

Gomes v Vornado 640 Fifth Ave. L.L.C.
2020 NY Slip Op 31173(U)
May 6, 2020
Supreme Court, New York County
Docket Number: 155216/2017
Judge: Barbara Jaffe
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12EFM

Justice

-----X

ANTHONY GOMES,

Plaintiff,

- v -

INDEX NO. 155216/2017

MOTION DATE _____

MOTION SEQ. NO. 005

VORNADO 640 FIFTH AVENUE L.L.C.,
SHAWMUT WOODWORKING & SUPPLY, INC.,
DAL ELECTRICAL CORPORATION, TOUCHTEL
TECHNOLOGY GROUP & ELECTRICAL
SERVICES, INC., VICTORIA'S SECREET STORES,
LLC, L BRANDS STORE DESIGN &
CONSTRUCTION, INC.,

Defendants.

-----X

SHAWMUT WOODWORKING & SUPPLY, INC.

Plaintiff,

-against-

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595669/2017

CURTIS PARTITION CORPORATION,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 005) 122-137, 163, 166, 178-180

were read on this motion for summary judgment.

In this action for personal injury sustained by plaintiff as the alleged result of an on-the-job accident, by notice of motion, third-party defendant Curtis Partition Corporation moves pursuant to CPLR 3212 for an order summarily dismissing the third-party complaint. Defendants

Vornado 640 Fifth Avenue LLC, Victoria's Secret Stores LLC, and L Brands Store Design & Construction, and third-party plaintiff Shawmut Woodworking & Supply, Inc. oppose. Defendants DAL Electrical Corporation and Touchtel Technology Group & Electrical Services, Inc. and plaintiff do not oppose.

I. BACKGROUND

On July 11, 2016, Shawmut, as general contractor, and Curtis, as subcontractor, executed a contract by which Curtis was to install drywall in a Victoria's Secret store in Manhattan. The contract provides, as pertinent here:

To the full extent permitted by applicable law, Subcontractor agrees to defend, indemnify and hold harmless Owner, the Architect/Engineer, Contractor and anyone else required by the Contract Documents, from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any act or omission of Subcontractor or those employed by it, or working under those employed by it at any level, regardless of whether or not caused in part by a party indemnified hereunder.

(NYSCEF 136).

On the day of his alleged injury, August 25, 2016, plaintiff, a Curtis employee, was working at a construction project on the third floor of a Victoria's Secret store at 650 Fifth Avenue. He was responsible for "[u]nloading trucks, moving materials around and assisting mechanic carpenters. His only supervisor was a Curtis foreman; Curtis provided plaintiff with equipment and tools to complete his work. According to plaintiff, the job site was "poorly kept" and full of dirt and debris. He never complained about it.

That morning, plaintiff was told to unload metal and sheet rock from a truck parked on the side of the building and bring it up to the third floor. Plaintiff first unloaded sheet rock onto an A-frame cart and, with the help of another Curtis employee, he moved the cart onto a freight elevator. Upon reaching the third floor, plaintiff exited, turned left, and dropped off the sheet

rock there. On his way back to the elevator, plaintiff noticed that the area was full of dirt, debris, wires, and clutter; he again made no complaint about the conditions.

Plaintiff and his coworker made a second trip to the third floor and upon exiting the freight elevator, they turned right. Plaintiff was at the back of the cart, pushing it, while his coworker was pulling the cart at the front of it. As they passed through a metal doorway, plaintiff's left foot got caught on an "[o]rangish-red extension cord" and fell, knocking into a metal column, causing him injury. Plaintiff had not seen the cord before the accident occurred. Afterward, he observed the cord, saw no markings on it, and could not determine where it was plugged in. Nor did he know who owned the cord. (NYSCEF 129).

As his deposition, Shawmut's site superintendent testified that his job was organize and coordinate with the subcontractors, that Shawmut is responsible for cleaning the area of plaintiff's accident, that the area of plaintiff's accident had been cleaned the night before, that Shawmut was aware that Curtis was responsible for moving the sheet rock to the third floor, and that part of plaintiff's job was to bring sheet rock to the third floor. He performed constant walk-throughs and on the third floor of the site, and on the day of plaintiff's accident, carpenters were building walls and installing drywall, electricians and "data guys" were "pulling the wires."

That morning, the site superintendent and lead supervisors assigned to each floor of the job site held a meeting on the third floor. To reach the meeting area, each supervisor passed by the area of plaintiff's accident; none saw an obstruction. Later that morning, the site supervisory was informed of plaintiff's injury. At the site of plaintiff's accident, the site superintendent observed extension cords on the floor and did not know to whom they belonged. Although one of the cords was plugged into a Shawmut fan, he did not recall which one or which cord was involved in the accident. While the fan is owned by Shawmut, the extension cords were used by

workers of different trades, regardless of who owned them, and the site superintendent did not know for how long the extension cords were present. (NYSCEF 132).

At his deposition, Curtis's foreman testified that Curtis was working on all three floors at the same time, that he directed Curtis workers in their daily, and that Curtis provided all tools, including power saws and extension cords, for its workers. He did not walk through the site each morning before Curtis employees started work.

According to Curtis's foreman, plaintiff, a carpenter's apprentice, delivered materials, including sheet rock, to various areas of the job site. Although Curtis had no policy against using extension cords owned by other contractors, it supplied its own cords which it stored on all three floors. According to him, Curtis employees used Curtis cords only. Curtis was not responsible for cleaning the job site of dirt and debris.

That day, the Curtis foreman instructed plaintiff and another Curtis employee to deliver sheetrock to a specified area of the site. He had been to the third floor the day before. After being informed of plaintiff's accident, and upon arriving where it had happened, he saw plaintiff sitting with back against the column. Plaintiff told him that he had stepped on a cord. The foreman recalled having seen many kinds of cords in the area, but he does not know who owned them or for how long they had been in the area. He had received no complaints about conditions of the worksite. (NYSCEF 133).

By supplemental summons and complaint, plaintiff advances causes of action against defendants for negligence, negligent hiring/retention, and violations of Labor Law §§ 200 and 241(6). (NYSCEF 126).

By third-party summons and complaint, Shawmut advances causes of action against Curtis for common law contribution and indemnification, contractual indemnification, and

breach of contract for failure to procure insurance. (NYSCEF 125).

II. CONTENTIONS

A. Curtis (NYSCEF 122-136)

Curtis contends that as plaintiff did not suffer a grave injury, as his employer and pursuant to Workers Compensation Law § 11, it cannot be held liable to Shawmut, observing that Shawmut does not allege a lack of workers compensation benefits for plaintiff, nor does plaintiff allege in his bill of particulars or deposition testimony that he suffered a grave injury. It also maintains that there is no competent medical evidence that plaintiff is no longer employable in any capacity.

In support, Curtis offers the expert affidavit of licensed physician who examined plaintiff and reviewed his medical history, in which he opines, among other things, that while plaintiff needed treatment on his shoulder, plaintiff “has made a good recovery and has returned to work as a carpenter without restrictions [and] has had no further episodes of shoulder dislocation or instability.” (NYSCEF 135).

Curtis also asserts that as the extension cord did not belong to it, its work was not the proximate cause of plaintiff’s injuries, observing also that Curtis was tasked solely with installing sheet rock and that no sheet rock was being installed where plaintiff was injured. Moreover, Curtis was not responsible for clearing the area of extension cords. Thus, Curtis denies that it was negligent and that there is no evidence that it created or had notice of the condition that caused plaintiff’s accident.

Curtis additionally argues that its contract with Shawmut is violates General Obligations Law § 5-322.1.

B. Shawmut (NYSCEF 163)

Shawmut does not oppose Curtis's motion to the extent it seeks to dismiss its claim for common law contribution and indemnity for lack of a "grave injury." It otherwise claims that plaintiff's accident arose from Curtis's work and that Curtis need not have been negligent for the indemnification provision to be triggered. Rather, plaintiff's accident must "be caused at least in part by something that a Curtis worker did or did not do." Thus, as plaintiff was employed by Curtis, the accident necessarily arose from Curtis's work for Shawmut.

Shawmut also observes that the contract with Curtis does not require Curtis's negligence for it to be obliged to indemnify it, maintaining, in any event, that Curtis has not established, *prima facie*, that plaintiff's accident did not arise from an act or omission of a Curtis employee. It also maintains that Curtis fails to establish that it did not own the extension cord, and that Curtis's foreman does not rule out that the cord belonged to it, and that as the Curtis coworker who assisted plaintiff was not deposed, it is unknown whether he saw the cord or had moved it into plaintiff's path while pulling the cart.

As Curtis's foreman had instructed his workers to deliver drywall to the third floor without warning them of the extension cords along their path, the indemnification obligation is triggered, argues Shawmut. It also denies that it seeks indemnification for its own negligence, and observes that there has been no finding that it was negligent. Moreover, it asserts, the indemnification clause is enforceable only "to the full extent permitted by applicable law," and thus, is enforceable.

C. Reply (NYSCEF 178-179)

As the owner of the extension cord is unknown, and as it was merely the mechanism of plaintiff's accident, Curtis denies that the contractual indemnity is triggered. It observes that the

contract provides that it is responsible for claims “arising out of” and “caused in whole or part by” its work, and thus, it argues, there must be a finding of proximate causation for it to be held liable.

Curtis also maintains that it procured insurance in compliance with the contract and attaches a copy of its commercial general liability policy for the period of April 13, 2016 to April 13, 2017. (NYSCEF 179).

D. Oral argument (NYSCEF 197)

At oral argument, Shawmut did not oppose Curtis’s argument and evidence that it provided insurance in compliance with their contract.

III. ANALYSIS

To prevail on a motion for summary judgment, the movant must establish, *prima facie*, its entitlement to judgment as a matter of law, providing sufficient evidence demonstrating the absence of any triable issues of fact. (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25-26 [2019]). If this burden is met, the opponent must offer evidence in admissible form demonstrating the existence of factual issues requiring a trial; “conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient.” (*Justinian Capital SPC v WestLB AG*, 28 NY3d 160, 168 [2016], quoting *Gilbert Frank Corp. v Fed. Ins. Co.*, 70 NY2d 966, 967 [1988]). In deciding the motion, the evidence must be viewed in the “light most favorable to the opponent of the motion and [the court] must give that party the benefit of every favorable inference.” (*O’Brien v Port Authority of New York and New Jersey*, 29 NY3d 27, 37 [2017]).

The indemnification provision does not violate GOL § 5-322.1, because it is expressly limited to “the full extent permitted by applicable law.” (*Kehoe v 61 Broadway Owner LLC*, 180 AD3d 618 [1st Dept 2020]; *Frank v 1100 Ave. of Americas Assocs.*, 159 AD3d 537, 537 [1st

Dept 2018]).

Where, as here, the contract provides that Curtis is liable to Shawmut for claims “arising out of” the work and “caused in whole or in part” by Curtis’s conduct, and plaintiff advances a cause of action under Labor Law § 241(6) against Shawmut, a finding that Curtis was negligent is unnecessary for Shawmut to be entitled to contractual indemnification. (*See Adagio v New York State Urban Dev. Corp.*, 168 AD3d 602, 603 [1st Dept 2019] [indemnitor need not be found negligent where contract obliges indemnification for all claims “arising out of” or “resulting from” work]; *Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018] [indemnitor need not be found negligent where contract mandates that damages or injury be “caused by” indemnitor]). Rather, for Shawmut to be entitled to indemnification, there must only be “some causal relationship” between Curtis’s conduct and plaintiff’s injury. (*See Wilk v Columbia University*, 2015 WL 13484589, *9 [Sup Ct, NY County 2015], *aff’d* 150 AD3d 502 [1st Dept 2017], quoting *Maroney v New York Cent. Mut. Fire Ins. Co.*, 5 NY3d 467, 472 [2005]).

It is undisputed that Curtis owned and used extension cords at the job site, including the third floor, and there is no evidence as to who owned the cord that caused plaintiff’s accident, how long it was present, and who placed it in the area. In addition, it is undisputed that plaintiff’s and Curtis’s work entailed transporting materials throughout the job site, including where the accident occurred. As gaps in a plaintiff’s case does not suffice for entitlement to summary dismissal (*Falah v Stop & Shop Companies, Inc.*, 41 AD3d 638, 639 [2d Dept 2007]), Curtis fails to meet its *prima facie* burden of demonstrating that plaintiff’s accident did not arise out of its work or conduct. Consequently, the sufficiency of Shawmut’s opposition need not be addressed. (*See Medina v Fischer Mills Condo Ass’n*, 181 AD3d 448 [1st Dept 2020] [movant

not entitled to summary judgment where it failed to meet *prime facie* burden, regardless of sufficiency of opposition]).

Accordingly, it is hereby

ORDERED, that third-party defendant Curtis Partition Corporation’s motion for summary judgment is granted to the extent that third-party plaintiff Shawmut Woodworking & Supply, Inc.’s causes of action for common law indemnification and contribution and breach of contract for failure to procure insurance are dismissed, and is otherwise denied.

5/6/2020
DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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