

Skillwood Corp. v 267 Ainslie St. LLC
2021 NY Slip Op 31123(U)
April 7, 2021
Supreme Court, Kings County
Docket Number: 515169/17
Judge: Karen B. Rothenberg
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At an IAS Term, Part 35 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of April, 2021.

P R E S E N T:

HON. KAREN B. ROTHENBERG,

Justice.

----- X
SKILLWOOD CORP.,

Plaintiff,

- against -

Index No. 515169/17

267 AINSLIE STREET LLC, ILE CONSTRUCTION GROUP, INC., GLOBE K CONSTRUCTION CORP., WU CHEN A/K/A WOODY CHEN D/B/A INFOCUS DESIGN & PLANNING P.C., CLEAR BLUE SPECIALTY INSURANCE COMPANY,

Defendants.

----- X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) _____

85-94

Opposing Affidavits (Affirmations) _____

121-129

Reply Affidavits (Affirmations) _____

110, 112-120,

130-131

Upon the foregoing papers in this action for property damage allegedly caused by construction activities at the adjacent property, defendant Wu Chen s/h/a Wu Chen a/k/a

Woody Chen (Chen) d/b/a Infocus Design & Planning P.C. (Infocus) moves (motion sequence five) for an order, pursuant to CPLR 3212, granting summary judgment dismissing the complaint and all crossclaims asserted as against him.

Background

Plaintiff Skillwood Corp. (Skillwood), the owner of the premises at 269 Ainslie Street in Brooklyn commenced this action against 267 Ainslie Street LLC (267), the owner of the adjoining property, their contractors, engineer and architect alleging negligence resulting in property damage. The complaint asserts causes of action for negligence against defendants ILE Construction Group, Inc. (ILE), Globe K Construction Corp. (Globe K), Chen; and 267 and a cause of action against defendant Clear Blue Specialty Insurance Company (Clear Blue) for breach of an insurance policy.

Defendants 267 and its general contractor, ILE Construction Group, Inc. (ILE), collectively answered the complaint and asserted affirmative defenses and a crossclaim against Globe K, Chen and Clear Blue for indemnification and/or contribution. Defendant Chen answered the complaint and asserted several affirmative defenses and crossclaims against co-defendants for common-law indemnification and/or contribution; contractual indemnification; and breach of an insurance procurement obligation.

The Instant Motion

Chen now moves for summary judgment dismissing the complaint and the crossclaims asserted against him on the grounds that: (1) he is not a general contractor, construction manager or subcontractor and he and his company, Infocus, did not perform any construction or excavation work at the Adjoining Property; (2) Chen only rendered

professional design services (3) Chen did not own, operate, maintain, manage or control the Adjoining Property or the construction project; (4) Chen did not control the means and methods for any of the demolition, shoring, bracing or construction activities; (5) Chen did not enter into an agreement with the parties; (6) the New York City Department of Buildings (DOB) issued a violation and a Stop Work Order for the construction project because it determined that “at the time of inspection contractor was not working according to [Infocus’s] plan”; and (7) Chen does not owe a duty to any of the parties.

Chen submits an affidavit attesting that he is a licensed engineer, a principal of Infocus. Chen also submits the deposition testimony of Ori Gilead, the supervisor on the construction project for defendants 267 and ILE, who confirmed that Mr. Yaker (a nonparty) was the engineer responsible for the demolition activities, and not Chen.

Chen alleges that Infocus only supplied architectural and engineering design services for the project. In this regard, he asserts:

“Infocus entered into an agreement [dated May 26, 2015] with Bobby Michaeli (a non-party to this matter) who is listed as owner of the Adjacent Premises . . . for architectural and engineering design services related to a new, 4 story, 5 unit residential building . . .” I signed the contract on behalf of Infocus as Principal. I did not enter into the Infocus Agreement in my individual capacity.

* * *

“Infocus’ scope of work included architectural and engineering design services for the new building at the Adjacent Premises only. Infocus also performed limited inspections. Construction Site Supervision and or

construction management were specifically excluded from Infocus' scope of work."

Chen submits a copy of the agreement and notes that it "does not contain any provision requiring that Infocus defend, indemnify, hold harmless or insure the plaintiff or co-defendants in this litigation."

Skillwood's Opposition

Skillwood, in opposition, argues that CHEN cannot deny responsibility by saying someone else did the actual work because Chen's contract "makes clear his responsibility for all aspects of design of the project . . ."

Skillwood asserts that Chen testified at his deposition that in addition to providing design services he inspected the progress of the project and reported to the DOB. When asked at deposition "[d]id you certify to the city in this technical report that you would make sure that the excavation, the sheeting, shoring and bracing would be done in accordance with your plans?" Chen replied "yes." Chen further testified that when the contractor finished the work he conducted a "TRI Inspection" to "make sure they're building according to the plan." Skillwood further notes Chen's testimony that pile driving the steel beams approximately 27 feet into the ground, three feet from the property line, was performed by the contractors before Chen conducted a "Pre-Construction Survey" of the excavation site and Plaintiff's Property. Chen testified that during the excavation pile driving stopped because there was "refusal" below ground at the location of the piles and the adjacent neighbor's sidewalk cracked.

Skillwood argues that “New York will impose liability on architects for dangers created when contractors execute their designs.” Skillwood asserts that at his deposition “CHEN admitted that he knew and intended that his plans were to be followed and relied upon by the contractors performing the construction of the [Adjoining Property].” Skillwood argues that “the present case presents the issue of whether the architect[’]s plans, by their very nature, endangered Plaintiff, and thus launched a force or instrumentality of harm.” Skillwood argues:

“CHEN did, by his negligence, create a dangerous condition by his design, which launched a force or instrument of harm, i.e. the construction at 267’s premises. He testified that he knew that he was responsible to see that his plans were followed, and that his design would be relied on in the course of the project. He designed a project with excavation admittedly eleven feet deep, without performing the required pre-construction survey of the neighboring property’s condition.

* * *

“CHEN’s plans clearly called for excavation at least to the eleven feet depth of the basement, and his separate contract called for him to perform the pre-construction survey. By designing the excavation, and then not performing the required inspection until after work had begun, he clearly launched the instrumentality, i.e. excavation causing vibrations when pile driving encountered the ‘refusal’ below ground, which damaged Plaintiff’s adjoining premises.”

Skillwood submits an affidavit from Oscar M. Lehmann, a professional engineer, who submitted his October 31, 2017 expert report regarding the damages sustained to Plaintiff’s Property.

Defendants 267 and ILE's Opposition

Defendants 267 and ILE, in opposition, argue that “there are clear questions of fact relating to Wu Chen’s duty and responsibility for the Support of Excavation Work at [the Adjoining Property] which plaintiff alleges caused and/or contributed to the damages at [Plaintiff’s Property].” In addition, defendants assert that “Chen was also the design professional – the Architect and Engineer on the project, and created the Support of Excavation Plans which the Contractors were required to follow.” Defendants argue that Chen, as the design engineer who drafted the “Support of Excavation Plans,” determined that no underpinning was required to protect Plaintiff’s Property. Defendants submit an affidavit from Robert Michaeli attesting that he is a member of 267 and that he executed the contract with Chen on 267’s behalf.

Defendants note that “[i]n his deposition testimony, Mr. Chen acknowledges that his role as the Special Inspector is a different ‘additional job’ than that of the Design professional who created the Support of Excavation drawings . . .” Defendants argue that “Chen and Infocus agreed to be responsible for not only the design of the support of excavation structures, but also, for the inspection of the site during the construction of [the Adjoining Property], to ensure that the work was being completed in compliance with the [support of excavation] design documents.” Defendants assert that “[i]f the contractor’s work was not in compliance with the plans, then Wu Chen bears culpability for failing to ensure compliance” and “[w]hether Wu Chen performed [his] responsibility as the Special Inspector is a clear question of fact which should be decided by a jury.”

Defendants submit an affidavit from Sarah G. Byer, a structural engineer, who provides an expert report concluding that Chen/Infocus prepared the support of excavation drawings that were used for the excavation and underpinning and Chen/Infocus were contractually responsible for conducting “Special Inspections” for the sheeting, shoring and bracing.

Defendants also argue that Chen’s summary judgment motion to dismiss their crossclaims for indemnification and contribution should be denied because “[t]o date, no determination has been made concerning the extent of any defendants’ negligence, *if any* . . .” and “the degree of responsibility of defendant, *if any*, remains outstanding . . .”

Chen’s Reply

In reply, Chen reiterates that Skillwood’s negligence claim must be dismissed because there is no privity of contract or the functional equivalent between him and any party to this action, since Infocus’s contract was with Bobby Michaeli, as owner of the Adjoining Property. Chen further argues that “[p]laintiff incorrectly asserts that the Administrative Code imposes strict liability upon [him]” as it only imposes strict liability on the owner, general contractor and subcontractors who perform the excavation.

Chen contends that he cannot be subject to liability under the Court of Appeals’ holding in *Espinal v Melville Snow Contractors, Inc.*, (98 NY2d 136 [2002]), because he did not control or direct any of the construction activities and he did not have exclusive control over the instrumentalities that allegedly damaged Plaintiff’s Property. Finally,

Chen contends that summary judgment dismissing the claims asserted against him is warranted because Skillwood failed to submit expert proof that he was negligent.

Discussion

“[T]he 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” (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “It is well-settled that on a motion for summary judgment, the moving party has the initial burden of demonstrating, by admissible evidence, its right to judgment” (*Bendik v Dybowski*, 227 AD2d 228, 228 [1996]). “To obtain summary judgment it is necessary that the movant establish his cause of action or defense ‘sufficiently to warrant the court as a matter of law in directing judgment’ in his favor (CPLR 3212, subd. [b]), and he must do so by tender of evidentiary proof in admissible form” (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 NY2d 1065, 1067 [1979]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In *American Security Insurance v Church of God of St. Albans*, (131 AD3d 903 [2015]), a factually similar case, an owner of a building which sustained damage during excavation of the adjacent building sued the owner of the adjacent building, the contractor and the owner’s design architect (Gebhard). The Second Department held that the design architect’s contractual obligations did not give rise to negligence liability:

“Gebhard’s contractual obligations to the Church do not give rise to tort liability in favor of the plaintiffs, *as his contract with the owner did not specifically impose any duties with*

respect to the excavation phase of the project and expressly stated that Gebhard did not have control over, and was not responsible for, the construction means and methods or the safety precautions taken in connection with the work . . . In opposition, the plaintiffs failed to raise a triable issue of fact, as Gebhard’s involvement in discussions related to the means and methods to be employed in the excavation, and his general responsibilities to visit the site during construction to monitor compliance with the contract, do not raise an issue of fact as to whether he entirely displaced the owner’s duty to maintain the premises . . .” (131 AD3d at 905 [emphasis added]).

Essentially, the Second Department held that an architect/engineer’s potential liability for negligence during excavation work depends on the nature and extent of the specific contractual duties undertaken and performed by the architect/engineer (*see also* 492 *Kings Realty, LLC v 506 Kings, LLC*, 105 AD3d 991, 994 [2013] [holding that design architects who were not contractually retained and did not provide “any services related to the methods utilized to protect the plaintiffs’ property” were entitled to summary judgment dismissing the complaint because they sufficiently demonstrated that “*in the performance of their contractual obligations*, [they] did not launch a force or instrument of harm by creating or exacerbating a dangerous condition”] [emphasis added]).

Unlike the design architect in the foregoing cases, Chen is not entitled to summary judgment dismissing Skillwood’s negligence cause of action because Chen’s contract with the owner of the Adjoining Property specifically imposed duties upon Chen regarding the excavation phase of the project. Contrary to Chen’s assertions, he was not a passive design architect who had nothing to do with the excavation work at the

Adjoining Property. In addition to providing design and engineering services specifically for the excavation – including the decision to have no underpinning – Chen admittedly contracted to inspect the excavation work as “Special Inspector,” to ensure that the sheeting, shoring and bracing were done properly and to send certified reports to the DOB in that capacity. The record reflects that Chen was contractually bound to design all aspects of the excavation, to serve as the “Special Inspector” for the excavation and he admittedly failed to conduct a “Pre-Construction Survey” *before* the contractors began pile driving steel beams approximately 27 feet into the ground a mere three feet from Plaintiff’s Property. Chen’s contractual duties and his role as “Special Inspector” raise questions of fact that preclude summary judgment, including, whether Chen’s excavation design plans, which dispensed with the need for underpinning, contributed to the Incident and whether the Incident could have been avoided if Chen had performed a Pre-Construction Survey of the excavation site and Plaintiff’s Property before pile driving began. Because Chen’s liability for negligence has yet to be determined, dismissal of defendants’ crossclaims for indemnification and contribution is not warranted. Accordingly, it is

ORDERED that Chen’s summary judgment motion (in mot. seq. five) is denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.