

Velentzas v 685 First Realty Co. LLC

2024 NY Slip Op 30662(U)

March 4, 2024

Supreme Court, New York County

Docket Number: Index No. 161081/2018

Judge: Paul A. Goetz

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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. PAUL A. GOETZ PART 47

Justice

-----X

FOTIOS VELENTZAS,

Plaintiff,

- v -

685 FIRST REALTY COMPANY LLC, EAST RIVER REALTY COMPANY LLC, SOLOW REALTY & DEVELOPMENT COMPANY LLC, SECOND AVE. SOLOW DEVELOPMENT CORP.,

Defendants.

-----X

685 FIRST REALTY COMPANY LLC, SOLOW REALTY & DEVELOPMENT COMPANY LLC, SECOND AVE. SOLOW DEVELOPMENT CORP.

Plaintiffs,

-against-

LIBERTY MECHANICAL CONTRACTORS, LLC, PAR PLUMBING CO., INC.

Defendants.

-----X

685 FIRST REALTY COMPANY LLC

Plaintiff,

-against-

Defendant.

-----X

LIBERTY MECHANICAL CONTRACTORS, LLC

Plaintiff,

-against-

INDEX NO. 161081/2018

05/04/2023, 05/15/2023, 05/24/2023, 05/24/2023

MOTION DATE

MOTION SEQ. NO. 014 016 018 018

DECISION + ORDER ON MOTION

Third-Party Index No. 595539/2021

Second Third-Party Index No. 595642/2021

Third Third-Party Index No. 595642/2021

Defendant.

-----X

SOLOW REALTY & DEVELOPMENT COMPANY LLC,
SECOND AVE. SOLOW DEVELOPMENT CORP.

Fourth Third-Party
Index No. 595642/2021

Plaintiffs,

-against-

R & J CARPENTRY INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 014) 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 570, 612, 618, 639, 674, 675, 676

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

The following e-filed documents, listed by NYSCEF document number (Motion 016) 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 571, 620, 628, 629, 644, 645, 646, 647, 648, 649, 650, 651, 656, 699, 700, 701

were read on this motion to/for JUDGMENT - SUMMARY .

The following e-filed documents, listed by NYSCEF document number (Motion 018) 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 622, 624, 638, 670, 671, 672, 673

were read on this motion to/for RENEW/REARGUE/RESETTLE/RECONSIDER .

The following e-filed documents, listed by NYSCEF document number (Motion 018) 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 622, 624, 638, 670, 671, 672, 673

were read on this motion to/for RENEWAL .

In this Labor Law personal injury action third-party defendant Par Plumbing Co. (“Par”) moves pursuant to CPLR § 2221 to reargue (MS # 14) and to renew (MS #18) its motion for summary judgment (MS # 6) dismissing all the claims and cross claims against it. By decision and order dated March, 13, 2023 this court denied Par’s motion (NYSCEF Doc No 437). Third-party defendant Liberty Mechanical Contractors LLC (“Liberty”) also moves pursuant to CPLR § 2221 (MS # 16) to reargue its motion for summary judgement (MS #5) dismissing the claims

and cross-claims against it, and granting it summary judgment on its cross claims and counterclaims. The court denied Liberty's summary judgment motion in the same March 13, 2023 decision and order (NYSCEF Doc No. 437). Par and Liberty's summary judgment motions were denied because "the contracts upon which they rely are merely attached to an attorney affirmation and are not authenticated as required by CPLR 4518(a) and thus cannot form the basis on which to grant summary judgment" (*id.*).

Par requests that upon reargument the court grant summary judgment in Par's favor on all the claims asserted by defendants / third-party plaintiffs 685 First Realty Company LLC, Solow Realty & Development Company LLC, and Second Ave. Solow Development Corp (collectively the "Developers") as against Par and grant summary judgement for all the cross claims asserted by Par as against third-party defendant Liberty and dismissing Liberty's crossclaims as against Par.

Similarly, Liberty requests that upon reargument the court grant summary judgment in its favor on all the claims asserted by the Developers as against Liberty, and on the crossclaims asserted by Liberty as against Par.

Finally, the Developers cross move on MS # 16 to renew their motion for summary judgment (MS #10) in which they sought partial summary judgment for their contractual indemnification claims as against Liberty and Par. By decision and order dated December 6, 2022 the Developers' motion was denied because the contracts were not properly authenticated (NYSCEF Doc No 358). The December 6, 2022 decision and order further provides that "even if the contracts are considered, the motion is premature as there has not yet been a finding as to whether defendants/third-party plaintiffs or the third-party defendants were negligent." Upon renewal, the Developers request that summary judgment be granted in the Developers' favor on

their contractual indemnification claim against Liberty. While, the Developers do not cross move on either of Par's motions, they asks that pursuant to CPLR § 3212(b) that upon a search of the record in MS # 14 and MS #18, summary judgment be granted in the Developers' favor on their contractual indemnification, and breach of contract for failure to procure insurance claims as against Par.

DISCUSSION

Reargue/Renew

Pursuant to CPLR § 2221(d)(2), reargument may be granted “based upon matters of fact or law allegedly overlooked or misapprehended by the Court in determining the prior motion.” Par argues that the Court misapprehended the law by deciding that the contract was not authenticated. Section 9.05(1) of the Guide to New York Evidence allows for authentication by “Evidence of an admission of authenticity made by the party against whom the evidence is being introduced” (*Guide to New York Evidence* [2023], § 9.05[1]). CPLR § 4540-a provides that “material produced by a party in response to a demand. . . authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party.” “[T]he burden of proving the existence, terms and validity of a contract rests on the party seeking to enforce it” (*Knight v New York and Presbyt. Hosp.*, 219 AD3d 75, 78 [1st Dept 2023] [internal quotation marks removed]). “Authentication may be effected by various means, including, for example, by certificate of acknowledgment . . . by comparison of handwriting . . . or by the testimony of a person who witnessed the signing of the document (*id.*). Furthermore, “It is quite customary . . . where there is no real question of authenticity of the documents, for attorneys to permit the use of documents not authenticated to the last iota of the statutory requirement” (*People v Parsons*, 84 AD2d 510, 511 [1st Dept 1981]).

Here, there is no dispute as to the authenticity of the contract since the Developers admit to its authenticity in their Counter Statement of Uncontested Facts (NYSCEF Doc No 509). Furthermore, Par presented deposition testimony of the Developers employee, Anthony Calicchio, in which he confirms that he drafted and signed the contract between the Developers and Par, thereby properly authenticated the document (NYSCEF Doc No 165 at p 27). Finally, since the Developers provided the contract during discovery with Par it shall be presumed authentic pursuant to CPLR § 4540-a. Accordingly, that part of Par's motion seeking reargument (MS # 14) will be granted.

For the same reasons, the contracts submitted by Liberty on MS # 5 and the contracts submitted by the Developers on MS #10 were also properly authenticated. Accordingly, reargument will be granted and the summary judgment motions will be decided on the merits.

The causes of action the Developers assert against Par and Liberty are for contractual indemnification, common law indemnification, breach of contract for failure to procure insurance, and contribution.

Common Law Indemnification / Contribution

“To be entitled to common-law indemnification, a party must show: (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part; and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work.” (*Naughton v. City of New York*, 94 AD3d 1, 10 [1st Dept 2012]). Furthermore, “[I]iability for indemnification may only be imposed against those parties (i.e., indemnitors) who exercise actual supervision” (*McCarthy v Turner Const., Inc.*, 17 NY3d 369, 378 [2011]).

“A contribution claim can be made even when the contributor has no duty to the injured plaintiff” (*Raquet v Braun*, 90 NY2d 177, 182 [1997]). “In such situations, a claim of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable” (*id.*). “The ‘critical requirement’ for apportionment by contribution . . . is that ‘the breach of duty by the contributing party must have had a part in causing or augmenting the injury for which contribution is sought’” (*id.* at 183).

Here, the Developers originally contracted with Par to perform all the plumbing work involved with the construction of a new building located at 685 First Avenue, New York, New York (NYSCEF Doc No 610 ¶ 3). Par then entered into a subcontract with Liberty wherein Liberty was to perform all the plumbing work in accordance with the original Par-Developers contract (*id.* at ¶ 4). Plaintiff was an employee of Liberty and was performing work for Liberty at the time of the accident on September 27, 2017 (*id.* at ¶ 5). It is undisputed that the plaintiff’s injury occurred when he tripped over a piece of sheetrock (NYSCEF Doc No 592 ¶ 10). It is also undisputed that the purpose of the agreement between Par and the Developers was to provide plumbing work (*id.* at ¶ 9). Relevant portions of the Par-Developers contract state that:

3.3 SUPERVISION AND CONSTRUCTION PROCEDURES

The Contractor [Developers] shall supervise and direct the Work, using the Contractor’s best skill and attention. The Contractor shall be solely responsible for, and have control over, construction means, methods, techniques, sequences and procedures and for coordinating all portions of the Work . . . [and] the Contractor shall evaluate jobsite safety . . . [and] be fully and solely responsible for the jobsite safety of such means, methods, techniques, sequences or procedures.

§3.15 CLEANING UP

§3.15.1 The Contractor [Developers] shall keep the premises and surrounding area free from accumulation of waste materials or rubbish caused by operations under the Contract. At the completion of the Work, the Contractor shall remove waste, materials, rubbish . . . from and about the Project.

The Developers concede that Par and Liberty were not responsible for either erecting sheetrock or cleaning up sheetrock debris (NYSCEF Doc No 638 ¶ 4). As for Par, since it was not on site at the time of the accident, nor did it have any contractual duty to clean the debris plaintiff slipped on, it has established a prima facie showing that it did not owe a duty to the plaintiff. Par has also established a prima facie showing that it did not breach a duty to Developers, as the contract establishes that it was not required to clean up the area where the accident occurred. Developers have failed to rebut this showing. Accordingly, summary judgment will be granted to Par and the common-law indemnification and contribution claims against it will be dismissed.

As for Liberty however, there is an issue of fact as to whether or not its employees were contributorily negligent, because plaintiff testified that under the direction of fellow Liberty employee, Ray Waters, they decided to carry a 250-350 pound pipe over an area strewn with debris (NYSCEF Doc No. 646).

Nevertheless, according to Workers Compensation Law § 11:

An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a “grave injury” which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Here, it is undisputed that the plaintiff was an employee of Liberty at the time of the accident (NYSCEF Doc No 646 ¶ 11). Further the injury that the plaintiff suffered was a torn

meniscus in his knee which does not rise to the level of a “grave injury” under Worker’s Compensation Law § 11 (NYSCEF Doc No 651 at 71:11 – 71:13). Accordingly, since Liberty cannot be held liable to the Developers for common law indemnification and contribution, summary judgment on these claims will be granted in Liberty’s favor and these claims will be dismissed.

Contractual Indemnification

“Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify” (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483, 484 [1st Dept 2010]). “A contractual indemnification provision must be strictly construed to avoid imposing a duty which the parties did not intend” (*Baginski v Queen Grand Realty, LLC*, 68 AD3d 905, 907 [2d Dept 2009]).

Here, the relevant portion of the indemnification agreement provides that:

The contractor [Par Plumbing] shall, to the fullest extent permitted by law defend, indemnify and hold 685 First Realty Company, LLC, Second Ave. Solow Development Corp., 685 First Realty Company II, LLC, Sheldon H. Solow and Stefan Q. Soloviev, their respective partners, directors, members, officers, employees, servant, representatives, consultants and agents harmless from and against any and all claims, loss, (including attorney’s fees, witnesses’ fees and all court costs), damages, expense and liability (including statutory liability), resulting from injury and/or death of any person or damage to or loss of any property ***arising out of any negligence or wrongful act, error, omission, breach of any statute, code or rule or breach of contract, in connection with the operations of the contractor, its subcontractors and sub-subcontractors.***

(NYSCEF Doc 606 [emphasis added]).

Furthermore, pursuant to General Obligations Law § 5-322.1:

a contract or agreement relative to the construction ... purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property

contributed to, caused by or resulting from the negligence of the promise ... is against public policy and is void and unenforceable

“[A]n agreement calling for full indemnification is void and unenforceable under General Obligations Law § 5-322.1 where the indemnitee is found to be at least partially negligent” (*Pardo v Bialystoker Ctr. & Bikur Cholim, Inc.*, 10 AD3d 298, 301 [1st Dept 2004]).

The indemnity provision in the contract is triggered only when an injury arises out of negligence in connection with the operations of the contractor, subcontractor or sub-subcontractors. As noted above, plaintiff’s injury occurred because he slipped on sheetrock debris, which was not Par’s responsibility to remove, and consequently, did not occur due to any negligence on the part of Par. Since plaintiff’s injury did not arise out of Par’s negligence, the indemnity provision cannot be triggered as it must be strictly construed to avoid imposing unintended duties. Indeed, in his deposition Mr. Calicchio, the Developers’ employee, admitted that the indemnity provision would only require indemnification resulting from negligence that arising out of plumbing work (NYSCEF Doc 183 at p 29-30). Consequently, Par has made a prima facie showing that it was not negligent, indeed it was not at the project on the day of plaintiff’s accident and the Developers do not rebut this showing. Accordingly, summary judgment will be granted in Par’s favor on the Developers’ contractual indemnification claim and the claim will be dismissed as against Par.

As for Liberty, however an unresolved issue of fact exists regarding its own negligence. Further, unlike the common law contribution and indemnification claims Workers’ Compensation Law § 11 states that:

For purposes of this section the terms “indemnity” and “contribution” shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or

indemnification of the claimant or person asserting the cause of action for the type of loss suffered.

Therefore, Liberty can be found liable for a claim under contractual indemnification. However, reading the contract strictly so as to not impose any unintended duty, it will only be liable to the extent that its negligence contributed to plaintiff's accident which must be determined by the finder of fact. Accordingly, that portion of Liberty and the Developers' motions for summary judgment on the Developers' contractual indemnification claims as against Liberty will be denied.

Breach of Contract to Purchase Insurance

As for the claims for breach of contract for failing to procure insurance as against both Par and Liberty, third party defendants have submitted proof that they did purchase the requisite insurance (NYSCEF Doc Nos 521 & 607). Further, they both were only required to purchase insurance to cover their own negligence (*see DiBuono v Abbey, LLC*, 83 AD3d 650 [2d Dept 2011]). Accordingly, that portion of Par and Liberty's motions for summary judgment on the Developers' breach of contract for failing to procure insurance claims will be granted and these claims as against Par and Liberty will be dismissed.

Based on the foregoing, it is

ORDERED that the parts of Par's motions to reargue (MS #14) and to renew (#18) are granted; and it is further

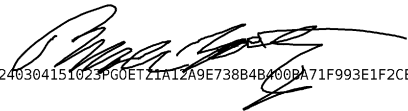
ORDERED that the parts of Par's motions (MS #14 and #18) seeking summary judgment are granted in their entirety and all claims and cross-claims against it are dismissed; and it is further

ORDERED that the part of Liberty's motion to reargue (MS #16) is granted; and it is further

ORDERED that the part of the Developer’s cross-motion to reargue (MS #16) is granted; and it is further

ORDERED that the parts of Liberty’s motion seeking summary judgment and dismissal of the Developers’ claims for common law contribution and indemnification, and for breach of contract for a failure to procure insurance (MS #16) are granted and these claims as against Liberty are dismissed; and it is further

ORDERED that both the Developer’s and Liberty’s motions seeking summary judgment on the Developers’ contractual indemnification claim (MS #16) are denied.


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3/4/2024
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

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APPLICATION:

CHECK IF APPROPRIATE: