Garcia v Bleeker St. Gardens, LLC
2018 NY Slip Op 30811(U)
April 20, 2018
Supreme Court, Queens County
Docket Number: 10134/14
Judge: Darrell L. Gavrin

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HONORABLE DARRELL L. GAVRIN** IA PART 27
Justice

CELSO GARCIA,

Plaintiff,

- against-

BLEEKER STREET GARDENS, LLC,

Defendant.

BLEEKER STREET GARDENS, LLC,

Third-Party Plaintiff,

- against -

NEW LEAF DEVELOPMENT, LLC,

Third-Party Defendant.

Index No. 10134/14

Motion Date November 28, 2017 & January 2, 2018

Motion Cal. No. 69, 70 & 30

Motion Seq. No. 4, 5 & 6

The following papers numbered 1 to 29 read on this motion by plaintiff for partial summary judgment on the issue of liability on his claim brought under Labor Law § 240 (1); and by separate notice of motion by defendant for partial summary judgment dismissing plaintiff's claims brought under Labor Law § 200, and for summary judgment against third-party defendant for contractual indemnification and for failure to procure insurance; and by separate order to show cause by plaintiff for an order extending the original return date as set forth in the May 17, 2017, so-ordered stipulation from September 26, 2017 to September 29, 2017.

	Papers Numbered
Notice of Motion - Affirmation - Exhibits.....	1-8
Affirmation in Opposition - Exhibits.....	9-14
Reply Affirmation.....	15-19
Order to Show Cause – Affidavits – Exhibits	20-25
Reply Affirmation.....	25-29

Upon the foregoing papers, it is ordered that the motions are determined as follows:

Plaintiff, a laborer employed by third-party defendant, New Leaf Development ("New Leaf"), allegedly sustained injuries on January 13, 2014, when he fell 14 to 16 feet to the ground while unloading lintels from a wooden box that was elevated by a lull. Plaintiff and another worker were allegedly standing inside the box and when the other worker stepped out of the box and onto an adjacent sidewalk bridge, the box tipped and fell to the ground while plaintiff was still inside. The accident occurred at 23 Bleeker Street in Brooklyn, New York ("construction site"). Defendant, Bleeker Street Gardens LLC ("BSG"), the owner of the construction site, entered into an agreement on May 2, 2013 ("Contract") with New Leaf to hired New Leaf to act as the general contractor.

As an initial matter, it is undisputed that plaintiff failed to move for summary judgment in accordance with the so-ordered stipulation dated May 17, 2017, which expressly recited that such motions were to be made returnable no later than September 26, 2017. Plaintiff's motion for summary judgment was made returnable on September 29, 2017, three days after the court-imposed deadline.

Pursuant to CPLR 3212 (a), the court may set a date after which no parties may move for summary judgment. Absent a satisfactory explanation for the untimeliness, the court has no discretion to entertain even a meritorious, non-prejudicial summary judgment motion. (*Miceli v State Farm Mut. Auto. Ins. Co.*, 3 NY3d 725 [2004]; *Brill v City of New York*, 2 NY3d 648, 652 [2004]; *see generally Bivona v Bob's Discount Furniture of NY, LLC* 90 AD3d 796 [2d Dept 2011].)

Here, the explanation proffered by plaintiff amounted to a perfunctory claim of law office failure, which is insufficient to demonstrate the good cause necessary to permit an untimely summary judgment motion. (*See Matter of Hibbert*, 137 AD3d 786, 787 [2d Dept 2016].) Moreover, "a late motion is not permitted simply because it has merit and the adversary is not prejudiced." (*Tower Ins. Co. of N.Y. v Razy Assoc.*, 37 AD3d 702, 703 [2d Dept 2007].) Although the court may consider an untimely summary judgment motion on its merits if there is a timely, pending motion for summary judgment made by another party on nearly identical grounds, (*see Sheng Hai Tong v K and K 7619, Inc.*, 144 AD3d 887, 890 [2d Dept 2016]; *Paredes v 1668 Realty Assoc., LLC*. 110 AD3d 700, 702 [2d Dept 2013]; *cf. McCallister v 200 Park, L.P.*, 92 AD3d 927, 928 [2d Dept 2012],) that is not the case here.

Next, the court will turn to the branch of defendant's timely motion seeking summary judgment dismissing plaintiff's Labor Law § 200 claim. Labor Law § 200 "is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Ortega v Puccia*, 57 AD3d 54, 60 [2008]). Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury. (*See Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505

[1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

Claims brought under Labor Law § 200 are generally brought in two possible categories, those where workers were injured as a result of dangerous or defective conditions on a work site and those involving the manner in which the work was performed. (*See Chowdhury v Rodriguez*, 57 AD3d 121, 128 [2008].) Where, as here, the claim arises out of the methods or materials of the work, an owner may be liable if it is shown that he or she had the authority to supervise or control the work. (*See LaGiudice v Sleepy's Inc.,* 67 AD3d 969, 972 [2009]; *Ortega v Puccia*, 57 AD3d at 61-63). However, "general supervisory authority for the purpose of overseeing the progress of the work is insufficient to impose liability." (*Van Nostrand v Race & Rally Constr. Co., Inc.*, 114 AD3d 664, 667 [2d Dept 2014].) An owner's right to potentially stop work if a violation is observed is also insufficient to impose liability on it under Labor Law § 200. (*See Marquez v L & M Dev. Partners, Inc.*, 141 AD3d 694, 698 [2d Dept 2016].)

Defendant demonstrated that it did not have the authority to supervise or control plaintiff's work. Bill Wade, defendant's project manager, testified at his deposition that he visited the construction site daily to check on the progress of the work and have informal discussions with all the foremen on what needed to be done, but he did not instruct New Leaf employees as to how to perform their jobs and he did not supervise any of the work performed by New Leaf employees. Although Wade could stop work if he saw work being performed in an unsafe manner, he stated that anyone who had the OSHA ten-hour certification could stop work, and he had no safety-related obligations with respect to the construction site. He further stated that New Leaf retained a scaffold company to build the sidewalk bridge, rented the lull in question and provided fall protection to their workers. Plaintiff similarly averred at his deposition that his foreman instructed him on his day-to-day activities and no one else gave him instructions. Since plaintiff failed to oppose this motion and New Leaf failed to raise a triable issue of fact, defendant's application for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted.

The court will now address the branch of defendant's motion for summary judgment on its third-party claim against New Leaf for contractual indemnification. "The right to contractual indemnification depends upon the specific language of the contract." (*Bermejo v New York City Health and Hosp. Corp.*, 119 AD3d 500, 503 [2d Dept 2014].) "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances." (*Hooper Assoc., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491-492 [1989]; *see Reyes v Post & Broadway, Inc.*, 97 AD3d 805, 807 [2d Dept 2012].) "A court may render a conditional judgment on the issue of contractual indemnity, pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed." (*Jardin v A Very Special Place Inc.*, 138 AD3d 927 [2d Dept 2016]; quoting *Arriola v City of New York*, 128 AD3d 747, 748-749 [2d Dept 2015].) "The party seeking contractual indemnification must establish that it was free from negligence and that it may be held liable

solely by virtue of statutory or vicarious liability." (*Arriola*, 128 AD3d at 749; *Van Nostrand v Race & Rally Constr. Co., Inc.*, 114 AD3d 664, 667 [2d Dept 2014].)

According to the plain language of the Contract, BSG is entitled to indemnification from New Leaf in the event plaintiff's injuries were caused by negligent acts or omissions of New Leaf or its subcontractors. Here, defendant demonstrated, *prima facie*, that it was free from negligence in the happening of the accident and it may be held liable solely by virtue of statutory or vicarious liability. (*See Jardin*, 138 AD3d at 930-931; *Van Nostrand*, 114 AD3d at 667-668; *Jamindar v Uniondale Union Free Sch. Dist.*, 90 AD3d 612, 616–17 [2d Dept 2011]; *see also Bermejo*, 119 AD3d at 503.)

In opposition, New Leaf failed to raise a triable issue of fact. New Leaf contended that defendant's motion was untimely since the moving papers were not served eight days prior to the motion's return date pursuant to CPLR 2214 (b). The court notes that the original return date of this motion was September 26, 2017. The motion was subsequently adjourned and New Leaf submitted opposition papers on November 14, 2017. New Leaf had almost two months to prepare its opposition to defendant's motion and therefore suffered no prejudice by this procedural irregularity. (*See Piquette v City of New York*, 4 AD3d 402 [2d Dept 2004]; *lv denied* 3 NY3d 605 [2004].) The court has considered New Leaf's remaining contentions and finds them unavailing.

Finally, the court turns to the branch of defendant's motion for summary judgment on its breach of contract claim against New Leaf for failure to procure insurance. A party seeking summary judgment on a cause of action for breach of contract for failure to procure insurance must show that a contract provision required insurance to be procured and that the provision was not complied with. (*See DiBuono v Abbey, LLC*, 83 AD3d 650 [2d Dept 2011]; *Rodriguez v Savoy Boro Park Assoc. Ltd. Partnership*, 304 AD2d 738 [2 Dept 2003].)

BSG alleged that New Leaf was required to maintain commercial general liability insurance with limits of not less than $1 million/occurrence and $2 million/annual aggregate, and umbrella limits of at least $5 million. Although Gina Wischusen, Esq., attorney for defendant, alleged in her affirmation that New Leaf has no provided proof that it procured the requisite insurance, BSG failed to present evidence showing that New Leaf failed to comply with the insurance provision. In light of defendant's failure to make a *prima facie* showing, the burden did not shift to New Leaf to show that it procured adequate insurance. (*See Ginter v Flushing Terrace, LLC*, 121 AD3d 840 [2d Dept 2014].) Thus, this branch of BSG's motion is denied, regardless of the sufficiency of the opposition papers. (*See Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985].)

Accordingly, plaintiff's order to show cause is denied and plaintiff's motion for summary judgment is denied as untimely. The branch of defendant's motion for summary judgment dismissing plaintiff's Labor Law § 200 claim is granted. The branch of defendant's motion for conditional summary judgment on its contractual indemnification claim against third-party

defendant is granted. The branch of defendant's motion for summary judgment against third-party defendant on the issue of liability on the breach of contract cause of action for failure to procure insurance is denied.

Dated: April 20, 2018

DARRELL L. GAVRIN, J.S.C.