Hufford v New York Convention Ctr. Operating Corp.
2008 NY Slip Op 33692(U)
October 24, 2008
Supreme Court, New York County
Docket Number: 108846/2006
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL G. FEINMAN PART 12

J.S.C.

Dennis Hufford and Lauren Huford,

- v -

New York Convention Center Operating Corporation, New York Convention Center Development Corporation, Reed Elsevier, Inc. and Pro Safety Services, LLC.

INDEX NO. 108846/2006
MOT. DATE 10-21-2008
MOT. SEQ. NO. 001
MOT. CAL. NO. 51

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The following papers, numbered 1 to 6, were read on this motion to dismiss & for summary judgment:

	PAPERS NUMBERED
Notice of Motion — Affidavits — Exhibits–Memo	1, 2
Answering Affidavits — Exhibits–Memo	3, 4
Replying Affidavits–Memo	5,6

CROSS-MOTION: ☐ Yes ☑ No

The International Vision Expo was a trade show held at the Javits Convention Center pursuant to a License Agreement between the defendant New York Convention Center Operating Corporation ("NYCCOC") and defendant Reed Elsevier, Inc. ("Reed"). Non-party Freeman Decorating Services, Inc. ("Freeman") was retained by Reed to oversee the move-out of the event. As was the show was being broken down and the exhibits and displays dismantled, Freeman's employee, plaintiff Dennis Hufford, was injured when a forklift operated by Anthony Monaco ran over Hufford's right leg. At the time of the incident, the forklift was moving in reverse. According to Monaco, although there had previously been rear view mirrors on this forklift, they had been removed at the direction of NYCCOC's safety manager at the Javits Center, Madeline Morano. Other evidence in the record sows that the decision to remove rear view mirrors from the forklifts was taken by NYCCOC's Director of Show Labor, John Dillon. Hufford suffered serious injuries, inter alia, to his ankle, foot, knee and skin, which required surgical repair of the bone structures and skin grafts.

According to Monaco's deposition testimony, his employer at the time of the incident was the "Jacob Javits Convention Center" and that is who signed his paychecks. Tr. of Monaco EBT at pp. 5-6, 19- 20. He would report to and obtain his time card from NYCCOC in the labor hall of the Javits Center and then report to a supervisor from Freeman for specific assignments, not the show management. Ibid at pp. 45 -50. Indeed, on the evening of the accident, no Reed employees were present at the Javits Center.

Upon completion of discovery in this action, defendant Reed sought a stipulation of discontinuance from the plaintiffs and its co-defendants. Plaintiffs

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agreed to voluntarily discontinue their action as against Reed. However, defendant NYCCOC has been unwilling to sign a stipulation of discontinuance as to their cross-claims against Reed. Thus, this motion ensued.

Defendant Reed moves for an order dismissing the complaint of the plaintiffs as against them with prejudice and with the plaintiffs' consent. Reed also moves for summary judgment pursuant to CPLR 3212 on the cross-claims asserted against it by NYCCOC. It also seeks sanctions, attorney's fees and costs pursuant to 22 NYCRR § 130-1.1 and CPLR § 8303-a. Plaintiffs have not appeared on the motion. Defendant NYCCOC vigorously opposes all branches of the motion.

In its answer to the second amended complaint, NYCCOC and the New York Convention Center Development Corporation ("NYCCDC") assert three cross-claims against their co-defendant Reed. The first alleges that plaintiffs' injuries are due to Reed's negligence, and therefore, Reed is entitled to common law contribution and/or indemnification. The second alleges that Reed breached its agreement with NYCCOC by failing to purchase insurance naming NYCCOC as an insured for a claim such as the one being made here. The third alleges Reed breached its agreement with NYCCOC for contractual indemnification.

Clearly, nothing is to be gained by forcing plaintiffs to proceed with a claim against Reed that they believe cannot succeed. Thus, the first branch of the defendant Reed's motion is granted and the plaintiffs' complaint against it is dismissed with prejudice.

The court will now turn to NYCCOC and NYCCDC's cross-claims *in seriatim.* Defendant Reed's moving papers make a *prima facie* showing that it was not negligent and that its conduct was not a substantial factor to the causing of plaintiff's injuries. In opposition, NYCCOC and NYCCDC raise a claim that Reed is vicariously liable for its contractor's liability, i.e., Freeman, which was supervising Monaco. However, this theory is nowhere asserted in the cross-claims. Even if the theory of vicarious liability can be read as having been adequately pleaded, the common law apportionment rule and contribution do not apply to vicarious liability. As to common law indemnification, NYCCOC has failed to allege, let alone prove, that the plaintiff's injuries were due solely to Reed's negligence solely within its province. *See, Corley v Rick Osburn Construction, Inc.,* 32 AD3d 978 (2nd Dept. 2006). Accordingly, the first cross-claim is dismissed as against Reed.

The second cross-claim for breach of an agreement to procure insurance is likewise dismissed. The documentary evidence establishes that NYCCOC and NYCCDC were named as additional insureds on Reed's policy with Ace Insurance Company.

The third cross-claim is premised on contractual indemnity. Of course, NYCCOC and NYCCDC cannot contractually require Reed to indemnify it for the negligence of its own employees. Monaco was NYCCOC and NYCCDC's employee. Although not relevant to this discussion, a jury might apportion some fault to the plaintiff himself, based on Monaco's testimony that after the accident plaintiff admitted he "wasn't paying attention." Tr. of Monaco EBT at p. 36 l. 3. There is also a view of

the record whereby a jury could find that the sole proximate cause of this accident was the negligence of NYCCOC and NYCCDC's safety director's decision to remove the rear view mirrors. There is no view of the evidence, however, which would allow a jury to find that Reed was negligent and that its conduct was a substantial factor in causing the accident. Thus, the only theory on which Reed might be liable is to the extent that there is a basis in the record for NYCCOC and NYCCDC's argument that Monaco was a special employee of non-party Freeman because they were responsible for supervising and directing his work, and Reed agreed contractually to indemnify NYCCOC and NYCCDC for its contractor's negligence.

However, there is no need to force Reed to participate In the trial as NYCCOC and NYCCDC can request that the trial judge to put on the verdict sheet questions regarding non-party Freeman's negligence, whether its negligence was a substantial factor in causing the plaintiff's injuries, whether Monaco was acting as a special employee of Freeman and to provide a line for Freeman in the apportionment question related to a finding of comparative negligence. Then, after the trial, the trial judge, if warranted by the verdict, can entertain a motion to enter judgment on this cross-claim as a matter of law. Indeed, in this court's experience during trials the parties frequently agree not to place the issues of contractual indemnification before the jury because it risks confusing the jury and allowing in proof of insurance that might otherwise be excluded. Rather, those issues are frequently left to the court to sort out after the jury has considered the issues of negligence and apportioned fault.

Thus, the motion for summary judgment on the third cross-claim by defendants NYCCOC and NYCCDC against is denied. However, the trial of the third cross-claim is severed from the trial of the main action. The trial judge, then, in his or her discretion can enter judgment as a matter of law on it after the verdict in rest of the action and/or schedule a trial of the third cross-claim in his or her discretion.

The court next turns to the branch of this motion which seeks monetary sanctions, costs, and attorney's fees.Finally, the supervision of this action was only recently transferred to this court. While the parties' affirmations contain acrimonious allegations back and forth about what transpired between them and before the previously assigned Justice regarding the stipulation of discontinuance, some of which are disturbing given that the affirmants are all officers of the court with ethical obligations to hold up the dignity of their profession, this court has no ability, nor desire, to sort through the "he said, he said" nature of the competing affirmations. It is not an endeavor which can be carried out solely on papers as the court would have to make credibility determinations given that it was not a party to the referenced conferences. The court and its special referees are simply too busy to devote scarce resources to be dragged into a morass. However, counsel are advised that this court will not hesitate to use all available remedies, if it detects any dilatory conduct, false statements, or other ethical breaches. Counsel are reminded that the uniform court rules for this county require counsel who appear to be fully authorized to address all issues in a case. Accordingly, the branch of the motion which seeks sanctions, attorney's fees and costs is denied.

Finally, the court is in receipt of two letters dated October 24, 2008 motion submission part, the court has received letters from counsel for NYCCOC and Reed seeking, inter alia, an adjournment of the October 29, 2008 appearance before J.H.O. Ira Gammerman in Part 40. The contents of the letter have not been considered in deciding this motion, as they are improper submissions after the motion was marked submitted in the motion submission part. If a party is seeking a further order from the court, it should follow the procedures set forth in CPLR 2211.

Accordingly, it is

ORDERED that the branch of the motion by defendant Reed Elsevier, Inc. which seeks dismissal of the plaintiffs' complaint as against it, is granted with prejudice; and it is further

ORDERED that the branch of the motion by defendant Reed Elsevier, Inc. which seeks summary judgment in its favor on the three cross-claims asserted by co-defendants New York Convention Center Operating Corporation and New York Convention Center Development Corporation is granted as to the first cross-claim for common law contribution and indemnification and the second cross-claim for breach of promise to procure insurance and is denied as to the third cross-claim for contractual indemnification; and it is further

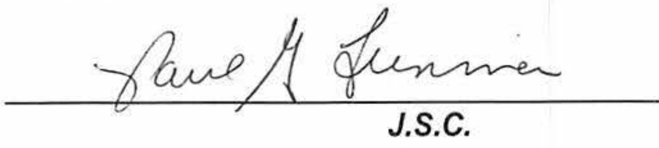
ORDERED that the trial of the third cross-claim is severed from the trial of the remainder of the action and to be tried, if necessary, in the discretion of the trial court in accordance with this decision; and it is further

ORDERED that the branch of the motion which seeks sanctions, costs and attorney's fees is denied; and it is further

ORDERED that upon proof of service of a copy of this decision and order the Clerk of the Court shall enter judgment accordingly; and it is further

ORDERED that the parties to this action shall appear for jury selection before J.H.O. Ira Gammerman on October 29, 2008 at 9:30 a.m. in Part 40, 60 Centre Street, New York, NY 10007as there is no pending motion, no stay of the trial, and no appearance scheduled in Part 12.

Dated: October 24, 2008



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