

Elkin v NYC Partnership Hous. Dev. Fund Co., Inc.

2013 NY Slip Op 33428(U)

December 18, 2013

Supreme Court, New York County

Docket Number: 102594/11

Judge: Cynthia S. Kern

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 102594/2011
ELKIN, JOSEPH
vs.
NYC PARTNERSHIP HOUSING
SEQUENCE NUMBER : 006
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

is decided in accordance with the annexed decision.

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

FILED

DEC 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 12/15/13

CR, 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: Part 55

-----X
JOSEPH ELKIN,

Plaintiff,

Index No. 102594/11

-against-

DECISION/ORDER

NYC PARTNERSHIP HOUSING DEVELOPMENT
FUND COMPANY, INC. and BLUE SEA
CONSTRUCTION COMPANY, LLC,

Defendants.

-----X
NYC PARTNERSHIP HOUSING DEVELOPMENT
FUND COMPANY, INC. and BLUE SEA
CONSTRUCTION COMPANY, LLC,

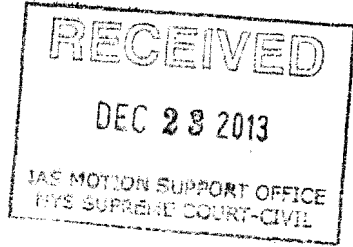
Third-Party Plaintiffs,

-against-

LARRY E. KNIGHT, INC. and JEM ERECTORS, INC.,

Third-Party Defendants.

-----X
HON. CYNTHIA S. KERN, J.S.C.



FILED

DEC 24 2013

COUNTY CLERK'S OFFICE
NEW YORK

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u> </u>
Answering Affidavits to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff commenced this action to recover for injuries he allegedly sustained in the course of his employment. Third-party defendant Larry E. Knight, Inc. ("Knight") now moves

for an Order pursuant to CPLR § 3212 dismissing the third-party complaint and any other claims asserted against it. For the reasons set forth below, Knight's motion is granted in part and denied in part.

The relevant facts are as follows. In or around 2008, plaintiff was employed as a cement mason foreman by third-party defendant JEM Erectors, Inc. ("JEM") at a construction project for the erection of a seven-story residential building located at 715 Fox Street, New York, New York (the "worksite"). The general contractor at the worksite was defendant and third-party plaintiff Blue Sea Construction Company, LLC ("Blue Sea"). Knight was hired by Blue Sea for the manufacture of the pre-cast concrete decking and staircases. Pursuant to that contract, Knight supplied the precast decking but subcontracted out the installation and labor to JEM and the manufacture of the precast stairs to non-party Bethlehem Precast.

Plaintiff alleges that on December 24, 2008, he and his co-worker, Chris Cole, were assigned to conduct welding work on the fourth floor of the worksite. Plaintiff further alleges that he used a staircase, which was clear of ice and snow, to get to the fourth floor of the worksite but that when they arrived, they observed Blue Sea's laborers shoveling snow from the roof area as the worksite was not yet fully enclosed and it had snowed the night before. Plaintiff alleges that when he and his co-worker realized they could not yet perform the welding work due to the snow, they exited the worksite by descending a different staircase when plaintiff suddenly slipped on snow/ice and sustained injuries to his right shoulder.

In or around March 2011, plaintiff commenced the instant action against Blue Sea and NYC Partnership Housing Development Fund Company, Inc. ("NYC Partnership"), the owner of the property, alleging causes of action for negligence and violations of the Labor Law and the

Industrial Code. In or around May 2011, defendants commenced a third-party action against Knight and JEM seeking indemnity and/or contribution in connection with plaintiff's lawsuit. Knight now moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party action against it on the ground that it did not create the condition on which plaintiff slipped and fell and that it was not responsible for the snow and/or ice removal from the staircase on which plaintiff slipped and fell.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a prima facie right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

In the instant action, Knight's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party action against it is granted in part and denied in part. As an initial matter, Knight has established its prima facie right to summary judgment dismissing third-party plaintiffs' claim for common law indemnification. A claim for "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 the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). Implied indemnity allows one who "is held vicariously liable

solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer.” *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999).

In the instant action, Knight is entitled to summary judgment dismissing third-party plaintiffs’ claim for common-law indemnification as Knight has established that plaintiff’s injuries were not caused by Knight’s negligence. As an initial matter, it is undisputed that Knight did not create the condition on which plaintiff slipped and fell but that the icy condition on the stairs was created due to the fact that the worksite was not yet finished and was open to the elements and that it had snowed the night before plaintiff’s accident. Further, it is undisputed that it was not the responsibility of Knight to clear the snow and ice from the worksite. According to Marcelo Budassi, the Superintendent of Blue Sea, it was the job of Blue Sea’s laborers’ to remove the snow and ice from the stairs and the worksite. Moreover, it is undisputed that Knight’s workers were never present at the worksite. Thus, as Knight has established that plaintiff’s injuries were not caused by its negligence, third-party plaintiffs’ cause of action for common-law indemnification against Knight must be dismissed.

Knight has also established its prima facie right to summary judgment dismissing the third-party plaintiffs’ claim for contribution. Under New York’s contribution statute, “two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is

sought.” CPLR § 1401. Here, Knight has established that plaintiff’s injuries were not in any way caused by Knight’s negligence and that it is not “subject to liability for damages” for plaintiff’s injuries. Thus, third-party plaintiffs’ claim for contribution against Knight must be dismissed.

However, Knight has failed to establish its prima facie right to summary judgment dismissing the third-party plaintiffs’ claim for contractual indemnification. Pursuant to Article 9, Section 1 of the contract between Knight and Blue Sea,

To the fullest extent permitted by law, [Knight] shall defend, indemnify and hold harmless [Blue Sea], its officers, directors and principals, [Blue Sea’s] other subcontractors, the Architect/Engineer, the Owner and their agents, consultants and employees (the Indemnitees) from all claims for bodily injury and property damage that may arise from the performance of the Subcontract Work to the extent of the negligence attributed to such acts or omissions by [Knight], [Knight’s] subcontractors or anyone employed directly or indirectly by any of them or by anyone for whose acts any of them may be liable.

Thus, pursuant to the contract, Knight owes Blue Sea a duty to indemnify it if plaintiff’s injuries were caused in any way by either Knight’s negligence or the negligence of Knight’s subcontractors. Although this court has determined that Knight was not negligent, a finding has not yet been made as to whether JEM, plaintiff’s employer and Knight’s subcontractor, was negligent and whether that negligence contributed to plaintiff’s injuries. Thus, summary judgment dismissing third-party plaintiffs’ claim for contractual indemnification must be denied. Knight’s assertion that third-party plaintiffs’ claim for contractual indemnification should be dismissed because Blue Sea may seek indemnification from JEM pursuant to the contract JEM maintains with Knight, which requires JEM to indemnify Blue Sea, is without merit. The fact

that Blue Sea may seek indemnification from JEM if it is found that JEM was negligent does not preclude Blue Sea from also seeking indemnification from Knight. Knight has also failed to establish its prima facie right to summary judgment dismissing the third-party plaintiffs' cause of action for attorney's fees on the ground that Knight may be required to pay third-party plaintiffs attorney's fees based on their contractual indemnification claim.

However, Knight has established its prima facie right to summary judgment dismissing the third-party plaintiffs' cause of action for breach of contract on the ground that Knight failed to procure insurance. Knight has provided its insurance policy issued by Graphic Arts Mutual Insurance Company, effective April 1, 2008 through April 1, 2009, which contains a blanket endorsement for contractually designated additional insureds, which sufficiently satisfies Knight's requirement to procure insurance. *See Perez v. Morse Diesel International, Inc.*, 10 A.D.3d 497, 498 (1st Dept 2004)(finding that as "[t]he record establishes [defendant] purchased a liability policy...with a blanket endorsement for contractually designated additional insureds...[plaintiff's] claim that [defendant] breached its obligation to procure insurance [is] untenable.")

Finally, Knight's request for a conditional order granting it indemnification from JEM if it is found that plaintiff's injuries were caused, in whole or in part, by JEM's negligence is granted pursuant to Article 4, Section 6 of the contract between Knight and JEM.

Accordingly, Knight's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the third-party complaint is granted in part and denied in part. The Clerk is directed to enter judgment dismissing the third-party complaint's first and sixth causes of action against Knight only. Additionally, Knight is conditionally entitled to indemnification from JEM

