Murphy v Eagle Scaffolding, Inc.

2013 NY Slip Op 30709(U)

March 28, 2013

Sup Ct, Suffolk County

Docket Number: 03-27573

Judge: Thomas F. Whelan

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[* 1]

SHORT FORM ORDER

INDEX No. 03-27573
CAL. No. 12-00285OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 7-20-12 (#006)
MOTION DATE 8-14-12 (#007)
ADJ. DATE 12-10-12
Mot. Seq. # 006 - MD
007 - MotD

---X

SEAN MURPHY and DANIELLE MURPHY,

Plaintiffs,

- against -

EAGLE SCAFFOLDING, INC.,

Defendant.

---X

EAGLE SCAFFOLDING, INC.,

Plaintiff,

- against -

KEYSPAN ENERGY CORPORATION,

Defendant.

---X

EAGLE SCAFFOLDING, INC.,

Plaintiff,

- against -

KEYSPAN GENERATION,

Defendant.

---X

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Upon the following papers numbered 1 to 57 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25; 26 - 41 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 42 - 47; 48 - 53 ; Replying Affidavits and supporting papers 54 - 55; 56 - 57 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion by third-party defendant, KeySpan Energy Corporation, and second third-party defendant, KeySpan Generation LLC, for summary judgment and this motion by defendant/third-party plaintiff/second third-party plaintiff, Eagle Scaffolding, Inc., for summary judgment are consolidated for the purposes of this determination; and it is further

ORDERED that this motion by third-party defendant, KeySpan Energy Corporation, and second third-party defendant, KeySpan Generation LLC, for an order pursuant to CPLR 3212 granting summary judgment in their favor dismissing the third-party complaint and the second third-party complaint on the grounds that they are barred by Workers' Compensation Law § 11 is denied; and it is further

ORDERED that this motion by defendant/third-party plaintiff/second third-party plaintiff, Eagle Scaffolding, Inc., for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and all claims against it is determined herein.

This is an action to recover damages, personally and derivatively, for injuries allegedly sustained by plaintiff Sean Murphy on April 11, 2003 when he fell from a scaffold at a construction site at the Northport Power Plant, Waterside Avenue, Northport, New York. The accident occurred during the course of his work as a mechanic on a project that involved the replacement of a heater.

In their complaint against defendant Eagle Scaffolding, Inc. (Eagle), plaintiffs allege that plaintiff Sean Murphy was employed by KeySpan Energy, Inc. as a mechanic, that defendant Eagle provided the scaffolding for this project pursuant to an agreement with his employer, and that the scaffold that plaintiff used was unsafe. Plaintiffs also allege a first cause of action on behalf of plaintiff Sean Murphy for common law negligence, a second cause of action on behalf of plaintiff Sean Murphy claiming violations of Labor Law §§ 200, 240 and 241, and a third, derivative, cause of action on behalf of plaintiff Danielle Murphy for loss of services.

Defendant Eagle commenced a third-party action against KeySpan Energy Corporation and a second third-party action against KeySpan Generation LLC (the KeySpan defendants) for indemnification and contribution alleging that on March 29, 2003 the KeySpan defendants entered into an agreement with Eagle in which Eagle was to deliver and install certain pre-assembled scaffolds in connection with this project at the Northport Power Plant, and that the agreement was in full force and effect at the time of plaintiff's accident. In addition, Eagle alleges that said agreement required the KeySpan defendants to indemnify, defend and hold Eagle harmless for injuries, claims, lawsuits and actions arising out of or in connection with KeySpan's use, control, supervision, maintenance, repair, alteration, modification and moving of said scaffold. The KeySpan defendants answered asserting affirmative defenses including, that the third-party claims are barred by the exclusive remedy provision of the Workers' Compensation Law as well as General Obligations Law § 5-322.1. They also asserted counterclaims for indemnification and contribution. The Court's computerized records indicate that the note of issue in this action was filed on February 21, 2012.

The KeySpan defendants now move for summary judgment dismissing the third-party complaint and the second third-party complaint on the grounds that they are barred by Workers' Compensation Law § 11 inasmuch as none of plaintiff's injuries alleged in his bill of particulars constitute a "grave injury" and no written indemnity agreement existed with Eagle. They assert that Eagle has failed to produce or disclose any such express agreement for indemnification or contribution despite demands for any and all contracts, agreements or work orders by notices for discovery and inspection dated December 15, 2005 and November 29, 2006 served on Eagle. Their submissions in support of the motion include the pleadings of the main action and the third-party actions, plaintiff's bills of particulars, and plaintiff's deposition transcripts.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Friends of Animals, Inc. v Associated Fur Mfrs., Inc.***, 46 NY2d 1065, 416 NYS2d 790 [1979]). The failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (*see* ***Winegrad v New York Univ. Med. Ctr.***, 64 NY2d 851, 487 NYS2d 316 [1985]). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (***Alvarez v Prospect Hosp.***, 68 NY2d at 324, 508 NYS2d 923, citing to ***Zuckerman v City of New York***, 49 NY2d at 562, 427 NYS2d 595).

Workers' Compensation Law § 11 provides:

> "An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a 'grave injury' which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability."

Plaintiff lists the following injuries in plaintiffs' amended bill of particulars: epidural injections in the neck, possibility of future spinal surgery, possibility of future epidural injections, left shoulder strain, significant compression fracture of the 6th,7th,8th and 9th thoracic vertebral body at T2-T8 and T9, narrowing at T6-T7 and T7-T8 interspace, epidural injections in the back, numbness of back, large right plural effusion collapse and compression of the right lung, deviation of mediastinum, pneumonia, pericardial effusion, pain upon deep breathing, difficulty sleeping, difficulty sitting for periods of time, multiple bilateral rib fractures with pulmonary contusion, constant numbness in right arm and hand, numbness of both arms and hands, subcutaneous emphysema in the flank area, internal derangement of

both knees, left knee sprain, possibility of future knee surgery, numbness of both legs and feet, contusion to the proximal left tibia, and various bruises, abrasions, and contusions on various parts of the body.

Here, plaintiff's alleged injuries do not constitute a "grave injury" pursuant to Workers' Compensation Law § 11. "Where the plaintiff has not sustained a 'grave injury,' section 11 of the Workers' Compensation Law bars third-party actions against employers for indemnification or contribution unless the third-party action is for contractual indemnification pursuant to a written contract in which the employer 'expressly agreed' to indemnify the claimant" (***Tonking v Port Auth. of N.Y. & N.J.***, 3 NY3d 486, 490, 787 NYS2d 708 [2004]; *see* ***Ascencio v Briarcrest at Macy Manor, LLC***, 60 AD3d 606, 607-608, 874 NYS2d 562 [2d Dept 2009]).

The KeySpan defendants failed to submit an affidavit or deposition testimony from someone with personal knowledge with their motion papers expressly stating that there was no contractual agreement between the KeySpan defendants and Eagle providing for indemnification (*see* CPLR 3212 [b]; *compare* ***Tullino v Pyramid Companies***, 78 AD3d 1041, 912 NYS2d 79 [2d Dept 2010]; ***Eldoh v Astoria Generating Co., LP***, 57 AD3d 603, 869 NYS2d 209 [2d Dept 2008]). The Keyspan defendants cannot meet their burden by merely stating that Eagle failed to produce during discovery a copy of an agreement between the parties.[1] Therefore, the motion by the KeySpan defendants for summary judgment dismissing the third-party complaint and the second third-party complaint is denied.

Eagle now moves for summary judgment dismissing plaintiff's complaint and all claims against it on the grounds that it was not at the construction site on a daily basis and did not have the authority to direct, supervise or control the work that gave rise to plaintiff's injuries; the scaffold was properly installed by Eagle employees on March 29, 2003 and the scaffold's condition was fundamentally altered when it was dismantled by KeySpan employees prior to plaintiff's accident; there is no evidence that Eagle was provided with any notice regarding an alleged defect in the scaffold that it constructed; and plaintiff's injury arose from his use of a scaffold that was not in use at the time and his failure to use available safety devices provided by his employer. In support of its motion, Eagle submits the pleadings of the main action and third-party actions, plaintiff's bill of particulars, plaintiff's deposition transcript dated October 26, 2004, the deposition transcript of Thomas M. Polis on behalf of KeySpan Energy Corporation, the deposition transcript of Michael Paladino, president of Eagle, and copies of scaffold inspection tags.

Plaintiff's deposition testimony reveals that he is a utility mechanic for KeySpan Energy and that at the time of the accident he had been at the subject job site for approximately three months but working on the specific job for only two weeks. Plaintiff explained that a power plant is constructed on elevation, 60 gratings, that the job involved working on a stage heater, a large tube that began at elevation 19, which was 19 feet above sea level, and continued up to elevation 51, and that on the date of the accident he was working on a steel grating that was elevation 31. He further explained that the heater went through each floor with grating surrounding it. Plaintiff testified that prior to the accident he

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[1] The KeySpan defendants have submitted with their affirmation in opposition to Eagle's motion the affidavits of two employees attesting that there was no contract between KeySpan and Eagle for scaffolding in 2003. Said affidavits cannot be considered in support of their motion for summary judgment (*see* CPLR 3212 [b]).

was on the scaffold and was told by a mechanic who had been told by the KeySpan foreman to remove a chain hoist, which he described as a barrel with metal wheels in it and chains that run through it used to lift a heavy object, from the I-beam, a structure of the power plant. He added that it was a job for two people, that he had performed this task hundreds of times, and that the other mechanic was on the grating waiting for plaintiff to lower the chain hoist to him. In addition, plaintiff testified that he had just removed the left chain hoist and was walking towards the right chain hoist that was approximately four feet away when the floorboards that he was walking on fell from underneath him, and he remembered pipes and boards coming down. He fell 16 feet.

According to plaintiff, he had worked on said scaffold for approximately three days prior to the accident, he had never encountered any problems with the scaffold, and he had seen Eagle working on a lower elevation of the subject scaffolding but he could not recall when and he stated that he did not see anyone from Eagle on the day of the accident. He described the scaffold as continuing from grating to grating, from floor to floor, and as being mounted on the I-beam. Plaintiff also testified that prior to his fall he did not see that any structural pieces of the scaffolding were removed and the wood planks that he stood on were not notched or nailed in, instead they were loose. He noted that the scaffold was not "tied off" to strengthen it, which he had observed on occasion, and which was something that Eagle would do, and that there were no kick plates around the bottom of the scaffold to prevent the user's feet from sliding out. Plaintiff did not know of anyone who had complained about the scaffold prior to the accident nor had he observed any repairs being performed on the scaffold prior to the accident. He was unaware of any alterations by KeySpan to the subject scaffold.

Thomas M. Polis, an engineer employed as a maintenance supervisor in the maintenance services department of KeySpan at the time of the accident, testified that the accident occurred at the Northport power station, unit number 4, elevation 35 called the heater platform. In addition, he testified that he had been in the area one day prior to the accident and that after plaintiff's fall, he observed that the scaffold's structure or framework remained intact but that some of the planks had fallen down to another level and across the opening leading down to elevation 19. Mr. Polis also testified that the subject scaffold was installed before KeySpan's insulation services group ascended it to perform their work several days after which his group ascended it to perform the removal phase of their work. He explained that as a general practice, after the scaffold contractor erected the scaffold the scaffold would not be "released" for use until a competent KeySpan employee inspected it. However, he had no personal knowledge as to whether anyone from KeySpan had inspected the subject scaffold prior to its use. According to Mr. Polis, when his group was on the scaffold he recalled that the only gaps were between the interior surface and the heater vessel. However, he recalled that the scaffold was erected when the old heater was in place and that KeySpan mechanics rearranged the planking on the scaffold when it came time to remove the old heater and that after the old heater was removed there was no longer a "solid hard deck scaffold" anymore. According to Mr. Polis, the scaffold was no longer in the same condition as it was when it was first installed, it was essentially unuseable. Mr. Polis stated that the removal of the heater was extremely obvious, that it was removed the night prior to plaintiff's accident. He added that everyone who has joined the company "has received adequate training to understand you don't access or utilize a scaffold without a hard deck, toe boards, mid rails, handrails." Mr. Polis believed that the new heater was installed the night of plaintiff's accident at which time the KeySpan employees reassembled the scaffold. According to Mr. Polis, plaintiff should have used an available

ladder, placing it close to the scaffold, to remove the rigging rather than using the obviously unuseable scaffold. In addition, Mr. Polis stated that there are crew boxes on elevation 19, 35 and 51 in which harnesses are available. According to Mr. Polis, yellow safety tape was placed around the scaffold on elevation 35 by the night shift after the heater was removed the night prior to plaintiff's accident. The scaffold had two planks per side.

In opposition to the motion, plaintiffs argue that there are issues of fact as to whether the subject scaffold was rearranged by plaintiff's employer prior to plaintiff's fall and, if so, how it was rearranged, whether Eagle initially installed a safe scaffold, and whether said scaffold was inspected by anyone prior to its use. They submit plaintiff's affidavit, the deposition transcript of Edward Sharpe, the results of a Freedom of Information (FOIL) request of OSHA concerning the subject accident, and copies of the affidavits of KeySpan employees attached to the "affirmation in opposition" of the KeySpan defendants. Plaintiff avers in his affidavit and Mr. Sharpe, a C mechanic working with plaintiff at the time of the accident, testified that there was no safety ribbon or warnings on the scaffolding indicating that it should not be used. Plaintiff emphasizes that the scaffold had not been partially disassembled at his level, contrary to the testimony of Mr. Polis. Plaintiffs note that an OSHA inspection of the subject scaffold revealed that it lacked standard guardrails.

In reply, Eagle contends that it is free from negligence inasmuch as the proximate cause of plaintiff's accident was his use of a scaffold that had been custom-built around a heating unit for its removal and was substantially altered and dismantled by KeySpan employees without any notice to Eagle, and the failure to use safety equipment.

A subcontractor may not be held liable under Labor Law § 200, and may not be held liable, as an agent of the owner or general contractor, under Labor Law § 240 (1) or § 241(6), where it does not have authority to supervise or control the work that caused the plaintiff's injury (*see* ***Tomyuk v Junefield Assn.***, 57 AD3d 518, 868 NYS2d 731 [2d Dept 2008]; ***Torres v LPE Land Devel. & Constr., Inc.***, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]). Here, there is no evidence in the record that Eagle had any authority to supervise or control the work that caused the plaintiff's injury. Therefore, plaintiff's second cause of action on behalf of plaintiff Sean Murphy claiming violations of Labor Law §§ 200, 240 and 241 are dismissed as against Eagle.

However, even though Eagle did not have authority to supervise or control the plaintiff's work, it could still be liable under a common-law theory of negligence for improper installation of the scaffold (*see* ***Tomyuk v Junefield Assn.***, 57 AD3d 518, 868 NYS2d 731; ***Kelarakos v Massapequa Water Dist.***, 38 AD3d 717, 832 NYS2d 625 [2d Dept 2007]; ***Urbina v 26 Ct. St. Assoc., LLC***, 12 AD3d 225, 784 NYS2d 524 [1st Dept 2004]; ***Keohane v Littlepark House Corp.***, 290 AD2d 382, 736 NYS2d 664 [1st Dept 2002]). Here, Eagle failed to demonstrate that the scaffold was initially properly installed by Eagle employees such that it cannot be liable for plaintiff's injuries inasmuch as Michael Paladino, president of Eagle, testified at his deposition that he was not present at the construction site when the subject scaffold was installed, and there is no deposition testimony or affidavit from Eagle's on-site foreman Michael Ruic or any of the other crew members that Mr. Paladino testified would have been at the construction site at the time of installation who would have personal knowledge of the proper installation of the subject scaffold. Thus, there remain issues of fact as to, among other things, whether Eagle properly

installed the subject scaffold, whether the subsequent removal and rearrangement of planks by KeySpan employees was the sole proximate cause of plaintiff's accident or whether even if the scaffold was not properly installed by Eagle, the removal and rearrangement of planks by KeySpan employees was a superceding, intervening cause of plaintiff's injuries thus relieving Eagle of any liability (*see* ***Vouzianas v Bonasera***, 262 AD2d 553, 693 NYS2d 59 [2d Dept 1999]).

Eagle also argues in its motion papers that it is entitled to indemnification pursuant to the terms and conditions of its scaffold inspection tag sheets provided with the installation of each scaffold since the accident arose from the misuse of its scaffold with no negligence on its part. It submits the deposition testimony of Mr. Paladino in which he identifies the scaffold inspection tag "caution" sheet used by the company stating that it is used and constitutes the contract for each installation, identifies a caution sheet dated March 29, 2003, signed only by his on-site foreman Michael Ruic, which he believes pertains to the subject project based on its date, then testifies that he does not have such a sheet signed by a representative of KeySpan for this particular project but that he did have such sheets for other projects at the Northport Power Plant. Eagle submits a copy of a scaffold inspection tag sheet dated March 29, 2003 for customer "Key Span Northport" stating "scaffolding for asbestos use" and "Customer agrees to inspect scaffold and scaffold components for visible defects before each work shift and after any occurrence which could affect the structural integrity... Customer agrees to contact Company immediately if material appears to be damaged in any way for inspection and will postpone All work until inspection is completed and damaged material is replaced at which time Company will approve continuation of work (as stated on reverse side #1)" and "Please See Reverse Side Additional For Terms and Conditions" signed only by Michael Ruic as the representative from Eagle with the accepted by name and signature lines left blank.[2] Paragraph 8 of said sheet entitled "Indemnification" provides "The Customer agrees to fully indemnify and hold harmless the Company from all actions, claims, cost, damages, liabilities and expenses. Including reasonable attorney fees, which may be brought or made against Company, which in any way arise out of or by reason pf [sic] the use of [sic] misuse of the Company's equipment rented hereunder, excerpting [sic] only such actions, claims, cost, damages, liability and expenses resulting from the sole negligence of the Company. The intent hereof is that the Customer shall fully indemnify and hold harmless the Company to the maximum extent allowable by law."

The KeySpan defendants submit an affidavit in opposition arguing that Eagle has failed to proffer sufficient evidence from parties with personal knowledge to demonstrate as a matter of law that prior to said accident, KeySpan expressly agreed to indemnify Eagle for any accident arising out of the use of the subject scaffold. Attached to the opposition papers are the affidavits of Lorraine Lynch, treasurer of KeySpan Energy Corporation, attesting that KeySpan Energy Corporation did not enter into any contracts with Eagle, and of Reshmi Das, assistant secretary of National Grid Generation LLC that was formerly known as KeySpan Generation LLC, attesting that he is familiar with the company's records relating to the Northport Power Plant and the procedures for entering into contracts in 2003, and that no

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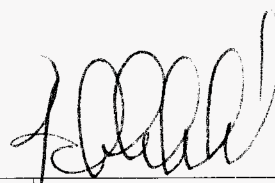
[2] The Court notes that Eagle has also submitted two scaffold inspection tag sheets dated after the date of the subject accident for customer "Key Span Port Jeff" which are signed by representatives of Keyspan and Eagle.

contract existed between Eagle and KeySpan Generation LLC concerning scaffolding at the Northport Power Plant in 2003.

"[A] contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute-such as the statute of frauds (General Obligations Law § 5-701)-that imposes such a requirement" (***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d 363, 368, 795 NYS2d 491 [2005]; ***Priceless Custom Homes, Inc. v O'Neill***, ___ AD3d ___, 2013 NY Slip Op 01391 [2d Dept 2013]). "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d at 369; *see* ***Geha v 55 Orchard St., LLC***, 29 AD3d 735, 736, 815 NYS2d 253 [2d Dept 2006]; *see also* ***Priceless Custom Homes, Inc. v O'Neill***, ___ AD3d ___, 2013 NY Slip Op 01391 [2d Dept 2013]). " 'In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look ... to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds' " (***Flores v Lower E. Side Serv. Ctr., Inc.***, 4 NY3d at 368, quoting ***Brown Bros. Elec. Contrs. v Beam Constr. Corp***., 41 NY2d 397, 399, 393 NYS2d 350 [1977]; *see* ***Minelli Constr. Co., Inc. v Volmar Constr., Inc.***, 82 AD3d 720, 721, 917 NYS2d 687 [2d Dept 2011]; *see also* ***Priceless Custom Homes, Inc. v O'Neill***, ___ AD3d ___, 2013 NY Slip Op 01391 [2d Dept 2013]). The adduced evidence raises issues of fact as to, among other things, whether the scaffold inspection tag sheet dated March 29, 2003 referred to the scaffold used by plaintiff, and if so whether its terms are enforceable against the KeySpan defendants based on their use of the scaffold after its installation by Eagle. In view of the foregoing, Eagle is not entitled to summary judgment on its third-party contractual indemnification claims.

Moreover, as there are material issues of fact as to whether any negligence by Eagle caused plaintiff's harm, Eagle is not entitled to summary judgment dismissing the third-party counterclaims against it for common-law indemnification and contribution (*see* ***Mendez v Union Theological Seminary in City of New York***, 17 AD3d 271, 793 NYS2d 420 [1st Dept 2005]; ***Correia v Professional Data Mgt., Inc.***, 259 AD2d 60, 693 NYS2d 596 [1st Dept 1999]; ***Sheehan v Fordham Univ.***, 259 AD2d 328, 687 NYS2d 22 [1st Dept 1999]).

Accordingly, the motion by the KeySpan defendants for summary judgment dismissing the third-party complaint and the second third-party complaint is denied and the motion by Eagle for summary judgment dismissing plaintiff's complaint and all claims against it is granted solely as to plaintiffs' second cause of action.



Dated: 3/28/13

THOMAS F. WHELAN, J.S.C.