

Pastorino v City of New York
2019 NY Slip Op 33235(U)
October 29, 2019
Supreme Court, New York County
Docket Number: 154450/2013
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON

PART IAS MOTION 37EFM

Justice

-----X

JOSEPH PASTORINO,
Plaintiff,

- v -

THE CITY OF NEW YORK, COMMODORE MAINTENANCE CORP.,

Defendants.

-----X

COMMODORE MAINTENANCE CORP.,
Plaintiff,

-against-

OCEAN MARINE DEVELOPMENT CORP.,

Defendant.

-----X

THE CITY OF NEW YORK,

Plaintiff,

-against-

OCEAN MARINE DEVELOPMENT, CORP.,

Defendant.

-----X

INDEX NO. 154450/2013

MOTION DATE 07/16/2019, 07/16/2019, 08/15/2019

MOTION SEQ. NO. 002, 003, 004

DECISION + ORDER ON MOTIONS

Third-Party Index No. 595059/2016

Second Third-Party Index No. 595385/2018

The following e-filed documents, listed by NYSCEF document number (Motion 002) 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 150, 151

were read on this motion for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 149, 155, 156, 157, 163, 164, 165, 166, 167, 171, 172, 173, 174, 175, 176, 177, 178

were read on this motion for JUDGMENT - SUMMARY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 144, 145, 146, 147, 148, 152, 153, 154, 158, 159, 160, 161, 162, 168, 169, 170

were read on this motion for

JUDGMENT - SUMMARY

Upon the foregoing documents, it is hereby ordered that the motion by defendant Ocean Marine Development Corp. for summary judgment dismissing the claims against it and for indemnity by Commodore Maintenance Corp. is granted; the motion by plaintiff for partial summary judgment on its Labor Law claims against the City of New York is denied; the cross-motion by defendant Commodore Maintenance Corp. for summary judgment dismissing the claims against it is denied; and the motion by defendant the City of New York for summary judgment dismissing the claims against it is granted.

Background

The Broadway Bridge spans the Harlem River and provides crossing between Inwood and Marble Hill in northern Manhattan. On April 15, 2011, Commodore Maintenance Corp. ("Commodore") contracted with the City of New York ("the City"), the owner of the Broadway Bridge, for Commodore to perform work on the bridge, including removing and replacing portions of the bridge's fender system (hereinafter, the "Broadway Bridge Project"). The fender system is a wooden structure that protects the bridge's foundation from damage by vessels.

On December 5, 2012, plaintiff, Joseph Pastorino ("Pastorino"), was injured while performing work for Commodore on the Broadway Bridge Project. Commodore hired Pastorino as a dock builder foreman for the Broadway Bridge Project.

The job site spanned the Harlem River and every day the workers reported to a barge, commonly referred to by the workers as the "shanty barge," on the south side of the Harlem River. The shanty barge remained on the south side of the Harlem River during the duration of the Broadway Bridge Project. Another barge, commonly referred to as the "work barge," was used as a floating work platform from which workers would perform their assigned tasks. The work barge was moved occasionally by tug boat to provide access to particular locations as needed. On the occasions when the work barge was in the middle or on the north side of the river, a small tug boat, named *Under Pressure*, was used to ferry the workers and necessary tools from the south side to wherever the barge was located. During all relevant times, the *Under Pressure* was owned by Ocean Marine Development Corp. ("OMDC") and chartered to Commodore. The *Under Pressure* was operated by either Joe Griffin, Sr., or his son Joe Griffin, Jr. Although Joe Griffin, Sr. is the owner of ODMC, at the time of the incident Commodore employed him as a job superintendent.

On December 5, 2012, Pastorino and his co-workers boarded the *Under Pressure*, which ferried them across the Harlem River to the work barge. The *Under Pressure* pulled alongside the work barge, and the workers then had to get themselves onto the deck of the work barge. The elevation differential between the deck of the *Under Pressure* and the higher deck of the work barge was approximately six feet, and Pastorino asserts that there was no ladder, gangway or device provided for the workers on this particular day. The work barge had a series of old, used rubber tires hanging along its side that were used as bumpers to cushion any impact that might

occur if objects came into contact with the side of the barge. The workers on the Broadway Bridge Project commonly used these tires to gain access from the *Under Pressure* to the work barge when no other devices to access the work barge were provided. On the date of the incident, Pastorino, while using a tire to attempt to board the work barge, slipped and fell backwards, sustaining serious injuries.

The Court now has before it four pending motions: (1) a motion by OMDC, pursuant to CPLR 3212, for summary judgment on the third-party claims brought by Commodore and the City, and on the counterclaims OMDC alleges against Commodore for indemnification and contribution; (2) a motion by Pastorino for partial summary judgment on his New York Labor Law claims against the City; (3) a cross-motion by Commodore for summary judgment; and (4) a motion by the City for summary judgment.

The “Bareboat” Charter

OMDC’s motion for summary judgment relies upon the premise that the *Under Pressure* was leased as a “bareboat” charter, an arrangement wherein a boat is chartered without any crew or provisions. Under a bareboat charter, the “legal responsibility of ownership” of a boat is cast upon the party chartering it in place of the actual owner. Mazella v Pittston Stevedoring Corp., 284 AD 984 (2nd Dep’t 1954). OMDC asserts that the *Under Pressure* was chartered to Commodore as a bareboat charter such that OMDC has no legal liability as the owner of the vessel.

Commodore argues that because Joe Griffin Sr., the owner of OMDC, operated the *Under Pressure* during the Broadway Bridge Project, the charter cannot be classified as a bareboat charter. Commodore cites to Leary v United States for the proposition that “retention by the general owner of such command, possession, and control is incompatible with the existence at the same time of such special ownership in the charterer.” 81 US 607, 611 (1871). This Court finds Commodore’s reliance on Leary to be misplaced. The Court in Leary also stated that:

There is no doubt that under some forms of a charter-party the charterer becomes the owner of the vessel chartered for the voyage or service stipulated, and consequently becomes subject to the duties and responsibilities of ownership. Whether in any particular case such result follows must depend upon the terms of the charter-party considered in connection with the nature of the service rendered. The question as to the character in which the charterer is to be treated is, in all cases, one of construction. If the charter-party let the entire vessel to the charterer with a transfer to him of its command and possession and consequent control over its navigation, he will generally be considered as owner for the voyage or service stipulated. But, on the other hand, if the charter-party let only use of the vessel, the owner at the same time retaining its command and possession, and control over its navigation, the charterer is regarded as a mere contractor for a designated service, and the duties and responsibilities of the owner are not changed. In the first case the charter-party is a contract for

the lease of the vessel; in the other it is a contract for a special service to be rendered by the owner of the vessel.

Id. at 610. This Court finds that the charter agreement between Commodore and OMDC to be the former, i.e. a bareboat charter, rather than the latter. While it is true that the owner of OMDC operated the *Under Pressure* during the Broadway Bridge Project, he did so as an employee of Commodore. Moreover, the charter contract between Commodore and OMDC states that the tug will be “on location and not manned [by the owner] at all times during [the] job.” (NYSCEF Doc. No. 128.) Accordingly, when Commodore chartered the *Under Pressure* (as a bareboat charter), Commodore became the “special owner,” “clothed with ‘the character or legal responsibility of ownership.’” Muscelli v Frederick Starr Contracting Co. 296 NY 330, 334 (1947). “Such a pro hac vice ownership... casts all responsibility onto the charterer, and makes it impossible to hold ... the actual owner liable.” Id. Thus, for the purposes of analyzing liability, Commodore is the “special owner” of the *Under Pressure*. Accordingly, OMDC’s motion for summary judgment on the third-party claims asserted against it by Commodore and the City is granted.

OMDC also seeks summary judgment on its counterclaims for contractual indemnification against Commodore. The charter contract between OMDC and Commodore states, in pertinent part:

Charterers hereby release Owners, Its officers, agents, employees, affiliated parent and subsidiary companies and vessels (collectively Owner Indemnities) from any liability to Charterers for, and Charterer will defend, indemnify and hold Owner Indemnities harmless from and against all suits, actions, claims, liability and demands in personam or in rem, and all losses and expense, including reasonably attorneys fees, based on bodily injury or death or property damage, whenever occurring, suffered or incurred by Charterer, its affiliate, its personal [sic] and their officers and employees arising from or relating in any way to performance so [sic] service hereunder, regardless of how such bodily injury or death or property damage is caused, excluding claims arising from the negligence or willful misconduct of Owner Indemnities.

(NYSCEF Doc. No. 128.) “A party is entitled to full contractual indemnification provided that the ‘intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances.’” Drzewinski v Atl. Scaffold & Ladder Co., 70 NY2d 744, 777 (1987). This charter contract clearly and unambiguously evinces the intent of the parties to indemnify OMDC for all bodily injury arising out of the charter, absent a showing of negligence by OMDC. The post-disclosure record shows no such evidence. It is undisputed that OMDC provided a ladder that was aboard the *Under Pressure* at the commencement of the bareboat charter. Accordingly, any claims of negligence based on failure to provide a ladder should attach to Commodore, as the special owner of the *Under Pressure* during the Broadway Bridge Project.

Thus, OMDC's motion for summary judgment is granted in its entirety, and Commodore's motion for summary judgment is denied. Pastorino has demonstrated a disputed issue of fact as to whether Commodore was negligent under § 905(b) of the Longshore and Harbor Workers Compensation Act ("LHWCA"). To the extent that Commodore argues it acted in a dual capacity as the "vessel owner" and Pastorino's employer, such issue should properly go before the trier of fact, and the Court should not determine such issue on a motion for summary judgment.

The Labor Law Claims

The City asserts that Pastorino's claims under New York Labor Law §§ 200, 240(1) and 241(6) are preempted by Federal maritime law. This Court disagrees. In Cammon v City of New York, the Appellate Division, First Department "rejected *any* preemption of the New York Labor Law by the Federal maritime law." 260 AD2d 70, 73, aff'd, 95 NY2d 583 (1st Dep't 1999). In so doing, the First Department stated that "[t]he application of [the] principles of preemption leads to the conclusion that there is no basis for refusing to enforce New York's Labor Law in this case ... [P]rotecting workers employed in the state is within the historic police powers of the State and there is no 'clear and manifest' Congressional intent to preempt this state prerogative." Id. at 74. In affirming the First Department's decision in Cammon, the Court of Appeals stressed that the Labor Law claims were not preempted because there was no Federal maritime law directly impacted by their implementation. Cammon v City of New York, 95 NY2d 583 (2000). Similarly, in the instant case there is no Federal maritime law that would preempt a Labor Law claim against the City.

The crux of Pastorino's Labor Law allegations against the City arises out of the failure to provide a ladder for safe passage from the *Under Pressure* to the work barge. Labor Law §§ 240(1) and 241(6) impose liability on owners and general contractors when a construction worker is injured as a result of the failure to provide safety devices.

However, in this Court's view, if any entity can be said to have violated these Labor Law sections, it is Commodore, as the "special owner" of the *Under Pressure*, the vessel from which Pastorino was disembarking. As any Labor Law claims against Commodore are preempted by Pastorino's claims against Commodore under the LHWCA, Pastorino's Labor Law claims must be dismissed. Thus, Pastorino's motion for partial summary judgment against the City is denied, and the City's motion for summary judgment is granted.

By Pastorino's own admission, a ladder was initially provided on the *Under Pressure*, although a disputed issue of fact remains as to whether a ladder was available on the date of the accident. If such a ladder was available, and known to Pastorino, an argument could be made that plaintiff was the sole proximate cause of his injuries. However, this issue will have to await development of the facts at trial.

Finally, the Court has considered the other arguments the parties have raised, including Commodore's assertion that the City's cross-claims are barred by the anti-subrogation doctrine, and finds them unavailing or non-dispositive.

Conclusion

Thus, for the reasons stated herein, it is hereby ordered that the motion by defendant Ocean Marine Development Corp. for summary judgment dismissing the claims against it and for indemnity against Commodore Maintenance Corp. is granted; the motion by plaintiff for partial summary judgment on his Labor Law claims against the City of New York is denied; the cross-motion by defendant Commodore Maintenance Corp. for summary judgment dismissing the claims against it is denied; the motion by defendant the City of New York for summary judgment dismissing the claims against it is granted; and the Clerk is hereby directed to enter judgment accordingly.



10/29/2019
DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input type="checkbox"/> GRANTED IN PART <input checked="" type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE