moynihan defendants argue that this representative seeing a padded rafter being placed against the wall by a contractor who is presumably using it to build the stage or the showcase piece was not something that would appear as a dangerous or defective condition.

The Moynihan defendants then argue that McDaniels bumped into an eight to ten foot tall padded rafter, yelled out a "heads up" warning, and plaintiff was hit in the head with the padded rafter. The Moynihan defendants argue that even though Skylight was the event operator, the Moynihan defendants are not responsible for the circumstances that gave rise to what was a third party knocking into a piece of scenery which was not dangerous or defective.

In opposition, plaintiff argues that triable issues of fact exist as to whether the Moynihan defendants exercised control over the work performed at the Farley Post Office on the day of the accident and whether they had actual or constructive notice of the defective condition because Skylight representatives were present at the site throughout the event.

PLS, which also opposes this motion, argues that it must be denied because there are triable issues of fact as to whether Skylight negligently operated and managed the premises during the event in question and whether the rafter being placed vertically, rather than horizontally, constituted a dangerous or defective condition. PLS further argues that Skylight had a common-law duty to maintain the premises in a safe condition, and that duty may not be contracted away. PLS further argues that Skylight was in complete and exclusive control of the premises during all events held there.

PLS then argues that the Moynihan defendants have failed to show prima facie that they did not create the alleged dangerous condition by propping up the object that struck plaintiff against the wall or have actual or constructive notice of it. PLS argues that there is no testimony or affidavit offered by the Moynihan defendants that addresses the issue of creating or having

notice of the allegedly dangerous or defective condition. PLS then argues that, even if the Moynihan defendants had made such a prima facie showing, there is still an issue of fact as to whether Skylight breached its duty to ensure that all activities at the premises were generally performed in a safe manner, whether through training, guidelines, house rules, or the like.

The well-established elements a plaintiff must establish in a negligence action are: (1) the existence of a duty; (2) a breach of that duty; and (3) that the breach of the duty proximately caused the plaintiff to be injured (*Pasternack v Laboratory Corp. of Am. Holdings,* 27 NY3d 817, 825 [2016]). The question of proximate cause is generally to be decided by the finder of fact and is not appropriate for summary judgment disposition (*Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 312 [1980]).

As to a duty, the Court finds there is an issue of fact as to whether the Moynihan defendants exercised control over the work and had actual or constructive notice of a defective condition.

The Court finds further that an issue of fact exists as to whether the placement of an eight to ten foot rafter vertically against the wall in an active construction area created a dangerous condition and was a proximate cause of plaintiff's injuries. The fact that McDaniels admitted to bumping into the rafter and, therefore, physically caused it to fall on plaintiff is not dispositive. "Where the acts of a third person intervene between the defendant's conduct and the plaintiff's injury, the causal connection is not automatically severed" (*id.* at 315). Rather, "liability turns upon whether the intervening act is a normal or foreseeable consequence of the situation created by the defendant's negligence" (*id.* [citation omitted]). To "break the causal nexus," the intervening act must generally be extraordinary under the circumstances and not foreseeable in the normal course of events (*id.*).

The Moynihan defendants' would have this Court find as a matter of law that the object, allegedly placed vertically, did not constitute a dangerous or defective condition. The Court finds that determining such issues is the province of the jury. The Court notes that a supervisor from PLS, Thomas Cheyne, testified that he instructed all the laborers to lay their materials flat, not vertically, which suggests an awareness that placing the rafter vertically created a dangerous or defective condition.

"It is well established that owners and lessees have a duty to maintain their property in a reasonably safe condition. A defendant moving for summary judgment has the initial burden of showing that it did not create [] or have actual or constructive notice of a dangerous condition" (*Langer v 116 Lexington Ave.*, Inc., 92 AD3d 597, 598 [1st Dept 2012] [internal citations omitted]). "A defendant has constructive notice of a hazardous condition on property when the condition is visible and apparent, and has existed for a length of time sufficient to afford the defendant a reasonable opportunity to discovery and remedy it." *(Rendon v Broadway Plaza Assocs. Ltd. Partnership*, 109 AD3d 975, 977 [2d Dept 2013].)

The Court finds that, assuming for the sake of argument the way the object was placed did create a dangerous or defective condition, the Moynihan defendants have failed to show prima facie by the submission of proof in admissible form, such as deposition testimony or affidavits regarding the time of last inspection, that they did not have actual or constructive notice of the condition. Under these circumstances, summary judgment is inappropriate.

As such, the branch of the Moynihan defendants' motion that is for summary judgment dismissing the complaint is denied. Accordingly, the branch of the Moynihan defendants' motion that is for an order granting them summary judgment against PLS on their cross claims for common-law indemnification is also denied as premature as there is an issue as to the Moynihan

defendants' negligence. (*See, e.g., Francescon v Gucci Am., Inc.* 71 AD3d 528 [1st Dept 2010].)

Motion Seq. 007

PLS argues that it is entitled to summary judgment dismissal because it owed no duty to plaintiff. PLS argues that it did not own or manage the premises and was only retained to provide lighting, scenery, and audio-visual services for the event. PLS further argues that it did not displace the duties of the owner or licensee. PLS further argues that McDaniels was not an employee of PLS but was in fact a freelancer brought onto the job by nonparty independent contractor Hands On[1], which was allegedly retained to provide stage hands and laborers for the event who would transport materials delivered to the premises into the premises and into the areas within the premises where they were used. PLS argues, in sum and substance, that it cannot be vicariously liable for the negligence of any of its independent contractors, e.g., McDaniels or anyone affiliated with Hands On.

The threshold question in every negligence action is whether the defendant owes a duty of care to the plaintiff (*Espinal v Melville Snow Contrs.*, 98 NY2d 136, 138 [2002]). Generally, a contractual obligation, standing alone, will not give rise to tort liability in favor of a third-party (*id.*). Under some circumstances, however, the Court of Appeals has recognized that "a party who enters into a contract [PLS] thereby assumes a duty of care to certain persons outside [of that] contract [plaintiff]" (*id.* at 139). Among them,

> "a party who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons ... where the contracting party, in failing to exercise reasonable care in the performance of [its] duties, 'launche[s] a force or instrument of harm'" (*id.* at 140, citing to *H.R. Moch*

[1]Although argued this way by counsel at the oral argument, the moving papers indicate that McDaniels was first retained by PLS in 2002 to provide lighting services for events and that he was hired by PLS as a freelance lighting director for the subject event.

Co. v Rensselaer Water Co. [247 NY 160, 168 (1928)]).

Here, at minimum, plaintiff has raised an issue of fact as to whether PLS's "independent contractors," employees, or agents launched a force or instrument of harm. Although PLS argues that it cannot be liable because McDaniels was an independent contractor, plaintiff argues based on certain EBT testimony that PLS maintained supervision and control over the event for which it was hired, and, as is relevant here, supervision and control over McDaniels. Cheyne, PLS's Technical Director for the HTC event, testified at his deposition that the people hired by PLS to create the event were its "labor force" and staff (Boyar affirmation, exhibit M, pp. 22, 26). Cheyne provided instructions, oversaw the construction process, and did not differentiate between PLS employees and independent contractors (*id., pp.. 26, 59*; exhibit N, pp. 203-204). At some point in his testimony, Cheyne referred to McDaniels as his crew member ultimately under the control of a PLS manager or supervisor and as "the gentleman from PLS who was involved" (*id.*, exhibit M, p. 45). Further, in the incident reports, Cheyne referred to McDaniels as both his crew member and as a PLS production worker.

Based on this testimony, it would appear that PLS was in charge of the construction of the scenery and maintained control of the work that was ongoing, including any of the independent contractors performing said work. At minimum, whether PLS is responsible for McDaniels's work is an issue of fact that cannot be resolved on summary judgment (*Carrion v Orbit Messenger*, 82 NY2d 742, 744 [1993]; *Anikushina v Moodie*, 58 AD3d 501, 501 [1st Dept 2009]).

As such, the branch of the motion that seeks dismissal of the complaint and any and all cross claims is denied. The branch of the motion that seeks summary judgment against McDaniels for indemnification and contribution is also denied as premature.

CONCLUSION

Accordingly, it is

ORDERED that the motion of third-party defendant and second third-party GSS Security Services Inc., sequence no. 005, is denied; and it is further

ORDERED that the motion of defendants/third-party plaintiffs Moynihan Station Development Corp., New York State Urban Development Corp. d/b/a Empire State Development, and Skylight Group Inc., sequence no. 006, is denied; and it is further

ORDERED that the motion of defendant/second third-party plaintiff PLS Staging, sequence no. 007, is denied.

Dated: January 25, 2019

ENTER:

J.S.C.

HON. ROBERT D. KALISH
J.S.C.