Main St. Am. Assur. Co. v Persico Contr. & Trucking Inc.
2020 NY Slip Op 34850(U)
May 6, 2020
Supreme Court, Westchester County
Docket Number: Index No. 62310/2017
Judge: William J. Giacomo
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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.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMPLIANCE PART

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MAIN STREET AMERICA ASSURANCE COMPANY a/s/o A&F PARTNERS,

Plaintiff,

-against-

PERSICO CONTRACTING & TRUCKING INC., PCT CONTRACTING, LLC and A&J CIANCIULLI, INC., PCI INDUSTRIES CORP.,

Defendants.

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DECISION & ORDER

Index No. 62310/2017
Motion Date: Nov. 15, 2019

Seq. Nos. 3, 4

GIACOMO, J.

The following papers were read on the motion by defendant PCI Industries Corp. ("PCI") (Motion Seq. No. 3) for an order granting PCI summary judgment dismissing the complaint and any and all cross claims asserted against it pursuant to CPLR 3212; and for such other and further relief as this Court deems just, equitable, and proper.

Notice of Motion - Affirmation in Support - Exhibits A - P
PCT's Affirmation in Opposition - Exhibits A- B
Reply Affirmation
NYSCEF File

The following papers were read on the motion by defendant A&J Cianciulli, Inc. ("A&J") (Motion Seq. No. 4) for an order, inter alia, granting it summary judgment dismissing the complaint and any and all cross claims asserted against it pursuant to CPLR 3212 and granting it summary judgment on all its cross claims asserted against defendants for contractual and common law indemnification; and for such other and further relief as this Court deems just, equitable, and proper.

Notice of Motion - Affirmation in Support - Exhibits A - V
Memorandum of Law in Support
Main Street America's Affirmation in Partial Support
PCT's Affirmation in Opposition - Exhibits A- B
Reply Affirmation
NYSCEF File

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Upon the foregoing papers, these motions are determined as follows:

This action arises out of an incident occurring on September 25, 2015, when a crane truck, located on Ashford Avenue in Ardsley, New York, accidentally rolled down the street and came into contact with a building located at 301 Ashford Avenue, owned by plaintiff-subrogee A&F Partners. Con Edison retained defendant PCT Contracting Corp. ("PCT Contracting" or "PCT") as the contractor to perform the work. Defendant PCT Contracting rented the subject crane from defendant A&J. Defendant Scott Graham was the operator of the crane (the "Project").

The plaintiff-subrogor Main Street America Assurance Company commenced a subrogation action on or about August 15, 2017, with the filing of its summons and complaint on or about August 15, 2017. Issue was joined on or about October 19, 2017, when defendant A&J filed its answer. PCT Contracting filed an answer to the complaint with cross claims on November 27, 2017. PCI filed its answer and with cross claims on or about August 22, 2018. PCT served its answer to PCI's' cross claims on or about August 24, 2018. This matter was consolidated for purposes of joint discovery and trial with *Garcin v Graham, et al.* (Index No. 53741/2016) by so-ordered stipulation entered on March 23, 2018, by the Supreme Court (Lefkowitz, J.). After discovery was completed, a note of issue was filed on or about July 9, 2019.

Motion Sequence No. 3

On or about August 21, 2019, PCI moved for summary judgment. PCI argues that it is entitled to summary judgment because it was not involved in the Project. PCI argues that it did not perform or contract to perform any work related to the Project, it was never present on the Project site, and did not provide any service or equipment for the Project. PCI argues that its name was mistakenly written on the crane rental agreement, instead of PCT. Thus, PCI argues that it did not, and could not, owe any duty to plaintiff or any of the other parties nor could it have been responsible for the crane rolling down the street or any subsequent damages. Accordingly, PCI contends that the complaint and any and all cross claims asserted against it should be dismissed. Notably, only PCT opposed the motion.

A party seeking summary judgment bears the initial burden of affirmatively demonstrating its entitlement to judgment as a matter of law (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). "Once this showing has been made . . . the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Here, PCI has demonstrated its entitlement to judgment as a matter of law. PCI

proffered, inter alia, the deposition testimony of many party witnesses in support of its argument that it had no involvement in the Project. PCI clearly demonstrated that it did not own or rent the crane or any equipment at the project, did not hire defendant Scott Graham, did not have any notice of any alleged deficiencies or dangerous conditions and did not have any duty to inspect, supervise or monitor the project.. The fact that PCT ordered and rented the crane for the Project was established by the testimony of PCT Contracting's own employees Michael Basilone and Manuel Perez, as well as its former Chief Financial Officer Richard Mach. Further, Manuel Perez testified that he executed the rental agreement for the crane, the Bare Rental Agreement, as an employee of PCT Contracting. He further testified that he did not read the agreement before he signed it and failed to see that it said "PCI". Moreover, Perez testified that no one at PCI gave him permission to sign the agreement on PCI's behalf. Michael Basilone testified that he ordered the crane and that the crane rental agreement mistakenly identified PCI. Further, James Robinson, a manager for A&J, testified that he mistakenly listed "PCI" on the rental agreement. Richard Mach, PCT's form Chief Financial Officer testified that both PCI and PCT shared the same business address in Mount Vernon, New York. In fact, at the time of this accident, both PCT and PCI shared office space on the second floor at that address. Further, both PCT and PCI were owned by the same individual, Richard Persico. Mach further confirmed that Basilone would have ordered the crane, and the lease agreement should not have listed PCI. In addition, defendant Scott Graham testified that he was hired to operate the crane at the Project site. Moreover, the agreement for the crane rental when the project was completed on October 19, 2015 by PCT Contracting, listed "PCT Contracting" on it. Based upon this testimony and documentary evidence, PCI clearly established that it had no involvement or responsibility with respect to this Project, it did not owe, let alone breach, a duty to plaintiff with respect to the alleged damages.

In opposition, none of the other parties produced any proof in admissible form sufficient to establish the existence of a material issue of fact. Notably, only PCT Contracting summarily opposed the motion relying on the entry of PCI instead of PCT on the rental agreement executed by its employees. In fact, its opposition appeared in a single sentence paragraph arguing "should this Court discern an issue of fact based upon A&J's identification of it as the lessor of the crane in the Bare Rental Agreement, it's motion should be denied" (Affirmation in Opposition of David H. Schultz, Esq., at ¶ 9 [NYSCEF Doc. No. 100]). Accordingly, PCI's motion for summary judgment dismissing the complaint and all cross claims asserted against it is granted.

Motion Seq. No. 4

On or about August 22, 2019, A&J moved for summary judgment. A&J argues, inter alia, that it is entitled to summary judgment pursuant to CPLR 3212: (1) dismissing the plaintiff's complaint; (2) on all of its cross claims for common law and contractual indemnification, including all attorneys' fees incurred to date; and (3) dismissing all cross claims and counterclaims raised against it. A&J argues that it has established through documentary evidence and admissible testimony that it was merely the lessor of the subject crane, that the crane was under the sole and exclusive control of PCT at the time of the accident; and PCT

employed defendant Graham as the crane's operating engineer at the time of the accident. Therefore, A&J contends that it is entitled to the dismissal of the plaintiff's verified complaint and all cross claims asserted against it.

It has long been settled that the proponent of a summary judgment motion must make 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 (*see Alvarez v Prospect Hosp*, 68 NY2d 320 [1996]; *Winegrad v New York Univ Med Center*, 64 NY2d 851 [1985]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). It is well-settled that in order for a plaintiff to sustain a claim of common-law negligence, the plaintiff must initially establish that the defendant breached a legal duty owed to him and that the alleged negligence was a proximate cause of his injuries (*see Pulka v Edelman*, 40 NY2d 781, 782 [1976]; *Moss v New York Tel. Co.*, 196 AD2d 492, 493 [2d Dept 1993]). Whether a duty exists is a question of law for the court (*see Eiseman v State of New York*, 70 NY2d 175, 187 [1987]).

A&J has failed to establish its prima facie entitlement to summary judgment. Contrary to A&J's contentions, it has failed to demonstrate the absence of any material issues of fact. A&J offered no competent evidence that demonstrated that the accident herein was not proximately caused by a mechanical defect with the crane. A&J relied upon only the testimony of the crane operator, defendant Scott Graham who testified that he conducted a visual examination of the crane at the A&J yard on level ground. A&J also relies upon Graham's testimony that he did not hear any loud noises before the crane descended the hill prior to the accident. However, A&J's reliance on Graham's testimony is insufficient to provide this Court with conclusive evidence that mechanical failure was not the proximate cause of this accident. A&J never conducted its own independent investigation of the accident. Moreover, the investigation report prepared by Clifford Zubrycki on behalf of the New York State Department of Transportation, at the request of the Westchester County Police and Ardsley Police, indicated his observations that the crane's brakes appeared to be out of adjustment and the brake shoes appeared to be a considerable distance from the drum at one of the axles. Further, A&J failed to offer any records concerning the maintenance and inspection of the crane involved in this accident that would establish the absence of any mechanical defect that could have been the accident's proximate cause or an expert opinion that this accident could not have arisen from mechanical failure as opposed to human error.

In the absence of any evidence as to the proximate cause of this accident, A&J has failed to present this court with prima facie proof of its entitlement to summary judgment as it has not conclusively ruled out its own negligence in the ownership, maintenance and repair of the crane as the proximate cause of this accident. Accordingly, this branch of A&J's motion should be denied.

A&J also argues that it is entitled to summary judgment on its contractual indemnification claim pursuant to the terms of the parties' Bare Rental Agreement. The right to contractual indemnification depends upon the specific language of the contract (*see Sherry v*

Wal–Mart Stores E, LP, 67 AD3d 992, 994 [2d Dept 2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). In the absence of a legal duty to indemnify, a contractual indemnification provision "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" *(Hooper Assocs v AGS Computers*, 74 NY2d 487, 491 [1984]; *Alfaro v 65 West 13th Acquisitions, LLC,* 74 AD3d 1255, 1255-56 [2d Dept 2010]). "The promise [to indemnify] should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*Hooper Assoc v AGS Computers*, 74 NY2d at 491–492; see *Eldoh v Astoria Generating Co., LP*, 57 AD3d 603, 604 [2d Dept 2008]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d at 744).

Contrary to A&J's contentions, it has not established its entitlement to summary judgment. The Bare Rental Agreement contains a partial indemnification clause requiring PCT as the lessee to indemnify A&J for claims for bodily injury and/or property damage "arising in any manner out of Lessee's operation". PCT's duty to indemnify included, but was not limited to costs or expenses arising out of claims, as well as attorneys' fees.

As an initial matter, the Bare Rental Agreement was executed by an authorized representative of PCT. Incredibly, PCT now argues on this motion that its employee Manuel Perez, who was the job site foreman, was not authorized to execute the Bare Rental Agreement on its behalf. Notably, this contention is wholly contradictory to the testimony of its employees Basilone and Perez both of whom testified that Perez was authorized to sign the Rental Agreement and had in fact executed such agreements in the past. Further, Basilone, Perez and its former CFO Mach, all uncontravertedly testified that PCT ordered and rented the crane for the subject Project. Thus, contrary to PCT's contentions, the Rental Agreement was valid, binding and enforceable.

A&J argues that there were no employees of A&J at the job site. However, contrary to A&J's contention, a question of fact exists as to who was Graham's employer on the Project site. The terms of the Bare Rental Agreement appear to give PCT exclusive jurisdiction, supervision and control over the operator of the crane truck. However, despite A&J's unconvincing argument that it was under no contractual obligation to pay Graham's wages, but, only "graciously paid him out of concern that PCT would not," nonetheless, A&J did pay Graham's wages, withholding union dues, social security, Medicare, federal, state and city taxes. Further, PCT's daily time sheets did not identify Graham as one of its employees at the Project site. Further, Graham and Robinson both testified that Graham was contacted by A&J as to his assignment as a crane operator at the Project site. Thus, a determination of which entity exercised supervision or control over Graham cannot be clearly implied from the language of the indemnification provision of the Rental Agreement. Therefore, an issue of fact exists precluding a determination herein as a matter of law that PCT was vicariously liable for any alleged negligence committed by Graham.

Similarly, the branch of A&J's motion for summary judgment on its common law indemnification claims and dismissing PCT's cross claims arising out of common law

indemnification and for contribution must also be denied for the same reasons. A&J's argument in support of this branch of its motion is again based upon is contention that while it was the owner of the subject crane, Graham was not its employee and therefore it was not operating the crane truck at the time of the alleged accident. To be entitled to common law indemnification, a party is required to show that it was not negligent and that the parties from which it sought indemnification were negligent in connection with the plaintiff's accident (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 929–930 [2d Dept 2009]) or, in the absence of any negligence by those parties, that those parties had the authority to direct, supervise, and control the work giving rise to the injury (*see Benedetto v Carrera Realty Corp.*, 32 AD3d 874, 875 [2d Dept 2006]). Pursuant to the Bare Rental Agreement, the equipment and all personnel operating the equipment were under PCT's exclusive jurisdiction, supervision and control. While, the Bare Rental Agreement may provide that Graham as the crane truck's operator was under PCT's jurisdiction, supervision or control at the time of the alleged accident, testimony was given that A&J might have exercised some control or supervision over Graham inasmuch as it paid Graham's wages and was exclusively responsible for his assignment to the Project. Accordingly, an issue of fact again exists as to Graham's employment status on the Project. Further, since a question of fact exists regarding the mechanical condition of the rented crane, A&J has not demonstrated that it was not negligent as a matter of law, entitling it to summary judgment on its cross claims and against defendants on their cross claims asserted against A&J. Thus, these branches of A&J's motion must also be denied.

All other arguments raised on this motion and evidence submitted by the parties in connection thereto, have been considered by this court, notwithstanding the specific absence of reference thereto.

Accordingly, it is

ORDERED that PCI Industries Corp.'s motion (Motion Seq. No. 3) is granted in its entirety, and all claims and cross claims asserted against it are dismissed; and it is further

ORDERED that A&J Cianciulli, Inc.'s motion (Motion Seq. No. 4) is denied in its entirety; and it is further

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ORDERED that defendant PCI Industries Corp. shall serve a copy of this order with notice of entry on all parties within ten days of entry; and it is further

ORDERED that the parties shall be notified of their scheduled settlement conference date by the Settlement Conference Part.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, New York
May 6, 2020

HON. WILLIAM J. GIACOMO, J.S.C.

ALPHABETICAL MASTER LIST -2/Main Street America Assurance v. PCI Industries Corp.