Olmann v RCB$_I$ Nominee, LLC
2022 NY Slip Op 31488(U)
May 9, 2022
Supreme Court, New York County
Docket Number: Index No. 152429/2018
Judge: Frank P. Nervo

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM PART IV

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DANIEL OLMANN, Index No. 152429/2018

Plaintiff,

-against-

RCB1 NOMINEE, LLC, TISHMAN CONSTRUCTION CORPORATION, and TISHMAN CONSTRUCTION **DECISION AND ORDER**

Defendants, Mot. Seq. No. 006

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RCB1 NOMINEE, LLC, TISHMAN CONSTRUCTION CORPORATION, and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third-Party Plaintiffs,

-against-

FRED GELLER ELECTRICAL, INC.,

Third-Party Defendant.

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FRANK P. NERVO, J:

Third-party defendant, Fred Geller Electrical, Inc. (hereinafter "FGE"), moves for summary judgment in its favor, and the concomitant dismissal of all claims, cross-claims and counterclaims against it.

Movant asserts independence from liability inasmuch as:

a) It did not own the property under construction;

b) It was neither the general contractor nor construction manager at this project;

c) Its retention on this project was limited to its expertise as core and shell electrical contractor;

d) Nothing in its contract obligate it to drill and then cover any holes in the subject plywood being employed as a safety device and, in fact, FGE was prohibited from drilling any holes in any plywood and it did not drill any holes in any plywood;

e) Nothing in its contract, or by any other assumed obligation, caused FGE to engage in any role to assure the safety of any aspect of this construction, save that of its own employees;

f) FGE did nothing to contribute to plaintiff's accident, nor to any of plaintiff's subsequent injuries or other losses;

g) Any contractual indemnity applies to its own negligent acts or omissions where, and if ever, present, and not to any negligence on the part of others, including third-party plaintiffs.

h) FGE is not a statutory agent under the Labor Law as it had no authority to supervise and control any part of this construction project, nor any of the contractors or subcontractors or their employees (including plaintiff) thereat, other than its own employees.

In opposition to this motion, third-party plaintiffs, RCB1 Nominee (hereinafter "RCB1") and Tishman Construction Corporation (hereinafter "Tishman"), posit FGE transmuted from its role as electrical subcontractor to a statutory agent under the Labor Law as FGE determined the location where holes were to be created to facilitate FGE's subsequent installation of electrical equipment, and FGE would have an employee present when another contractor (known as a lather) would do the actual cutting out of the holes.

The interested reader is referred to this Court's Decision and Order of Motion Sequence 005 for pertinent factual reference.

The Court finds the activities of FGE to be nothing more than that necessary to comply with its agreement to install electrical conduit, in coordination with the other myriad trades at the site. Labor Law § 240(1) is well-recognized as intending to hold owners, general contractors, and construction managers strictly liable for their negligence or other shortcomings in the performance of their authority and supervision of a construction project as a whole. To assert the activity of the limited nature as here engaged in by FGE would elevate any subcontractor to the status of Labor Law statutory agent, would so distort the meaning and intent of Labor Law § 240(1) as to

render it meaningless. While in the course of litigation an aggressive effort to attribute or disseminate tortfeasor responsibility among as many parties as possible is often warranted, the attempt here by third-party plaintiffs to effectively imbue itself with Labor Law indemnity by a peripherally engaged subcontractor is so grossly without merit that any number of magistrates would deem such argument sanctionable, and rightly so. Perhaps worse still, advancing an argument so devoid of merit casts a very wide shadow of doubt upon all other arguments advanced on behalf of that party, if not the advocate. Be that as it may. . .

Third-party plaintiff also asserts a number of contractual terms it would prefer the Court read to expand FGE's responsibilities to that, again, of a statutory agent responsible for the safe operation of this entire construction project. This Court declines the invitation to read FGE's contract so expansively as, frankly, a bridge too far on the never-ending quest of litigators to inculpate other parties to share in or assume tortfeasor liability.

An objective reading of the terms cited by third-party plaintiff must start from the basic premise of contract law: agreements are to be construed in accordance with the parties' intent; the best evidence of what the parties intend

is what they provide in their writing; and in construing a contract, an interpretation that gives effect to all the terms of an agreement is preferable to one that ignores terms *or accords them an unreasonable interpretation*. (See *Katz v. One Union Square East Condominium*, 2009 NY Slip Op. 52477(U) affd 83 A.D.3d 501 [1st Dept. 2011]; *Perlbinder v. Board of Managers of 411 East 53rd Street*, 65 A.D.3d 985, App. Div. 1st Dept. 2009). Emphasis supplied.

Here, each of the contractual terms relied on by third-party plaintiffs require unreasonable or distorted interpretations to extend or distend their unmistakable intent to facilitate FGE's work and/or FGE's coordination of its work with that of the general contractor (Tishman) and other trades at the site. E.g., ". . .[O]penings or leave outs required for subsequent installation of [FGE's] work must be brought to the attention of the Construction Manager. . ." and "[FGE to] provide protection necessary to safeguard its own work, as well as the Work of other trades, from damage by its own operations," and "[FGE to] provide all material, labor protection, layout and supervision necessary for furnishing and installation of all specified and related work."

It would be error to apply to these terms any interpretation more than agreement by FGE to do its own contracted-for electrical installation work

safely and with due regard for the safety of the property and persons of other trades in FGE's vicinity. Further, and particularly pertinent, is the requirement that FGE notify the construction manager (third-party plaintiff) of any openings created, providing a mechanism that specifically puts third-party plaintiff construction manager on notice of the creation of a dangerous condition that may warrant the third-party plaintiff-construction manager's further attention in its professional capacity, and under its authority and responsibility at the site. The contract required nothing further of FGE.

Third-party plaintiff's further assertions of FGE responsibilities for violations of Labor Law § 241(6) and cited industrial codes must fail as FGE has no liability as statutory agent of the owner or general contractor, or otherwise.

That FGE may be held responsible under Labor Law § 200 for a failure to abide by the terms of the cited "Tishman Construction Safety Guidelines," including any requirement of FGE "to ensure that all openings or holes in the floor. . .shall be covered. . ." and et cetera, is vitiated by the deposition testimony of third-party plaintiff's own Superintendent at the location, Mr. Robert Kunzelman, that the subject holes while bored through the plywood for the future use by FGE, at the very time of plaintiff's accident "The holes [had]

to stay exposed, the [electrical] conduit has to stay exposed so the reinforcement bars can run around it. . ." (Deposition Tr. at p. 58 – NYSCEF Doc. No. 155); those reinforcement bars were being installed by plaintiff and his coworkers at the time of plaintiff's accident. There is no evidence of any other dangerous condition having been caused or created by FGE, or that contributed to plaintiff's accident, that would rise to FGE liability under Labor Law § 200, or otherwise.

In view of the foregoing, there is no basis for any party to seek indemnity from FGE. As to any assertion of contractual indemnity, it is axiomatic no party may be contractually indemnified for its own negligence.

It is therefore:

ORDERED any and all claims, third-party claims, and cross-claims asserted against third-party defendant FGE, arising out of the allegations of the plaintiff's complaint, are dismissed with prejudice, without costs.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

New York, New York
May 9, 2022

E N T E R:

FRANK P. NERVO,
Justice Supreme Court