

Contino v 340 Madison Owner LLC
2012 NY Slip Op 30817(U)
March 28, 2012
Supreme Court, New York County
Docket Number: 116392/07
Judge: Paul Wooten
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANTHONY J. CONTINO and SANDRA CONTINO,

Plaintiffs,

-against-

Index No. 116392/07
Seq. No. 002

340 MADISON OWNER LLC and McGRAW HUDSON
CONSTRUCTION CORPORATION,

Defendants.

340 MADISON OWNER LLC and McGRAW HUDSON
CONSTRUCTION CORPORATION,

Defendants/Third-Party Plaintiffs,

Third-Party Index No.
590336/08

-against-

SAGE ELECTRICAL CONTRACTING,

FILED

Third-Party Defendant.

APR 02 2012

The following papers numbered 1 to 3 were read on this motion by the third-party defendant for summary judgment dismissing the third-party complaint and for summary judgment on its counterclaim.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answering Affidavits — Exhibits (Memo)

2

Reply Affidavits — Exhibits (Memo)

3

Cross-Motion: Yes No

In this action which arises from an accident at a construction site, third-party defendant Sage Electrical Contracting (Sage) moves, pursuant to CPLR 3212 and Workers' Compensation Law § 11, for summary judgment dismissing the third-party complaint and granting Sage summary judgment on its counterclaim for contribution or common-law indemnification.

BACKGROUND

On October 4, 2005, Anthony J. Contino (plaintiff), an electrician then an employee of Sage, slipped and fell on a slick of grease/oil and water at the base of a staircase in the premises located at 340 Madison Avenue in Manhattan. Defendant 340 Madison Owner LLC (340 Madison) owned the premises, and defendant McGraw Hudson Construction Corporation (McGraw Hudson) was the general contractor for the construction project. Sage was a subcontractor hired by McGraw Hudson to perform electrical work at the site. Plaintiff was aware of the puddle, as he had walked past it several times prior to the accident. McGraw Hudson's laborers were responsible for keeping the work site clean. In December 2007, plaintiff commenced this action against 340 Madison and McGraw Hudson. The complaint consists of three causes of action, the first two sounding in negligence and violations of Labor Law §§ 200, 240(1) and 241(6). The third cause of action for loss of consortium is asserted by plaintiff Sandra Contino, Contino's wife. On April 29, 2008, 340 Madison and McGraw Hudson commenced the third-party action against Sage. The third party complaint asserts four causes of action for: contribution, common-law and contractual indemnification, and breach of contract for failure to procure insurance. In its third-party answer, Sage asserts a counterclaim for contribution or common-law indemnification.

SUMMARY JUDGMENT STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). The failure to make such a showing requires denial of the motion, regardless

of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist; not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable issue, summary judgment should be denied (see *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

DISCUSSION

Admissibility of Sage's Evidence

As a threshold matter, 340 Madison and McGraw Hudson argue that Sage's motion for summary judgment must be denied because Sage failed to submit evidence in admissible form for the Court to consider its application. Sage bases its summary judgment motion in large part on the deposition testimonies of plaintiff, Robert Avitabile (McGraw Hudson's superintendent), Richard Conti (McGraw Hudson's labor foreman), and Carlo Pannone (Sage's superintendent). 340 Madison and McGraw Hudson argue that these deposition transcripts, while certified, are unsigned and unsworn, and thus, cannot be considered admissible evidence, and in support cite to *Lo Cicero v Frisian* (150 AD2d 761 [2d Dept 1989] [unsigned and unsworn transcripts of examinations before trial inadmissible]). However, more recent Appellate Division, Second Department, case law states that "the transcript of [the] examination before trial was certified

and, hence, in admissible form" (*Felberbaum v Weinberger*, 40 AD3d 808, 809 [2d Dept 2007]).

More frequent statements of the law indicate that unsigned, unsworn deposition transcripts can be admissible if the defendant forwarded the deposition to the deponent for consideration and review, but the deponent failed to sign or return it within 60 days (see CPLR 3116 [a]; see e.g. *Franzese v Tanger Factory Outlet Ctrs., Inc.*, 88 AD3d 763, 763-764 [2d Dept 2011]; *R.M. Newell Co. v Rice*, 236 AD2d 843, 844 [4th Dept 1997]), or that "[a]n unsigned but certified deposition transcript of a party can be used by the opposing party as an admission in support of a summary judgment motion" (*Morchik v Trinity School*, 257 AD2d 534, 536 [1st Dept 1999] [emphasis added]; see also *R.M. Newell Co. v Rice*, 236 AD2d at 844).

The facts of this matter do not fall within any of these situations. Here, Sage uses unsworn, unsigned, but certified deposition transcripts as a basis for its summary judgment motion, and fails to give any indication that its use of the transcripts falls within CPLR 3116(a). However, 340 Madison and McGraw Hudson, while attacking Sage's use of them, use these same transcripts as a basis for their opposition. This situation falls more within the context of *Morchik* (257 AD2d at 535), where the Court found that, "[plaintiff's] transcript here, though unsigned, had been certified by the court reporter. Moreover, plaintiff himself used portions of it in his opposition papers. We find that the court erred in denying the motion on these grounds" The Court finds that the deposition transcripts used by Sage in its summary judgment motion are admissible and will therefore consider Sage's motion.

Sage's Motion

Workers' Compensation Law § 11

"Workers' Compensation Law § 11 prohibits a third-party action for common-law indemnification or contribution against an employer except in the case where, inter alia, the employee has sustained a grave injury" (*Cocom-Tambriz v Surita Demolition Contr., Inc.*, 84 AD3d 1300, 1301 [2d Dept 2011]). The definition of "grave injury" is set by statute, and only

those conditions listed, constitute a "grave injury" (see *Fleming v Graham*, 10 NY3d 296, 300 [2008] ["the list, both 'exhaustive' and 'not illustrative,' is 'not intended to be extended absent further legislative action' (Governor's Approval Mem at 55)"]).

It is undisputed that on the date of the accident, plaintiff was employed by Sage and that he did not sustain a "grave injury." Therefore, the portion of Sage's motion which seeks summary judgment dismissing 340 Madison and McGraw Hudson's contribution and common-law indemnification claims is granted.

Contractual Indemnification

"[A] party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Baillargeon v Kings County Waterproofing Corp.*, 91 AD3d 686, 688 [2d Dept 2012], quoting *Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987]). "[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" (*Baillargeon*, 91 AD3d at 688 [internal quotation marks and citations omitted]). If a triable issue of fact exists regarding the indemnitee's negligence, summary judgment on a claim for contractual indemnification must be denied as premature (see *Baillargeon*, 91 AD3d at 688).

340 Madison and McGraw Hudson contend that paragraphs 7(a) and (c) of the March 15, 2004 McGraw Hudson/Sage Trade Contract entitle them to be indemnified by Sage if they are found liable to plaintiff in this action. Paragraph 7(a) provides indemnification "against all penalties for violation" of Sage's "covenants and warrants that it [would] perform the work in a safe and proper manner and so as to comply with all laws, rules, regulations, codes and ordinances referring to such work." Since there is no evidence that Sage failed to perform its work in a safe and proper manner, or that it failed to comply with any laws or rules, regulations,

codes, and ordinances, it cannot be held liable for contractual indemnification under this provision.

Paragraph 7(c) requires indemnification if 340 Madison and McGraw Hudson are found liable for damages for bodily injuries "sustained by any person or persons *other than employees of [Sage]*" (emphasis added). Since, as it has already been noted, that on the date of the accident plaintiff was an employee of Sage, no contractual indemnification based on this provision can lie. Therefore, the portion of Sage's motion which seeks summary judgment dismissing 340 Madison and McGraw Hudson's claim for contractual indemnification is granted.

Breach of Contract for Failure to Obtain Insurance

The parties do not discuss this cause of action in their motion papers. Thus, Sage has failed to meet its burden on its summary judgment motion, and the part of its motion which seeks summary judgment dismissing this claim is denied.

Sage's Counterclaim for Common-Law Indemnification or Contribution

"Indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for that loss because it was the actual wrongdoer" (*Trump VII. Section 3 v New York State Hous. Fin. Agency*, 307 AD2d 891, 895 [1st Dept 2003], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 451 [1st Dept 1985]).

However, the Court has already concluded, that there is no evidence in the record to indicate that Sage had anything to do with creating the grease/water hazard, that it had any obligation to clean the area where plaintiff fell and failed to do so, or that it acted negligently in any way such that it would be held liable. In light of the Court granting Sage's motion for summary judgment dismissing the third-party complaint against it, except as to the fourth cause of action for breach of contract, Sage is not entitled to any common-law relief as against 340 Madison and McGraw Hudson. Accordingly, the portion of Sage's motion seeking summary

judgment on its counterclaim against 340 Madison and McGraw Hudson for common-law indemnification or contribution is denied as moot.

CONCLUSION

Accordingly, it is

ORDERED that the part of Sage Electrical Contracting's motion which seeks summary judgment dismissing 340 Madison Owner LLC and McGraw Hudson Construction Corporation's contribution, common-law and contractual indemnification claims is granted; and it is further

ORDERED that the part of Sage Electrical Contracting's motion which seeks summary judgment dismissing 340 Madison Owner LLC and McGraw Hudson Construction Corporation's breach of contract claim is denied; and it is further

ORDERED that the part of Sage Electrical Contracting's motion which seeks summary judgment on its counterclaim against 340 Madison Owner LLC and McGraw Hudson Construction Corporation for contribution or common-law indemnification is denied as moot; and it is further,

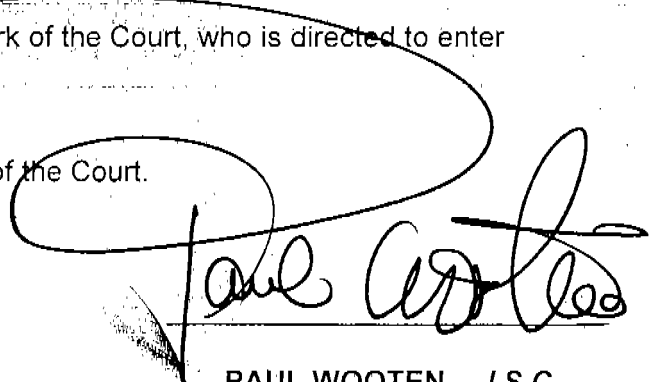
ORDERED that trial counsel are directed to appear for a pre-trial conference in Part 7, 60 Centre Street, Room 341 on May 10, 2012 at 2:30 P.M.; and it is further,

ORDERED that Sage Electrical Contracting is directed to serve a copy of this order with notice of entry upon all parties and upon the Clerk of the Court, who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: 3-28-12

Enter:



PAUL WOOTEN J.S.C.

FILED

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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