

Polanco v City of New York
2021 NY Slip Op 33157(U)
December 6, 2021
Supreme Court, Queens County
Docket Number: Index No. 719020/2018
Judge: Tracy Catapano-Fox
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

-----X
JUAN POLANCO,

Plaintiff,

-against-

THE CITY OF NEW YORK and THE PORT
AUTHORITY OF NEW YORK and NEW JERSEY,

Defendants.

-----X
THE PORT AUTHORITY OF NEW YORK and
NEW JERSEY,

Third-Party Plaintiff,

-against-

CRISTI CLEANING SERVICE CORP.,

Third-Party Defendant.
-----X

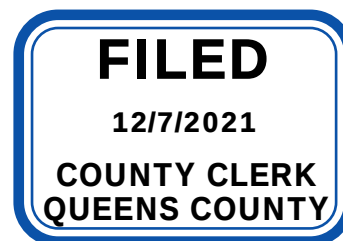
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Part 6

Motion Date: September 17, 2021

Calendar No. 35

Sequence No. 2



The following papers numbered 1 to 13 read on this motion by THIRD-PARTY DEFENDANT CRISTI CLEANING SERVICE CORP.'s motion for summary judgment and dismissal pursuant to CPLR §3212, and this cross-motion by DEFENDANT/THIRD-PARTY PLAINTIFF PORT AUTHORITY OF NEW YORK AND NEW JERSEY for summary judgment as to third-party defendant's contractual indemnification for all claims.

Papers
Numbered

Notice of Motion, Affirmation, Exhibits.....1-4
Notice of Cross-Motion, Affirmation, Exhibits.....5-8
Cristi's Affirmation in Opposition, Exhibits.....9-11
Port Authority's Reply Memorandum.....12-13

Upon the foregoing papers it is ordered that these motions are determined as follows:

Third-Party Defendant Crist Cleaning Service Corp.(hereinafter referred to as “Cristi”)'s motion for summary judgment and dismissal pursuant to CPLR §3212(b) is denied, and defendant/third-party plaintiff Port Authority of New York and New Jersey's cross-motion for summary judgment pursuant to CPLR §3212 is denied.

Plaintiff commenced this action for personal injuries sustained on March 8, 2018, when he slipped and fell while crossing the pedestrian bridge above the JFK expressway. Plaintiff filed the Summons and Complaint on December 12, 2018, and issue was joined on February 27, 2019. Defendant/Third-Party Plaintiff filed a third-party Complaint against third-party defendant Cristi on February 28, 2019, and Cristi filed an Answer on April 19, 2019.

Cristi argues that summary judgment is warranted because plaintiff was not working for Cristi at the time of his accident, and Cristi was not responsible for snow removal on the pedestrian bridge. Cristi presents the pleadings, deposition testimony of the parties, an affidavit of merit from Cristi employee Anthony Ciuffo, and the contract and insurance policy for Cristi to support its motion. Plaintiff testified that he left work and walked across the pedestrian bridge when he slipped and fell on snow. William Lachnicht from defendant/third-party plaintiff testified that Cristi was not responsible for snow or ice removal on the pedestrian bridge but instead the BBA Group was responsible to remove snow and ice from the bridge at Building 14. Cristi also presented Sonya Rendon who testified with regard to the initial contract, and contract extension between Cristi and defendant/third-party plaintiff, and that the contract directed Cristi to perform general cleaning, including snow and ice removal, at JFK Airport, from November 1, 2016 through September 30, 2020. Cristi argues that since plaintiff was not working for it at the time of plaintiff's accident, and Cristi was not responsible for snow and ice removal on the pedestrian walkway, it cannot be liable for plaintiff's injuries.

Cristi further argues that it cannot be liable for contractual indemnification because plaintiff was not acting within the scope of his employment at the time of the accident. Cristi argues that based upon plaintiff's deposition testimony, plaintiff had finished working for Cristi and was walking home when he slipped and fell on snow on the pedestrian bridge. Cristi argues that Anthony Ciuffo's affidavit established it fulfilled its duties by procuring additional insurance and naming defendant/third-party as an additional insured, and therefore the breach of contract claim must be dismissed.

Defendant/Third-Party Plaintiff opposed Cristi's motion and cross-moved for summary

judgment, arguing that it is entitled to contractual indemnification from Cristi. It argues that the contractual indemnification provision of their contract was triggered because plaintiff was leaving his job with Cristi at the airport, and therefore plaintiff's accident arose out of Cristi's operations at the airport. Defendant/Third-Party Plaintiff further argues that Cristi is liable for contractual indemnification regardless of whether Cristi was negligent. Finally, it argues that an inquest should be held if defendant/third-party plaintiff is held liable for plaintiff's injuries, so that Cristi can indemnify it for damages.

Pursuant to CPLR 3212, "[a] motion [for summary judgment] shall be granted if . . . the cause of action . . . [is] established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party." (CPLR 3212 [b]; *Rodriguez v. City of New York*, 31 N.Y.3d 312 [2018].) The motion for summary judgment must also "show that there is no defense to the cause of action." (*Id.*). The party moving for summary judgment must make a *prima facie* showing that it is entitled to summary judgment by offering admissible evidence demonstrating the absence of any material issues of fact and it can be decided as a matter of law. (CPLR § 3212 [b]; see *Jacobsen v New York City Health and Hosps. Corp.*, 22 N.Y.3d 824 [2014]; *Brill v City of New York*, 2 N.Y.3d 648 [2004].) In deciding a summary judgment motion, the court does not make credibility determinations or findings of fact. Its function is to identify issues of fact, not to decide them. (*Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 [2012].) Once a *prima facie* showing has been made, however, the burden shifts to the non-moving party to prove that material issues of fact exist that must be resolved at trial. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980].)

In a premises liability case, a defendant real property owner, or a party in possession or control of real property who moves for summary judgment can establish its *prima facie* entitlement to judgment as a matter of law by showing that it neither created the allegedly dangerous or defective condition nor had actual or constructive notice of its existence. (*Chang v. Marmon Enters., Inc.*, 172 A.D.3d 678-679 [2d Dept. 2019].)

Cristi established a prima facie entitlement to summary judgment, in that it established plaintiff was not working at the time of his accident and Cristi was not liable for negligent removal of snow and ice on the pedestrian bridge. However, defendant/third-party plaintiff raised triable issues of fact as it established that plaintiff's accident occurred on the bridge plaintiff regularly used to go to, and leave work, and therefore there are issues of fact as to whether plaintiff's injuries occurred in the operation of Cristi's activities. (See *DeCoursey v. Briarcliff Cong. Church*, 104 A.D.3d 799 [2d Dept. 2013].) Based upon the evidence presented, there are issues of fact as to whether Cristi must indemnify defendant/third-party plaintiff according to their contract, and

summary judgment is denied.

Defendant/Third-Party Plaintiff failed to establish a prima facie entitlement to summary judgment, as it failed to demonstrate it was free from liability for negligent snow removal. As Lachnicht's deposition demonstrated defendant/third-party plaintiff was responsible for snow removal in the area where plaintiff fell, it failed to demonstrate that it did not act in a negligent manner in removing snow and ice that caused plaintiff's fall. (*See Anderson v. United Parcel Serv.*, 194 A.D.3d 675 [2d Dept. 5/5/2021].)

Accordingly, third-party defendant Cristi's motion for summary judgment pursuant to CPLR §3212 is denied, and defendant/third-party plaintiff Port Authority of New York and New Jersey's cross-motion for summary judgment pursuant to CPLR §3212 is denied.

This constitutes the decision and Order of the Court.

Dated: December 6, 2021



Tracy Catapano-Fox, J.S.C.

