

Hasani v Community Health Project, Inc.
2022 NY Slip Op 34051(U)
November 23, 2022
Supreme Court, New York County
Docket Number: Index No. 150316/2019
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 41

BASHKIM HASANI,

Index No. 150316/2019

Plaintiff

- against -

DECISION AND ORDER

COMMUNITY HEALTH PROJECT, INC.,
BIO-BRIGHT NY, LLC, and A&A MAINTENANCE
ENTERPRISES, INC.,

Defendants

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for personal injuries sustained July 27, 2018, when he slipped and fell on a wet floor near a bathroom on the second floor of a Callen-Lorde medical clinic at 356 West 18th Street, New York County. Defendant Community Health Project, Inc. (Callen-Lorde), owned the premises, for which defendant A&A Maintenance Enterprises, Inc., provided maintenance and cleaning services as an independent contractor. Plaintiff discontinued his claims against his employer, defendant Bio-Bright NY, LLC, by a stipulation dated June 19, 2019. C.P.L.R. § 3217(a)(2). Callen-Lorde now moves for summary judgment dismissing both plaintiff's amended complaint and A&A Maintenance's cross-claims for non-contractual indemnification and contribution against Callen-Lorde and for

summary judgment against A&A Maintenance for contractual indemnification. C.P.L.R. § 3212(b). The court denies the motion as follows.

II. CalLEN-LORDE'S MOTION AGAINST PLAINTIFF

To obtain summary judgment dismissing plaintiff's claims arising from his slip and fall, Callen-Lorde must establish that it neither created the dangerous condition that caused plaintiff's injury nor received actual or constructive notice of that condition. De Barcadel v. 1015 Concourse Owners Corp., 204 A.D.3d 605, 606 (1st Dep't 2022); Moss v. Marymount Manhattan Coll., 203 A.D.3d 473, 473 (1st Dep't 2022); Lara v. Kadir, 201 A.D.3d 590, 591 (1st Dep't 2022); Cuello v. 708 Tremont Realty, LLC, 199 A.D.3d 604, 604 (1st Dep't 2021). The absence of Callen-Lorde employees at the premises on the night of plaintiff's injury demonstrates that Callen-Lorde did not create the wet floor.

Moreover, A&A Maintenance's incident report, which the parties stipulated as authenticated and admissible, recounts that Ivan Portes, an A&A Maintenance employee, apologized for not placing a "wet sign post on the floor." Aff. of Michael Guttman Ex. O. This apology constitutes an admission by A&A Maintenance that it failed to warn of a wet floor, indicating that A&A Maintenance also created that condition. C.P.L.R. § 4549.

Callen-Lorde further shows that it did not receive actual

notice of the wet floor because both Christine Smoot-Lowers, Callen-Lorde's Chief Operating Officer, and Chris Mainor, Callen-Lorde's Director of Facilities, attest that they received no complaints of a wet or slippery condition before the night of plaintiff's injury. Plaintiff does not rebut Callen-Lorde's motion on either of these grounds.

Plaintiff contends instead that Callen-Lorde received constructive notice of the condition because Elaine Harvey, an A&A Maintenance supervisor, admitted to plaintiff that Portes had a history of not placing a "wet floor" sign where he mopped, which Callen-Lorde's Mainor must have been aware of due to his close supervision of the premises' maintenance. Plaintiff further contends both that Callen-Lorde is vicariously liable for Portes's negligence and Harvey's negligence in retaining and supervising Portes and that Callen-Lorde itself failed to maintain its premises in a reasonably safe condition.

A. Constructive Notice

Callen-Lorde shows it lacked constructive notice because plaintiff testified at his deposition that he walked past the bathroom two or three times without noticing anything on the floor. He testified that he first walked past the bathroom approximately 30 to 40 minutes before he slipped and fell, so the second and third times were an even shorter time before his fall. Thus his injury did not occur long enough after the floor became

wet to provide Callen-Lorde constructive notice. Powell v. BLDG 874 Flatbush LLC, 201 A.D.3d 534, 535 (1st Dep't 2022); Frederick v. New York City Hous. Auth., 172 A.D.3d 545, 545 (1st Dep't 2019).

Although plaintiff relies on Harvey's alleged statement to him regarding Portes's history of not placing a "wet floor" sign where he mopped, Harvey was an A&A Maintenance employee, so her alleged statement constitutes an admission against A&A Maintenance only, not Callen-Lorde. C.P.L.R. § 4549. Harvey's alleged statement may support a claim of Callen-Lorde's vicarious liability, however, if Callen-Lorde created a special employment relationship with Harvey, as discussed below.

B. Special Employment Relationship

Callen-Lorde points out in its reply that the amended complaint does not include a claim for vicarious liability, but factual questions that, if determined in plaintiff's favor, would support an actionable claim nonetheless warrant denying dismissal via summary judgment, even if the claim is not distinctly pleaded. Burgdoerfer v. CLK/HP 90 Merrick LLC, 170 A.D.3d 427, 428 (1st Dep't 2019); Ramos v. Jake Realty Co., 21 A.D.3d 744, 745 (1st Dep't 2005). Although plaintiff's opposition does not specify a basis for Callen-Lorde's vicarious liability, his opposition does claim that Callen-Lorde is vicariously liable for Harvey's negligent retention or supervision of Portes. Thus the

court must determine whether plaintiff raises factual questions regarding Callen-Lorde's vicarious liability, irrespective of the complaint's allegations.

Since both Harvey and Portes worked for A&A Maintenance, Callen-Lorde may be vicariously liable for conduct by Harvey and Portes only if Callen-Lorde acted as their special employer. Cross v. Supersonic Motor Messenger Courier, Inc., 140 A.D.3d 503, 504 (1st Dep't 2016); Nelson v. E&M 2710 Clarendon LLC, 129 A.D.3d 568, 570 (1st Dep't 2015); Saini v. Tonju Assoc., 299 A.D.2d 244, 245 (1st Dep't 2002). A special employment relationship turns on whether Callen-Lorde directed and controlled the "manner, details and ultimate result of the employee's work," Fung v. Japan Airlines Co., Ltd., 9 N.Y.3d 351, 359 (2007); Thompson v. Grumman Aerospace Corp., 78 N.Y.2d 553, 558 (1991); Bautista v. David Frankel Realty, Inc., 54 A.D.3d 549, 550 (1st Dep't 2008), particularly if Callen-Lorde determined "all essential, locational and commonly recognizable components of the [employee's] work relationship." Fung v. Japan Airlines Co., Ltd., 9 N.Y.3d 351, 359; Bautista v. David Frankel Realty, Inc., 54 A.D.3d at 550 (quoting Thompson v. Grumman Aerospace Corp., 78 N.Y.2d at 558). See Ramos v. 110 Bennett Ave., LLC, 180 A.D.3d 554, 554 (1st Dep't 2020); Bayona v. Hertz Corp., 148 A.D.3d 608, 608 (1st Dep't 2017); Ortega v. 669 Meeker Ave., LLC, 191 A.D.3d 686 (2d Dep't 2021). This determination is

typically "fact-laden and generally presents an issue for the trier of fact." Bautista v. David Frankel Realty, Inc., 54 A.D.3d at 550.

Callen-Lorde denies a special employment relationship because Mainor did not closely supervise A&A Maintenance. Mainor oversaw the maintenance of Callen-Lorde's facilities, largely performed by outside vendors, including A&A Maintenance, which contracted with Callen-Lorde as its exclusive facilities manager. The parties stipulated that the Building Service Agreement between Callen-Lorde and A&A Maintenance was authenticated and admissible. As the contract expressly permitted, Guttman Aff. Ex. M, at 4 ¶ 5, Mainor testified that he regularly reviewed and inspected A&A Maintenance's work. The contract also granted Callen-Lorde "the right to instruct [A&A Maintenance] to terminate any employee that Callen-Lorde objects to." Id. at 3 ¶ 5(A). Its right to recommend termination of A&A Maintenance employees, however, does not alone demonstrate a special employment relationship.

Nevertheless, Mainor's testimony suggests a high level of direction and control over A&A Maintenance. Not only did he inspect A&A Maintenance's work as the contract permitted, but he testified that he also assisted A&A Maintenance's employees with their daily job duties, provided them resources, and actively managed them. Mainor further testified that he directly

supervised Harvey and that she reported directly to him and Smoot-Lowers. Finally, Mainor testified that he instructed Harvey to supervise Bio-Bright on the night of plaintiff's injury and not to investigate the incident afterward, implying that he would take charge of any investigation. Mainor's direction and close supervision of Harvey's work raises factual questions whether the level of direction and control that Mainor held over Harvey created a special employment relationship.

The contract, moreover, does not fully detail the extent of Callen-Lorde's authority over A&A Maintenance's employees, because the contract incorporates the terms of a "Proposal," which is neither attached to the contract nor presented as a separate exhibit. Guttman Aff. Ex. M, at 1 ¶¶ 1-2. Consequently, Harvey's status as a special employee is indeterminable based on this record. That determination rests on factual questions that remain for trial.

Portes does not qualify as a special employee based on his un rebutted deposition testimony that he never interacted with Mainor or another Callen-Lorde supervisor. Because Portes had no relationship with Callen-Lorde, it may be vicariously liable for plaintiff's injury only if Harvey's alleged knowledge of Portes's work history may be imputed to Callen-Lorde as Harvey's special employer. Again, although plaintiff does not allege a claim for negligent retention or supervision, he does allege facts and

present evidence supporting this actionable claim, to warrant a denial of summary judgment. Burgdoerfer v. CLK/HP 90 Merrick LLC, 170 A.D.3d at 428; Ramos v. Jake Realty Co., 21 A.D.3d at 745.

C. Reasonably Safe Premises

An employer is ordinarily not liable for an independent contractor's conduct, but if the employer is a building owner, it may face liability if it fails to maintain the building's public areas in a reasonably safe condition. Tobola v. 123 Washington, LLC, 195 A.D.3d 456, 457 (1st Dep't 2021); Edwards v. BP/CG Ctr. I, Inc., 102 A.D.3d 413, 413 (1st Dep't 2013). Plaintiff insists that Callen-Lorde "owes a nondelegable duty to provide a safe means of ingress and egress to all persons lawfully upon the premises, including the plaintiff, an employee of its independent contractor." Backiel v. Citibank, 299 A.D.2d 504, 507-508 (2d Dep't 2002). Plaintiff's injury, however, did not result from an unsafe entrance to or exit from the building, but occurred on the building's second floor, after the building had closed.

Nonetheless, although Mainor testified that plaintiff's fall occurred in an area outside his scope of work, plaintiff testified that he was on his way to a bathroom where he was assigned to work when he slipped. The work that Callen-Lorde invited his employer into the building to perform may have required him to pass through the area where he slipped. Portes also

testified that plaintiff disregarded the wet floor signs that Portes had placed, indicating that the floor was in fact wet, but plaintiff testified that he did not see any signs. This conflicting testimony presents factual questions whether the area of the building where plaintiff was required to pass to carry out the work, for which Callen-Lorde had hired his employer and invited its employees into Callen-Lorde's building, was reasonably safe, defeating summary judgment in Callen-Lorde's favor. Kuhfeldt v. New York Presbyt./Weill Cornell Med. Ctr., 205 A.D.3d 480, 481 (1st Dep't 2022); Salcedo v. City of New York, 201 A.D.3d 607, 608 (1st Dept 2022); Venezia v. LTS 711 11th Ave., 201 A.D.3d 493, 495 (1st Dep't 2022); Williams v. Forward Realty Corp., 198 A.D.3d 503, 504 (1st Dep't 2021).

To the extent Callen-Lorde insists that Backiel v. Citibank is distinguished or overruled by Diaz v. LaGuardia Express, LLC, 186 A.D.3d 1616, 1617 (2d Dep't 2020), where an independent contractor sustained personal injuries in a building area open only to service workers, there the court granted summary judgment to the defendant building owner because the "plaintiff failed to raise a triable issue of fact as to whether the moving defendants should be held vicariously liable for the negligence of the carpet cleaning contractor." Here, however, plaintiff's testimony raises factual questions whether plaintiff was in an area within his scope of work and, together with Mainor's

testimony and the contract between the two defendants, whether Callen-Lorde may be vicariously liable as Harvey's special employer. Therefore the court denies Callen-Lorde's motion for summary judgment dismissing plaintiff's claims against Callen-Lorde.

III. CalLEN-LORDE'S MOTION AGAINST A&A MAINTENANCE

Callen-Lorde next seeks summary judgment dismissing A&A Maintenance's cross-claims for non-contractual, implied indemnification and for contribution. Since Callen-Lorde does not establish the absence of its negligence as explained above, Callen-Lorde is not entitled to summary judgment dismissing A&A Maintenance's claims for non-contractual indemnification or for contribution. Seymour v. Hovnanian, 207 A.D.3d 420, 420 (1st Dep't 2022); Winkler v. Halmar Intl., LLC, 206 A.D.3d at 461; Vitucci v. Durst Pyramid LLC, 205 A.D.3d 441, 444 (1st Dep't 2022); Goya v. Longwood Hous. Dev. Fund Co., Inc., 192 A.D.3d 581, 585 (1st Dep't 2021).

Last, Callen-Lorde seeks summary judgment awarding Callen-Lorde contractual indemnification against A&A Maintenance. An agreement to indemnify is void and unenforceable to the extent that the agreement allows indemnification of a party for its own negligence. N.Y. Gen. Oblig. Law § 5-322.1; Itri Brick & Concrete Corp. v. Aetna Cas. & Sur. Co., 89 N.Y.2d 786, 795 (1997); Padilla v. Absolute Realty Inc., 195 A.D.3d 422, 423 (1st

Dep't 2021). An indemnification agreement that includes a saving provision limiting indemnification "to the fullest extent permitted by law" complies with New York General Obligations Law § 5-322.1. Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210 (2008); Winkler v. Halmar Intl., LLC, 206 A.D.3d 458, 462 (1st Dep't 2022).

In the Building Service Agreement A&A Maintenance:

agrees to indemnify, defend, and hold harmless [Callen-Lorde] . . . from any and all liability, loss, suit, claim, damage, cost, judgment and expense, including reasonable attorneys' fees, experts' fees and costs of litigation . . . arising from or or [sic] alleged to arise from a breach or alleged breach of any covenant, representation, or warranty set forth in this Agreement, or the conduct of [A&A Maintenance], its agents, employees, representatives, or sub-contractors, in connection with the performance of this Agreement.

Guttman Aff. Ex. M, at 3 ¶ 4. Plaintiff's claims trigger the indemnification provision because his claims arise from A&A Maintenance's work, which no party disputes. Callen-Lorde may not be indemnified for its own negligence, however, pursuant to General Obligations Law § 5-322.1. Since the Agreement does not include a saving provision, which would limit A&A Maintenance's indemnification to the extent that Callen-Lorde was not at fault, Callen-Lorde is not entitled to contractual indemnification from A&A Maintenance until a determination that Callen-Lorde was not negligent in maintaining reasonably safe premises. Galeno v. Everest Scaffolding, Inc., 202 A.D.3d 433, 434 (1st Dep't 2022); Pawlicki v. 200 Park, L.P., 199 A.D.3d 578, 578 (1st Dep't 2021);

Hammer v. ACC Constr. Corp., 193 A.D.3d 455, 455 (1st Dep't 2021); Cackett v. Gladden Properties, LLC, 183 A.D.3d 419, 422 (1st Dep't 2020). If the area where plaintiff fell is determined to be outside his scope of work, Callen-Lorde will remain, at most, only vicariously liable for Harvey's alleged negligence, for which Callen-Lorde may be indemnified without violating General Obligations Law § 5-322.1. Torres v. Love Lane Mews, LLC, 156 A.D.3d 410, 411 (1st Dep't 2017); O'Leary v. S & A Elec. Contr. Corp., 149 A.D.3d 500, 503 (1st Dep't 2017); Guzman v 170 W. End Ave. Assoc., 115 A.D.3d 462, 464 (1st Dep't 2014); Dwyer v. Central Park Studios, Inc., 98 A.D.3d 882, 884 (1st Dep't 2012).

IV. CONCLUSION

For all the reasons explained above, the court denies the motion by defendant Community Health Project, Inc., for summary judgment in all respects. C.P.L.R. § 3212(b).

DATED: November 23, 2022



LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C