Gonzalez v L&L Holding Co.
2017 NY Slip Op 30294(U)
February 15, 2017
Supreme Court, New York County
Docket Number: 151304/2015
Judge: Cynthia S. Kern
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 55

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ALEJANDRO CORREA GONZALEZ,

Plaintiff,

DECISION/ORDER
Index No. 151304/2015

-against-

L&L HOLDING COMPANY and L&B REALTY ADVISORS, LLP,

Defendants.

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L&L HOLDING COMPANY and L&B REALTY ADVISORS, LLP,

Third-Party Plaintiffs,

-against-

EAST COAST RESTORATION & CONSTRUCTION CONSULTING CORP.,

Third-Party Defendant.

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L&L HOLDING COMPANY and L&B REALTY ADVISORS, LLP,

Second Third-Party Plaintiffs,

-against-

METROPOLITAN CLEANING, LLC,

Second Third-Party Defendant.

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HON. CYNTHIA KERN, J.:

Plaintiff Alejandro Correa Gonzalez commenced the instant action seeking to recover for injuries he allegedly sustained when he slipped and fell on a staircase. Third-party defendant East Coast Restoration & Construction Consulting Corp. ("East Coast") now moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing the third-party complaint. Second third-party defendant Metropolitan Cleaning, LLC ("Metropolitan") cross-moves for an Order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint and the second third-party complaint. For the reasons set forth below, East Coast's motion is granted in part and denied in part and Metropolitan's cross-motion is denied.

The relevant facts are as follows. Defendants/third-party plaintiffs L&L Holding Company and L&B Realty Advisors, LLP (collectively the "third-party plaintiffs") own and/or manage the premises located at 150 5th Avenue, New York, New York (the "premises"). Metropolitan provided cleaning services for the premises pursuant to a contract with L&L Holding Company. East Coast was hired by L&L Holding Company to repair a leak in the roof at the premises (the "work"). On or about September 22, 2014, plaintiff, an East Coast employee assisting with the work at the premises, allegedly slipped and fell on an interior staircase (the "accident"). The accident was witnessed by Wilson Munoz, another East Coast employee who was standing at the bottom of the staircase holding sheetrock or similar material, and was captured in surveillance footage. Plaintiff testified during his deposition that he was walking down the staircase to take a break from his work when he slipped on about the fourth or fifth step up from the landing due to water. Although he testified that he did not see any water or debris on any of the steps when he was walking down the staircase, when he slipped, he noticed that his boots were wet and then saw that there was a puddle of water approximately a quarter of an inch deep "three or four steps up" from where he slipped. Further, he testified that he did not have any idea where the water came from and that the step with the puddle of water was in "another place" than the leaky portion of the roof that East Coast was repairing. Plaintiff also testified that it was not raining on the day of the accident, that he did not have to walk through any water on the roof and that he did not notice any water leaking through the roof. Chris Bybel ("Bybel"), East Coast's foreman, testified during his deposition that he did not notice any water on the staircase or the roof itself when he left the roof and descended the staircase approximately ten or fifteen minutes before the accident.

The purchase order between L&L Holding Company and East Coast provides that East Coast "shall indemnify, defend and hold harmless Owner and L&L Holding Company, LLC…from and against all liabilities…arising out of, or in connection with any act, negligence, omission or breach of any of the terms of this Agreement" by East Coast or its employees. The contract between L&L Holding Company and Metropolitan similarly provides that Metropolitan "shall indemnify, defend and hold harmless Owner, [L&L

Holding Company] and all partners, officers, directors...from and against all liabilities...arising out of, or in connection with, any negligent act or omission, of [Metropolitan]."

Initially, the portion of East Coast's motion for summary judgment dismissing third-party plaintiffs' causes of action for common law indemnification and contribution pursuant to Workers' Compensation Law § 11 on the ground that plaintiff did not sustain a grave injury is granted without opposition.

The portion of East Coast's motion for summary judgment dismissing third-party plaintiffs' cause of action for contractual indemnification on the ground that the accident was not caused by any act, negligence, omission or breach of the agreement by East Coast or its employees is denied without prejudice as premature. The court should not award summary judgment where discovery necessary to justify opposition to the motion has not been completed. *See* CPLR § 3212(f); *Blech v. West Park Presbyterian Church*, 97 A.D.3d 443 (1st Dept 2012) ("Defendants' initial motions for summary judgment were premature, since the matter was in the early stages of discovery, and depositions had not yet been taken"). In the present case, the deposition of Wilson Munoz, who witnessed the accident and may testify regarding the puddle of water that allegedly caused the accident, has yet to be conducted and may lead to relevant evidence regarding whether the accident was caused by any act, negligence, omission or breach of the agreement by East Coast or its employees.

The court next considers Metropolitan's cross-motion for summary judgment dismissing plaintiff's complaint and the second third-party complaint. As an initial matter, the portion of Metropolitan's cross-motion for summary judgment dismissing plaintiff's complaint is denied as Metropolitan is not a defendant in the underlying action.

The portion of Metropolitan's cross-motion for summary judgment dismissing third-party plaintiffs' second third-party complaint seeking contractual and common law indemnification and contribution on the ground that the accident was not caused by its negligence as it did not create or have actual or constructive notice of the puddle of water is also denied. 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.*

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). The right to indemnification can be created by an express contract or may be implied by law. *Id.* 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). Further, 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. *Board of Educ. of Hudson City School Dist. v. Sargent, Webster, Crenshaw & Folley*, 71 N.Y.2d 21, 26 (1987).

In the present case, Metropolitan, which entered into a contract with L&L Holding Company requiring it to clean the premises, including the staircase at issue, has failed to make a *prima facie* showing that it did not create or have notice of the puddle of water and thus that the accident was not caused by its negligence. Metropolitan has yet to be deposed and has not submitted any affidavit regarding whether it created or had notice of the puddle of water.

Accordingly, the portion of East Coast's motion for summary judgment dismissing third-party plaintiffs' causes of action for common law indemnification and contribution is granted but the portion of East Coast's motion for summary judgment dismissing third-party plaintiffs' cause of action for contractual

indemnification is denied without prejudice. Metropolitan's cross-motion for summary judgment dismissing plaintiff's complaint and the second third-party complaint is denied. This constitutes the decision and order of the court.

DATE: 2/15/17

KERN, CYNTHIA S., JSC

HON. CYNTHIA S. KERN