

Bradby v Structure Tone, LLC
2022 NY Slip Op 33089(U)
September 14, 2022
Supreme Court, New York County
Docket Number: Index No. 159950-2018
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON.LYNN R. KOTLER, J.S.C.

PART 8

DOUGLAS BRADBY

INDEX NO. 159950-2018

- v -

MOT. DATE

STRUCTURE TONE, LLC et al

MOT. SEQ. NO. 2&3

The following papers were read on this motion to/for sj
Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits
Notice of Cross-Motion/Answering Affidavits — Exhibits
Replying Affidavits


ECFS Doc. No(s). _____
ECFS Doc. No(s). _____
ECFS Doc. No(s). _____

In this personal injury action governed by New Jersey law, there are two pending motions which are hereby consolidated for the court's consideration and disposition in this single decision/order. In motion sequence 2, second third party defendant United States Information Systems, Inc. ("USIS") moves for an order pursuant to CPLR 3212: [1] granting it summary judgment against the second third-party defendant USIS Electric, Inc. ("USIS Electric"), on its causes of action for contractual indemnification and failure to procure insurance; [2] dismissing third-party plaintiff Structure Tone, LLC's ("Structure Tone") causes of action against it for common-law indemnity and contribution; and [3] dismissing USIS Electric's counterclaim against it. In motion sequence 3, Structure Tone moves for summary judgment dismissing plaintiff's complaint against it, as well as on its claim for contractual indemnification against USIS and USIS Electric.

Plaintiff opposes USIS's motion to the extent that the latter seeks dismissal of Structure Tone's complaint. Structure Tone opposes USIS's motion as to the common-law indemnity and contribution claims as premature and and USIS Electric oppose USIS's motion as to USIS' contractual indemnification claim against it. USIS opposes Structure Tone's motion against it, plaintiff partially opposes Structure Tone's motion as to whether a General Contractor such as Structure Tone has a duty of care with respect to workplace safety in New Jersey and USIS Electric joins in Structure Tone's request for dismissal of plaintiff's complaint against Structure Tone but opposes Structure Tone's motion on its claim for contractual indemnification against USIS Electric.

The relevant facts are as follows. On January 20, 2018, plaintiff Douglas Bradby was employed by USIS Electric as an electrician and was working at a construction project located in Holmdel, New Jersey. That day, plaintiff was electrocuted while placing a lock nut on a wire while installing under cabinet lighting. At his deposition, plaintiff testified that prior to the accident, he installed 3 or 4 light fixtures and

Dated: 9-14-22



HON. LYNN R. KOTLER, J.S.C.

- 1. Check one: CASE DISPOSED NON-FINAL DISPOSITION
- 2. Check as appropriate: Motion is GRANTED DENIED GRANTED IN PART OTHER
- 3. Check if appropriate: SETTLE ORDER SUBMIT ORDER DO NOT POST
- FIDUCIARY APPOINTMENT REFERENCE

that there was no cover on the electrical panel box. Plaintiff further testified that he placed a strip of electrical tape over the particular circuit breaker he was working on with the work "working" written on it in marker. Plaintiff testified that after the accident, he and his foreman named "Vinnie" went to the electrical panel and observed that the circuit breaker with the tape applied was now in the "on" position. Plaintiff did not know how or who turned the breaker on.

Structure Tone is the general construction manager for the subject project, which was hired by Guardian Life Insurance to build out 65,000 square feet of office space at the Bell Workers Building in Holmdel. Structure Tone contracted with USIS to install lighting on the 4th and 5th floors of the subject building. USIS does not have a labor force and in turn contracted with USIS Electric to perform the work. Structure Tone's witness testified that it did not direct USIS Electric on how to perform its work. However, there is no dispute that Structure Tone's employees actively walked the site and supervised the safety of all workers including plaintiff.

Finally, a copy of both the prime contract between Structure Tone and USIS as well as USIS's contract with USIS Electric (the "subcontract") have been provided to the court. Pursuant to sections 6 and 7 of the subcontract, USIS is entitled to a defense, indemnity and insurance. The relevant provisions of the prime contract provide as follows:

To the fullest extent by Law, Subcontractor will indemnify and hold harmless Structure Tone, LLC., the owner of the project, the owner of the property where the job/project is located, and all parties required to be indemnified by the prime contract entered into by Structure Tone, LLC. in connection with the job/project work, and any of their trustees, officers, members, directors, agents, affiliates, parents, subsidiaries, and servants and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, sub-subcontractors, its officers, directors, agents, employees and Subcontractors in connection with the performance of any work by subcontractor, its employees and sub-subcontractors pursuant to this Subcontract/Purchase Order or a related Proceed Order. Subcontractor will defend and bear all costs of defending any action or proceedings brought against Structure Tone, LLC. and or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or defaults.

Meanwhile, the subcontract provides in pertinent part as follows:

6. Insurance

6.1 The Subcontractor, at its own expense, shall procure, carry and maintain on all its operations workers', compensation and employer's liability insurance covering all of its employees, public liability and property damage insurance in at least a minimum amount of \$3,000,000.00...., Coverage limits shall be in accordance with the requirements of the general contract. The Subcontractor is required to name the Company and Owner as additional insureds on the Subcontractor's general liability policy on a primary basis including waiver of subrogation.

...

7. Indemnification

7.1 The Subcontractor hereby assumes all and exclusive responsibility and will hold the Company harmless, to the fullest extent permitted by law, for any claims, damages, losses and expenses, including legal fees, arising out of or resulting from the performance of the subcontractor's work, whether caused by the Subcontractor or by anyone directly or indirectly employed or engaged, in any capacity and for any purpose, by the Subcontractor. The Subcontractor agrees to indemnify, protect and defend The Company, its officers, directors, agents, employees or affiliated companies, and the owner against all claims, suits, losses or damages arising out of the Subcontractor's performance of its work in any manner.

Parties' arguments

Structure Tone argues that plaintiff cannot establish a *prima facie* case of negligence against it under New Jersey law and therefore the complaint must be dismissed. It further contends that it is entitled to conditional contractual indemnification from USIS and USIS Electric. Plaintiff maintains that Structure Tone was "fully present and oversaw all of the work" and at a minimum Structure Tone was negligent in "allowing access to the circuit breaker box/switches to any and every electrical employee and/or other trade that traversed the worksite." USIS argues that Structure Tone's motion for contractual indemnity against it should be denied as Structure Tone did not establish entitlement under the contract and factual issues regarding Structure Tone and USIS' negligence and respective fault otherwise preclude summary judgment. Finally, USIS Electric opposes Structure Tone's motion against it, pointing out that Structure Tone did not have a contract with USIS Electric and that Structure Tone did not raise a substantive argument as to why it should be granted summary judgment on its contractual indemnification claim against USIS Electric.

As for USIS' motion, it argues that it did not direct or control plaintiff's work and did not have notice of the allegedly unsafe working conditions and thus is entitled to dismissal of Structure Tone's claims against it for common law indemnification and contribution as well as USIS Electric's counterclaim. USIS otherwise curtly argues that it is entitled to summary judgment against USIS Electric for contractual defense and indemnification and failure to procure insurance under the subcontract. Structure Tone contends USIS' motion against it is premature. USIS Electric contends that the motion should be denied because fault has not been determined, USIS failed to show that USIS Electric failed to procure insurance and caselaw does not support USIS' argument.

DISCUSSION

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

At the outset, USIS' motion is denied as to its failure to procure insurance claim since USIS Electric is correct that USIS has failed to establish this claim as a matter of law. Further, USIS Electric's silence as to its counterclaim against USIS is deemed an abandonment of that claim and thus USIS' motion is granted as to USIS Electric's counterclaim.

The court grants the balance of USIS' motion for the reasons that follow. The court will first consider Structure Tone's claim for common law indemnification and contribution against USIS. "To establish a claim for common-law indemnification, 'the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident'" (*Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 684-685 [2d Dept 2005], quoting *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]).

"Contribution is available where two or more tortfeasors combine to cause an injury and is determined in accordance with the relative culpability of each such person" (*Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2d Dept 2003], *lv dismissed* 100 NY2d 614 [2003] [internal quotation marks and citations omitted]). USIS has demonstrated that it was not negligent as a matter of law and Structure Tone has failed to raise a triable issue of fact on this point. Thus, USIS is entitled to summary judgment dismissing Structure Tone's claims for common law indemnification and contribution against it.

Finally, USIS is entitled to defense and contractual indemnification from USIS Electric pursuant to the subcontract. "A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; see also *Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]). However, "General Obligations Law § 5-322.1 prohibits and renders unenforceable any promise to hold harmless and indemnify a promisee which is a construction contractor or a landowner against its own negligence" (*Kilfeather v Astoria 31st St. Assoc.*, 156 AD2d 428 [2d Dept 1989]).

As the court has already found that USIS was not negligent, USIS Electric's argument that USIS' motion is premature fails. Otherwise, plaintiff's accident arose "out of the Subcontractor's performance of its work in any manner" and thus triggered USIS Electric's duty to indemnify and defend USIS. Accordingly, the balance of USIS' motion is granted and the issue of USIS's defense costs to date is hereby referred to a Special Referee or JHO to hear and determine.

The court now turns to Structure Tone's motion. As for plaintiff's claims against it, the motion is granted. Structure Tone argues that it did not owe plaintiff a duty of care under New Jersey law and that mere general supervisory authority is insufficient to establish the type of control over the work being performed need to sustain a negligence claim against a general contractor. Under New Jersey law, "the general principle is that the landowner is under no duty to protect an employee of an independent contractor from the very hazard created by the doing of the contract work, provided that the landowner does not retain control over the means and methods of the execution of the project" (*Muhammad v. New Jersey Transit*, 176 NJ 185 [2003] citing *Gibilterra v. Rosemawr Homes*, 19 NJ 166 [1955] [internal quotations omitted]). This principle applies to general contractors as well and will not be "disturbed by the exercise of merely such general superintendence as is necessary to insure that the contractor performs his agreement... especially when the contractor is an experienced laborer hired to correct the very danger present or to perform his tasks amidst visible hazards" (*Muhammad* at 199).

The court does not find that that the uncovered electrical box or Structure Tone's retention and exercise of general supervisory authority sufficient to establish liability under New Jersey law. Certainly, Structure Tone did not supervise plaintiff's work. Rather, plaintiff was under the direct supervision and control of his employer, USIS Electric. Non-compliance with OSHA standards does not establish a duty of care standing alone (*Costa v. Gaccione*, 308 NJ Super 362 [App Div 2009]). Finally, plaintiff's argument that Structure Tone owed him an ordinary negligence standard of care is rejected. As Structure Tone's counsel points out, *Carvalho v. Toll Bros. & Developers* (143 N.J. 565 [1996]) is distinguishable because in that case the engineer had actual knowledge of the dangerous condition which caused the underlying accident. Actual knowledge was also present in another case relied upon by plaintiff, to wit, *Alloway v. Bradlees, inc.* (157 NJ 221 [NJ 1999]). Based upon the foregoing, Structure Tone's motion is granted to the extent that plaintiff's complaint against it is dismissed.

As for Structure Tone's claim for contractual indemnification against USIS, the contract requires USIS to defend and indemnify from and against any and all claims... arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor, sub-subcontractors, its officers, directors, agents, employees and Subcontractors in connection with the performance of any work by subcontractor, its employees and sub-subcontractors pursuant to this Subcontract/Purchase Order or a related Proceed Order." Since it is undisputed that plaintiff was injured while performing work as an electrician for USIS Electric under USIS Electric's direct supervision and control pursuant to the sub-contract with USIS, Structure Tone is entitled to contractual indemnification from USIS. Accordingly, Structure Tone's motion is granted in its entirety.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence 2 is granted to the extent that Structure Tone's claim for common law indemnification and contribution against USIS and USIS Electric's counterclaim against USIS are dismissed and USIS is granted summary judgment on its claim for contractual indemnification and defense against USIS Electric; and it is further

ORDERED that Structure Tone's motion is granted as follows: [1] plaintiff's complaint against Structure Tone is dismissed and the Clerk is directed to enter judgment accordingly; and [2] Structure Tone is entitled to contractual indemnification and defense from USIS; and it is further

ORDERED that the issues of [1] what amount USIS Electric should reimburse USIS for defense costs incurred to date, with statutory interest and [2] what amount USIS should reimburse Structure Tone for defense costs incurred to date, with statutory interest is referred to the Special Referee Clerk for assignment to a Special Referee or JHO to hear and determine; and it is further

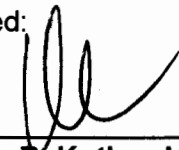
ORDERED that counsel for USIS and/or Structure Tone shall, within 90 days from the date of this order, serve a copy of this order with notice of entry, together with a complete Information Sheet, upon the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

9-14-22
New York, New York

So Ordered:



Hon. Lynn R. Kotler, J.S.C.