

Hipp v J.C. Penney Corp., Inc.
2021 NY Slip Op 31035(U)
March 24, 2021
Supreme Court, Kings County
Docket Number: 525074/2018
Judge: Debra Silber
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS : PART 9**

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DANIEL HIPPI,

Plaintiff,

-against-

**J.C. PENNEY CORPORATION, INC.,
SCHIMENTI CONSTRUCTION COMPANY, LLC,
BCI TECHNOLOGIES, INC. and
BROOKLYN KINGS PLAZA LLC,**

Defendants.

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DECISION/ORDER

Index No. 525074/2018

Motion Seq. No. 1

Date Submitted: 1/28/2021

BCI TECHNOLOGIES, INC.,

Third Party Plaintiff,

-against-

SOUTH SHORE ALARMS, INC.,

Third Party Defendant.

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Recitation, as required by CPLR 2219(a), of the papers considered in the review of third-party defendant's motion for summary judgment dismissing the third-party complaint.

Papers	NYSCEF Doc.
Notice of Motion, Affirmations, Affidavits, and Exhibits Annexed.....	<u>27-38</u>
Affirmation in Opposition and Exhibits Annexed.....	<u>41-49</u>
Reply Affirmation.....	<u>50-51</u>

**Upon the foregoing cited papers, the Decision/Order on this application is
as follows:**

The third-party defendant moves for summary judgment dismissing the third-party complaint in this action, which arises from a workplace accident which occurred on May 14, 2018, and the resultant injuries allegedly sustained by the plaintiff.

Plaintiff was employed by movant South Shore at the time of the accident. South Shore had been contracted to install an alarm system at the J.C. Penney Store at the Kings Plaza Shopping Center in Brooklyn, NY. The premises were owned by Brooklyn Kings Plaza LLC ("Kings Plaza"). J.C. Penney was a commercial tenant. To perform renovation work, J.C. Penney retained defendant Schimenti Construction Company, LLC ("Schimenti") as the general contractor and defendant (and third-party plaintiff) BCI Technologies, Inc. ("BCI") to install the security alarm system. BCI subcontracted with movant South Shore (the third-party defendant) to do the work.

The plaintiff was injured when he fell from a ladder. His complaint alleges causes of action for common law negligence and violations of NY Labor Law §§ 200, 240 (1), and 241 (6).

BCI's third-party complaint alleges three causes of action: (1) common law indemnification; (2) contractual defense and indemnification "pursuant to the terms of its commercial general liability insurance policy"; and (3) contribution.

South Shore claims the agreement between it and BCI was just a "work order" and that this document, annexed to the motion papers as Doc. 30, does not contain an indemnification clause or an agreement to procure insurance for the benefit of BCI. The court notes that initially, South Shore claimed that plaintiff was not an employee, but was an independent contractor. South Shore was determined to be plaintiff's employer by the NY State Worker's Compensation Board (Doc 31). This conclusion is not *res judicata* with regard to the other parties in this action, just with regard to South Shore. Movant South Shore argues that, as plaintiff was South Shore's employee, and was awarded Worker's Compensation benefits, South Shore now argues that it cannot be

sued for contribution or common law indemnification at all, and it cannot be sued for contractual indemnification in the absence of a contract which provides for indemnification, unless the plaintiff sustained a grave injury, which is not applicable here.

BCI opposes the motion and BCI's counsel states in his affirmation in opposition (Doc 41) that the motion "must be denied as it is grossly premature as there has been absolutely no discovery - including the depositions of any parties - conducted to date due to the remand of the case from the United States District Court for the Eastern District to Kings County Supreme Court, the subsequent COVID pandemic and the bankruptcy of co-defendant JC Penney, resulting in the stay of this case." He also argues that if plaintiff is determined to be an independent contractor and not an employee, common law indemnification and contribution are available.

BCI's counsel provides, as an exhibit to his affirmation, a "Vendor Services Procedures and Billing Agreement" which was signed by the President of South Shore on February 18, 2009, meant to cover the work that BCI engaged South Shore to do in the future (Doc 47). Counsel also annexes a certified letter sent by counsel for South Shore's insurance company (Doc 46) dated October 10, 2019, which states in pertinent part (although this document is not in admissible form) that the company "will participate in BCI's defense under a reservation of rights. BCI may not be entitled to coverage under the Policy depending on the basis of a judgment, if any, awarded to Hipp. Moreover, should Underwriters' investigation reveal that the Policy does not cover Your potential liability to Hipp, Underwriters will no longer defend or indemnify You in the underlying action." BCI's counsel also annexes an e-mail (Doc 44) from South Shore's

insurance company adjuster dated October 15, 2019, that states (although this document is not in admissible form, either) that “[w]e have completed a coverage review and have determined that BCI Technologies is considered an additional insured under our policy and have agreed to provide a defense.” BCI has a defense at this point, but the issue of indemnification has not been determined and South Shore’s insurer has reserved its rights.

Discussion

First, the court notes that it is not prohibited from deciding this motion as a result of the automatic stay imposed by the Chapter 11 Bankruptcy filing of J.C. Penney, as the interested parties are solely in the third-party action. However, this third-party action would fall if defendant and third-party plaintiff BCI were dismissed in the main action as an improper defendant, that is, not a proper Labor Law defendant. But BCI cannot make a motion to dismiss the action as against it because the main action is stayed. Therefore, the court agrees that this motion is premature.

A proper defendant under the Labor Law is usually an owner, general contractor, or an agent thereof (see *Zapeta v 5214 15 Ave Dev. LLC*, 2021 NY Slip Op 30767[U], *12 [Sup Ct, Kings County 2021]). A subcontractor is generally not a proper Labor Law defendant unless it was the statutory agent of the owner (see *Guevara-Ayala v Trump Palace/Parc LLC*, 2021 NY Slip Op 30610[U], *15 [Sup Ct, NY County 2021]), which generally involves the party exercising supervision and control over the work (see *Domanski v Sun Moon NY LLC*, 2021 NY Slip Op 30677[U] [Sup Ct, Kings County 2021]), or where the party was actively negligent and its liability is claimed to be other

than solely vicarious. As there have been no depositions held in the main action, BCI has not been able to even determine if this argument would have merit.

Accordingly, third-party defendant South Shore's motion for summary judgment dismissing the third-party action as against it is denied as premature, without prejudice to renew after discovery is completed.

This constitutes the decision and order of the court.

Dated: March 24, 2021

ENTER :



Hon. Debra Silber, J.S.C.