

Walsh v New York Univ.
2019 NY Slip Op 32431(U)
August 15, 2019
Supreme Court, New York County
Docket Number: 116134/2009
Judge: Carol R. Edmead
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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
ACOUSTICS, INC., and D.P. CONSULTING CORP.

Second Third Party Defendants.

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DECISION AND ORDER

Index No.: 116134/2009

Motion Sequence 010

Third Party Index No.: 590733/2010

Second Third Party Index No.:
590521/2013

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

MEMORANDUM DECISION

In this Labor Law action, Second Third Party Defendant Tri State Dismantling Corp. (“Tri State”) moves for summary judgment dismissing the second third party complaint and all cross claims against it. Third Party Defendants/Second Third Party Plaintiffs Burgess Steel, LLC, Burgess Steel Erectors of New York, LLC, and Burgess Steel Products Corp. (collectively, “Burgess”) oppose Tri State’s motion and cross-move for an order, pursuant to CPLR 3126, striking Tri State’s answer or issuing an order of preclusion at trial, or, in the alternative, compelling Tri State to produce a proper witness for examination before trial pursuant to CPLR 3214. Tri State’s motion is additionally opposed by Defendants/Third Party Plaintiffs New York University (“NYU”) and Turner Construction Corporation (“Turner”).

FACTS AND PROCEDURAL BACKGROUND

This case arises out of renovation of NYU’s Silver Hall building, located at 100 Washington Square Park in Manhattan. NYU owns the property and Turner served as the construction manager on the project, which encompassed demolition and renovation work on four floors, including the roof. 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, including the removal of exhaust ducts and fans. Turner hired Tri State to do the demolition work on the roof. Tri State removed the exhaust fans, but left a portion of the iron angles, which had supported them, protruding from the roof.

On October 14, 2009, Plaintiff was working as a foreman for Burgess on the roof of Silver Hall. Plaintiff tripped over one of the protruding angles, and 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 and that Turner had ignored his warnings about the danger they may pose. He then 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 Acoustics (“National Acoustics, Inc.”), 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 Acoustics joined the action, DP Consulting has never answered the second third-party complaint and is in default.

Turner and NYU previously moved for summary judgment and this 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).

National Acoustics and Tri State then moved for summary judgment seeking dismissal of the second third party complaint, along with all cross claims against them. By a memorandum decision dated April 5, 2019 (the April 2019 decision), the Court granted National Acoustics' motion to the extent that it was dismissed from the second third party complaint. Tri State's motion was denied without prejudice, as Burgess, in opposition to the motion, successfully contended that the motion was premature given that Tri State had failed to produce a proper

witness for deposition before trial. The April 2019 decision ordered Tri State to appear for deposition within 21 days of the order. Should Tri State fail to comply, the Court noted that it would grant Burgess' motion to strike Tri State's answer. Tri State then produced two witnesses for deposition. Andre Barnowski, the president of Tri State, testified on April 18, and Richard Flamio, the company's vice president, testified on May 3.

Tri State now moves again for summary judgment in its favor, on the grounds that it did not cause or create the condition responsible for Plaintiff's accident, did not have a duty with respect to the claimed dangerous and defective condition, and there is no evidence that Tri State was negligent or otherwise liable. In opposition, Burgess argues that Tri State did not comply with the Court's order in its April 2019 decision, as the witnesses produced were not proper ones with knowledge of how its work was performed. Burgess argues Tri State's answer should now be stricken. Additionally, Burgess argues Tri State's motion should be denied on the merits as there are questions of fact as to whether it created or contributed to the dangerous condition that caused Plaintiff's injury.

DISCUSSION

Summary judgment is granted when "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]). Once the proponent has made a prima facie showing, the burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; see also, *DeRosa v*

City of New York, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]). When the proponent 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).

To establish a *prima facie* case of negligence in a slip and fall accident, plaintiff must prove that defendant owed him or her a duty of care, and breached that duty, and that the breach proximately caused his or her injury (*Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302 [1st Dept 2001]). “A defendant who moves for summary judgment in a slip-and-fall action has the initial burden of making a prima facie demonstration that it neither created the hazardous condition, nor had actual or constructive notice of its existence” (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526 [1st Dept 2013]; *Pfeuffer v New York City Housing Authority*, 93 AD3d 470 [1st Dept 2012]; *Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419 [1st Dept 2011]). Once a defendant establishes *prima facie* entitlement to such relief as a matter of law, the burden shifts to plaintiff to raise a triable issue of fact as to the creation of the defect or notice thereof” (*Briggs v Pick Quick Foods, Inc.*, 103 AD3d 526, *supra*, citing *Rodriguez v 705-7 E. 179th St. Hous. Dev. Fund Corp.*, 79 AD3d 518 [1st Dept 2010], citing *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [2008]).

Burgess’s Cross-Motion to Strike Tri State’s Answer

Before turning to the merits of Tri State’s motion to dismiss, the Court must first address Burgess’s cross-motion to dismiss Tri State’s complaint due to its failure to comply with the Court’s April 2019 decision. The striking of an answer is a drastic remedy, but it is warranted

when a party has demonstrated “blatant and willful disregard” of a court order without reasonable excuse (CPLR 3126; *see also Pimental v City of New York*, 246, AD2d 467 [1st Dept 1998]). The remedy is not appropriate “absent a clear showing that the failure to comply with discovery demands is willful, contumacious or in bad faith” (*Barth v City of New York*, 294 AD2d 386 [2nd Dept 2002]). Such willful conduct will generally be inferred by the court when a party continually fails to comply with discovery orders without providing a reasonable excuse (*see Zletz v Wetanson*, 67 NY2d 711 [1986]).

Here, the striking of Tri State’s pleading is not warranted, as Tri State has fully complied with the Court’s order, which merely stated that Tri State must appear for deposition within 21 days of the order. Tri State fully complied by producing one witness three days after the order date, and another witness 15 days later at the request of Burgess (NYSCEF doc No. 294 at 6). Burgess argues that the witnesses produced were not ones with firsthand knowledge of Plaintiff’s accident, but this requirement is not part of the Court’s order. The notion that Tri State has disregarded the order in bad faith is thus unfounded. Burgess’s cross-motion depicts Tri State’s failure to produce a proper witness as a part of a pattern of Tri State’s consistent disregard for court orders. However, the Court already noted in its April 2019 decision that “a review of the orders and the discovery history of this case does not reveal any special wantonness on Tri State’s part” (NYSCEF doc No. 274 at 9). The Court is also mindful of the fact that Plaintiff’s accident took place ten years ago, and that the order gave Tri State a short window of time to produce the most knowledgeable witness available to it.

As Burgess has failed to demonstrate that Tri State willfully thwarted the Court’s discovery orders in bad faith, the branch of Burgess’s motion that seeks to strike Tri State’s answer or preclude Tri State from testifying at trial unless it produces a proper witness before

trial, is denied. The Court now turns to the merits of Tri State's motion for dismissal of the second third party complaint.

Tri State's Motion for Summary Judgment

Tri State argues that is entitled to dismissal from this action as it did not cause or create the condition responsible for plaintiff's accident, did not have a duty with respect to the claimed dangerous and defective condition, and there is no evidence that Tri State was negligent or otherwise liable. Burgess disputes this, arguing that there is a question of fact regarding whether Tri State negligently agreed to perform the demolition work pursuant to Turner's instructions, which Burgess contends were obviously dangerous. Burgess further claims that Tri State is liable to it under common law and contractual indemnification, and that it is entitled to contribution from Tri State.

As a preliminary matter, the Court notes that Tri State cannot owe Burgess contractual indemnification. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]). Here, there can be no contractual indemnification as Burgess and Tri State never entered into a contractual agreement together (NYSCEF doc No. 272, ¶ 8). Tri State only entered into a contract with Turner, as Turner hired it to perform the demolition work. However, no provision in Tri State's contract with Turner requires any sort of indemnification to Burgess (NYSCEF doc No. 273). Therefore, Tri State could only be liable under principles of common law indemnification, meaning that it is culpable of some wrongdoing and owes indemnity to a party whose liability is solely vicarious. (*See Correia v Professional Data Mgmt. Inc.*, 259 AD2d

60, 65 [1st Dep't 1990]). A finding of contribution requires a similar finding of negligence and supervision of Plaintiff's work (*id.*). Thus, the matter of whether Burgess has any claims against Tri State, along with the question of whether Tri State is entitled to dismissal, both depend on Tri State's negligence and involvement in creating the condition that caused Plaintiff's accident.

The issue of whether the iron angles that caused Plaintiff's accident constituted a dangerous condition on the premises was already addressed by this Court in its March 2018 decision, which denied dismissal of Plaintiff's claim of common-law negligence against NYU and Turner. Turner and NYU argued that the protruding angles were an open and obvious condition, meaning that they had no duty to warn employees of the risk (NYSCEF doc No. 172 at 10). This Court was unpersuaded, holding that a cut angle protruding six to eight inches "presents the type of danger that lies in wait" and is clearly not open and obvious (*id.*). Plaintiff argued that the circumstances were more akin to those in *Aragona v State of New York* (74 AD3d 1260 [2nd Dept 2010]), where a worker tripped on a padeye (a metal plate with a projecting loop or ring) that was welded to the deck of a work barge. The Appellate Division held there was a question of fact as to whether the padeye constituted a dangerous condition (*id.* at 1260-1261). This Court agreed that a padeye was similar to the cut angle at issue here, and thus denied Turner and NYU's motion for dismissal of Plaintiff's negligence claim.

It is not disputed that while performing the demolition work, Tri State left behind the cut iron angles pursuant to Turner's directions in accordance with the contract drawings, plans and specifications Tri State was given (NYSCEF doc No. 282 at 2). Tri State argues that as it merely followed Turner's instructions and had no duty to Burgess, it cannot be liable. Burgess, in opposition, argues that Tri State may be liable for following instructions that would obviously lead to a dangerous condition. It is well settled that "a 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” (*Diaz v Vasques*, 17 AD3d 134, 135 [1st Dept 2005] quoting *Ryan & Feeney & Sheehan Bldg. Co.*, 239 NY 43 [1924]). Burgess argues that if the plans were clearly defective, Tri State should not have blindly followed them to complete the demolition work but instead should have addressed the matter with Turner or taken other action to cover up the protruding iron angles.

Tri State, in reply to Burgess, argues that Turner’s instructions also provided that the iron angles were meant to be removed by second third party defendant D.P. Consulting (NYSCEF doc No. 294 at 7). If Tri State was operating under the belief that D.P. Consulting would remove the angles after Tri State finished their demolition work, it was not unreasonable for Tri State to proceed with Turner’s directions. Tri State also argues *Diaz* is distinguishable as that case involved the court granting summary judgment because the opposition failed to show that the plans were obviously defective, while here Burgess speculates that the plans were obviously defective, and it was thus negligent for Tri State to adhere to them (*id.* at 8-9).

Here, the record reflects that Tri State was hired by Turner pursuant to a standard subcontractor form work order (NYSCEF doc No. 276 at 29). Turner testified that while Tri State was hired to remove the exhaust fans, D.P. Consulting was hired to cut back the angle protrusions (NYSCEF doc No. 267 at 114-115). Turner also testified that the angles were not removed until at least a month after Tri State completed their demolition work (*id.* at 143). While the Court has determined that Turner may have been negligent in scheduling the work such that the angles were left in place for a long time and allowing work to proceed in the interim, Burgess does not demonstrate a sound basis for why this negligent decision should be imputed to Tri

State. The record does not suggest that Tri State had any role in the decision to leave the angles in place. Burgess speculates that the instructions and drawings followed by Tri State were patently dangerous but cites to no provision of the contract or construction materials that highlights such danger. Burgess also offers no expert testimony or other evidence indicating that the plans were clearly defective. Burgess argues it has not been able to inspect the plans as Tri State has not turned over its project file, but Tri State has demonstrated that it provided a full response of every document contained in its project file (NYSCEF doc No. 293). Burgess has thus failed to demonstrate that Tri State engaged in bad faith or that any outstanding documentation exists that is unavailable for inspection.

Accordingly, Tri State is entitled to summary judgment as Burgess has not sufficiently demonstrated a triable question of fact pertaining to Tri State's involvement in the causation of Plaintiff's accident, nor the breach of any duty owed by Tri State to Burgess. As none of the other parties in the second third party complaint oppose Tri State's action, it is entitled to dismissal from this proceeding.

NYU and Turner also oppose Tri State's motion. In support, NYU and Turner submit a "Notice of Cross-Claims," in which NYU and Turner purport to assert cross claims against Tri State for indemnification and contribution (NYSCEF doc No. 297). However, the purported cross claims are nullities, as Tri-State is not a direct defendant (see CPLR 3019; see also *BAS Communications, Inc. v YTK Corp.*, 15 Misc3d 1104 [A] at 7 [Sup Ct, Nassau Cty 2007] [noting that there is no provision in the CPLR for a defendant to plead cross claims in a third-party action]). If NYU and Turner wished to bring claims against Tri-State, the proper vehicle would

have been an impleader pursuant to CPLR 1007. As NYU and Turner's opposition is based on improper cross claims, the court declines to consider the opposition.¹

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that second third party defendant Tri State Dismantling Corp.'s motion for summary judgment is granted in its entirety; and it is further

ORDERED that the cross-motion of third party defendants/second third party plaintiffs Burgess Steel LLC, Burgess Steel Erectors of New York, LLC and Burgess Steel Products Corp. is denied; and it is further

ORDERED that counsel for Tri State Dismantling Corp. shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: August 15, 2019



Hon. Carol R. Edmead, J.S.C.

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

¹ This reasoning also applies to court's unwillingness to consider NYU and Turner's opposition to National Acoustic's motion for summary judgment (motion seq. No. 008), which was resolved pursuant to memorandum decision dated April 5, 2019 (NYSCF doc No. 250).