

Pimentel v De Freight LLC

2021 NY Slip Op 30495(U)

February 22, 2021

Supreme Court, New York County

Docket Number: 161075/2017

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART IAS MOTION 14

Justice

-----X

FRANCISCO PIMENTEL,
Plaintiff,

INDEX NO. 161075/2017

MOTION DATE 02/16/2021

MOTION SEQ. NO. 008

- v -

DE FREIGHT LLC, NAMOR REALTY COMPANY L.L.C.,
ARCHSTONE BUILDERS LLC,

DECISION + ORDER ON MOTION

Defendant.

-----X

NAMOR REALTY COMPANY L.L.C.
Plaintiff,

Third-Party
Index No. 595883/2018

-against-

TRANSEL ELEVATOR, ELECTRIC INC. D/B/A T.E.I. GROUP

Defendant.

-----X

DE FREIGHT LLC
Plaintiff,

Second Third-Party
Index No. 595289/2020

-against-

ED TRUCK SERVICE, INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 578, 579, 580, 581, 582, 583, 584, 585

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

The motion by defendant/third-party plaintiff Namor Realty Company L.L.C. ("Namor") for summary judgment against third-party defendant Transel Elevator and Electric Inc. dba T.E.I. Group ("Transel"), defendant De Freight LLC ("De Freight") and plaintiff is granted in part.

Background

In this Labor Law action, plaintiff contends that he was hurt while off-loading materials from a delivery truck. Plaintiff worked for Transel and Namor was the owner of the job site. The accident happened when the lift gate on a truck owned by De Freight collapsed. De Freight was delivering parts for the elevator that Transel was installing at the building. Previously, the Court granted the branch of plaintiff's motion for summary judgment predicated upon Labor Law § 240(1).

In this motion, Namor moves for summary judgment on its claims for contractual indemnification, breach of contract for failure to procure insurance, common law indemnification against defendant Transel, dismissing the cross-complaint by defendant De Freight, awarding Namor summary judgment dismissing plaintiff's cause of action ground in common law negligence and Labor Law § 200.

Namor and Transel

Namor claims that it entered into a contract with Transel that required Transel to indemnify Namor from any claims arising out of Transel's work. It also claims that Transel has not procured the amount of insurance coverage required under the contract.

Transel claims in opposition that there is a question of fact as to whether plaintiff's accident arose out of work performed by Transel.

"In contractual indemnification, the one seeking indemnity need only establish that it was free from negligence . . . Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

The Court grants the branch of the motion seeking contractual indemnification against Transel. There is no question that Namor and Transel entered into an agreement that contained an indemnification provision. And plaintiff was hurt while he was working under the supervision of Transel—in fact, plaintiff was unloading parts for the elevator Transel was supposed to install in the premises owned by Namor.

Simply put, there is no way that Namor was negligent in this accident. As the Court expressed in connection with the last motion, it is unclear whether plaintiff's accident was caused, in whole or in part, by Transel or something wrong with De Freight's truck. But there is no evidence presented that plaintiff was acting under the direction of Namor.¹ It does not matter whether De Freight ultimately turns out to be responsible (as Transel's opposition suggests). The only question on this issue is whether the accident arose out of Transel's work installing the elevator (unloading elevator parts clearly qualifies) and whether Namor is free of negligence. Of course, Transel can (and does) seek recovery from De Freight because it believes De Freight is responsible for the accident. Namor is also entitled to recover defense costs and expenses from Transel, an amount that will be determined at trial (Namor did not identify or submit any evidence concerning the amount it seeks).

“Common-law indemnification is predicated on vicarious liability, which necessitates that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefits of the doctrine” (*Edge Mgt. Consulting, Inc. v Blank*, 25 AD3d 364, 367 [1st Dept 2006] [internal quotations and citations omitted]). “[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was

¹ The Court observes that plaintiff was awarded summary judgment on liability against Namor because Labor Law § 240(1) imposes strict liability on owners.

guilty of some negligence that contributed to the causation of the accident” (*Correia*, 259 AD2d at 65).

This branch of the motion is denied because the Court has not found that Transel was negligent. Therefore, common law indemnification and contribution claims cannot be granted as a matter of law.

The Court also denies the branch of the motion that sought summary judgment on the claim that Transel failed to procure insurance. Transel argues in opposition that it obtained the required insurance coverage and named Namor as an additional insured. Namor did not specifically address this issue in reply.

Namor and De Freight

Namor seeks dismissal of the cross-complaint against it by De Freight. It also seeks conditional common law contribution/indemnification against De Freight.

The Court grants the branch of the motion dismissing the cross-complaint by De Freight. As the Court previously stated, Namor was not negligent in this case. The question is whether the collapse of the lift gate was caused by something Transel did or whether the accident was caused by De Freight’s negligence; accordingly, De Freight cannot recover against Namor.

However, because there is a question about who is responsible, the Court is unable to grant common law indemnification in favor of Namor and against De Freight. It may be that a fact finder concludes that Transel is wholly to blame for the way it utilized the lift gate. Namor would not be entitled to common law indemnification from De Freight if De Freight is completely free of negligence.

Namor and Plaintiff

Namor seeks summary judgment dismissing the common law negligence and Labor Law § 200 claims against Namor. The Court grants this branch of the motion. Namor, as stated above, did not cause this accident and therefore plaintiff cannot seek a claim for negligence against Namor.

In any event, plaintiff characterizes this part of Namor’s motion as academic since he has already been awarded summary judgment on his Labor Law § 240(1) claim although plaintiff still offers opposition.

Accordingly, it is hereby

ORDERED that the motion by Namor is granted only to the extent that it is awarded summary judgment on its claim for contractual indemnity against defendant Transel, the cross-complaint by defendant De Freight against Namor is severed and dismissed and plaintiff’s common law negligence and Labor Law § 200 claims against Namor are severed and dismissed; and it is further

ORDERED that the remaining balance of Namor’s motion is denied.

Remote Conference: April 20, 2021 at 11:00 a.m.

2/22/2021
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	
<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED
<input type="checkbox"/>	SETTLE ORDER	
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	

<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
<input type="checkbox"/>	SUBMIT ORDER	
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: