Walsh v New York Univ.
2019 NY Slip Op 30982(U)
April 5, 2019
Supreme Court, New York County
Docket Number: 116134/09
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THOMAS WALSH,

Plaintiff,

--against--

NEW YORK UNIVERSITY and TURNER CONSTRUCTION CORPORATION,

Defendants.

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NEW YORK UNIVERSITY and TURNER CONSTRUCTION CORPORATION,

Third-party Plaintiffs,

--against--

BURGESS STEEL, LLC, BURGESS STEEL ERECTORS OF NEW YORK, LLC, and BURGESS STEEL PRODUCTS CORP.,

Third-party Defendants.

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BURGESS STEEL, LLC, BURGESS STEEL ERECTORS OF NEW YORK, LLC, and BURGESS STEEL PRODUCTS CORP.,

Second Third-party Plaintiffs,

--against--

TRI STATE DISMANTLING CORP., NATIONAL ACCOUSTICS, INC., and D.P. CONSULTING CORP.,

Second Third-party Defendants.

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Index No. 116134/09
Motion Seq. Nos. 006 and 007

DECISION AND ORDER

Third-party index No. 590733/10

Third-party index No. 590521/13

CAROL R. EDMEAD, J.S.C.:

In this Labor Law action, second third-party defendant National Acoustics, Inc. (National Acoustics) moves, pursuant to CPLR 3212, for summary jugdgment dismissing the second third-

party complaint and any cross claims as against it (motion seq. No. 008). While National Acoustics moves, nominally, for summary judgment on its cross claims and counterclaims, it does not address these claims in its moving papers.

Second third-party defednat Tri State Dismantling Corp. (Tri State) moves for summary judgment dismissing the second third-party complaint and all cross claims as against it (motion seq. No. 009). Third-party defendants/second third-party plaintiffs Burgess Steel, LLC, Burgess Steel Erectors of New York, LLC, and Burgess Steel Products Corp. (collectively, Burgess) cross-move against Tri-State for an order, pursuant to CPLR 3124, striking Tri State's answer to the second third-party complaint, or, in the alternative, issuing an order of preclusion, or compelling Tri State to appear for a deposition. The motions are consolidated for disposition.

BACKGROUND

This case arises out of renovation of defendant/New York Univesity's (NYU) Silver Hall, located at 100 Washington Square Park in Manhattan. NYU owns the property and defendant/third-party plaintiff Turner Construction Corporation (Turner) served as the construction manager on the project, which encompassed demolition and renovation work on four floors, including the roof. Turner's project superintendant, Devanand Deonarine (Deonarine) testified that the work on the roof involved "building a steel platform, so that NYU could install future mechanical equipment on that platform" (Deonarine tr at 27). This is the portion of the work with which plaintiff Thomas Walsh, an ironworker, and Burgess, his employer, were involved.

Prior to reaching the stage where the steel platform could be erected, some demolition work on the roof was required. Specifically, exhaust ducts and fans were removed (*id.* at 29). Turner hired second third-party plaintiff, Tri State, to do the demolition work on the roof. Prior

to the project, the exhaust fans on the roof sat on iron angles that were raised two or three feet off of the roof (*id.* at 30-31). When Tri State removed the exhaust fans, they left a portion of the iron angles, which had supported them, protruding from the roof (id. at 32-35). As to why the angles were not fully removed, Deonarine tesitified that "[y]ou don't want to cut [them] down low because then you would have water getting into the roof" (*id.*).

Prior to Burgess's erection of a metal platform, National Acoustics, the carpentry subcontractor, built a temporary plywood platform, referred to colloquially as a "dance floor," so that the work would not damage the roof (*id.* at 87). The remnants of the iron angles that had supported the exhaust fans protruded up from between the pieces of plywood of the "dance floor" (*id.* at 112-113). Deorarine testified that the project could have been scheduled differently, so that the protrusions were removed prior to Burgess's work, but doing so would have been more expensive:

> Q: Who decided, if you know, who decided that that would be the process?
> A: Basically the – whoever created the project schedule.
> Q: And who creates a project schedule?
> A: I did.
> Q: Okay. Is there any reason why you decided, and I'm not sure whether you decided or whether it ended up that leaving the protrusions in the condition they were in was the preferred way of doing it?
> A: It is the preferred way to do it because you end – you want to save your client, you know, money from basically having to rip that plywood out doing the protection, repairing the roof and putting the plywood [in] again.
> Q: Could it have been done differently?
> A: Yes. You could have actually – NYU could have actually removed all the plywood protection, repaired it, then put new protection down. That's what we could have done.

(*id.* at 117).

On October 14, 2009, plaintiff was working as a foreman for Burgess on the roof of Silver Hall. Immediately before his accident, in which he tripped over one of the protruding angles, plaintiff gave instructions to his crew about the integration of beams, stored on the roof,

to the metal platform Burgess was constructing. "I was telling them to take a couple of beams over to a certain area," plaintiff testified. "When I turned around, my pants, the lower part of the pants hooked the angle and flipped me to the ground" (plaintiff's September 3, 2014 tr at 59). Plaintiff alleges that the fall caused injuries, including a tear of the meniscus in his left knee, which required surgery. Plaintiff also testified that the angles protruded six to eight inches from the plywood "dance floor" and that he had complained to the super from Turner about the safety risk they presented and the Turner super "said he was going to be taking care of them" (plaintiff's July 10, 2012 tr at 33-34, 37).

While no one from Turner acknowledged such a conversatin, Deonarine, Turner's project superintendent, testified that he saw the protruding angle remnants. Deonarine, who did walkthroughs of the jobsite "[a]t least three times a day," testified that the angles protruded approximately "six to eight inches" from the plywood "dance floor" (Deonarine tr at 53, 88). Deonarine testified that he did not receive any complaints about the angles and, when asked why he did not have them removed, he responded: "Because in my mind they were close – they were away from the work area, and they were not a safety -- there were no major safety issues with it or safety concerns" (*id.* at 90).

Plaintiff commenced the action by serving his summons and complaint dated November 12, 2009. The complaint alleges that NYU and Turner are liable under Labor Law § 200 and common-law negligence, as well as Labor Law §§ 240 (1) and 241 (6). Subsequently, NYU brought a third-party complaint dated August 10, 2010 against Burgess, alleging breach of contract for failure to procure insurance and seeking indemnification. Finally, Burgess brought a second third-party action against Tri State, National Accoustics, the carpentry subcontractor, and D.P. Consulting Corp. (DP Consulting) alleging failure to procure insurance, and seeking

indemnification and contribution. While Tri State and National Accoustics joined the action, DP Consulting has never answered the second third-party complaint and is in default.

Turner and NYU argue, among other things, that the complaint should be dismissed, as the protruding angle involved in plaintiff's accident was not a dangerous condition on the jobsite. Burgess, on the other hand, argues that the Turner and NYU's claim for breach of contract should be dismissed because Burgess procured the insurance required by its contract with Turner. Additionally, Burgess argues that Turner and NYU's contractual indemnification claim is barred, or at least restricted, by the anitisubrogation doctrine.

Turner and NYU previously moved for summary judgment and the court, by a memorandum decision dated March 2, 2018 (the March 2018 decision), granted in part, and denied in part. The March 2018 decision, among other things, dismissed all of plaintiff's claims except for his Labor Law § 200 and common-law negligence claims, as well as his Labor Law § 241 (6) claim, as premised on an alleged violation of 12 NYCRR 23-1.7 (e) (2).

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. National Acoustics' Motion

Here, National Acoustics installed temporary "dance floor." In its moving papers, National Acoustics argues that, as it was not responsible for the removal of the iron angle that caused plaintiff's accident, or for the scheduling of work, or safety on the jobsite, it cannot be found negligent. Accordingly, National Acoustics argues that it cannot be responsible be liable under theories of common-law negligence and contribution.

In opposition, Burgess argues that its claims for common-law negligence and contribution against National Acoustics are viable, as there is a question of fact as to whether the plans which National Acoustics followed were so defective as to subject it to liability. Burgess relies on a longstanding principle articulated by the Court of Appeals in *Ryan v Feeney & Sheehan Bldg. Co.* (239 NY 43 [1924]): "A builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury" (*id.* at 46).

In *Ryan*, the Court of Appeals found that the general rule, rather than its exception was applicable (*id.* at 47). In the almost 100 years since *Ryan* was decided, New York courts have followed its lead in applying this standard as a steep threshold (*see e.g. Nichols-Sisson v Windstar Airport Serv., Inc.*, 99 AD3d 770 [2d Dept 2012] and *Hartofil v McCourt & Trudden Funeral Home, Inc.*, 57 AD3d 943 [2d Dept 2008]).

In *Nichols-Sisson*, the Appellate Division held that the contractor had no liability where "the plaintiffs failed to raise a triable issue of fact as to whether the contract plans were so clearly defective that a contractor of ordinary prudence would not have performed the work" (99 AD3d at 772). The Court also noted that liability for the contractor was inappropriate as "there is no

evidence that it assumed or undertook a continuing duty" as to safety on the jobsite (*id.*). In *Hartofil*, the Appellate Division overturned the trial court's denial of a contractor's application for summary judgment, holding that "the plaintiff failed to raise a triable issue of fact as to whether the contract plans were so clearly defective that a contractor of ordinary prudence would have not performed the work" (57 AD3d at 945-946). The Court reasoned that "[c]ontrary to the Supreme Court's determination, the affidavit of the plaintiff's masonry expert was insufficient to raise an issue of fact because his conclusions were not supported by citation to empirical data or any relevant construction practices or industry standards" (*id.* at 946).

Here, National Acoustics has made a *prima facie* showing of entitlement to judgment. It is uncontested that National Acoustics did not install, remove, or repair the angle irons on the subject project. The court has determined that a question of fact exists as to Turner's negligence based on its scheduling of the work – specifically, its decision to partially, instead of fully, removing the angle irons and allowing work to proceed among the remnants. National Acoustic clearly had no role in these decisions.

Burgess failed to raise a question of fact in opposition. It provided no expert testimony that the plans National Acoustics carried out were clearly defective. Instead, the record reflects that the work National Acoustics performed was customary. In these circumstances, the general rule that a contractor may not be liable for relying on the plans provided to it controls. As such, Burgess fails to raise an issue of fact as to whether National Acoustics was negligent. Accordingly, Burgess's claims against National Acoustics – for indemnification and contribution – must be dismissed. As Tri State, does not oppose National Acoustics' motion, National Acoustics is not only entitled to dismissal of the second third-party complaint but also all cross claims as against it.

Burgess's argument that the motion is premature is unpersuasive. In its moving papers, Burgess argues that it has not been provided with the plans and specifications on which National Acoustics relied. In reply, National Acoustics provides a response to Burgess's demand for discovery and inspection, which, in essence, states that it is not in possession of the documents that Burgess seeks. Here, where nothing in the record suggests that National Acoustics might be negligent, any further discovery would represent a fishing expedition. Accordingly, Natioanal Acoustics application is not premature.

Despite not having standing to do so, NYU and Turner oppose National Acoustics motion. National Acoustics is not a defendant, so NYU and Turner cannot cross claim against it (*see BAS Communications, Inc. v YTK Corp.*, 15 Misc3d 1104 [Sup Ct, Nassau Cty 2007]). Nor have NYU and Turner brought third-party claims against National Acoustics. As Turner and NYU do not have standing to oppose National Acoustics motion, the court declines to read their opposition.

However, National Acoustics fails to make a *prima facie* showing, or even argue, that it is entitled to summary judgment on any of its cross claims. Accordingly, its application for such relief is denied.

II. Tri State's Motion and Burgess's Cross Motion

Initially, the court must address Burgess's contention that the motion is premature and that Tri State must be sanctioned for failing to appear for a deposition. Burgess submits six court orders directing Tri State to appear for a deposition (NYSCEF doc No. 229). The discovery orders embodying those directives are dated July 12, 2016, November 15, 2016, September 5, 2017, November 21, 2017, February 27, 2018, and July 31, 2018.

At first glance, this would appear to represent an egregious disregard of court orders. However, a review of the orders and the discovery history of this case does not reveal any special wantonness on Tri State's part. That is, all six orders also contain the scheduling of other parties, including Burgess, who preceded Tri State in priority. The history, then, does not show that the delay in the taking of depositions was Tri State's fault. Moroever, none of the orders contained "conditional language" setting out penalties against Tri State in the event that it failed to comply.

However, this order will. Tri State has 21 days from the date of this order to appear for a deposition. If it fails to do so, its answer to the second third-party complaint will be stricken. In the meantime, its motion for summary judgment will be denied without prejudice.

CONCLUSION

Accordingly, it is

ORDERED that second third-party defendant National Acoustics, Inc.'s motion for summary judgment (motion seq. No. 008) is granted to the extent that the second third-party complaint, as against it, as well as all cross claims as against it, are dismissed; and it is further

ORDERED that the Clerk shall enter judgment accordingly and the case is severed and continues against remaining defendants, third-party defendants and second third-party defendant; and it is further

ORDERED that second third-party defendant Tri State Dismantling Corp.'s (Tri State) motion for summary judgment (motion seq. No. 009) is denied without prejudice; and it is further

ORDERED that third party defendands/second third-party plaintiffs Burgess Steel, LLC, Burgess Steel Erectors of New York, LLC, and Burgess Steel Products Corp.'s (together, Burgess) cross motion for discovery or discovery sanctions is granted only to the extent that Tri State is directed to appear for a deposition within 21 days of this order; and it is further

ORDERED that Tri State's failure to appear for a deposition within 21 days will result in striking of its answer to the second third-party complaint; and it is further

ODERED that counsel for Burgess is to serve a copy of this order, along with notice of entry on all parties, within 5 days of entry.

Dated: April 5, 2019

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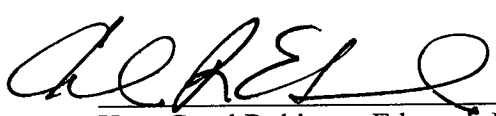

Hon. Carol Robinson Edmead, JSC

HON. CAROL R. EDMEAD
J.S.C.