

Alonso v Reed Elsevier, PLC
2019 NY Slip Op 31974(U)
July 8, 2019
Supreme Court, New York County
Docket Number: 152383/2013
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

X-----X
WILLIAM ALONSO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 152383/2013
Mot. Seq. Nos. 003, 004, 005

REED ELSEVIER, PLC, REED ELSEVIER GROUP, PLC,
REED ELSEVIER, INC., REED EXHIBITIONS,
REED MIDEM, THE FREEMAN COMPANIES a/k/a
FREEMAN, FREEMAN EXHIBIT COMPANY,
FREEMAN DECORATING SERVICES, INC.,
FREEMAN DECORATING CO., FREEMAN AUDIO
VISUAL SOLUTIONS, INC., and THE VISION
COUNCIL a/k/a VISION COUNCIL OF AMERICA,

Defendants.

X-----X
FREEMAN DECORATING SERVICES, INC.
FREEMAN DECORATING CO. and FREEMAN
AUDIO VISUAL SOLUTIONS, INC.,

Third-Party Plaintiffs,

Index No. 590443/2013

- against -

NATIONAL MICRO RENTAL, (INC.) and
NEW YORK CONVENTION CENTER OPERATING CORP.,

Third-Party Defendants.

X-----X
REED ELSEVIER, PLC, REED ELSEVIER GROUP PLC,
REED ELSEVIER, INC., REED EXHIBITIONS,
REED MIDEM and THE VISION COUNCIL OF
AMERICA,

Second Third-Party Plaintiffs,

Index No. 590628/2013

- against -

NATIONAL MICRO RENTAL, (INC.),

Second Third-Party Defendant.

X-----X
Hon. James E. d'Auguste

Factual and Procedural History

This action arises out of an alleged accident that occurred on March 18, 2010 when a portion of a customer care exhibition booth fell forward and struck plaintiff William Alonso, causing injury to him. At the time of the accident, plaintiff was employed by non-party CTI Metro LLC (“CTI”) to greet guests at the Vision Expo, a trade show that took place at the Jacob Javits Center (“Javits Center”). Plaintiff claimed, and was awarded, New York State Workers’ Compensation (“Workers’ Compensation”) benefits through his non-party employer.

The Defendants

The Vision Expo was produced by a joint venture formed by defendants Reed Exhibitions (“Reed”) and The Vision Council a/k/a Vision Council of America (“Vision Council”) pursuant to a Joint Venture Agreement. Reed has undertaken the defense of Vision Council pursuant to that agreement.

Defendant Reed retained Freeman Decorating Services, Inc. (“Freeman”) pursuant to a Master Services Agreement (“Reed/Freeman MSA”) (NYSCEF Doc. No. 190) to, *inter alia*, design, construct, and erect the allegedly injurious customer care booth.

Third-party defendant New York Convention Center Operating Corporation (“NYCCOC”) operates the Javits Center and licensed the premises to Reed for the Vision Expo pursuant to a licensing agreement (“NYCCOC/Reed License Agreement”) (NYSCEF Doc. No. 162).

Third-party/second third-party defendant National Micro Rentals (“NMR”) provided monitor, computer, audiovisual, and other staging equipment rentals to Reed for the Vision Expo pursuant to a contractor agreement (“Reed/NMR Contractor Agreement”) (NYSCEF Doc. No. 138).

The Actions

Plaintiff commenced the main action to recover damages for personal injuries relating to the accident by filing a complaint against Reed, Freeman, and Vision Council on March 15, 2013 (the "Alonso Complaint") (Index No. 152383/2013). Freeman filed its answer to the Alonso Complaint on May 17, 2013 in which it included a cross-claim against defendants Reed and Vision Council for common-law indemnification or, in the alternative, contribution. Reed and Vision Council filed a joint answer to the Alonso Complaint on June 12, 2013, which includes a cross-claim against Freeman for contractual indemnification and defense under the Reed/Freeman MSA.

On May 17, 2013, Freeman commenced a third-party action (Index No. 590443/2013) against NMR and NYCCOC seeking common law indemnification or, in the alternative, contribution. NYCCOC filed an answer to the third-party complaint asserting a cross-claim against Reed for contractual indemnification under the NYCCOC/Reed License Agreement.

On August 8, 2013, Reed and Vision Council commenced a second third-party action (Index No. 590628/2013) against NMR asserting causes of action for common law indemnification or, in the alternative, contribution, and contractual indemnification pursuant to the Reed/NMR Contractor Agreement.

Discovery is now complete, and the Note of Issue has been filed.

The Instant Motions

Motion Sequence Nos. 003, 004, and 005 are hereby consolidated for disposition.

Motion Sequence No. 003, NYCCOC seeks (i) summary judgment on its cross-claim against Reed for contractual indemnification, (ii) summary judgment on its cross-claim against Reed for breach of contract for alleged failure to procure insurance for NYCCOC, and (iii) dismissal of Freeman's third-party complaint seeking common law indemnification or, in the alternative, contribution from NYCCOC.

Motion Sequence No. 004, Freeman seeks summary judgment (i) dismissing the Alonso Complaint in its entirety, and (ii) dismissing all cross-claims and counterclaims asserted against it by Reed, Vision Council, NMR, and NYCCOC.

In Motion Sequence No. 005, Reed and Vision Council seek (i) leave to amend their joint answer to assert an affirmative defense based on the Workers' Compensation Law's exclusive remedy provision, (ii) summary judgment dismissing the Alonso Complaint in its entirety and all cross-claims against them based upon that requested additional defense, and (iii) summary judgment on their cross-claim seeking contractual indemnification from Freeman.

Discussion

Mot. Seq. No. 003

NYCCOC's Motion for Contractual Indemnification and Duty to Defend from Reed

In Motion Sequence No. 003, NYCCOC moves for summary judgment on its cross-claim for contractual indemnification against Reed based upon the NYCCOC/Reed License Agreement. Although Reed does not oppose the motion, Freeman submits papers in opposition arguing that questions of fact preclude summary judgment on the issue of indemnification. In reply, NYCCOC contests Freeman's standing to oppose the motion as it does not seek any relief from Freeman. Freeman submits that it has standing to oppose the motion because Reed has asserted a cross-claim against Freeman for contractual indemnification and duty to defend under the Reed/Freeman Master Services Agreement, which obligates Freeman to indemnify Reed and "any party that [Reed] is required to indemnify." NYSCEF Doc. No. 190.

Given the language of the indemnification provisions contained in the Reed/Freeman MSA, it appears that Freeman has standing to oppose NYCCOC's motion. However, regardless of the appropriateness of Freeman's standing to oppose, NYCCOC fails to meet its prima facie burden of establishing the lack of any triable issue of material fact with regard to its cross-claim

against Reed for contractual indemnification.

A proponent of a summary judgment motion bears the burden of eliminating all material issues of fact and “must establish its defense or cause of action sufficiently to warrant a court’s directing judgment in its favor as a matter of law.” *O’Halloran v. City of New York*, 78 A.D.3d 536, 537 (1st Dep’t 2010) (citing *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980)). If the movant fails to meet this initial burden, summary judgment must be denied, regardless of the sufficiency of opposition. *O’Halloran*, 49 N.Y.2d at 537 (citing *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985)). Notably, the courts have gone so far as to search the record and grant summary judgment in favor of the non-moving party even where the motion is submitted without opposition. *Myers v. Bartholomew*, 91 N.Y.2d 630 (1998) (affirming the Appellate Division, Second Department’s modification and dismissal of an action on plaintiff’s own unopposed motion for summary judgment upon his failure to meet his prima facie burden).

Pursuant to the NYCCOC/Reed License Agreement, Reed agreed to indemnify and defend NYCCOC against any loss “arising in any way in connection with the use and enjoyment by the Licensee, or of any other person or entity with the permission, express or implied, of Licensee, of the Space, equipment or of the Center; or arising out of the use of patented, trademarked or copyrighted materials, equipment, devices, processes or dramatic rights furnished to or used by Licensee, its exhibitors or other persons in connection with the Event or the use of the Space” (the “NYCCOC/Reed Indemnification Clause”). The NYCCOC/Reed Indemnification Clause, however, expressly does not apply “to the extent that damage or injury results from the sole negligence, gross negligence or willful misconduct of [NYCCOC].” NYSCEF Doc. No. 123 (NYCCOC/Reed License Agreement). As a result, for NYCCOC to be entitled to indemnification as a matter of law, it must show that there are no triable issues of fact that could give rise to the

conclusion that plaintiff's injuries could have resulted from NYCCOC's sole negligence. NYCCOC has failed to meet that burden.

There are triable issues of fact as to whether plaintiff's injuries arose out of the sole negligence of NYCCOC and therefore there are triable issues of fact as to whether the exclusion contained in the NYCCOC/Reed Indemnification Provision applies. Plaintiff testified that, at the time of his alleged injury, "there was a guy putting a TV up" onto the customer service booth, or "[h]e had just mounted the TV or he was doing something to the TV." NYSCEF Doc. No. 120, Tr. 126:4-127:12. Pursuant to the NYCCOC/Reed License Agreement, NYCCOC retained the exclusive right to provide, *inter alia*, electric services. NYSCEF Doc. No. 123. Specifically, paragraph B of section 10, entitled "EXCLUSIVE SERVICES" reads, "[NYCCOC] reserves the exclusive right to provide telephone, telecommunication, water, waste water, plumbing, *electrical*, compressed air and cleaning." *Id.* (emphasis added). Anthony Bamonte, NYCCOC's electrical foreman for 1E Hall of the Javits Center, the situs of the accident, testified that the monitor in question, although provided by third-party/second third-party defendant NMR, would have been installed by NYCCOC. NYSCEF Doc. No. 129, Tr. 19:12-20:2. This evidence, when viewed in the light most favorable to the nonmovant, is insufficient to establish NYCCOC's entitlement to summary judgment on the issue of indemnification by Reed. Accordingly, although it is possible that Reed may be obligated to indemnify and defend NYCCOC if it is found not to be solely responsible, there are triable issues of fact that could lead to the conclusion that NYCCOC solely caused plaintiff's claimed injuries and, therefore, NYCCOC has failed to establish its entitlement to indemnification from Reed as a matter of law at this juncture. The Court further rejects NYCCOC's argument that plaintiff's failure to assert a direct claim against NYCCOC necessarily precludes the applicability of the exclusion provision in the event that a jury were to find plaintiff's injury resulted from NYCCOC's sole negligence, gross negligence, or willful misconduct.

The result is the same on the issue of Reed's duty to defend. "As an indemnitor, [Reed] is not an insurer, and in that context its duty to defend is no broader than its duty to indemnify." *Inner City Redevelopment Corp. v. Thyssenkrupp Elevator Corp.*, 128 A.D.3d 425, 426 (1st Dep't 2015) (citing *Bellefleur v. Newark Beth Israel Med. Ctr.*, 66 A.D.3d 807, 809 (2d Dep't 2009)). Accordingly, summary judgment is also denied on the issue of Reed's duty to defend.

NYCCOC's Motion for Summary Judgment on Reed's Alleged Breach of Contract

The branch of NYCCOC's motion seeking summary judgment against Reed on its breach of contract cross-claim for failure by Reed to procure insurance must also be denied. NYCCOC has not submitted sufficient evidence to conclude as a matter of law that Reed has breached its contractual obligation to obtain insurance. For instance, in its own moving papers, NYCCOC does not assert that Reed failed to procure the insurance policy contemplated by the agreement, but, rather, that "Reed *and its carrier* have failed to honor its obligation to defend and indemnify the Convention Center for this loss." NYSCEF Doc. No. 151, ¶ 28 (emphasis added) (Weiss Aff.). Further, although far from "undisputed" as suggested by Freeman's counsel in his affirmation, there appears to be at least some evidence in the record that suggests that Reed may have fulfilled its alleged insurance procurement obligation by causing NYCCOC to be named on Reed's CGL policy. NYSCEF Doc. No. 130, ¶ 16 (Tisman Aff.).

Accordingly, NYCCOC failed to demonstrate it is entitled to judgment as a matter of law on the issue of Reed's alleged breach of contract for failing to procure insurance for NYCCOC and, thus, this branch of NYCCOC's motion is denied.

NYCCOC's Motion for Summary Dismissal of Freeman's Claim for Common Law Indemnification or Contribution

NYCCOC moves for summary dismissal of Freeman's third-party complaint seeking common law indemnification or, in the alternative, contribution. NYCCOC asserts that it is

entitled to summary judgment on the grounds that there is no evidence of negligence on the part of NYCCOC. However, “[a] defendant’s burden cannot be satisfied merely by pointing to gaps in the plaintiff’s case.” *Davranov v. 470 Realty Assocs., LLC*, 79 A.D.3d 697, 697-98 (1st Dep’t 2010). Moreover, as noted above, if there are triable issues of fact that plaintiff’s injuries may have resulted from NYCCOC’s sole negligence, there are certainly triable issues of fact regarding whether NYCCOC, as the potentially exclusive provider of electrical services, caused or contributed to plaintiff’s claimed injuries. Accordingly, this branch of NYCCOC’s motion is denied.

Motion Seq. No. 004

Freeman’s Motion for Summary Dismissal of the Alonso Complaint

Freeman’s motion for summary judgment dismissing plaintiff’s direct case is denied as questions of fact remains as to whether Freeman launched an instrument of harm by negligently designing, constructing, and installing the customer care booth. *Espinal v. Melville Snow Contractors, Inc.*, 98 N.Y.2d 136 (2002). Freeman’s argument that *res ipsa loquitur* is not applicable to the instant case because multiple defendants may have exercised control over the booth likewise fails to establish its entitlement to summary judgment as a matter of law. “[T]he doctrine of *res ipsa loquitur* can be applied even when more than one defendant is in a position to exercise exclusive control.” *DiPilato v. H. Park Cent. Hotel, L.L.C.*, 17 A.D.3d 191, 193 (1st Dep’t 2005) (internal quotation marks and citation omitted); *see also Kleinberg v. City of New York*, 61 A.D.3d 436, 438 (1st Dep’t 2009) (“[T]he fact that more than one entity may have been in control of the elevator does not preclude the application of the doctrine.”). Accordingly, Freeman’s motion for summary judgment is denied.

Freeman's Motion for Summary Dismissal of NYCCOC's and NMR's Cross-Claims for Common Law Indemnification or Contribution

The branch of Freeman's motion that seeks to dismiss NYCCOC's and NMR's cross-claims or counterclaims for common law indemnification or, in the alternative, contribution is denied for the same reasons that Freeman's motion to dismiss the Alonso Complaint was denied.

Mot. Seq. No. 005

Reed/VC's Motion for Leave to Amend their Answer to Interpose a Workers' Compensation Exclusivity Bar Defense

Reed and Vision Council seek leave to amend their joint answer to include an affirmative defense that the action is barred by the exclusive remedy provision of the Workers' Compensation Law, which provides that "[t]he sole remedy of an employee against his employer for injuries in the course of employment is benefits under the Workers' Compensation Law." *Lane v. Fisher Park Lane Co.*, 276 A.D.2d 136, 139 (1st Dep't 2000). Reed and Vision Council seek to assert this defense on the theory that plaintiff was a special employee of Reed and that his acceptance of Workers' Compensation benefits from CTI bars plaintiff from maintaining this action.

Absent a showing of prejudice or surprise, a motion for leave to amend a pleading pursuant should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit." *Bishop v. Maurer*, 83 A.D.3d 483, 485 (1st Dep't 2011) (quoting *Smith-Hoy v. AMC Prop. Evaluations, Inc.*, 52 A.D.3d 809, 811 (2d Dep't 2008)) (internal quotation marks and citation omitted in original).

Thus, regardless of whether there is a lack of any prejudice or surprise that would operate to preclude the amendment, an "examination of the underlying merit of the proposed amendment is mandated" in the interests of judicial economy. *Spitzer v. Schussel*, 48 A.D.3d 233, 233 (1st Dep't 2008). While Reed and Vision Council correctly point out that they need not establish the merits of their affirmative defense on a motion to the amend a pleading, the proposed amendment

must not be “palpably insufficient or clearly devoid of merit.” *Cruz v. Brown*, 129 A.D.3d 455, 456 (1st Dep’t 2015) (quoting *Miller v. Cohen*, 93 A.D.3d 424, 425 (1st Dep’t 2012)) (alterations in original). Moreover, in simultaneously seeking summary judgment on its proposed amendment, Reed and Vision Council have opened the record for review and disposition by the Court pursuant to CPLR 3212(b).

As stated, Reed and Vision Council seek to assert the defense that a special employment relationship exists between them and plaintiff and therefore the action is barred by the Workers’ Compensation exclusive remedy. A special employee is one who is transferred from his or her general employer for a limited time to the service of a special employer. *Thompson v. Grumman Aerospace Corp.*, 78 N.Y.2d 553, 557 (1991). For the purposes of the Workers’ Compensation exclusive remedy bar, there is a presumption that general employment continues (*id.*) and “[s]pecial employment will not be found absent a clear demonstration of surrender of control by the general employer and assumption of control by the special employer.” *Bellamy v. Columbia Univ.*, 50 A.D.3d 160, 161 (1st Dep’t 2008) (quoting *Thompson*, 78 N.Y.2d 553) (internal quotation marks omitted). The alleged special employee must also have been “aware and consented to the alleged change in his employment status.” *Id.* While special employment status is generally a factual issue, summary judgment will be granted where uncontroverted evidence clearly establishes the relationship of the parties. *See Bynog v. Cipriani Grp., Inc.*, 1 N.Y.3d 193, 200 (2003) (rejecting plaintiffs’ special employment claim on summary judgment).

It is undisputed that, on the day of the accident, plaintiff arrived at the Javits Center and reported to a CTI supervisor who instructed him and other CTI employees to go to the lower level as a group. NYSCEF Doc. No. 120, Tr. 40:17-21. After proceeding to the lower level, plaintiff stopped at the subject customer care booth and had a brief conversation with a fellow CTI greeter

and one of his CTI supervisors. *Id.*, Tr. 140:21-141:10. During this conversation, the customer care booth fell forward and caused plaintiff to be injured. *Id.*, Tr. 40:15-21.

It is uncontroverted that the only instruction plaintiff received on the day of the accident was given to him directly by a supervisor employed by CTI. The suggestion that plaintiff would have received further instruction in the form of a video or briefing is purely speculative and is woefully insufficient to support an inference that CTI ceded control over plaintiff, Reed assumed total control over him, and plaintiff was aware that his employment status had changed. The portions of the record cited by counsel in support of the amendment do not indicate there was any special employment between plaintiff and Reed.

Accordingly, the motion to amend Reed and Vision Council's joint answer is denied as "the proposed amendment is patently devoid of merit." *See, Red Zone LLC v. Cadwalader, Wickersham & Taft LLP*, 118 A.D.3d 581, 582 (1st Dep't 2014) (affirming trial court's denial of proposed assumption of risk defense as devoid of merit) (*modified on other grounds by* 27 N.Y.3d 1048 (2016)).

Reed/VC's Motion for Summary Dismissal of the Alonso Complaint Based on the Workers' Compensation Exclusivity Bar Defense

In light of the Court's determination that plaintiff's special employment argument is meritless, Reed and Vision Council's motion for summary judgment dismissing the complaint is also denied.

Reed's Motion for Contractual Indemnification and Duty to Defend from Freeman

Reed moves for summary judgment seeking a contractual indemnification and defense from Freeman. In opposition, Freeman asserts that Reed failed to assert a cross-claim against Freeman alleging contractual indemnification.

At the outset, Freeman is correct that Reed's verified answer (NYSCEF Doc. No. 19) fails to properly plead cross-claims for contractual indemnification. Instead, the first and second cross-claims both sound in common law indemnification and contribution. However, "summary judgment may be awarded on an unpleaded cause of action if the proof supports such cause and if the opposing party has not been misled to its prejudice." *Torrioni v. Unisul, Inc.*, 214 A.D.2d 314, 315 (1st Dep't 1995) (citing *Rubenstein v. Rosenthal*, 140 A.D.2d 156, 158 (1st Dep't 1988)).

The proof supports Reed's claim for indemnification and defense. Pursuant to the indemnification clause contained within the Reed/Freeman MSA ("Reed/Freeman Indemnification Clause"), Freeman has a duty to indemnify and defend Reed from, *inter alia*, "any and all claims or actions, actual or alleged, . . . arising out of or in connection with . . . (ii) any negligent act or omission or willful misconduct of Freeman or its directors, officers, employees, subcontractors, agents, assigns or other third parties otherwise acting under the direction of Freeman in connection with the performance of this Agreement." NYSCEF Doc. No. 190, ¶ 28(a). The Reed/Freeman Indemnification Clause, therefore, which establishes the parties' intention to create a contractual duty, offers strong support for a cross-claim by Reed for Freeman's contractual indemnification.

Additionally, considering the zealous advocacy that has already been undertaken by Freeman on behalf of Reed in opposition to NYCCOC's motion for summary judgment (Mot. Seq. No. 003), it cannot be said that Freeman has been misled to its prejudice. In fact, Freeman based its standing to oppose NYCCOC's motion for summary judgment against Reed on the grounds that "the Reed defendants have asserted a cross-claim over against [sic] Freeman that Freeman is contractually obligated to fulfill Reed's alleged obligations to NYCCOC." NYSCEF Doc. No. 130, ¶ 1 (Tisman Affirmation).

Accordingly, despite not being sufficiently pled, Reed is entitled to summary judgment on the issue of contractual indemnification and defense from Freeman.

The Court has considered the parties' remaining contentions and considers them to be without merit.

In accordance with the foregoing, it is hereby

ORDERED that NYCCOC's motion for summary judgment (Mot. Seq. No. 003) is denied; and it further,

ORDERED that Freeman's motion for summary judgment (Mot. Seq. No. 004) is denied; and it is further,

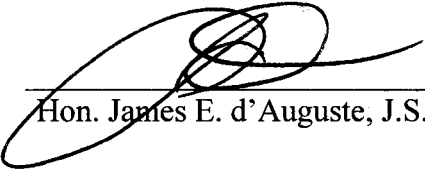
ORDERED that the branch of Reed and Vision Council's motion (Mot. Seq. No. 005) seeking leave to amend their answer is denied; and it is further,

ORDERED that the branch of Reed and Vision Council's motion (Mot. Seq. No. 005) seeking summary dismissal of the complaint and cross-claims is denied; and it is further,

ORDERED that the branch of Reed and Vision Council's motion (Mot. Seq. No. 005) seeking contractual indemnification and defense from Freeman is granted.

This constitutes the decision and order of this Court.

Dated: July 8, 2019



Hon. James E. d'Auguste, J.S.C