291 Broadway Realty Assoc. v Weather Wise Conditioning Corp.
2012 NY Slip Op 31962(U)
July 16, 2012
Supreme Court, New York County
Docket Number: 702513/08
Judge: Doris Ling-Cohan

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN
Justice

PART 36

291 Broadway Realty Associates

-v-

Weather Wise Conditioning

INDEX NO. 702513/08

MOTION DATE

MOTION SEQ. NO. 002

The following papers, numbered 1 to 5, were read on this motion ~~to/~~for summary judgment

Notice of Motion/Order to Show Cause — Affidavits — Exhibits | No(s). 1, 2, 3

Answering Affidavits — Exhibits | No(s). 4

Replying Affidavits | No(s). 5

Upon the foregoing papers, it is ordered that this motion ~~is~~ for summary judgment by defendant Gabe Construction Corp., is denied in accordance with the attached memorandum decision.

(This motion seq. no. 002 is consolidated for decision with motion seq. no. 003).

FILED

JUL 24 2012

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/16/12

, J.S.C.
DORIS LING-COHAN

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: IAS PART 36

----------X

291 BROADWAY REALTY ASSOCIATES a/k/a
291 BROADWAY REALTY ASSOCIATES, LLC,
SUTTON MANAGEMENT CORP. and
STARBUCKS CORPORATION d/b/a
STARBUCKS COFFEE COMPANY,

Plaintiffs,

Index No.: 702513/08
DECISION/ORDER

-against-

WEATHER WISE CONDITIONING CORP. and
GABE CONSTRUCTION CORP.,

Defendants.

----------X

HON. DORIS LING-COHAN, J.S.C.:

In this insurance indemnification action, defendant Gabe Construction Corp. (Gabe) moves for summary judgment to dismiss the complaint as against it (motion sequence number 002), and plaintiffs move separately for partial summary judgment on the complaint as against defendant Weather Wise Conditioning Corp. (Weather Wise) (motion sequence number 003). For the following reasons, both motions for summary judgment are denied.

BACKGROUND

Plaintiffs 291 Broadway Realty Associates a/k/a 291 Broadway Realty Associates, LLC (291 Broadway), Sutton Management Corp. (Sutton) and Starbucks Corporation d/b/a Starbucks Coffee Company (Starbucks; collectively, plaintiffs) are, respectively, the owner, the managing agent and the tenant of the first-floor commercial unit of a building (the building) located at 291 Broadway in the County, City and State of New York. *See* Notice of Motion (motion sequence number 002), Exhibit B (third-party complaint). Defendant Gabe is a general contractor that Starbucks had hired in 2000 to perform certain construction work in its premises. *Id.*, ¶¶ 8-14,

57. Defendant Weather Wise is an HVAC maintenance company that Starbucks hired in 2006 to service the HVAC system in its premises. *Id.*, ¶¶ 1-7, 21.

The specific work that Gabe performed in the building was governed by the terms of its December 7, 1999 Construction Management Agreement with Starbucks (the Gabe contract), and included the installation of an HVAC unit that was to have been suspended from the building's "concrete slab" ceiling with mechanical fasteners and anchors. *See* Notice of Motion (motion sequence number 002), Exhibit G-1.

Gabe's president, Ernest Bertuzzi (Bertuzzi), however, has submitted an affidavit in which he states that it proved impossible to install the HVAC unit in the prescribed manner because the fasteners and anchors kept detaching. *Id.*; Exhibit G, at 2 (pages not numbered). Bertuzzi further states that he explained this situation to Starbucks's manager, Otilio Rivera (Rivera), and Starbucks's architect, Giuseppe Anzalone (Anzalone), in response to which they provided him with a set of hand-drawn plans (prepared by Anzalone) in June 2000 for installing, instead, a platform above Starbucks's drop ceiling, on which the HVAC unit would sit. *Id.* at 2-3 (pages not numbered). Bertuzzi avers that the small dimensions of the platform were dictated by the small amount of available space in which to place it, and that it was designed and installed without safety railings because it was only intended to support the weight of the HVAC unit, and not to accommodate the additional weight of any maintenance workers who might have to service the unit in the future. *Id.* at 3 (pages not numbered). Bertuzzi further avers that Anzalone inspected and approved the platform soon after it was installed, that Starbucks approved and paid for Gabe's work in August 2000, and that Gabe was never subsequently called back to perform any additional work on the platform. *Id.* at 3-4; Exhibits G-2, G-3. Finally, Bertuzzi states that

he did not keep copies of the plans or the other paperwork pertaining to Gabe's installation of the platform. *Id.* at 3. However, plaintiffs have provided a copy of an August 7, 2000 "change order" from Gabe that states that Gabe performed certain "additional work," including:

> 4. Fabricate and install HVAC service platform [-] due to the size and weight of new unit it could not be supported by slab above, and would not be serviceable.

See Tompkins Affirmation in Opposition, Exhibit C-2. Plaintiffs have also provided a copy of an August 29, 2000 inter-office memo from Rivera to his supervisors that lists certain "field directives" that had been issued to Gabe, including:

> 4. Base Building Upgrade (Other) - Fabricate and install HVAC services platform due to the size and weight of [the] new unit. Structure above and height of ceiling (21 feet plus) would have made unit difficult to services [*sic*]. Size of louvers required for the proposed unit would also require additional louver areas and make duct work difficult to get to unit. Decision was made in the field to provide services platform that would address all these issues. Platform constructed of steel tube and metal "C joist" framing.

Id.; Exhibit C-3.

This insurance indemnification action follows a personal injury action that was commenced by nonparty Weather Wise employee Edwin Martinez (Martinez) in this court (against the plaintiffs herein), on February 14, 2008 under Index Number 102513/08 (the Martinez action). *See* Tompkins Affirmation in Opposition, Exhibit A. On August 31, 2007, Martinez was injured when he fell from the platform through the drop ceiling and to the floor below while attempting to perform work on the HVAC unit. *Id.*; ¶ 32. On June 2, 2010, this court issued an order that severed this third-party action from the Martinez action. *See* Notice of Motion (motion sequence number 002), Exhibit A. The parties aver that the Martinez action was eventually settled for the sum of $675,000.00. *Id.*; Kaye Affirmation, at 2 (pages not numbered).

In this action, plaintiffs seek to recover the costs of that settlement against Gabe and Weather Wise. Kaye Affirmation, at 1.

Plaintiffs have presented a transcript of Martinez's October 28, 2008 deposition testimony wherein he described ascending a ladder through the drop ceiling to reach the HVAC unit, stepping onto a 12 foot long wooden board that served as a ledge on one side of the unit, climbing over the unit, standing on a concrete ledge on the other side of the unit, opening the unit's access panel and determining that it needed a replacement contact, climbing back over the unit and placing his foot on the wooden ledge again prior to stepping onto the ladder, feeling the wood crack as soon as his foot touched it and falling to the floor 18 feet below. *See* Notice of Motion (motion sequence number 003), Exhibit J, at 34-36, 78-92, 102-104. Martinez admitted that he had safety harnesses in his truck, but that he didn't use them. *Id.* at 38-39.

Plaintiffs have also presented a transcript of the July 26, 2001 deposition testimony of Martinez's co-worker and fellow Weather Wise employee, Miguel Velez (Velez), who was present at the time of Martinez's accident, who stated that he had examined the broken piece of wood that fell to the floor when Martinez stepped on it, and opined that the wooden board next to the HVAC unit was not strong enough to stand on, and was only intended to be used to rest tools on. *See* Notice of Motion (motion sequence number 003), Exhibit K, at 30-33, 59-61, 67-68. Velez also stated that Martinez was making a call on his cell phone to his Weather Wise supervisor at the time that he fell. *Id.* at 50-52.

Finally, plaintiffs have presented a copy of the January 10, 2006 "HVAC Services" agreement between Starbucks and Weather Wise (the Weather Wise contract), the relevant portions of which provide as follows:

> 11. Indemnification. Contractor [i.e., Weather Wise] hereby indemnifies and holds harmless Starbucks, its officers directors, employees, agents, subsidiaries and other affiliates, from and against any and all claims, damages, liability and expenses (including attorney's fees) incurred by reason of Contractor's breach of any representation, warranty, covenant, Agreement or obligation under this agreement, or Contractor's (or its allowed subcontractor's) negligent and/or willful acts or omissions in carrying out its obligations under this Agreement.
>
> 12. Representations and Warranties. Contractor represents and warrants ... (c) that the Services shall be performed by qualified personnel in a professional and workmanlike manner, in accordance with the highest industry standards and in compliance with all federal, state and local laws including building codes and handicapped accessability codes ... .

See Notice of Motion (motion sequence number 003), Exhibit H-A.

Plaintiffs commenced this third-party action on April 7, 2010, by filing a summons and complaint that sets forth causes of action for: 1) contractual indemnification (against Weather Wise); 2) common-law indemnification/contribution (against Weather Wise); 3) breach of contract (against Weather Wise); 4) contribution (against Gabe); 5) common-law indemnification (against Gabe); and 6) contractual indemnification (against Gabe). *See* Notice of Motion (motion sequence number 002), Exhibit B. Both third-party defendants served timely answers. *Id.*; Exhibits C, D.

Now before the court are general contractor Gabe's motion for summary judgment to dismiss the complaint as against it (motion sequence number 002), and plaintiffs' motion for partial summary judgment on the complaint as against Weather Wise (motion sequence number 003). Plaintiffs oppose Gabe's motion, and have also presented an affidavit from architect Stuart Sokoloff (Sokoloff), who opines that the platform, as constructed, was insufficient to support Martinez's weight, and therefore was both in violation of Labor Law § 240 (1), and was also the proximate cause of Martinez's injuries. *See* Tompkins Affirmation in Opposition, Exhibit D.

Weather Wise opposes plaintiffs' motion. *See* Rubinstein Affirmation in Opposition.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 (1985); *Sokolow, Dunaud, Mercadier & Carreras LLP v Lacher*, 299 AD2d 64 (1st Dept 2002). Despite the sufficiency of the opposing papers, the failure to make such a showing requires denial of the motion. *Winegrad v New York University Medical Center*, 64 NY2d at 853 (1985). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557 (1980); *Pemberton v New York City Tr. Auth.*, 304 AD2d 340 (1st Dept 2003).

Gabe's Motion

In its motion, Gabe seeks summary judgment to dismiss plaintiffs' claims against it for contributory negligence, common-law indemnification and contractual indemnification.

With respect to plaintiffs' negligence claims, Gabe argues for dismissal on the ground that its' only duty to plaintiffs arose out of its contract with Starbucks, and that New York law provides that a contractual duty, standing alone, will not generally give rise to tort liability to a third party, such as Martinez. *See* Notice of Motion, Kaye Affirmation, at 8-10. Plaintiffs respond that New York law allows for three exceptions to this rule, one of which applies to defendants whose actions resulted in "launching a force or instrumentality of harm," which renders Gabe liable herein. *See* Tompkins Affirmation in Opposition, ¶¶ 17-20. Gabe replies

that New York law further provides that the foregoing exception does not apply where a contractor justifiably relies on the construction plans that it is hired to execute, and where the contractor completes the subject work prior to the accrual of any claim and the property owner has accepted said work without complaint. *See* Kaye Reply Affirmation, at 3-5. After careful consideration, Gabe has failed to establish that it is entitled to dismissal as a matter of law.

In *Espinal v Melville Snow Contrs.* (98 NY2d 136, 138-140 [2002]), the Court of Appeals observed that:

> Under our decisional law a contractual obligation, standing alone, will generally not give rise to tort liability in favor of a third party. ... On the other hand, we have recognized that under some circumstances, a party who enters into a contract thereby assumes a duty of care to certain persons outside the contract. ... Although the "policy-laden" nature of the existence and scope of a duty generally precludes any bright-line rules, ...
>
> *Moch, Eaves Brooks* and *Palka* identify contractual situations involving possible tort liability to third persons.
>
> ...
>
> In sum, *Moch, Eaves Brooks* and *Palka* identify three situations in which a party who enters into a contract to render services may be said to have assumed a duty of care - and thus be potentially liable in tort - to third persons: (1) where the contracting party, in failing to exercise reasonable care in the performance of his duties, "launche[s] a force or instrument of harm"; (2) where the plaintiff detrimentally relies on the continued performance of the contracting party's duties; and (3) where the contracting party has entirely displaced the other party's duty to maintain the premises safely. These principles are firmly rooted in our case law, and have been generally recognized by other authorities [internal citations omitted].

Thus, the general rule in New York does not impose tort liability on contractors, to a third party. The court, therefore, turns its attention to the three exceptions to that rule.

Here, the first of those exceptions is the only one at issue. As previously indicated, plaintiffs argue that their contributory negligence claim against Gabe should not be dismissed because, when Gabe constructed the subject HVAC platform, it "launched an instrument of

harm." *See* Tompkins Affirmation in Opposition, ¶ 17. To support this argument, plaintiffs specifically refer to Sokoloff's expert opinion that the HVAC platform was a "service platform," and was defectively constructed because it lacked safety devices as required by Labor Law §§ 240.1, 200 (1) and 240 (3). *Id.*, ¶¶ 10, 16. Gabe responds by citing the rule recently reiterated by the Appellate Division, Second Department, in *Peluso v ERM* (63 AD3d 1025, 1026 [2d Dept 2009] that "[a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow, unless they are so apparently defective that an ordinary builder of ordinary prudence would be put upon notice that the work was dangerous and likely to cause injury [internal quotation marks and citations omitted]." *See also Ryan v Feeney & Sheehan Bldg. Co.*, 239 NY 43 (1924). Gabe argues that plaintiffs have failed to present any evidence that the building plans that Rivera gave it to follow were "so apparently defective." *See* Notice of Motion, Kaye Affirmation, at 12-14 (paragraphs not numbered).

However, as stated above, "[t]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 (1985). Accordingly, Gabe has the burden to establish that it relied on the plans and specifications of the contract, and that such plans were not apparently defective. *See Ryan v Fenney & Sheehan Bldg. Co.*, 239 NY 43 (1924). Here, it is undisputed that the parties modified the Gabe contract after the original plans proved futile and that such modifications were hand-drawn by Anzalone. Additionally, all parties agree that such plans and specifications referred to by Gabe no longer exist or cannot be located. Aside from Gabe's conclusory statements that it relied upon the plans and specifications contracted to, and that the

service platform was not apparently defective, Gabe has failed to provide any evidence to support its assertions. Noteably, in support of its motion, Gabe proffers, *inter alia*, an affidavit from Bertuzzi, rather than Bertuzzi's deposition transcript, claiming that Bertuzzi's affidavit is significantly more comprehensive than his deposition transcript. Kaye Affirmation, p. 5. However, the self-serving statement in Bertuzzi's affidavit that Gabe "installed the platform in accordance with the hand drawn schematic provided by Starbucks", is not supported by any evidence. Bertuzzi Affidavit, p. 3. As such, Gabe has failed to meet its burden to establish entitlement to judgment as a matter of law, as issues of fact exist regarding whether Gabe followed the plans and specifications provided by Starbucks. In fact, Gabe has not even produced the plans and specifications allegedly subsequently agreed to by both sides. Moreover, Gabe does not present any specific arguments directed against plaintiffs' claims for contractual and common-law indemnification. Therefore, Gabe's motion for summary judgment is denied.

Plaintiffs' Motion

As previously mentioned, the complaint asserts causes of action against Weather Wise for contractual indemnification, common-law indemnification/contribution and breach of contract. However, in their motion, plaintiffs only seek summary judgment against Weather Wise based upon contractual indemnification. Plaintiffs first cite the Court of Appeals holding in *Levine v Shell Oil Co.* (28 NY2d 205, 212 [1971]) that indemnification clauses by which an indemnitor seeks to indemnify an indemnitee against the indemnitee's own active negligence will be enforced where the contractual language is such that "that appears to have been the unmistakable intent of the parties." Plaintiffs then argue that paragraph 11 of the Weather Wise contract contains such a clause. *See* Notice of Motion (motion sequence number 003), Tompkins

Affirmation, ¶¶ 19-21.

Weather Wise responds that the plain language of paragraph 11 requires a finding that it was in some degree negligent before its obligation to indemnify plaintiffs is triggered. *See* Rubinstein Affirmation in Opposition, ¶ 6. Gabe contends that because Weather Wise's opposition argument was raised by its attorney, it does not constitute admissible proof that is capable of defeating a motion for summary judgment. *See* Kaye Reply Affirmation, ¶ 5.

As was previously noted, paragraph 11 of the Weather Wise contract states that:

> 11. Indemnification. Contractor [i.e., Weather Wise] hereby indemnifies and holds harmless Starbucks... from and against any and all claims, damages, liability and expenses (including attorney's fees) incurred by reason of Contractor's breach of any representation, warranty, covenant, Agreement or obligation under this agreement, or Contractor's (or its allowed subcontractor's) negligent and/or willful acts or omissions in carrying out its obligations under this Agreement ... .

See Notice of Motion (motion sequence number 003), Exhibit H-A. This differs from the indemnification clause at issue in *Levine v Shell Oil Co.*, which provided that:

> ... the '[l]essee ... shall indemnify [the landlord] against any and all claims, suits, loss, cost and liability on account of injury or death of persons or damage to property, or for liens on the premises, caused by or happening in connection with the premises (including the adjacent sidewalks and driveways) or the condition maintenance, possession or use thereof or the operations thereon.'

28 NY2d at 210. The disputed indemnification clause clearly states that Weather Wise's obligation to indemnify is *conditional*, and shall arise only upon a "breach of any representation, warranty, covenant, Agreement or obligation," or upon Weather Wise's perpetration of any "negligent and/or willful acts or omissions." By contrast, the indemnification clauses at issue in *Levine v Shell Oil Co.* and the cases that follow that decision, all contain unconditional language, which the Court of Appeals has found must be read as imposing no limitations on the obligation

to indemnify. *See Levine v Shell Oil Co.*, 28 NY2d at 211-212. Because the indemnification clause in the Weather Wise contract clearly *does* contain limiting language, the rule in *Levine v Shell Oil Co.* and its progeny does not apply herein. It is well settled that "'[o]n a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and ... circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself'." *Maysek & Moran, Inc. v S.G. Warburg & Co., Inc.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Development Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Therefore, the court rejects plaintiffs' first argument.[1]

Plaintiffs also argue, in the alternative, that there is evidence that Martinez was negligent, in that he was using his cell phone at the time that he fell from the HVAC platform, and that this proof is sufficient to trigger Weather Wise's indemnification obligation. *See* Notice of Motion (motion sequence number 003), Tompkins Affirmation, ¶¶ 22-25. Weather Wise does not address this point directly in its opposition papers, but instead raises a number of arguments alleging that there is a triable issue of fact as to whether Gabe was negligent, and that this issue precludes the triggering of Weather Wise's indemnification obligation at this juncture. *See* Rubinstein Affirmation in Opposition, ¶¶ 9-17. As the court has already denied Gabe's motion

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[1] The court is mindful that General Obligations Law § 5-322.1 normally voids indemnity clauses that purport to indemnify a party against liability for its own negligence. *See* Rubinstein Affirmation in Opposition, ¶ 8. However, plaintiffs are also correct to point out that the Court of Appeals holding in *Levine v Shell Oil Co.* is still good law. *See e.g. In re New York City Asbestos Litigation*, 41 AD3d 299, 301 (1st Dept 2007) ("Indemnification provisions have been enforced, despite negligence on the part of the party being indemnified, where the provision stated that they applied to 'any and all claims, suits, loss, cost and liability' ... or 'any and all damage or injury of any kind.'"). However, as was discussed above, the instant indemnity clause does *not* purport to indemnify Starbucks against the consequences of its own negligence.

for summary judgment, on the ground that it failed to establish entitlement to judgment as a matter of law, an issue of fact exists as to whether Gabe was negligent.

Finally, Weather Wise argues that dicta in this court's October 4, 2011 decision that denied its previous motion for summary judgment (motion sequence number 001) required a trial in this action, because "Weather Wise is only responsible for its percentage of negligence in the happening of Martinez's accident." *See* Rubinstein Affirmation in Opposition, ¶¶ 21-22. Although the court's decision does not say this in so many words, Weather Wise's interpretation is nonetheless correct. A determination must be made as to what quantum of negligence, if any, that Starbucks and Weather Wise, respectively, are responsible for herein before the extent of Weather Wise's liability to indemnify Starbucks, if any, can be determined. *See e.g. Kowalewski v North Gen. Hosp.*, 266 AD2d 114 (1st Dept 1999). At issue in this motion is whether there is sufficient evidence to warrant a trial on the matter, or whether it can be disposed of via summary judgment. A trial *is* required in this action as plaintiffs have submitted inconsistent affidavits. *Id.*, ¶¶ 15-17. There is indeed an inconsistency between the deposition testimony of Martinez and Velez, in that the latter claims that Martinez was using a cell phone at the time of his injury, while the former made no such admission. Without determining the issue of whether the use of a cell phone in the instant circumstances was per se negligent, such behavior could constitute some evidence of negligence, and the inconsistent testimony herein presents a question of fact that revolves around witness credibility. It is axiomatic that issues of witness credibility are not appropriately resolved on a motion for summary judgment. *See e.g. Santos v Temco Service Industries, Inc.*, 295 AD2d 218 (1st Dept 2002). Therefore, it would be improper to determine whether or not Weather Wise owes contractual indemnification to plaintiffs at this juncture.

Accordingly, plaintiffs' motion is denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendant Gabe Construction Corp. is denied; and it is further

ORDERED that the motion, pursuant to CPLR 3212, of plaintiffs 291 Broadway Realty Associates a/k/a 291 Broadway Realty Associates, LLC, Sutton Management Corp. and Starbucks Corporation d/b/a Starbucks Coffee Company is denied; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this decision/order upon all parties with notice of entry.

Dated: New York, New York
July 16, 2012

Hon. Doris Ling-Cohan, J.S.C.

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