

Ryder Truck Rental, Inc. v Leighton Constr. Corp.

2019 NY Slip Op 34726(U)

September 25, 2019

Supreme Court, Westchester County

Docket Number: Index No. 67992/2016

Judge: Joan B. Lefkowitz

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT: STATE OF NEW YORK
IAS PART WESTCHESTER COUNTY
PRESENT: HON. JOAN B. LEFKOWITZ, J.S.C.

To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

-----X
RYDER TRUCK RENTAL, INC.,

Plaintiff,

-against-

LEIGHTON CONSTRUCTION CORP.,

Defendant.

-----X

LEIGHTON CONSTRUCTION CORP.,

Third-Party Plaintiff,

-against-

STANLEY KIELTYKA, INC., and DEEGAN
OVERHEAD DOORS CO., INC.,

Third-Party Defendants.

-----X

The following papers (e-filed documents 326-445; 456-505) were read on: (1) the motion by the third-party defendant, Stanley Kieltyka, Inc., for an order granting summary judgment dismissing the third-party complaint and all cross-claims asserted against it (sequence no. 4); (2) the motion by the third-party defendant, Deegan Overhead Doors Co., Inc., for an order granting summary judgment dismissing all claims and cross-claims asserted against it (sequence no. 5); (3) the motion by the plaintiff for an order granting summary judgment and setting the matter down for an inquest (sequence no. 6); and (4) the motion by the defendant, Leighton Construction Corp., for an order granting summary judgment dismissing all claims and counterclaims asserted against it and granting it summary judgment on its claims for contractual indemnity and common law indemnification.

DECISION & ORDER

Index No: 67992/2016

Motion Return Date:

June 14, 2019

Motion Sequence Nos. 4-7

Sequence No. 4:

Notice of Motion-Affirmation-Exhibits (A-AA; B-BB; C-Y; Y1-Y3; Z-Z1-Z5)

Affirmation in Opposition-Exhibits (A-B)-Memorandum of Law

Reply Affirmation-Exhibit (A)

Sequence No. 5:

Notice of Motion-Affirmation-Exhibits (A-Y)

Affirmation in Opposition-Memorandum of Law

Reply Affirmation

Sequence No. 6:

Notice of Motion-Affirmation-Exhibits (A-Q; 1)-Memorandum of Law

Affirmation in Opposition-Exhibits (A-B)-Memorandum of Law

Reply Affirmation-Exhibits (A-J)-Reply Memorandum of Law

Sequence No. 7:

Notice of Motion-Affirmation-Exhibits (A-Z; AA-CC)-Memorandum of Law

Affirmation in Opposition (by third-party defendant Deegan)

Affirmation in Opposition (by plaintiff)-Exhibits (A-J)-Memorandum of Law

Affirmation in Opposition (by third-party defendant Kieltyka)-Exhibits (A-B)

Reply Affirmation

Upon reading the foregoing papers, it is

ORDERED the motion by the third-party defendant, Stanley Kieltyka, Inc., is granted (sequence no. 4), and so much of the third-party complaint as asserts a cause of action against Stanley Kieltyka, Inc., is dismissed; and it is further

ORDERED the motion by the third-party defendant, Deegan Overhead Doors Co., Inc., is granted (sequence no. 5), and so much of the third-party complaint as asserts a cause of action against Deegan Overhead Doors Co., Inc., is dismissed; and it is further

ORDERED the motion by the plaintiff is denied (sequence no. 6); and it is further

ORDERED the motion by the defendant/third-party plaintiff, Leighton Construction Corp., is denied (sequence no. 7); and it is further

ORDERED the plaintiff and defendant/third-party plaintiff are directed to appear on November 12, 2019, at 9:15 a.m. in Courtroom 1600, Westchester County

Supreme Court, 111 Dr. Martin Luther King Jr. Boulevard, White Plains, New York, prepared to conduct a settlement conference.

Plaintiff commenced this action against Leighton Construction Corp. (Leighton) on December 1, 2016, seeking to recover monetary damages for property damage, loss of business income, and added business expenses purportedly incurred as a result of a partial roof collapse on February 20, 2014, at the premises located at 1018 Saw Mill River Road, Yonkers, New York (premises). Plaintiff operated a truck rental company at the premises which it leased from the property owner, defendant/third-party plaintiff, Leighton, pursuant to a written lease agreement entered in 1985. Thereafter, the parties entered into six amendments to the lease agreement which renewed the terms of the original agreement. Pursuant to a sixth amendment to the lease agreement the parties entered in 2013, Leighton agreed to perform certain renovation work.

In connection therewith, Leighton retained, among others, third-party defendant, Stanley Kieltyka, Inc. (Kieltyka), to construct a small alcove at the south side of the building, expand the opening for the garage door on the west side of the building, perform general repair work, including insulation and perform minor roof repair on the southwest corner of the building—the opposite side of where the partial collapse occurred. The agreement Leighton entered with Kieltyka provided, in relevant part, “Subcontractor [Kieltyka] agrees to partially indemnify and save Owner, Leighton Construction Corporation, . . . harmless from claims . . . of loss, damage or injury to property, . . . arising in any manner out of Subcontractor’s operation. . . .”

Leighton also retained third-party defendant, Deegan Overhead Doors, Co., Inc. (Deegan), to replace two overhead garage doors within the subject building. The agreement Leighton entered with Deegan did not contain contractual indemnification language.

On December 30, 2016, Leighton joined issue by service of a verified answer. On June 12, 2017, Leighton filed a third-party complaint against third-party defendants, Kieltyka and Deegan, for common law and contractual indemnification, contribution, and breach of contract. On April 18, 2018, Leighton filed a second third party summons and complaint against second third-party defendant, East Coast Ironworks, Inc. (East Coast), for common law and contractual indemnification, contribution, and breach of contract. Subsequently, East Coast moved to sever the second third-party action from the main action (this action). By order dated December 3, 2018, the court granted this motion.

Following the completion of discovery, all parties to the main action move for summary judgment.

Motion by Defendant Kieltyka for Summary Judgment (sequence no. 4):

In support of its motion, defendant Kieltyka proffers the affidavit of non-party Michael J. McGarvey, P.E. (McGarvey). McGarvey was retained by defendant/third-party plaintiff Leighton to prepare the plans and specifications for the renovation work. Based upon his review of the plans and specifications he prepared for the renovation work, and observations he made during periodic visits to the premises to assess whether the renovation work was being performed in accordance with the plans and specifications, McGarvey opines, within a reasonable degree of engineering certainty, that Kieltyka performed its work in accordance with the project's plans and specifications and in accordance with the New York State and City of Yonkers Building Codes. McGarvey further opines that Kieltyka's work did not involve any alterations or modifications to the building's existing roof and roofing system and that its work did not transfer any additional loads to the building's roofing system in the area where the partial collapse occurred. Based thereon, McGarvey opines that Kieltyka did not cause or contribute to the partial roof collapse. Kieltyka further proffers the affidavit of Robert Monaco, P.E. Mr. Monaco opines, within a reasonable degree of engineering certainty, that Kieltyka did nothing to cause or contribute to the partial roof collapse.

The affidavits Kieltyka proffered are sufficient to demonstrate its *prima facie* entitlement to judgment as a matter of law. (*cf. Wing Wong Realty Corp. v Flintlock Constr. Servs., LLC*, 95 AD3d 709, 709 [1st Dept 2012]).

In opposition, Leighton failed to raise a triable issue of fact.

As Kieltyka established that it was free from negligence in contributing to the happening of the partial roof collapse, it is entitled to summary judgment dismissing the claims for common law and contractual indemnification and contribution (*see Schultz v Bridgeport & Port Jefferson Steamboat Co.*, 68 AD3d 970, 972 [2d Dept 2009]; *Hopes v New Amsterdam Restoration Group, Inc.*, 83 AD3d 784, 785-86 [2d Dept 2011]).

In addition, Kieltyka sufficiently demonstrated that it complied with the insurance provision of the subcontractor agreement it entered with Leighton by obtaining an insurance policy with a blanket additional insured endorsement. The issue of whether Kieltyka's insurer will ultimately defend and indemnify Leighton is a separate issue not before the court.

In opposition, Leighton failed to raise a triable issue of fact.

Motion by Defendant Deegan for Summary Judgment (sequence no. 5):

In support of its motion, Deegan proffers the affidavit of Shawn Z. Rothstein, P.E. (Rothstein). Based upon his professional knowledge and review of the subject case including, deposition transcripts, bill of particulars, photographs, engineering reports, Rothstein opines, within a reasonable degree of engineering certainty, that the work done by Deegan did not cause or contribute to the partial roof collapse. Rothstein further concludes that a pre-existing structural defect was the proximate cause of the partial roof collapse and that this defect existed before Deegan installed the door. Deegan further proffers an affidavit from Frank Peter Genese (Genese), Deegan's President. Genese attests that in performing the subject renovation work, Deegan did not touch, cut, alter, modify or remove any structural beams or columns in the building and that none of the work Deegan performed contributed to the partial roof collapse. Deegan demonstrated its *prima facie* entitlement to judgment as a matter of law.

In opposition, Leighton failed to raise a triable issue of fact.

As Deegan established that it was free from negligence in contributing to the happening of the partial roof collapse, it is entitled to summary judgment dismissing the claims for common law and contractual indemnification and contribution (*see Schultz v Bridgeport & Port Jefferson Steamboat Co.*, 68 AD3d 970, 972 [2d Dept 2009]; *Hopes v New Amsterdam Restoration Group, Inc.*, 83 AD3d 784, 785-86 [2d Dept 2011]).

Motion by Plaintiff for Summary Judgment (sequence no. 6):

In support of its motion, plaintiff proffers the affidavit of Michael Lamoreaux, P.E. (Lamoreaux). Lamoreaux annexes to his affidavit a report dated March 4, 2014, which was prepared by him following a site inspection of the premises on March 3, 2014. The report indicates that Lamoreaux performed "cursory calculations" on the main roof beam and based his opinions on a visual inspection of only those areas that were accessible and without conducting material testing. Based thereon, Lamoreaux opines that the cause of the partial roof collapse was "an inappropriate load path of the structural assembly, which when taxed to support a full design load (such as the load resulting from significant snow fall and accumulation), the . . . [b]uilding was unable to maintain structural integrity."

Plaintiff's expert affidavit lacks probative value because it is speculative and conclusory. The expert fails to set forth foundational facts and fails to sufficiently recite the manner in which the engineer came to his conclusions (*see Ioffe v Hampshire House Apt. Corp.*, 21 AD3d 930, 931 [2d Dept 2005]; *DiStefano v Ulta Salon*, 95 AD3d 932, 933 [2d Dept 2012]). As the plaintiff failed to make a *prima facie* showing of entitlement to judgment as a matter of law, the court need not consider the sufficiency of the opposing papers (*see Cendant Car Rental Group v Liberty Mut. Ins. Co.*, 48 AD3d 397, 398 [2d Dept 2008]).

Motion by Defendant Leighton for Summary Judgment (sequence no. 7):

In support of its motion, Leighton proffers the lease agreement and amendments thereto. Based thereon, Leighton asserts that the "hold harmless" language contained within the lease agreement bars recovery by plaintiff for its damages.

Leighton failed to make its *prima facie* showing of entitlement to judgment as a matter of law. The hold harmless provision provides, in relevant part, that "Landlord shall not in any event whatsoever be liable for . . . damage to any property . . . unless such damage or injury results from Landlord's negligence or deliberate acts or omissions." Leighton failed to demonstrate that it was free from any negligent act or deliberate act or omission. As Leighton failed to demonstrate its *prima facie* entitlement to judgment as a matter of law, the court need not consider the sufficiency of the opposing papers (*see Cendant Car Rental Group*, 48 AD3d at 398).

ENTER,

Dated: White Plains, New York
September 25, 2019


HON. JOAN B. LEFKOWITZ, J.S.C.