Arnone v Weill Med. Coll. of Cornell Univ.
2017 NY Slip Op 30591(U)
March 28, 2017
Supreme Court, New York County
Docket Number: 156210/2013
Judge: Kelly A. O'Neill Levy
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

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MARC ARNONE and CATHERINE ARNONE,

Plaintiff,

-against-

WEILL MEDICAL COLLEGE OF CORNELL UNIVERSITY and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, and D'APRILE, INC.,

Defendants.

Index No. 156210/2013

Seq. No. 003 and 004

Decision and Order

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WEILL MEDICAL COLLEGE OF CORNELL UNIVERSITY and TISHMAN CONSTRUCTION CORPORATION OF NEW YORK,

Third-Party Plaintiff

-against-

ALLEN BRITEWAY ELECTRICAL CONTRACTORS, INC.,

Third-Party Defendant.

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ALLEN BRITEWAY ELECTRICAL CONTRACTORS, INC.,

Fourth Party Plaintiff,

-against-

D'APRILE, INC.,

Fourth Party Defendant.

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Kelly O'Neill Levy, J:

Third party defendant Allen Briteway Electrical Contractors, Inc. (Allen) moves under

motion sequence 003, pursuant to CPLR 3212(a), for summary judgment against third party plaintiffs Weill Medical College of Cornell University (Weill) and Tishman Construction Corporation of New York (Tishman), dismissing the claims that (1) Allen is contractually obligated to provide defense and indemnification to Weill and Tishman, (2) Allen breached its contract by failing to name Weill and Tishman as insureds, and (3) Allen owes Weill and Tishman common-law indemnification and/or contribution for negligently causing plaintiff's injuries. Additionally, fourth party defendant D'Aprile, Inc. (D'Aprile) moves under motion sequence 004, pursuant to CPLR 3212(a), for summary judgment against plaintiff Marc Arnone and fourth party plaintiff Allen, dismissing the claims against it, including that it (1) violated New York Labor Law and caused the injuries sustained by plaintiff, (2) is contractually obligated to provide defense and indemnification to Allen, (3) breached its contract by failing to name Allen as insured, and (4) owes Allen common-law indemnification and/or contribution for negligently causing plaintiff's injuries. The motions are consolidated for disposition.

D'Aprile's motion seeking to dismiss Mr. Arnone's claims is unopposed. In addition, Allen, in its affirmation in opposition to D'Aprile's summary judgment motion, admits its claims for contractual indemnification and breach of contract are without merit. Furthermore, Allen contends that a Tishman laborer is responsible for plaintiff's injuries and that if the court denies its motion for summary judgment, then it must also deny D'Aprile's motion for summary judgment.

The action arises from a December 4, 2012 accident wherein plaintiff Marc Arnone was allegedly struck in the face by a wooden plank carried by a Tishman laborer thereby causing injuries to Mr. Arnone's shoulder, neck and head. The accident took place at a Weill Cornell Medical Building located at 413 East 69th Street in Manhattan, which was under active

construction (Construction Project). Weill owns the subject property. Tishman was the general contractor on the Construction Project. Allen was responsible for providing electrical services on the Construction Project, and it employed Mr. Arnone. D'Aprile was subcontracted by Tishman to provide masonry services.

In July 2013, Mr. Arnone brought an action for violations of New York Labor Law and negligence against Weill and Tishman. Thereafter, in December 2013, Weill and Tishman commenced a third party action against Allen. In April 2014, plaintiff amended his complaint to include D'Aprile. Allen then commenced a fourth party action against D'Aprile in July 2014. Allen and D'Aprile both now seek summary judgment, dismissing the claims against each, respectively.[1]

On a motion for summary judgment, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or findings of fact. *Vega v. Restani Const. Corp.*, 18 N.Y.3d 499, 503, 505 (2012). Nevertheless, "[b]ald conclusory assertions, even if believable, are not enough" to raise issues of fact. *Ehrlich v. Am. Moninger Greenhouse Mfg.*

[1]The Note of Issue was filed in June 2016.

Corp., 26 N.Y.2d 255, 259 (1970).

With respect to the first claim made by third party plaintiffs–that Allen is contractually obligated to defend and indemnify Weill and Tishman in connection with Mr. Arnone's claims–Allen argues that its indemnity obligations are not triggered because the accident did not arise out of Allen's acts or omissions, or the Trade Contract between Tishman and Petrocelli Electric.[2] Moreover, Allen argues that the accident arose out of Tishman's sole negligence and therefore, pursuant to the terms of the Trade Contract, it has no obligation to indemnify Weill or Tishman.

Third party plaintiffs contend that Weill cannot be held solely negligent because Weill was not physically performing any work at or near the area of the alleged accident on the date of the accident and that therefore, Allen is required to indemnify Weill and Tishman. Furthermore, third party plaintiffs argue that questions of fact remain unresolved: whether it was a Tishamn laborer who carried the plank that struck Mr. Arnone and whether Allen failed to maintain a safe working environment for its employees.

In July 2010, Tishman entered into a Trade Contract with Petrocelli Electric to provide electrical and telecom services on the Construction Project. Petrocelli Electric assigned the Trade Contract to Allen in April 2011. Paragraph 7 of the Trade Contract entitled "Indemnity Violation of Law," provides, in relevant part:

> "To the fullest extent permitted by law, the Contractor shall indemnify, defend, and hold harmless the Owner, Construction Manager . . . from and against all claims or causes of action, damages, losses, and expenses, including but not limited to attorneys' fees and legal and settlement costs and expenses (collectively, "Claims"), arising out of or resulting from the acts or omissions of Contractor, or anyone for whose acts Contractor

[2] As will be discussed below, Tishman entered into a Trade Contract with Petrocelli Electric to provide electrical and telecom services on the Construction Project.

> may be liable, in connection with the Contract Documents, the performance of, or failure to perform, the Work, or the Contractor's operations . . . . To the fullest extent permitted by law, Contractor's duty to indemnify the Indemnitees shall arise whether caused in part by the active or passive negligence or other fault of any of the Indemnitees, provided, however, that Contractor's duty hereunder shall not arise to the extent that any such claim, damages, loss or expense was caused by the sole negligence of the Indemnitees or an Indemnitee." (Emphasis added).

Without reaching the issue of whether Tishman was solely negligent,[3] the court finds that Allen is not contractually obligated to indemnify third party plaintiffs as the claim does not ""aris[e] out of or result[] from the acts or omissions of" Allen. *See Regal Const. Corp. v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34, 39 (2010); *Worth Const. Co. v. Admiral Ins. Co.*, 10 N.Y.3d 411, 416 (2008); *see also Trawally v. City of N.Y.*, 137 A.D.3d 492, 492–93 (1st Dep't 2016); *Leon D. Dematteis Const. Corp. v. Utica Nat. Assur. Co.*, 49 Misc. 3d 1207(A) (Sup. Ct. 2015).

The phrase "arising out of" has been interpreted to mean "originating from, incident to, or having connection with." *Regal* at 38. For a claim to "arise out of" an act or omission "[i]t requires only that there be some causal relationship between the injury and the risk for which coverage is provided." *Id.* "The focus of the inquiry is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained." *Id.*

Here, Mr. Arnone testified at his deposition that while he was on his way to the bathroom for a coffee break, and thus not during the course of his work, and in an area away from where he was working, he tripped over lumber left behind from another trade, was then struck in the face by a plank carried by a Tishman laborer and subsequently fell, sustaining injuries. Mr. Arnone

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[3] Paragraph 7 of the Trade Contract provides, "Contractor's duty hereunder shall not arise to the extent that any such claim . . . was caused by the sole negligence of the Indemnitees [Weill and Tishman] or an Indemnitee [Weill or Tishman]." (Emphasis added). Thus, Allen would not be obligated to indemnify third party plaintiffs if the claim was caused by either the sole negligence of third party plaintiffs jointly or the sole negligence of either Weill or Tishman separately.

also testified that Allen's work was on another floor altogether. He testified that the accident took place on an upper level, "B1," while Allen was conducting work on a separate, lower level, "B2."

Third party plaintiffs did not proffer sufficient evidence to show that there are material factual issues as to whether the claim arose out of or resulted from the acts or omissions of Allen. In their opposition, third party plaintiffs assert that the accident report states that a cinderblock laborer was involved. Mr. Arnone denied the presence of a cinderblock laborer, but regardless, the accident report only describes the cinderblock laborer as a witness to the accident and not as a cause of the accident. Third party plaintiffs then argue that Mr. Arnone did not definitively know the "employer/identity" of the person who struck him, citing pages 41and 42 of the deposition testimony transcript of Mr. Arnone. While third party plaintiffs are correct that Mr. Arnone testified that he did not know the identity of the person who struck him, he was asked if he knew who employed the person who hit him with the plank, and he testified that it was a Tishman laborer. (Arnone Tr. 41). Third party plaintiffs also argue that the accident was never reported to Tishman. Mr. Arnone testified that he reported the accident to a foreman for Allen as instructed during his safety meetings; that Allen did not report the accident to Tishman does not raise material issues of fact. Finally, third party plaintiffs' assertion that "the work conducted by [Allen] BRITEWAY was under the supervision of [Allen] BRITEWAY," does not bear on whether Allen actually conducted work at or near the situs of the accident.

With respect to the second claim–that Allen breached its contract by failing to name Weill and Tishman as insureds–third party plaintiffs do not provide further support for their claim or any opposition to this branch of Allen's motion.

Starr Indemnity & Liability Company issued to Allen a commercial general liability

policy. The policy ran from March 11, 2012 through March 11, 2013. The policy includes an additional insured endorsement entitled "Additional Insured – Owners, Lessees Or Contractors – Automatic Status When Required In Construction Agreement With You," which provided, in relevant part:

> "Who [i]s [a]n [i]nsured is amended to include as an additional insured any person or organization for whom you are performing operations when you and such person or organization have agreed in writing in a contract or agreement that such person or organization be added as an additional insured on your policy. Such person or organization is an additional insured only with respect to liability for 'bodily injury,' 'property damage' or 'personal and advertising injury' caused, in whole or in part, by:
>
> 1. Your acts or omissions; or
> 2. The acts or omissions of those acting on your behalf;
>
> in the performance of your ongoing operations for the additional insured.
>
> A persons's or organization's status as an additional insured under this endorsement ends when your operations for that additional insured are completed." (Emphasis added).

Paragraph 8 of the Trade Contract, in pertinent part, provides:

> ". . . the Contractor and each of the Contractor's subcontractors shall, at its own expense, maintain the following insurance on its own behalf and for the protection of the Owner, Owner's Lender, Construction Manager and all other Indemnitees named in this Agreement (hereinafter referred to as 'Additional Insureds')."

Thus, pursuant to the terms of the policy, Weill and Tishman are additional insureds on the policy. *See, e.g., Perez v. Morse Diesel Intern., Inc.*, 10 A.D. 3d 497 (1st Dep't 2004) (finding insured did not breach contract to procure insurance where record shows third-party defendant obtained a policy "with a blanket endorsement for contractually designated additional insureds").

As with the claim for contractual indemnification, third party plaintiffs' claim for common-law indemnification and/or contribution is rejected by the court. In the context of

work-site injuries, the Court of Appeals has held that common-law indemnification is available to a party who is held vicariously liable for a work-site injury, despite such party's lack of negligence or actual supervision over the work-site, but only if the indemnifying party was itself negligent or exercised actual supervision. *See McCarthy v. Turner Constr., Inc.*, 17 N.Y.3d 369, 377-78 (2012); *Felker v. Corning Inc.*, 90 N.Y.2d 219 (1997); *see also Naughton v. City of New York*, 94 A.D.3d 1, 10 (1st Dep't 2012) ("To be entitled to common-law indemnification, a party must show (1) that it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) that the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work"). As discussed above, third party plaintiffs have failed to provide sufficient evidence to show that Allen, here the proposed indemnitor, was either negligent or exercised actual supervision or control over the conditions alleged in Mr. Arnone's complaint. Mr. Arnone testified that he was injured during his break by a Tishman employee on an entirely separate floor from where Allen was conducting work. Accordingly, the motion is granted.

In light of the dismissal of the third-party action, the fourth-party action seeking indemnification and/or contribution is dismissed. The court therefore does not reach the merits of that branch of D'Aprile's motion for summary judgment, which seeks to dismiss Allen's claims against it.

Concerning the branch of D'Aprile's motion for summary judgment that seeks dismissal of Mr. Arnone's complaint, D'Aprile argues that there is no evidence that it was negligent or involved in the accident. Plaintiff does not oppose this.

Richard Mazzella, Senior Vice President of Tishman Construction and lead on-site supervisor on the Construction Project testified that D'Aprile in its masonry work used its own

scaffolds and used "[p]ipe scaffolds for the scaffolds and planking for the platform." (Mazzella Tr. 59-60). There is, however, no indication that the lumber at the location of the accident was left by D'Aprile. The testimony only indicates that D'Aprile used planks in its scaffolding and does not indicate that the planks over which Mr. Arnone tripped were the same planks D'Aprile laborers used. Furthermore, while Mr Arnone testified that the lumber over which he tripped looked like scaffolding planks, he also testified that it was a Tishman laborer who picked up a plank from the pile, thus suggesting they were planks used by Tishman laborers.

For the reasons stated above, the court finds that Allen has offered sufficient evidence to make a prima facie showing that the claims asserted against it are deficient as a matter of law and third party plaintiffs failed to establish that there exist material factual issues. The court also finds that Mr. Arnone has failed to raise material issues of fact as to D'Aprile's liability. Accordingly, it is hereby

ORDERED that Allen Briteway Electrical Contractors, Inc.'s motion for summary judgment is granted and the third party complaint is dismissed; and it is further

ORDERED that D'Aprile Inc.'s motion is granted to the extent that the plaintiff's amended complaint is dismissed against D'Aprile only and the fourth party complaint is dismissed.

The clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

DATED: March 28, 2017 ENTER:

Kelly O'Neill Levy J.S.C.

HON. KELLY O'NEILL LEVY