

Casalini v Alexander Wolf & Son

2012 NY Slip Op 31900(U)

July 12, 2012

Sup Ct, NY County

Docket Number: 102184/2010

Judge: Saliann Scarpulla

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA
J.S.C.
Justice

PART 19

Index Number : 102184/2010
CASALINI, MICHAEL
VS.
ALEXANDER WOLF & SON
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 7/12/12
which disposes of motion sequence(s) no. 001

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

FILED

JUL 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 7/12/12

Saliann Scarpulla J.S.C.
SALIANN SCARPULLA
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
 - 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
 - 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

----- X
MICHAEL CASALINI and GAIL CASALINI,

Plaintiffs,

- against-

Index No.: 102184/2010
Submission Date: 03/21/2012

ALEXANDER WOLF & SON a/k/a A.W. & S.
CONSTRUCTION CO., INC., MANHATTAN MALL
EAT, LLC, STRAWBERRY STORES, INC.,
VNO 100 WEST 33RD STREET, LLC, VORNADO
REALTY TRUST and VORNADO SHENANDOAH
HOLDINGS, LLC,

Defendants.

----- X
MANHATTAN MALL EAT, LLC, STRAWBERRY
STORES, INC., VNO 100 WEST 33RD STREET, LLC,
VORNADO REALTY TRUST and VORNADO
SHENANDOAH HOLDINGS, LLC,

FILED

JUL 19 2012

NEW YORK
COUNTY CLERK'S OFFICE

Index No: 590573/2011

Third-Party Plaintiffs,

-against-

FLORIN PAINTING, INC.,

Third-Party Defendant.

----- X

ALEXANDER WOLF & SON a Division of A.W.&S.
CONSTRUCTION CO., INC. s/h/a ALEXANDER WOLF
& SON a/k/a A.W.&S. CONSTRUCTION CO., INC.,

Index No.: 590224/2011

Second Third-Party Plaintiff,

-against-

FLORIN PAINTING, INC.,

Second Third-Party Defendant.

----- X

For Plaintiffs:
Silbowitz, Garafola, Silbowitz, Schatz
& Frederick, LLP
25 West 43rd Street, Suite 711
New York, NY 10036

For Third-Party Plaintiffs :
Wilson, Elser, Moskowitz, Edelman & Dicker LLP
150 East 42nd Street
New York, NY 10017-5639

For Defendant Alexander Wolf & Son
a/k/a A.W. & S. Construction Co., Inc.:
Barry, McTiernan & Moore
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New York, NY 10006

For Third-Party Defendant
Florin Painting, Inc.
Jones, Hirsch, Connors & Bull, P.C.
One Battery Park Plaza
New York, NY 10004

Papers considered in review of this motion for summary judgment:

Noting of Motion	1
Aff of Support	2
Aff in Limited Opp	3
Notice of Cross-Motion	4
Aff in Opp	5
Mem of Law	6
Reply Aff	7

FILED

DEC 14 2012

HON. SALIANN SCARPULLA, J.:

In this action for indemnification and contribution, defendants/third-party plaintiffs
Manhattan Mall Eat, LLC (“Manhattan Mall Eat”), Gimstraw, LLC s/h/a Strawberry
Stores, Inc. (“Strawberry Stores”), VNO 100 West 33rd Street, LLC (“VNO”), Vornado

Realty Trust (“Vornado Realty”) and Vornado Shenandoah Holdings, LLC (“Vornado Shenandoah”) move pursuant to CPLR 3212 for summary judgment (1) on Strawberry Stores’ and VNO’s third party-claims against third-party defendant Florin Painting, Inc. (“Florin”) for contractual indemnity, including all costs and attorney’s fees; (2) on Strawberry Stores’ and VNO’s cross-claims against defendant/second third-party plaintiff Alexander Wolf & Son a/k/a A.W. & S. Construction Co., Inc. (“Alexander Wolf”) for common law indemnity, including all costs and attorney’s fees; and (3) to dismiss the complaint against Manhattan Mall Eat, Vornado Realty and Vornado Shenandoah. Alexander Wolf cross-moves for conditional summary judgment on its second third-party claim for contractual indemnity against Florin.

This action arises out of personal injuries plaintiff Michael Casalini (“Casalini”) sustained on November 21, 2008 when he slipped and fell on debris while working on a project (the “project”) to renovate a Strawberry Store (the “premises”). The store was located in the Manhattan Mall at 100 West 33rd Street in Manhattan. VNO owns the premises and Strawberry Stores is its tenant. At the time, Casalini was an employee of Florin, which was performing work on the project pursuant to a subcontractor agreement (the “Agreement”) with Alexander Wolf, the project’s general contractor. Paragraph four of the Agreement states:

[Florin] agrees to indemnify, defend and hold harmless [Alexander Wolf], Owner and any other person or entity whom [Alexander Wolf] is required to defend, indemnify and hold harmless and/or for whom [Alexander Wolf] is performing work, their tenants, mortgages, officers, directors, agents, employees and partners

and each of them (hereinafter "Indemnitees"), from any and all claims, suits, damages, liabilities, professional fees (including attorneys fees), costs, disbursements, expenses and losses of every kind (hereinafter "Claims"), including those brought by any employee of [Florin], its sub-contractors, lower tier contractors or suppliers, arising from or related to death, personal injuries, property damage (including loss of use thereof) and/or advertising injury brought against any of the Indemnitees, arising from, in connection with or as a result of performance of Subcontractor's work hereunder (including any additional, extra or add-on work) or delivery of its materials, whether or not caused in whole or in part by [Florin] or its sub-contractors, suppliers or lower tier contractors.

Casalini commenced this action in February, 2010, asserting causes of action for common law negligence and various Labor Law and Industrial Code violations against Manhattan Mall Eat, Strawberry Stores, VNO, Vornado Realty and Vornado Shenandoah (collectively "defendants"). In their Answers, Manhattan Mall Eat, Strawberry Stores, VNO, Vornado Realty and Vornado Shenandoah asserted cross-claims against Alexander Wolf for common law indemnification. In June, 2010, Manhattan Mall Eat, Strawberry Stores, VNO, Vornado Realty and Vornado Shenandoah commenced a third-party action against Florin for indemnification, contribution, and breach of contract. Thereafter, Alexander Wolf commenced a second third-party action against Florin for indemnification and contribution.

At his deposition, Casalini testified that at approximately 10:30 or 11:00 A.M on the date of his accident, he was hanging wallpaper at the premises. After stepping off a ladder, Casalini turned around to look at his work, took three steps and slipped on a pile of debris, causing him to fall and sustain injuries to his right wrist and hand. Casalini testified that the pile of debris consisted of trash, a small pipe and some wiring.

According to Casalini, the debris had not been there when he began hanging wallpaper fifteen minutes earlier.

Vincent Bartolomucci (“Bartolomucci”), Casalini’s co-worker who was with him on the date of the accident, also testified at his deposition that Casalini slipped on a pile of debris after coming down from the ladder. Bartolomucci testified that workers on the project would throw their debris on the ground after eating.

A project manager with Alexander Wolf, Kevin Walter (“Walter”), testified that Alexander Wolf was responsible for removing debris from the work site. According to Walter, Alexander Wolf did not have a set schedule for removing the debris, but would do so on an as-needed basis. Walter further testified that employees of various subcontractors were working at the premises on the day of Casalini’s accident.

VNO and Stawberry Stores now move for summary judgment on their contractual indemnity claims against Florin, arguing that the Agreement is unambiguous and entitles them to full indemnity for their costs in defending this action. VNO and Stawberry Stores also argue that they are entitled to summary judgment on their common law indemnity cross-claims against Alexander Wolf because Walter testified that Alexander Wolf was responsible for clearing debris, and because VNO and Stawberry Stores did not supervise or control Casalini’s work site. Thus, their potential liability arises solely from Alexander Wolf’s negligence. Lastly, Manhattan Mall Eat, Vornado Realty and Vornado Shenandoah maintain that the Court should dismiss the complaint in its entirety against

them because they did not own, operate, manage, maintain, control or repair the premises on the date of Casalini's accident.

On its cross-motion for summary judgment on the contractual indemnity claim against Florin, Alexander Wolf adopts Strawberry's and VNO's argument that the plain wording of the Agreement is unambiguous and entitles Alexander Wolf to full indemnity for the costs in defending this action. In opposition to Strawberry's and VNO's summary judgment motion on their cross-claims, Alexander Wolf argues that Strawberry and VNO have failed to establish that Alexander Wolf was negligent as a matter of law, a predicate to common law indemnification. Alexander Wolf points out there is no evidence that it was negligent in failing to clear the pile of debris that allegedly caused Casalini's accident.

In opposition to defendants' motions for summary judgment on the contractual indemnity claims, Florin maintains that it is not required to indemnify defendants because there is no evidence that Florin's acted negligently.

The motion for summary judgment dismissing the complaint as to Vornado Realty and Vornado Shenandoah is unopposed.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgement as a matter of law, offering sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853

(1985). Once a showing has been made, the burden shifts to the opposing party, who must then demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980).

Here, Strawberry Stores, VNO and Alexander Wolf have made a *prima facie* showing of entitlement to summary judgment on their contractual indemnity claims against Florin. The Agreement states that Florin is required to indemnify Alexander Wolf, as well as any property owner or tenant for whom Alexander Wolf was performing work, for costs in defending personal injury actions “arising from, in connection with or as a result of performance of” Florin’s work. The parties do not dispute that Alexander Wolf was performing work for Strawberry Stores, or that VNO owned the premiss. Further, the uncontroverted evidence shows that Casalini’s allegations arise from Florin’s work on the project, as Casalini testified that he was injured while attempting to view work he had just completed for Florin.

Though Florin maintains that it is not required to indemnify Strawberry Stores, VNO or Alexander Wolf because there is no evidence that Florin acted negligently, the Agreement requires Florin to indemnify Strawberry Stores, VNO and Alexander Wolf regardless of whether Florin’s negligence caused Casalini’s injuries. Accordingly, as the plain wording of the Agreement is unambiguous, the Court grants summary judgment on Strawberry Stores, VNO’s and Alexander Wolf’s contractual indemnity claims against Florin. *See Brookhaven Memorial Hosp. Medical Center, Inc. v. County of Suffolk*, 155

A.D.2d 404, 406-07 (2d Dept. 1989) (granting summary judgment on indemnity claim where agreement to indemnify was “unambiguous on its face”).

However, VNO and Strawberry Stores have failed to make the required showing entitling them to common law indemnity against Alexander Wolf. When an owner is liable for injuries solely by virtue of its ownership of the premises, and lacks supervision or control over the work that is being performed, the owner is entitled to common law indemnity from the party whose negligence caused the plaintiff’s accident. *See Guzman v. Haven Plaza Housing Dev. Fun Co.*, 69 N.Y.2d 559, 568 (1987).

Though Alexander Wolf may have been responsible for removing debris from the work site, VNO and Strawberry Stores have failed to show that Alexander Wolf was negligent in failing to remove the debris that allegedly caused Casalini’s accident. Casalini testified that the debris was not there fifteen minutes before the accident. Further, there is no evidence in the record that Alexander Wolf had notice of, or created, the pile of debris. *See Wynne v. State*, 53 A.D.3d 656, 657 (1st Dept. 2010).¹ Thus, VNO’s and Strawberry Stores’ motion is denied insofar as it seeks summary judgment on the common law indemnification claim against Alexander Wolf.

In accordance with the foregoing, it is hereby

ORDERED that the motion for summary judgment by defendants/third-party plaintiffs Manhattan Mall Eat, LLC, Strawberry Stores, Inc., VNO 100 West 33rd Street,

¹The Court also notes that Casalini’s hospital records, which state that he fell off the ladder, contradict Casalini’s testimony and create an issue of fact as to the cause of his injuries.

LLC, Vornado Realty Trust and Vornado Shenandoah Holdings, LLC is granted insofar as VNO 100 West 33rd Street, LLC and Gimstraw, LLC s/h/a Strawberry Stores, Inc. are entitled to contractual indemnification, including all costs and attorney's fees, against third-party defendant Florin Painting, Inc., and the complaint is dismissed without opposition against Manhattan Mall Eat, LLC, Vornado Realty Trust and Vornado Shenandoah Holdings, LLC, and the motion is otherwise denied; and it is further

ORDERED that the cross-motion for summary judgment by defendant/second third-party plaintiff Alexander Wolf & Son a/k/a A.W. & S. Construction Co., Inc. on its contractual indemnity cause of action against Florin Painting, Inc. is granted; and it is further

ORDERED that the Clerk of the Court is directed to sever and enter judgment dismissing the complaint as to Vornado Realty Trust and Vornado Shenandoah Holdings, LLC accordingly.

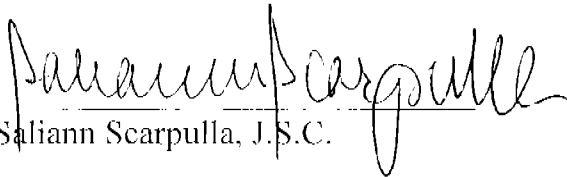
This constitutes the decision and order of the court.

FILED

Dated: New York, New York
July 12, 2012

JUL 12 2012

ENTER:


Saliann Scarpulla, J.S.C.