

Lima v El Sol Contr. & Constr. Corp.

2024 NY Slip Op 30233(U)

January 18, 2024

Supreme Court, New York County

Docket Number: Index No. 157553/2018

Judge: Arlene P. Bluth

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

-----X

ALBINO LIMA, DULCE LIMA,

Plaintiff,

INDEX NO. 157553/2018

MOTION DATE 01/16/2024

MOTION SEQ. NO. 002

- v -

EL SOL CONTRACTING AND CONSTRUCTION
CORPORATION, NATIONAL RAILROAD PASSENGER
CORPORATION,

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

EL SOL CONTRACTING AND CONSTRUCTION
CORPORATION

Third-Party
Index No. 595784/2019

Plaintiff,

-against-

NUCO PAINTING CORP.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 122, 124, 126, 127, 128, 130, 132, 133, 134, 136, 137, 138, 139

were read on this motion to/for SUMMARY JUDGMENT.

Defendants’ motion for summary judgment is decided as described below.

Background

This Labor Law action arises out of an accident that occurred in the Henry Hudson viaduct in the Upper West Side of Manhattan. Plaintiff Albino Lima (“Plaintiff”) was a shop steward for third-party defendant Nuco Painting Corp. (“Nuco”) when he allegedly stepped in an opening in a floor. Defendant El Sol Contracting and Construction Corporation (“El Sol”) was

hired to be the general contractor for the job and defendant National Railroad Passenger Corporation (“Amtrak”) gave El Sol permission to enter its portion of the premises to do construction associated with the job. El Sol was tasked by the New York City Department of Transportation with rehabilitating the Henry Hudson Parkway viaduct.

The Court observes that after defendants filed the instant motion, the parties uploaded a stipulation of discontinuance relating to the main action (NYSCEF Doc. No. 135). That means that the portions of the motion that relate to plaintiffs’ claims are moot.

Defendants explain in their reply that the only remaining issue for this Court is whether defendants are entitled to summary judgment relating to reimbursement for defense costs and expenses based on the third-party claims against Nuco for contractual indemnification and for breach of contract for failure to procure insurance. They observe that Nuco’s insurer funded the settlement of the main action.

Defendants contend that they are entitled to contractual indemnification from Nuco based on the subcontract signed by Nuco. They observe that there is no dispute that plaintiff was performing work for Nuco at the time of his accident. Defendants insist that they were not negligent in any way.

In opposition, Nuco argues that there has not been any determination about the liability of defendants as the main action settled. It argues that if the Court finds that defendants are entitled to summary judgment, the Court should order a hearing to determine the amount to be awarded to defendants. Nuco also argues that the proper venue for this dispute is a declaratory judgment action.

In reply, defendants argue that Nuco did not oppose the branch of the motion that seeks summary judgment for defendant Amtrak. They claim they are entitled to recover their costs and

fees in this action as they were not negligent. Defendants insist that Nuco failed to procure insurance naming defendants as additional insureds on the ground that Nuco's insurer refused to cover Amtrak and refused to cover El Sol unless the coverage limits of El Sol's other coverage were exhausted.

Discussion

Before analyzing the merits of the instant motion, the Court must address a procedural matter. Although both defendants seek summary judgment, the Court observes that, at least on this record, Amtrak never asserted any claims against Nuco. The third-party complaint, which was filed before Amtrak was named as a defendant, includes claims asserted by El Sol against Nuco (NYSCEF Doc. No. 14). After plaintiffs filed their amended complaint, defendants never sought to amend their third-party complaint to add Amtrak as a third-party plaintiff.

Instead, defendants appear to have asserted "cross-claims" against Nuco in their answer to the amended complaint (NYSCEF Doc. No. 62). Of course, a cross-claim is a cause of action asserted against a co-defendant and, here, Nuco was only a third-party defendant; Nuco was not named as a direct defendant. Accordingly, because Amtrak never properly asserted claims against Nuco, the Court is unable to grant Amtrak any relief. Now that the main action is resolved, Amtrak no longer has any interest in this case. The only "live" dispute is between El Sol and Nuco concerning the third-party complaint. However, nothing prevents Amtrak from bringing a new action to recover its defense costs or for other relief.

Turning to the merits, the Court's analysis begins with Nuco's subcontract. This agreement required that Nuco had to procure insurance and that "All policies described above, except for workers' compensation and property coverage on subcontractor's policy shall include as additional insureds: El Sol Contracting / El Sol II Enterprises, J.V., New York City

Department of Transportation and National Railroad Passenger Corporation” (NYSCEF Doc. No. 110, § 9.1[j]).

Nuco was required to “indemnify and hold harmless the Contractor, Owner, and others additionally insured as required by the Prime Contract from and against all claims and demands . . . for death and bodily injury and for personal injury. . . arising or alleged to arise out of the subcontract work and for all loss, costs and expenses incurred by them in the defense, settlement or satisfaction thereof” (*id.* § 10.1).

As an initial matter, the Court observes that the only issue remaining in this decision is Nuco’s duty to defend.

The “duty to defend its insured is ‘exceedingly broad’ and an insurer will be called upon to provide a defense whenever the allegations of the complaint suggest a reasonable possibility of coverage. The duty to defend an insured is derived from the allegations of the complaint and the terms of the policy. If a complaint contains any facts or allegations which bring the claim even potentially within the protection purchased, the insurer is obligated to defend” (*BP A.C. Corp. v One Beacon Ins. Group*, 8 NY3d 708, 714, 840 NYS2d 302 [2007] [internal quotations and citation omitted]).

There is no question that the complaint here implicates Nuco’s duty to defend under the terms of the subcontract. Plaintiff was working for Nuco at a jobsite when he was injured; therefore, the allegations clearly arose out of the subcontract work and El Sol is entitled to summary judgment to the extent it shall be reimbursed for defense costs related to the instant action.

Nuco’s focus on the absence of a finding a liability is immaterial. “The standard for determining whether an additional named insured is entitled to a defense is the same standard

that is used to determine if a named insured is entitled to a defense' (*id.* at 715 [finding that a liability determination is not required before a holding that an additional insured is entitled to defense]).

Also raised in the instant motion is El Sol's claim against Nuco for failure to procure insurance. Although there is little doubt that Nuco procured insurance (its insurer paid the settlement), the Court grants this branch of El Sol's motion as Nuco did not address it in its opposition. Nor did Nuco attach a complete copy of an insurance policy naming El Sol as an additional insured in its opposition papers. In any event, because the main action has settled, El Sol's damages are limited to recovering the defense costs and expenses related to this case.

The Court recognizes that Nuco argues that the instant dispute should be handled in a declaratory judgment action. But neither Nuco nor its insurer has commenced such a case and Nuco does not cite any cases for the proposition that El Sol is barred from seeking the instant relief in this case.

Having found that El Sol is entitled to summary judgment on liability, the Court observes that El Sol did not request a specific amount for its defense costs. Therefore, there shall be a trial on damages to assess the reasonable amount El Sol is entitled to recover. As a note of issue was already filed, the dispute will simply stay on the trial calendar.

The Court also observes that to the extent Nuco asserted a counterclaim against El Sol in the third-party action, that claim is severed and dismissed.

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted *only* to the extent that defendant El Sol Contracting and Construction Corporation is entitled to summary judgment on liability on its claims for reimbursement of defense costs as well as El So's claim for breach

of contract for failure to procure insurance and to the extent that Nuco Painting Corp.’s claims are severed and dismissed; and it is further

ORDERED that the remaining branches of the motion are denied, including to the extent that defendants demand relief for defendant National Railroad Passenger Corporation against third-party defendant Nuco Painting Corp.

1/18/2024

DATE



ARLENE P. BLUTH, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE