

Mammadova v Pace Eng'g P.C.

2022 NY Slip Op 31778(U)

June 3, 2022

Supreme Court, Kings County

Docket Number: Index No. 518541/2016

Judge: Wayne P. Saitta

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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on the 3rd day of June, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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SAMIRA MAMMADOVA,

Plaintiff,

Index No. 518541/2016

-against-

PACE ENGINEERING P.C., 176 BROADWAY OWNERS CORP., KEY REAL ESTATE ASSOCIATES, LLC, CAPITAL ONE, N.A., CAPITAL ONE BANK (USA) N.A., CAPITAL ONE FINANCIAL CORPORATIONS, YORK RESTORATION CORP., YORK RESTORATION MGMNT. CORP., YORK RESTORATION MGMT. CORP., CONSOLIDATED SCAFFOLDING INC., and SEVENTH AVENUE ASSOCIATES, L.P.,

Defendants.

DECISION AND ORDER
MS #11 and MS #12

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The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>29-231, 246, 252-253, 278-279</u>
Answering Affidavit (Affirmation)	<u>248, 250, 280-281, 289-291, 284-286, 301-303</u>
Reply Affidavit (Affirmation)	<u>299, 296, 305-307</u>
Supplemental Affidavit (Affirmation)	
Pleadings – Exhibits	<u>232-245, 292-295, 254-277, 304</u>
Stipulations – Minutes	
Filed Papers	

Defendant YORK RESTORATION CORP. (Defendant YORK) moves for an Order granting summary judgment dismissing all claims and cross-claims as against it. Defendant CONSOLIDATED SCAFFOLDING INC. (Defendant CONSOLIDATED) also

moves for an Order granting summary judgment dismissing all claims and cross-claims as against it.

Plaintiff alleges that she tripped and fell on loose pipes on a sidewalk in front of a Capital One Bank located at 176 Broadway, New York, New York on September 27, 2016. Plaintiff stated that the pipes were made of metal and were similar to pipes from nearby metal scaffolding.

Defendant 176 BROADWAY OWNERS CORP. (Defendant 176 BROADWAY) owns the building at 176 Broadway, (the Premises). Defendant KEY REAL ESTATE ASSOCIATES (Defendant KEY) manages the Premises. Defendants CAPITAL ONE, N.A., CAPITAL ONE BANK (USA) N.A., and CAPITAL ONE FINANCIAL CORPORATION (Defendant CAPITAL ONE) leased the Premises.

Defendants 176 BROADWAY and KEY retained Defendant YORK RESTORATION MGMT. CORP. (Defendant YORK) to do facade restoration at the Premises. Defendant CONSOLIDATED SCAFFOLDING INC. (Defendant CONSOLIDATED) was retained to construct a sidewalk shed in front of the Premises. Defendant CONSOLIDATED used scaffolding pipes to support the deck of the sidewalk shed it constructed.

Defendant YORK's motion

Defendant YORK moves for summary judgment dismissing Plaintiff's complaint as against it arguing that it cannot be liable for Plaintiff's accident because it had no duty to Plaintiff and did not breach any duty owed to Plaintiff. Defendant YORK also moves for summary judgment dismissing co-Defendants cross-claims for contractual and common-law indemnification and contribution arguing that since it is not liable to Plaintiff, it cannot be held liable to co-Defendants.

Plaintiff only opposes that part of Defendant YORK's motion seeking to dismiss the cross-claims by co-Defendants. Plaintiff does not oppose that portion of Defendant YORK's motion seeking to dismiss the Complaint as against it. Therefore, Plaintiff's claims as against YORK must be dismissed.

Defendant CONSOLIDATED's cross-claims against Defendant YORK must be dismissed because while Defendant CONSOLIDATED contested some of the facts alleged by Defendant YORK, it did not oppose Defendant YORK's request for summary judgement.

Defendants 176 BROADWAY and KEY do oppose Defendant YORK's motion to dismiss their claims for contractual and common-law indemnification and contribution against YORK.

Defendant YORK argues that it cannot be liable to Defendants 176 BROADWAY and KEY for contractual indemnification since YORK was not retained to maintain or repair the sidewalk shed erected by Defendant CONSOLIDATED. And that the accident was not caused by its work.

The contract between Defendants 176 BROADWAY and KEY and Defendant YORK requires YORK to defend and indemnify 176 BROADWAY and its agents under specific circumstances.

“The right to contractual indemnification depends upon the specific language of the contract” (*Burgos v. 14 East 44 St., LLC*, 203 AD3d 688, 628-629 [2d Dept 2022], quoting *O'Donnell v. A.R. Fuels, Inc.*, 155 AD3d 644, 645 [2d Dept 2017]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*id.*, quoting *George v. Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2d Dept 2009]). “A party that moves

for summary judgment dismissing a claim for contractual indemnification must make a prima facie showing that it was not contractually obligated to indemnify the party asserting the indemnification claim” (*id.*). “This may be accomplished by showing that, under the circumstances, an indemnification clause in a contract between the parties either was not triggered or was otherwise inapplicable” (*id.*)

Here, the indemnification provision in paragraph 14(a) of the contract between Defendants 176/KEY and Defendant YORK provides in part that the contractor shall indemnify the owner and its managing agent to the extent such Claims are caused by any negligent or wrongful act, error or omission of the Contractor, its officers, partners and employees.

This contract provision is triggered by each party’s own negligence. However, there are questions of fact as to Defendant YORK’s negligence.

Judge Martin in his decision of October 11, 2018, denied summary judgment finding, “at this juncture, questions of fact exist, including, but not limited to, how the pipe scaffolding came to be on the sidewalk and whether, pursuant to the terms of the parties’ contract, York maintained responsibility for the safety of the sidewalk area where plaintiff fell, despite the fact that Consolidated constructed the sidewalk shed/bridge”.

Judge Martin based his finding on paragraph 26 of the Rider to the Contract between Defendant 176 BROADWAY and YORK which provided that “all safety outriggers, netting, barriers and scaffolding must be designed and constructed so as to prevent falling and bouncing material from landing on the roof of any adjacent buildings, courtyards, or on the sidewalk or street”.

Paragraph 26 also provided that “(c) The Contractor shall conduct a daily job hazard analysis of the Work site and shall undertake all reasonably necessary procedures

and precautions to ensure the safety of this job and provide reasonable protection to prevent injury, damage or loss to all persons and property at the Work site or adjacent thereto and all areas inside and outside the Building”.

Thus, there remain questions of fact as to whether YORK was negligent in failing in its duty to 176 BROADWAY and KEY, to ensure the job site was kept in a safe condition which preclude dismissing 176 BOARDWAY and KEY’s claim for contractual indemnification against it.

For the same reasons, that part of Defendant YORK’s motion seeking to dismiss Defendants 176 BROADWAY and KEY’s common law indemnification and contribution cross-claims must also be denied.

Defendant CONSOLIDATED’s motion

Defendant CONSOLIDATED moves for summary judgment dismissing Plaintiff’s complaint as against it and co-Defendants’ cross-claims as against it arguing that: (1) it did not own or control the sidewalk where Plaintiff was allegedly injured; (2) it did not have an obligation to maintain said sidewalk or owe a duty of care to Plaintiff; (4) it did not undertake any actions or fail to take any actions that were negligent or were proximately related to Plaintiff’s accident; and/or (5) it lacked notice of the alleged defect.

Plaintiff opposes Defendant CONSOLIDATED’s motion arguing that (1) CONSOLIDATED built the sidewalk shed using the same type of pipes that Plaintiff tripped over and they had a continuing duty to keep the structure and the adjacent sidewalk in a reasonably safe condition; (2) CONSOLIDATED has failed to eliminate the issue of fact as to whether it left behind pipes, or that the pipes involved in Plaintiff’s

accident were present on the sidewalk as a result of its negligence; and (3) CONSOLIDATED launched the instrument of harm involved in Plaintiff's accident.

Defendants 176 BROADWAY and KEY also oppose Defendant CONSOLIDATED's motion for the same reasons set forth in Plaintiff's opposition.

As a preliminary matter, Defendant CONSOLIDATED owed no duty to Plaintiff to keep the sidewalk clear of obstructions.

Further, CONSOLIDATED did not undertake the responsibility to maintain the sidewalk shed once erected.

The contract between Defendant CONSOLIDATED and Defendant 176 BROADWAY for CONSOLIDATED to furnish, erect, and dismantle a sidewalk bridge at the Premises specifically excluded maintenance from CONSOLIDATED's responsibilities

Additionally, Section 3307.6.5.3 of the NYC Administrative Code states "Sidewalk sheds shall be maintained and used by the general contractor, or where there is no general contractor, the contractor causing the work to be performed, or where there is no active work, the building owner".

The shed was inspected by CONSOLIDATED after its construction and found to be sound and no evidence was submitted in opposition indicating that CONSOLIDATED negligently constructed the sidewalk shed or left behind any extra pipes at the site.

Oscar Hernandez, foreman for Defendant CONSOLIDATED, testified that the sidewalk shed at the Premises was erected on December 15, 2015, and that he never returned to the Premises after the complete erection of the sidewalk bridge.

Thus, even if the pipe on which Plaintiff fell came off the sidewalk shed, the 10 months between its erection and Plaintiff's accident demonstrate that any negligence would be in the sheds maintenance rather than its construction. Therefore, it cannot be

alleged that the sidewalk shed erected by Defendant CONSOLIDATED “created a dangerous or defective sidewalk condition so as to launch an instrumentality of harm” (*Moore v. City of Yonkers*, 92 AD3d at 740).

As maintenance of neither the sidewalk shed nor the sidewalk was the responsibility of CONSOLIDATED, its entitled to summary judgement dismissing the complaint against it.

For these reasons, Defendant YORK’s cross-claim and Defendants 176 BROADWAY and KEY’s cross-claims for common law indemnification and contribution against CONSOLIDATED must be dismissed.

Summary judgment dismissing Defendant YORK’s cross-claim and Defendants 176 BROADWAY and KEY’s cross-claims for contractual indemnification must also be dismissed because no agreement requiring CONSOLIDATED to indemnify either YORK, 176 BROADWAY or KEY has been produced.

WHEREFORE, it is ORDERED that the portion of Defendant YORK’s motion for summary judgment dismissing Plaintiffs’ complaint as against it is GRANTED; and it is further

ORDERED that the portion of Defendant YORK’s motion for summary judgment dismissing Defendant CONSOLIDATED’s cross-claims is GRANTED; and it is further

ORDERED that the portion of Defendant YORK’s motion for summary judgment dismissing Defendants 176 BROADWAY and KEY’s cross-claims is DENIED; and it is further

ORDERED that the portion of Defendant CONSOLIDATED’s motion for summary judgment dismissing Plaintiff’s complaint as against it is GRANTED; and it is further

ORDERED that the portion of Defendant CONSOLIDATED's motion for summary judgment dismissing Defendant YORK's cross-claims against it is GRANTED; and it is further

ORDERED that the portion of Defendant CONSOLIDATED's motion for summary judgment dismissing Defendants 176 BROADWAY and KEY's cross-claims against it is GRANTED.

This constitutes the decision and order of the Court.

ENTER,



J.S.C.