

Mancusi v Avalonbay Communities, Inc.
2020 NY Slip Op 31179(U)
May 3, 2020
Supreme Court, New York County
Docket Number: 156626/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. NANCY M. BANNON

PART IAS MOTION 42EFM

Justice

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INDEX NO. 156626/2015

VINCENT MANCUSI,

MOTION DATE 10/27/2019

Plaintiff,

MOTION SEQ. NO. 002

- v -

AVALONBAY COMMUNITIES, INC., AVALONBAY NYC DEVELOPMENT, INC., AVALONBAY WILLOUGHBY WEST, LLC, TOTAL SAFETY CONSULTING, L.L.C.,

DECISION + ORDER ON MOTION

Defendant.

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AVALONBAY COMMUNITIES, INC., AVALONBAY NYC DEVELOPMENT, INC., AVALONBAY WILLOUGHBY WEST, LLC, TOTAL SAFETY CONSULTING, L.L.C.

Third-Party Index No. 595242/2016

Plaintiff,

-against-

S.J. ELECTRIC, INC.

Defendant.

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AVALONBAY COMMUNITIES, INC., AVALONBAY NYC DEVELOPMENT, INC., AVALONBAY WILLOUGHBY WEST, LLC, TOTAL SAFETY CONSULTING, L.L.C.

Second Third-Party Index No. 595084/2018

Plaintiff,

-against-

S.J. ELECTRIC, INC.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 123, 124

were read on this motion to/for JUDGMENT - SUMMARY .

I. INTRODUCTION

In this third-party action seeking contractual and common-law indemnification, contribution, and alleging breach of contract for failing to procure insurance, the third-party defendant S.J. Electric, Inc. (SJE) moves for summary judgment pursuant to CPLR 3212 dismissing the first and second third-party complaints as against it.¹ The third-party plaintiffs Avalonbay Communities, Inc., Avalonbay Development, Inc. Avalonbay Willoughby West LLC, and Total Consulting LLC (collectively the Avalon parties), oppose the motion and cross-move for summary judgment on their second cause of action for contractual indemnification and a conditional order requiring SJE to indemnify them in the event that SJE is found liable for part of the plaintiff's injuries in the underlying action, and for summary judgment pursuant to CPLR 3212 dismissing the plaintiff's Labor Law § 240(1) claim. SJE opposes the branch of the cross-motion seeking the conditional order for indemnification. The plaintiff opposes the branch of the cross-motion seeking to dismiss its Labor Law § 240(1) claim. SJE's motion for summary judgment is granted in part. The branch of the third-party plaintiff's cross-motion seeking a conditional order requiring indemnification is granted. The branch of the third-party plaintiff's cross-motion seeking to dismiss the plaintiff's Labor Law § 240(1) claim is denied.

II. BACKGROUND

In the underlying action, SJE's employee Victor Mancusi (Mancusi), an electrician, slipped and fell while walking across a wet wooden ramp at a construction site. At the time of the accident, the ramp was wet because the construction site was partially exposed to the elements including a previous rainfall. It is undisputed that the ramp was installed approximately two months prior to the accident, by either Avalon's carpenter, Prince Carpentry, or its concrete contractor Park Avenue. As a result of his accident, Mancusi claims injuries to both his left and right shoulders.

The trade contract between SJE and Avalon provides that: "With the exception that this section shall in no event be construed to require indemnification by [SJE] to a greater extent than permitted under the laws of the state of New York, [SJE] shall defend, indemnify and save harmless [Avalon] ... of and from any and all claims, demands, allegations... arising out of or in

¹ The first and second third-party complaints seek the same relief as against SJE. The first third-party complaint was withdrawn without prejudice on May 18, 2016. The second third-party complaint was filed on February 2, 2018 following a dispute regarding insurance coverage in the main action. As such, SJE's motion shall be treated as only against the second third-party complaint.

any way connected with or incidental to, the performance of the Work or any of the obligations contained in this Contract.” The contract further required SJE to maintain general liability coverage in the amount of \$1,000,000.00 for each occurrence of bodily injury by accident.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824 (2014); Alvarez v Prospect Hosp., 68 NY2d 320 (1986); Zuckerman v City of New York, 49 NY2d 557 (1980). Once such a showing is made, the opposing party, to defeat summary judgment, must raise a triable issue of fact by submitting evidentiary proof in admissible form. See Alvarez, supra; Zuckerman, supra. However, if the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court’s directing judgment in its favor as a matter of law (see Alvarez v Prospect Hospital, supra; Zuckerman v City of New York, supra; O’Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O’Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because “summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.” Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d 480, 480 (1st Dept. 1990) *quoting Nesbitt v Nimmich*, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Contribution and Common-Law Indemnification

The Avalon parties’ first cause of action seeks contribution and common-law indemnification. SJE moves for summary judgment on the grounds that the plaintiff did not suffer a grave injury. Section 11 of the Workers’ Compensation Law states that “an employer shall not be liable for contribution or indemnity to any third person based upon liability sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a ‘grave injury[.]’” See also Olszewski v. Park Terrace Gardens, Inc., 18 AD3d 349 (1st Dept. 2005). Section 11 states that the term grave injury “shall mean only...death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of

multiple toes, paraplegia or quadriplegia, total and perm blindness, total and permanent deafness, loss of nose, loss of ear, preeminent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." It is well settled that "injuries qualifying as grave are narrowly defined...and the words in [the] statute are to be given their plain meaning without resort to forced or unnatural interpretations." Castro v United Container Mach. Grouo. Inc., 96 NY2d 398, 401 (2001); see also Meis v ELO Org., LLC, 97 NY2d 714 (2001).

In support of its summary judgment motion, SJE submits, *inter alia*, the Mancusi's Bill of Particulars averring injuries he sustained to both of his shoulders, Mancusi's deposition testimony, further detailing those injuries, and the results of an independent medical examination performed on Mancusi stating that Mancusi is able to use both of his arms and has not suffered any neurological injury resulting in permanent total disability. These submissions establish, *prima facie*, that Mancusi did not suffer a grave injury.

In opposition, the Avalon parties fail to address, much less raise a triable issue of fact concerning SJE's motion for summary judgment dismissing the first cause of action. As such, SJE's motion for summary judgment on the first cause of action is granted.

C. Contractual Indemnificaiton

The Avalon parties' second cause of action seeks contractual indemnification under their trade agreement SJE. SJE moves for summary judgment to dismiss the second cause of action arguing (i) that the indemnity provision is overbroad because it improperly requires SJE to indemnify the Avalon parties for all claims arising out of the contract in violation of New York General Obligations Law § 5-322.1 and (ii) even were the indemnity provision to be construed such that SJE could only be required to indemnify the Avalon parties for its own negligence, as it does contain a saving provision, SJE was not negligent. The Avalon parties cross-move pursuant to the same contractual provisions seeking an order conditionally requiring SJE to indemnify the Avalon parties to the extent that SJE can be found negligent.

The contract states that: "With the exception that this section shall in no event be construed to require indemnification by [SJE] to a greater extent than permitted under the laws of the state of New York, [SJE] shall defend, indemnify and save harmless [Avalon] ... of and from any and all claims, demands, allegations... arising out of or in any way connected with or

incidental to, the performance of the Work or any of the obligations contained in this Contract.” Although SJE objects to the provision on the grounds that it is overbroad in scope, the parties both correctly interpret this clause to allow for "partial contractual indemnity" only to the extent that SJE may be held liable for its proportionate share of negligence. See Brooks v Judlau Contr., Inc., 11 NY3d 204 (2008).

SJE claims it did not contribute to the underlying accident, and therefore cannot be found negligent. In support, SJE submits, *inter alia*, Mancusi’s deposition testimony, where he claims that the wooden ramp was in place for weeks prior to SJE working on the project, and that to the best of his knowledge, the ramp was not put in place by SJE. Mancusi’s deposition testimony further states that he had previously complained to SJE’s foreman, Steven Hickis, about the wooden ramp being slippery. SJE also submits the affidavit of Steven Hickis, corroborating the plaintiff’s claim that he complained about the ramp, and further states that he spoke to the safety personnel at Total Safety and Avalon Bay about his concerns with the ramp. SJE claims that these submissions establish that it was not negligent, as the ramp was not within its control.

In response, the Avalon parties correctly note that Hickis’ deposition testimony states that SJE’s employees discussed amongst themselves that the ramp was dangerous because the rain had made it slippery prior to the accident, that aside from personal notes regarding the complaints about the ramp, he was unaware of any other records of the complaints, that he recalled that it rained on the day of the accident, and that the plaintiff told him that he was carrying a length of pipe weighing approximately 30 pounds on his shoulder and he was stepping up the ramp when his feet gave out and he slipped. The Avalon parties’ submissions establish a triable issue of fact as to whether SJE may have been contributorily negligent. The First Department has held that in the context of third-party claims for contractual indemnification, comparative negligence of an injured employee may be imputed to his employer. See Hoverson v Herbert Construction Co., Inc., 283 AD2d 237 (1st Dept. 2001); Guiga v JLS Construction Co., Inc., 255 AD2d 244 (1st Dept 1998). As the Avalon parties’ submissions demonstrate that Mancusi used the ramp despite being aware of its dangerous condition and tried to carry 30 pounds of wire across the wet ramp on his own, there is a triable issue of fact as to whether Mancusi may be contributorily negligent, and whether such negligence could be properly attributed to SJE. As such, SJE’s motion for summary judgment on the second cause of action

is denied, and the Avalon parties cross-motion for an order requiring that SJE conditionally indemnify them is granted to the extent that SJE may be found to be liable at trial.

D. Breach of Contract

The Avalon parties' third cause of action alleges that SJE breached its trade agreement by failing to procure insurance. SJE moves for summary judgment on the grounds that it did procure insurance, in compliance with the trade agreement. In support SJE submits a copy of the trade agreement, outlining the insurance requirements that SJE was to comply with and a copy of its policy from Harleysville Insurance Company which provides the primary and non-contributory coverage amounts required under the trade agreement. This establishes SJE's prima facie burden, and as the Avalon parties do not attempt to raise a triable issue of fact in response, SJE's motion for summary judgment on the third cause of action is granted. See Hoverson v Herbert Const. Co., 283 AD2d 237 (1st Dept. 2001).

E. Summary Judgment on Plaintiff's Labor Law § 240(1) Claim

To the extent that the Avalon parties also cross-move for summary judgment dismissing Mancusi's Labor Law § 240(1) claim, the cross-motion is untimely. While a party may cross-move for summary judgment on issues raised in a timely motion for summary judgment, a party may not untimely cross-move for summary judgment on claims not discussed therein. See Kershaw v Hospital For Special Surgery, 114 AD3d 75 (1st Dept. 2013). Here, it is undisputed that the cross-motion was made beyond the 60-day deadline for moving for summary judgment. The Note of Issue was filed on January 31, 2019. The Avalon parties did not make their cross-motion until May 8, 2019. It is also without question that Mancusi's Labor Law § 240(1) claim was not the subject of SJE's motion for summary judgment. Therefore, the branch of the Avalon parties' cross-motion seeking to dismiss Mancusi's Labor Law § 240(1) claim is denied. See Kershaw v Hospital For Special Surgery, *supra*.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of S.J. Electric, Inc. for summary judgment dismissing the second third-party complaint is granted to the extent that the first cause of action for contribution

and common-law indemnification and the second cause of action for breach of contract are dismissed, and the motion is otherwise denied; and it is further,

ORDERED that the branch of the cross-motion of Avalonbay Communities, Inc., Avalonbay Development, Inc. Avalonbay Willoughby West LLC, and Total Consulting LLC seeking partial summary judgment on its second cause of action for contractual indemnification is conditionally granted to the extent that S.J. Electric, Inc. will be required to indemnify Avalonbay Communities, Inc. to the extent that S.J. Electric, Inc. may be found negligent; and it is further,

ORDERED that the branch of the cross-motion of Avalonbay Communities, Inc., Avalonbay Development, Inc. Avalonbay Willoughby West LLC, and Total Consulting LLC seeking summary judgment on plaintiff Victor Mancusi's Labor Law § 240(1) claim is denied; and it is further,

ORDERED that the parties are to contact chambers on or before June 19, 2020 to schedule a settlement conference.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

5/03/2020
DATE

NANCY M. BANNON, 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 type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
		<input type="checkbox"/>	REFERENCE
		<input type="checkbox"/>	OTHER

APPLICATION:

CHECK IF APPROPRIATE: