

Breslin v Richmond Univ. Med. Ctr.
2019 NY Slip Op 30620(U)
March 12, 2019
Supreme Court, New York County
Docket Number: 153586/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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DONAL BRESLIN, DENISE BRESLIN, MARK
GIORDANO, and PATRICIA GIORDANO,

Plaintiff

Index No. 153586/2014

v

DECISION AND ORDER

RICHMOND UNIVERSITY MEDICAL CENTER,
BARR & BARR, INC., and J.M. BOTTO INC.,

Defendants.

MOT SEQ 005, 006

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action seeking damages, *inter alia*, for personal injuries under Labor Law §§ 200, 240(1), and 241(6), and asserting a claim sounding in common law negligence, the defendants Richmond University Medical Center (Richmond) and Barr & Barr, Inc. (Barr), move pursuant to CPLR 3212 for partial summary judgment dismissing the plaintiffs' Labor Law §§ 200 and 240(1) and negligence claims, limiting the plaintiffs' § 241(6) claim, and granting contractual and common law indemnification against the defendant J.M. Botto, Inc. (Botto) (SEQ 005). The defendant Botto joins in its co-defendants' application to the extent that it seeks dismissal of the plaintiffs' claims, and opposes the branch of the motion seeking indemnification against

Botto. The plaintiffs Mark Giordano and Patricia Giordano (together, the Giordano plaintiffs) cross-move for summary judgment on the issue of liability against all defendants (SEQ 005). The plaintiffs Donal Breslin and Denise Breslin (together, the Breslin plaintiffs) move for the same relief under a separate motion sequence, and the Giordano plaintiffs purport to cross-move under the new motion sequence to join in their co-plaintiffs' application (SEQ 006). The defendants oppose the motion.

By letter dated March 1, 2019, the court was apprised that the main action had settled, that Richmond and Barr's motion for summary judgment dismissing the complaint was partially withdrawn, and the plaintiff's motions for summary judgment were withdrawn. The only remaining issue is the branch of Richmond and Barr's motion seeking contractual and common law indemnification against Botto. The branch of Richmond and Barr's motion seeking such relief is granted in part.

II. BACKGROUND

The plaintiffs in this action are Donal Breslin (Breslin) and Mark Giordano (Giordano), who were employees of Cord Contracting, Inc. (Cord), and their wives, Denise Breslin and Patricia Giordano. Cord was a carpentry subcontractor at the Staten Island job site where the plaintiffs allege that Breslin

and Giordano sustained injuries resulting from an explosion on March 28, 2014. Richmond was the owner of the property where the job site was located, and Barr was the construction manager/general contractor for the construction project. Botto was the plumbing subcontractor for the same project. The plaintiffs aver that one day prior to the incident, plumbers working for Botto left two acetylene tanks in a closed and locked gang box in an unventilated room. When Breslin and Giordano began working on March 28, 2014, Giordano ascended a ladder and began using an angle grinder. The sparks from the use of the grinder caused the gang box to explode. The force of the explosion allegedly caused Giordano to fall from the ladder and knocked Breslin to the ground, resulting in severe injuries.

The plaintiffs commenced this action against the defendants, asserting that they violated Labor Law § 200 by failing to provide the Breslin and Giordano with a safe place to work, that they violated Labor Law § 240(1) by failing to supply Giordano with safety devices necessary to provide proper protection to workers from fall-related injuries, and that they violated Labor Law § 241(6) based on their alleged violations of several sections of the Industrial Code. The plaintiffs also allege that the defendants are liable under a theory of common law negligence.

III. DISCUSSION

It is well settled that the movant on 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." Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form (see Zuckerman v City of New York, 49 NY2d 557 [1980]), as well as the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The facts must be viewed in the light most favorable to the non-moving party. See Vega v Restani Constr. Corp., 18 NY3d 499 (2012); Garcia v J.C. Duggan, Inc., 180 AD2d 579 (1st Dept. 1992). Once the movant meets his burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See Vega v Restani Constr. Corp., supra.

As to contractual indemnification, it is well-settled that indemnification clauses must be "construed as to achieve the apparent purpose of the parties" (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E. 86th St.

Owners Corp., 117 AD3d 593, 595 (1st Dept. 2014), quoting
Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973).

Barr, as general contractor, and Botto, as plumbing subcontractor, entered into a contract for plumbing work to be performed at the Staten Island job site owned by Richmond, where the plaintiffs' injuries are alleged to have taken place.

Paragraph 21(a) of the contract recites, in relevant part that:

"to the fullest extent permitted by law the subcontractor shall defend, indemnify and hold harmless the owner, architect, construction manager and all other additional insureds referred to in the insurance coverage provisions hereof (collectively the indemnitees) from and against any and all claims, losses, cost, injuries, damages and expenses including reasonable attorneys' fees brought or assumed against any of the indemnitees by any person or firm arising out of or in connection with or as a result of or consequence of the performance of the work of the subcontractor under this agreement"

The contract further provides that full indemnity shall only be available to the indemnitees if liability is imposed on them in the absence of their own negligence, solely by reason of statute, operation of law or otherwise.

The indemnification provision in the contract does not purport to completely indemnify Barr and Richmond for their own negligent acts and, hence, is enforceable. See General Obligations Law § 5-322.1(1); Miranda v Norstar Bldg. Corp., 79 AD3d 42 (3rd Dept. 2010). Nonetheless, contractual indemnification is available to a party only where that party is itself free from fault in the happening of the underlying

accident. See General Obligations Law § 5-322.1(1); Rodriguez v Heritage Hills Socy., Ltd., 141 AD3d 482 (1st Dept. 2016); Cuomo v 53rd & 2nd Assoc., LLC, 111 AD3d 548 (1st Dept. 2013). In their moving papers, Barr and Richmond purport to show that they were free from negligence in the underlying construction accident from which this action arose because they did not create or have actual or constructive notice of the allegedly dangerous condition that caused the accident. See Korostynskyy v 416 Kings Hway, LLC, 136 AD3d 758 (2nd Dept. 2016).

It is undisputed that the accident occurred when two employees of Botto stored acetylene tanks in a closed and locked, unventilated gang box on the night preceding the incident, and that the gang box exploded the following morning in the room wherein two of the plaintiffs were working. The tanks were stored in violation of rules and guidelines that require such tanks to be completely shut off and stored upright in a well-ventilated location.

Richmond submits proof establishing that the underlying accident was not caused or contributed to by any act of negligence on its own part. Botto does not submit any evidence sufficient to raise a triable issue of fact with respect to that issue. Accordingly, Richmond will prevail on its cross-claim for contractual indemnification against Botto in the event that it is

found liable to the plaintiff for violating Labor Law §§ 200, 240(1), or 241(6).

Barr submits the deposition testimony of its project superintendent, Paul Koteris, in support of its claim that it lacked actual or constructive notice of the improper acetylene tank storage. Koteris avers that he does not know the rules regarding proper storage of acetylene tanks, that he had no discussion with any Botto employee regarding storage of the acetylene tanks on site, and that no one told him that Botto employees were storing acetylene tanks in gang boxes. Koteris concedes that he had the authority to interfere if he observed work being done in an unsafe manner at the job site. Koteris' testimony is contradicted in part by the testimony of Mario Torres, a Botto employee at the job site. Torres avers that he had two conversations with Koteris on the subject of storing acetylene tanks during the construction project, but that Koteris did not give him a final answer on that subject. Further, he states that on one occasion, Koteris was in the room while he was storing the acetylene tanks in gang boxes.

While Barr contends that Torres' testimony that Koteris saw the tanks being stored is inadmissible hearsay, Torres' testimony that he had conversations with Koteris regarding such storage and that Koteris, on one occasion, was in the room while the tanks were being improperly stored, is admissible, and is sufficient to

raise a triable issue of fact as to Barr's notice of a dangerous condition, and negligence pursuant to Labor Law § 200. Accordingly, Barr fails to demonstrate its prima facie entitlement to judgment as a matter of law on its cross-claim for contractual indemnification against Botto. Moreover, the findings of the Environmental Control Board Administrative Law Judge at a hearing that Barr violated the Building Code and Administrative Code due to its failure to ensure the safe storage of materials during construction and failure to safeguard all persons and property affected by construction operations, produced by Botto in opposition to Barr's motion, constitute some evidence of negligence (see Elliot v City of New York, 95 NY2d 730 [2001]), and would render summary judgment inappropriate even if Barr had made a prima facie showing of entitlement to judgment as a matter of law.

To establish the right to 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 (2nd Dept. 2005), quoting Correia v Professional Data Mgt., 259 AD2d 60, 65 (1st Dept. 1999). As contractual indemnification has been awarded to Richmond, the court does not reach the issue of

common-law indemnification with respect to that party. Since Barr has not established that it was not guilty of any negligence, it is not entitled to common-law indemnification at this juncture.

IV. CONCLUSION

In light of the foregoing, it is

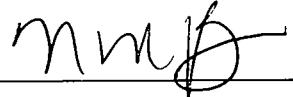
ORDERED that the cross-motion of the plaintiffs Mark Giordano and Patricia Giordano for summary judgment on the issue of liability (SEQ 005), the motion of the plaintiffs Donal Breslin and Denise Breslin for summary judgment on the issue of liability (SEQ 006), and the cross-motion of the plaintiffs Mark Giordano and Patricia Giordano for summary judgment on the issue of liability are permitted to be withdrawn in light of the parties' settlement; and it is further, ORDERED that the branch of the motion of the defendants Richmond University Medical Center and Barr & Barr, Inc., seeking summary judgment partially dismissing the complaint (SEQ 005) is permitted to be withdrawn; and it is further,

ORDERED that the branch of the motion of the defendants Richmond University Medical Center and Barr & Barr, Inc., seeking summary judgment on their cross-claims against the defendant J.M. Botto, Inc. (SEQ 005), is granted to the extent that Richmond University Medical Center is awarded condition summary judgment on its cross-claim for contractual indemnification against J.M.

Botto, Inc., in the event it is found liable to the plaintiffs for their injuries arising out of the incident underlying this action, and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

Dated: March 12, 2019

ENTER:  J.S.C.

HON. NANCY M. BANNON