

Cruz v Sylvandale Assoc., LLC
2024 NY Slip Op 35214(U)
May 2, 2024
Supreme Court, Bronx County
Docket Number: Index No. 25203/2018E
Judge: Kim Adair Wilson
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, NEW YORK: Part IA-12

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JORGE CRUZ,

Plaintiff,

-against-

SYLVANDALE ASSOCIATES, LLC, BOGEE
SUPERMARKET, INC., MORTOMER MURPHY,
and C.A.P.H. CONTRACTING INC.,

Defendants.

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Kim Adair Wilson, J.:

DECISION AND ORDER
Index No. 25203/2018E
Motion Seq. #: 003

HON. KIM ADAIR WILSON

“NOTICE OF MOTION” (NYSCEF Doc 40), dated and filed June 20 and 21, 2023, respectively, and signed by one Michael A. Calano, Esq. (Calano & Culhane LLP), counsel for defendants Sylvandale Associates, LLC (“Sylvandale”) and Bogee Supermarket, Inc (“Bogee”) seeking an Order, “pursuant to CPLR 3211 and/or 3212 dismissing plaintiff’s Complaint as to common law, Labor Law 200, 240, and 241(6); [and] dismissing any crossclaims against the defendants SYLVANDALE ASSOCIATES, LLC and BOGEE SUPERMARKET, INC [;]” is submitted without opposition, and is decided as set forth below.

The instant matter was commenced on May 3, 2018, by the filing of plaintiff’s Verified Complaint seeking monetary damages for injuries allegedly sustained on or about January 6, 2017, when it is alleged that plaintiff “fell from a height while in the course of his employment with Tito’s Iron Works, Inc.,” at the premises known as 5421 Sylvan Avenue, Bronx, New York (“Subject Premises”), allegedly owned and/or controlled by defendants Sylvandale, Bogee, Mortomer Murphy (“Murphy”) and C.A.P.H. Contracting Inc. (“C.A.P.H.”). Plaintiff’s Complaint alleges five causes of action, including negligence, jointly and severally, and for the defendants’ alleged collective violation of New York State Labor Law Section 200, *et seq.* On May 15, 2018, co-defendants Murphy and C.A.P.H. filed their Verified Answer (NYSCEF Doc 5), asserting a general denial and twenty-one affirmative defenses, as well as crossclaims against co-defendants Sylvandale and Bogee for contribution, common law and contractual indemnity. Subsequently, on October 5, 2018, co-defendants Sylvandale and Bogee filed a Verified Answer also asserting a general denial and 13 affirmative defenses. A Note of Issue

(NYSCEF Doc 21) filed on November 23, 2024, but the time to file summary judgment motions was effectively extended until September 7, 2023, by the Order (NYSCEF Doc 38) entered March 23, 2023 (Julia I. Rodriguez, J.). A motion for summary judgment (NYSCEF Doc 40) by defendants Murphy and C.A.P.H. was granted in part by the prior Decision and Order dated April 30, 2024, and signed by the Undersigned (Kim Adair Wilson, J.), dismissing all claims and cross-claims asserted against defendant C.A.P.H. Contracting, Inc.; dismissing plaintiff's negligence claims under common law and Labor Law § 200 as to defendant Murphy; and dismissing plaintiff's negligence claim under Labor Law §241(6) for violation of Industrial Code Section 23-1.7(b)(1)(i) as to defendant Murphy.

At the outset, consistent with the reasoning set forth in the previous Decision and Order, dated April 30, 2024, Further, with respect to plaintiff's claims set forth under common law and Labor Law § 200, and in cognizance that defendants Sylvandale and Bogee can only be hold vicarious liability to the extent of defendant Murphy's actual liability under those claims, the movants' motion is **GRANTED in part**, to the extent that plaintiff's claims grounded in common law and Labor Law § 200 are dismissed. Further, consistent with that same prior Decision and Order, movants motion is also **GRANTED in part**, dismissing plaintiff's negligence claims under Labor Law §241(6) for violation of Industrial Code Section 23-1.7(b)(1)(i) as to both movants. Consequently, because this Court did not previously determine that defendant Murphy had no liability with respect to plaintiff's claims under Labor Law § 240(1), and under § 241(6) for violation of Industrial Code Section 23-1.7(d), both statutes respectively imposing strict liability on general contractors and owners for breaches of either their provisions or of the Industrial Code, that corresponding branch of movants' motion seeking summary judgment dismissing those claims as against the movants is **DENIED**. Resultantly, the only remaining unresolved branch of this motion is that seeking summary judgment dismissing all crossclaims asserted by defendants Murphy and C.A.P.H. against the movants.

In light of the absence of opposition to the instant motion, this Court notes that the movants have served their Notice of Motion upon the opposing parties via the New York State Unified Court System's Electronic Filing System ("E-File"), pursuant to 22 NYCRR § 202.5-bb. The record shows that all parties in this matter are fully participating in the E-

Filing system, which automatically transmits a digital notification of new filings to the email address provided by the recipient upon registry. Therefore, movants' service of the instant Notice of Motion is presumptively deemed effective.

In support of the instant motion, movants submit their "AFFIRMATION IN SUPPORT" (NYSCEF Doc 61), dated and filed June 20 and 21, 2023, respectively, by movants' aforementioned attorney. Movants also adopt and submit and the "MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MORTOMER MURPHY AND C.A.P.H. CONTRACTING INC.'S MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 66), previously submitted by defendants Murphy and C.A.P.H. (NYSCEF Doc 42) in support of their prior motion for summary judgment (NYSCEF Doc 40). Also submitted as admissible evidence in support is Gee Eng's deposition transcript dated March 16, 2022 (NYSCEF Doc 62); John Bogovic's deposition transcript dated June 1, 2022 (NYSCEF Doc 63); Defendant Mortomer Murphy's deposition transcript dated August 11, 2022 (NYSCEF Doc 64); and the Affidavit of Michael Cronin, Professional Engineer, dated May 18, 2023 (NYSCEF Doc 65).

The movants' Affirmation in Support (NYSCEF Doc 61) states as follows: "[Y]our affiant has adopted co-defendants Motion, joins in the arguments made by co-defendant in its Motion for Summary Judgment and in its Memorandum of Law submitted by co-defendant. Your affiant has elaborated and provided additional facts and has highlighted additional testimony of the parties, as set forth herein, but had adopted co-defendants Memorandum of Law." While, in the interest of judicial economy, this Court would normally proceed by addressing the points of fact and law not previously asserted by co-defendants Murphy and C.A.P.H., the movants here offer no new contentions as to why the cross-claims asserted by co-defendants Murphy and C.A.P.H. should be dismissed.

Parenthetically, this Court notes that movants' "AFFIRMATION IN OPPOSITION TO CROSS MOTION FOR SUMMARY JUDGMENT" (NYSCEF Doc 82), dated and filed September 1, 2023, was apparently submitted, improperly, under motion sequence #3. In the context of the instant motion, the movants are effectively submitting an additional affirmation in support, much in the manner of a reply, but in the absence of any papers submitted in opposition on this motion sequence. It is well established that the function of reply papers is

to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (*Dannasch v. Bifulco*, 184 A.D.2d 415, 417, 585 N.Y.S.2d 360, 362 (1st Dept. 1992). However, since the arguments offered herein against co-defendants' Murphy and C.A.P.H.'s claim for contractual indemnity correspond to the stated relief sought in movants' motion papers, and also explicitly adopt the exact arguments proffered by defendants Murphy and C.A.P.H. in their previous motion, this Court will consider them. Therein, the movants contend that an agreement by a subcontractor to indemnify an owner or general contractor is only enforceable where the indemnitee is found to be free of any negligence. Movants posit that, because cross-claimants Murphy and C.A.P.H. have not proven that they are free from active negligence, they cannot claim entitlement to indemnification from the movants.

At the outset, this Court notes that movants' motion papers do not specify the grounds on which it moves pursuant to CPLR 3211, as is required by CPLR 2214. Therefore, this Court will construe the instant motion as proceeding solely under the provisions of CPLR 3212.

The proponent of a summary judgment motion has the burden of submitting evidence in admissible form demonstrating the absence of any triable issues of fact and establishing entitlement to judgment as a matter of law. *Giuffrida v Citibank Corp.*, 100N Y2d 72 (2003); *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986); *Winegrad v New York University Medical Center*, 64 NY2d 851 (1985). The failure to make such prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers. *Winegrad, supra* at 853. "[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient" to rebut the movants claims and establish that triable issues of fact exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

A party is not entitled to common law indemnification from another party who did not exercise actual control and supervision over the work performed. See *McCarthy v. Turner Const., Inc.*, 17 N.Y.3d 369, 377-78 (2011). Further, a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor. *Cava Const. Co. v. Gealtec Remodeling Corp.*, 58 A.D.3d 660, 662 (2d Dept. 2009); also see *Brown v. Two Exch. Plaza*

Partners, 76 N.Y.2d 172, 175 (1990); General Obligations Law § 5-322.1. Courts will construe a contract to provide indemnity to a party for its own negligence only where the contractual language evinces an “unmistakable intent” to indemnify. *Great N. Ins. Co. v. Interior Const. Corp.*, *supra* at 417. Finally, as codified by statute, any tortfeasor who pays more than its fair share of a judgment—as apportioned by the factfinder in terms of relative culpability—may recover the excess from others who are also liable. *Sommer v. Fed. Signal Corp.*, 79 N.Y.2d 540, 556, (1992); CPLR 1401; also see *Dole v. Dow Chem. Co.*, 30 N.Y.2d 143 (1972).

Upon review and an analysis of the statutory authority, case law, the submitted papers and the record, this Court determines that the movants, defendants Sylvandale and Bogee are entitled to summary judgment dismissing defendant Murphy’s crossclaim seeking common law and contractual indemnification. It is apparent that, as defendants Sylvandale and Bogee did not ever exercise actual supervision over the work performed, they are not obligated to indemnify Murphy under common law, and so Murphy’s First Cross-Claim must be dismissed. Further, the record shows that the contract signed between defendants Sylvandale and Murphy (see NYSCEF Doc 46), submitted previously before this Court, does not demonstrate an unmistakable intent by either Sylvandale or Bogee to be contractually obligated to indemnify Murphy for liabilities incurred via the construction project, and therefore Murphy’s Third Cross-Claim for contractual indemnification must also be dismissed. Additionally, it is clear that defendant Murphy is statutorily entitled to assert his claims for contribution from any other tortfeasors found also to be at fault, and so that defendant’s Second and Fourth Cross-Claims will not be disturbed. Finally, and consistent with the prior Decision and Order, dated April 30, 2024, dismissing all claims against defendant C.A.P.H. for the reason that the entity was defunct at the time of the accident and had no nexus to the construction project, it also follows that all cross-claims asserted by C.A.P.H. against the movants must also be dismissed, due to the absence of any possible obligation existing under contract or common law by which the claimed relief could be granted. In light of the above, that branch of the movants’ motion seeking to dismiss defendants Murphy’s and C.A.P.H.’s crossclaims as asserted against the movants, is **GRANTED solely to the extent**, as stated herein.

The Court has considered the additional contentions of the parties not specifically addressed herein. To the extent that any relief requested by the parties was not addressed by the Court, it is hereby denied.

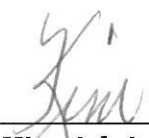
Accordingly, it is hereby

ORDERED that defendants Sylvandale Associates, LLC's and Bogee Supermarket, Inc.'s joint motion seeking summary judgment pursuant to CPLR 3211 and/or 3212 dismissing plaintiff's Complaint as to common law, Labor Law 200, 240, and 241(6); dismissing any crossclaims asserted against those defendants, is **GRANTED** solely to the extent of (i) dismissing plaintiff's negligence claims under common law and Labor Law § 200 as to defendants Sylvandale Associates, LLC and Bogee Supermarket, Inc.; and (ii) dismissing plaintiff's negligence claims under Labor Law §241(6) for violation of Industrial Code Section 23-1.7(b)(1)(i) as to defendants Sylvandale Associates, LLC and Bogee Supermarket, Inc.; (iii) dismissing all cross-claims asserted by C.A.P.H. Contracting, Inc. as against defendants Sylvandale Associates, LLC and Bogee Supermarket, Inc.; and (iv) dismissing defendant Mortomer Murphy's First and Third Cross-Claims as asserted against defendants Sylvandale Associates, LLC and Bogee Supermarket, Inc.; and it is further

ORDERED that the movants are directed to serve a copy of this Decision and Order with Notice of Entry, upon all parties within thirty (30) days of entry, and to file proof of service with the Court.

This constitutes the Decision and Order of this Court.

Dated: May 2, 2024
Bronx, New York



Hon. Kim Adair Wilson, J.S.C.