

Caro v Ibrahim

2019 NY Slip Op 32269(U)

June 3, 2019

Supreme Court, Bronx County

Docket Number: 301378/2016

Judge: John R. Higgitt

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX: I.A.S. PART 14

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LEONARD CARO,

Plaintiff,

DECISION AND ORDER

- against -

Index No. 301378/2016

KAHLIL IBRAHIM, A.K.S. INTERNATIONAL INC.
and GENESYS ENGINEERING P.C.,

Defendants.

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John R. Higgitt, J.

Upon the March 29, 2019 notice of motion of defendant Genesys Engineering P.C. (Genesys) and the affirmation and exhibits submitted in support thereof; the May 21, 2019 affirmation in partial opposition of defendant A.K.S. International Inc. (AKS) and the affidavit and exhibit submitted therewith; and due deliberation; defendant Genesys's motion for summary judgment is granted in part.

Plaintiff pedestrian alleges that he was struck by the vehicle driven by defendant Ibrahim while crossing an internal roadway on the campus of Lehman College, and that the construction work of defendants Genesys and AKS on the campus contributed to the accident by obstructing visibility in the roadway.

In support of its motion for summary judgment, defendant Genesys submits the transcripts of the parties' deposition testimony, photographs marked at the depositions, the contract between non-party owner Dormitory Authority of the State of New York and defendant Genesys, and the contract between defendants Genesys and AKS.

Plaintiff testified that while returning to his vehicle after a meeting, he bent down about halfway across the street to pick up brochures he had just dropped. He was struck by defendant Ibrahim's vehicle almost immediately after standing up. Plaintiff testified that he was well-

acquainted with the area, there was no construction equipment in the roadway at the time of the accident, and nothing blocked his view when he checked for traffic and stepped into the roadway to cross.

Defendant Ibrahim, a Lehman College employee, testified that the only thing obscuring his view of plaintiff as he travelled on the roadway was a parked SUV belonging to one of his colleagues, and that construction fencing in the area could not have blocked his view of plaintiff because plaintiff was crouching down behind and below the height of the colleague's SUV in the roadway as defendant Ibrahim approached. Defendant Ibrahim further testified that the fencing and construction trailers did not block his view.

Defendant AKS's vice president testified that defendant Genesys was a project designer that performed no actual work, and that defendant AKS performed the contract work. Defendant AKS's vice president testified further that the location of fencing and trailers was designated on the site plans, and defendant Genesys's construction manager testified that Lehman chose and approved the placement of the construction trailers. Defendant AKS's vice present testified that the roadway in the area where the accident occurred was not regularly traveled, and defendant Genesys's construction manager testified that the roadway was open to college traffic unless there were deliveries for the project.

Defendant Genesys asserts that it owed no duty to plaintiff, and the construction work was not a proximate cause of the accident.

A contractor ordinarily owes no duty of care to a noncontracting third party (*see Espinal v Melville Snow Contrs., Inc.*, 98 NY2d 136 [2002]). However,

“[a] duty of care to noncontracting third parties ... may arise out of a contractual obligation or the performance thereof in three sets of excepted circumstances, in which case the promisor is subject to tort liability for failing to exercise due care in the execution of the contract . . . first, ‘where the promisor, while engaged

affirmatively in discharging a contractual obligation, creates an unreasonable risk of harm to others, or increases that risk;’ second, ‘where the plaintiff has suffered injury as a result of reasonable reliance upon the defendant’s continuing performance of a contractual obligation,’ and third, “‘where the contracting party has entirely displaced the other party’s duty to maintain the premises safely’” (*Timmins v Tishman Constr. Corp.*, 9 AD3d 62, 66 [1st Dept 2004] [internal citations omitted], *rearg den* 4 NY3d 795 [2005]; *see Powell v HIS Contrs., Inc.*, 75 AD3d 463 [1st Dept 2010]; *Ragone v Spring Scaffolding, Inc.*, 46 AD3d 652 [2d Dept 2007]).

Defendant Genesys’s evidence establishes that it did not “fail to exercise due care in the execution of the contract,” and that the *Espinal* exceptions are inapplicable in any event (*see Reece v J.D. Posillico, Inc.*, 131 AD3d 597 [2d Dept 2015]; *Rios v Gristedes Delivery Serv. Inc.*, 69 AD3d 499 [1st Dept 2010]). Defendant Genesys did not launch an instrument of harm or create or exacerbate an unreasonably dangerous condition that contributed to the happening of the accident (*see Cortez v Mia*, 115 AD3d 456 [1st Dept 2014]; *Sakai-Figurny v Irastan, LLC*, 67 AD3d 985 [2d Dept 2009]). The second *Espinal* scenario does not apply, because there is no evidence of plaintiff’s reliance on defendant Genesys’s limited role (if any), with respect to the roadway or the safety of the campus (*see Lenti v Initial Cleaning Servs., Inc.*, 52 AD3d 288 [1st Dept 2008]; *Vushaj v Insignia Residential Group, Inc.*, 50 AD3d 393 [1st Dept 2008]). Finally, given the respective roles of the parties, there can be no question that the third *Espinal* scenario does not apply (*see Cahn v Ward Trucking, Inc.*, 101 AD3d 458 [1st Dept 2012]).

Furthermore, given plaintiff’s and defendant Ibrahim’s deposition testimony, defendant Genesys demonstrated that the accident was not proximately caused by fencing, trailers or other items incidental to the construction work (*cf. Cherrez v Gonzalez*, 94 AD3d 938 [2d Dept 2012]; *see Levitt v County of Suffolk*, 166 AD2d 421 [2d Dept 1990], *lv dismissed* 77 NY2d 834 [1991]; *Cooper v Steve Brody, Inc.*, 35 AD2d 814 [2d Dept 1970]).

Defendant AKS opposes the motion to the extent defendant Genesys seeks summary judgment on its cross claims against defendant AKS for contractual and common-law

indemnification.

The party seeking contractual indemnification must establish that it was not negligent and that the indemnification provision applies to the facts and circumstances of the subject occurrence (*see Correia v Professional Data Mgt., Inc.*, 259 AD2d 60 [1st Dept 1999]). Having declined to cite to any provision of the contract between defendants Genesys and AKS, let alone one that would support its contractual-indemnity claim, defendant Genesys failed to meet its prima facie burden. In any event, defendant AKS demonstrated that Article XXIII of the contract between defendant Genesys and AKS required AKS to assume liability only for injuries “caused by, resulting from, arising out of or occurring in connection with the execution of the work,” and that defendant AKS’s obligation to indemnify defendant Genesys was limited to “any claims for *such* damage or injury,” i.e. claims for damage or injury “caused by, resulting from, arising out of or occurring in connection with the execution of the work.”

Phrases such “arising out of,” “originating from,” “incident to” or “having connection with” “[require] only that there be some causal relationship between the injury and the risk” (*Worth Constr. Co., Inc. v Admiral Ins. Co.*, 10 NY3d 411, 415 [2008] [citation and quotation marks omitted]; *see also Hunter Roberts Constr. Group, LLC v Arch Ins. Co.*, 75 AD3d 404 [1st Dept 2010]). Accordingly, because, as established by plaintiff’s and defendant Ibrahim’s testimony, the accident was not caused by, did not result from, did not arise out of and did not occur in connection with the execution of the work, defendant Genesys did not establish its entitlement to summary judgment on its contractual indemnification cross claim against defendant AKS (*see Cahn, supra*).

As to defendant Genesys’s cross claim against defendant AKS for common-law indemnification, “[the party] seeking [common-law] indemnity must prove not only that it was

not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law” (*Correia*, 259 AD2d at 65; *see McCarthy v Turner Constr., Inc.*, 17 NY3d 369 [2011]). Defendant Genesys failed to establish defendant AKS’s negligence as a matter of law; accordingly, this aspect of the motion is also denied.

Accordingly, it is

ORDERED, that the aspects of the motion of defendant Genesys for summary judgment dismissing plaintiff’s complaint as against it and all cross claims against it are granted; and it is further

ORDERED, that plaintiff’s complaint as against defendant Genesys and all cross claims against defendant Genesys are dismissed; and it is further

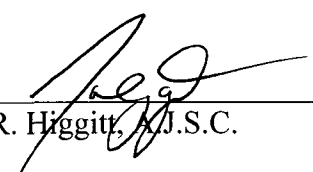
ORDERED, that the Clerk of the Court is directed to enter judgment in favor of defendant Genesys dismissing the complaint as against it and all cross claims against it; and it is further

ORDERED, that the motion is otherwise denied.

The remaining parties are reminded of the July 1, 2019 pre-trial conference before the undersigned.

This constitutes the decision and order of the court.

Dated: June 3, 2019



John R. Higgitt, A.J.S.C.