Spielmann v 170 Broadway NYC LP
2019 NY Slip Op 33354(U)
November 8, 2019
Supreme Court, New York County
Docket Number: 152835/2015
Judge: Lucy Billings

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

----------x

PETER JAMES SPIELMANN and JUDITH HANSEN,

Index No. 152835/2015

Plaintiffs

- against -

DECISION AND ORDER

170 BROADWAY NYC LP, McGOWAN BUILDERS INC., CONSTRUCTION REALTY SAFETY GROUP INC., DeMARTINO CONSTRUCTION CO., INC., and COLGATE ENTERPRISE CORP.,

Defendants

----------x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiffs sue to recover damages for personal injuries and lost services sustained April 24, 2014, when plaintiff Spielmann fell after being struck by a door in a plywood fence that opened from a construction site outward onto the sidewalk where he was walking along Maiden Lane in New York County. The fence or barrier was in front of premises undergoing renovation at the corner of Broadway, owned by defendant 170 Broadway NYC LP. Defendants McGowan Builders Inc. and DeMartino Construction Co., Inc., were general contractors for different areas of the work. Defendant Colgate Enterprise Corp., a subcontractor, installed

the door.

Plaintiffs move for partial summary judgment on the liability of 170 Broadway NYC and Colgate Enterprise, on the conditional liability of McGowan Builders or DeMartino Construction, and dismissing all affirmative defenses alleging Spielmann's fault. C.P.L.R. § 3212(b) and (e). 170 Broadway NYC separately moves for partial summary judgment on cross-claims for indemnification against McGowan Builders, DeMartino Construction, and Colgate Enterprise. Id. Defendant Construction Realty Safety Group Inc. (CRSG), another subcontractor for the renovation, cross-moves for summary judgment dismissing all claims and cross-claims against CRSG. For the reasons explained below, the court grants plaintiffs' and 170 Broadway NYC's motions in part, but otherwise denies the motions, and denies CRSG's cross-motion.

II. PLAINTIFFS' MOTION

Plaintiffs claim that 170 Broadway NYC, Colgate Enterprise, and the general contractor that hired Colgate Enterprise, whether McGowan Builders or DeMartino Construction, are liable and that any affirmative defenses of Spielmann's comparative negligence, assumption of risk, or other culpable conduct lack merit as a matter of law. 170 Broadway NYC, McGowan Builders, DeMartino

Construction, and Colgate Enterprise maintain that plaintiffs fail demonstrate the negligence of 170 Broadway NYC and Colgate Enterprise or the liability of the general contractor that hired independent contractor Colgate Enterprise. At oral argument, the parties agreed that plaintiffs rely on the installation of the door opening outward without recessing it as evidence of negligence and not on the failure to post a flagman. Defendants maintain that plaintiffs' documentary evidence supporting defendants' negligence is inadmissible and that plaintiffs fail to demonstrate the lack of merit to the affirmative defenses through Spielmann's deposition testimony.

A. Defendants' Liability

As the owner of the premises abutting the sidewalk on which Spielmann was walking, 170 Broadway NYC is liable a for violating New York City Administrative Code § 7-210(a), which requires owners of property abutting sidewalks "to maintain such sidewalk in a reasonably safe condition." Contrary to 170 Broadway NYC's contentions, Administrative Code § 7-210(a) is not limited to defects in the sidewalk itself. Doyley v. Steiner, 107 A.D.3d 517, 520 (1st Dep't 2013); Cook v. Consolidated Edison Co. of NY, Inc., 51 A.D.3d 447, 448 (1st Dep't 2008). See N.Y.C. Admin. Code § 7-210(b); Vucetovic v. Epsom Downs, Inc., 10 N.Y.3d 517,

522 (1st Dep't 2008). Interference with pedestrian traffic on a sidewalk from construction activity is a basis for liability under that statutory provision. Doyley v. Steiner, 107 A.D.3d at 520; Gabriele v. Edgewater Park Owners Coop. Corp., Inc., 67 A.D.3d 484, 485 (1st Dep't 2009); Cook v. Consolidated Edison Co. Of NY, Inc., 51 A.D.3d at 448. Installation of the door opening outward onto a pedestrian sidewalk without being recessed constituted negligence. See Sicilano v. Henry Modell & Co., Inc., 85 A.D.3d 534, 536-37 (1st Dep't 2011); Hunter v. Riverview Towers, 5 A.D.3d 249, 250 (1st Dep't 2004).

Since 170 Broadway NYC's statutory duty to maintain the sidewalk was non-delegable, Vullo v. Hillman Hous. Corp., 173 A.D.3d 600, 600 (1st Dep't 2019); LaRosa v. Corner Locations, II, L.P., 169 A.D.3d 512, 513 (1st Dep't 2019); Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d 615, 616 (1st Dep't 2017); Wahl v. JCNYC, LLC, 133 A.D.3d 552, 552 (1st Dep't 2015), the installation of the door by a general contractor or subcontractor does not eliminate 170 Broadway NYC's liability for the negligent work. Vullo v. Hillman Hous. Corp., 173 A.D.3d at 600. See Cook v. Consolidated Edison Co. of N.Y., Inc., 51 A.D.3d at 448. Any claim that 170 Broadway NYC did not request or authorize the work only raises factual issues regarding the further liability of

whoever did. Gabriele v. Edgewater Park Owners Coop. Corp., Inc., 67 A.D.3d at 485. 170 Broadway's representative at the construction site admitted that he passed by the door that struck Spielmann many times after it was modified to open outward and before Spielmann's injury, giving 170 Broadway constructive if not actual notice of the unsafe sidewalk condition.

170 Broadway NYC maintains that the New York City Department of Buildings (DOB) notices of violations, the site safety manager's log, a CRSG site safety incident report, and a police report on which plaintiffs rely are inadmissible. Spielmann's deposition testimony regarding how he sustained his injury and defendants' admissions that DOB issued a notice of violation regarding the construction of the door swinging outward support plaintiffs' motion on defendants' negligence without resorting to other documentary evidence.

Whether Spielmann accurately described the door that struck him as wood, rather than metal, or as green, rather than gray, is immaterial. His description well may have been inaccurate, since he did not observe the door before it struck him and it rendered him unconscious. All that is material is undisputed: the door that struck him opened outward onto the sidewalk; Colgate Enterprise admits that it modified at least one door to open

outward; and no one else actually performed the work modifying any doors in the perimeter fence. Moreover, although the evidence establishes that Colgate Enterprise modified a metal door to open outward, no evidence establishes that it did not modify any other doors, including a green plywood door.

DOB did not issue its notices of violations to 170 Broadway in any event, but issued them to McGowan Builders, citing Administrative Code § 28-105.12.2, which requires work to conform to filed construction documents, and New York City Building Code § 3301.2 (formerly N.Y.C. Admin. Code § 27-1009), which requires a contractor to implement safety measures and safeguard persons affected by its operations. Whiting-Turner Contr. Co. v. Environmental Control Bd. of the City of N.Y., 170 A.D.3d 585, 585 (1st Dep't 2019); Auliano v. 145 E. 15th St. Tenants Corp., 129 A.D.3d 469, 470 (1st Dep't 2015); Trustees of Columbia Univ. v. City of New York, 110 A.D.3d 467, 467 (1st Dep't 2013). Plaintiffs do not seek summary judgment against McGowan Builders based on the violations.

The liability of nonowner Colgate Enterprise for an unsafe sidewalk condition depends on whether Colgate Enterprise created the unsafe condition or made special use of the sidewalk. Kellogg v. All Sts. Hous. Dev. Fund Co., Inc., 146 A.D.3d 615,

617 (1st Dep't 2017); O'Brien v. Prestige Bay Plaza Dev. Corp., 103 A.D.3d 428, 429 (1st Dep't 2013); Abramson v. Eden Farm, Inc., 70 A.D.3d 514, 514 (1st Dep't 2010). The parties do not dispute that Colgate Enterprise installed any doors that opened outward without recessing them. Martin Early, a Colgate Enterprise salesperson, testified at his deposition that doors providing egress from a construction site must open outward, but must be recessed. Although plaintiffs nowhere cite a statute or regulation requiring doors opening outward onto a sidewalk to be recessed, Colgate Enterprise's violation of its own construction standards constitutes evidence of negligence. Ogarro v. St. Luke's Roosevelt Hosp. Ctr., 158 A.D.3d 550, 551 (1st Dep't 2018); Lowenstein v. Normandy Group, LLC, 51 A.D.3d 517, 518 (1st Dep't 2008).

Since plaintiffs present evidence of both 170 Broadway NYC's and Colgate Enterprise's negligence in installing the door, which defendants do not rebut, plaintiffs are entitled to summary judgment on these two defendants' liability. Derix v. Port Auth. of N.Y. & N.J., 162 A.D.3d 522, 522 (1st Dep't 2018); Polini v. Schindler El. Corp., 146 A.D.3d 536, 536 (1st Dep't 2017); Jean-Francois v. Port Auth. of N.Y.& N.J., 137 A.D.3d 450, 450 (1st Dep't 2016). Plaintiffs are not required to demonstrate the

absence of Spielmann's comparative negligence to obtain summary judgment on these defendants' liability. Rodriguez v. City of New York, 31 N.Y.3d 312, 324-25 (2018); Derix v. Port Auth. of N.Y. & N.J., 162 A.D.3d at 522.

170 Broadway NYC hired McGowan Builders as the general contractor for renovation of the hotel space at 170 Broadway and DeMartino Construction as the general contractor for renovation of the retail space there. Stephanie Cobleigh, McGowan Builders' project manager, testified at her deposition that DeMartino Construction constructed the changes to the doors so that one or more opened outward. Michael DeMartino, an owner of DeMartino Construction, testified at his deposition, however, that, at a meeting before Spielmann's injury, 170 Broadway required DeMartino Construction to purchase the hardware for the doors and McGowan Builders to change the doors and that McGowan Builders then contracted with Colgate Enterprise to change the doors. Martin Early, Colgate Enterprise's salesperson, testified that a DeMartino Construction foreman instructed the Colgate Enterprise foreman to change one door to swing outward.

Given the dispute regarding which general contractor was responsible for changing the plywood fence doors, factual issues remain regarding which general contractor was responsible for

constructing the door that opened outward without being recessed and struck Spielmann. Since factual issues also remain whether either McGowan Builders or DeMartino Construction was negligent, conditional summary judgment for plaintiffs against either or both of these defendants is premature. Navarez v. 2914 Third Ave. Bronx, LLC, 88 A.D.3d 500, 501 (1st Dep't 2011); Erey v. Stresscon Indus., 22 A.D.3d 249, 249 (1st Dep't 2005).

B. Dismissal of Affirmative Defenses

Defendants' affirmative defenses include Spielmann's comparative negligence, assumption of risk, and other culpable conduct. Defendants never specify what risk Spielmann assumed or any culpable conduct by him other than negligence, nor rebut plaintiffs' evidence that he was looking ahead as he was walking on the sidewalk, attentive, and not negligent in any way. Therefore plaintiffs also are entitled to summary judgment dismissing defendants' affirmative defenses regarding Spielmann's conduct. Hedian v. MTLR Corp., 169 A.D.3d 620, 620-21 (1st Dep't 2019); Bokum v. Sera Sec. Servs., LLC, 165 A.D.3d 535, 535 (1st Dep't 2018); Oluwatayo v. Dulinayan, 142 A.D.3d 113, 120 (1st Dep't 2016); Hauptner v. Laurel Dev., LLC, 65 A.D.3d 900, 903 (1st Dep't 2009). Any issues regarding the liability of defendants other than 170 Broadway NYC and Colgate Enterprise do

not preclude dismissal of these affirmative defenses regardless of the defendant that claims them. Hedian v. MTLR Corp., 169 A.D.3d at 621; Davis v. Turner, 132 A.D.3d 603, 603 (1st Dep't 2015).

III. DEFENDANTS' MOTIONS

A. 170 Broadway NYC's Motion for Summary Judgment on Indemnification Against Co-Defendants

170 Broadway NYC seeks summary judgment in its favor on its indemnification claims against McGowan Builders, DeMartino Construction, and Colgate Enterprise. 170 Broadway NYC's cross-claims against these defendants include both contractual and non-contractual, implied indemnification. At oral argument, the parties stipulated that the contracts between 170 Broadway NYC and McGowan Builders, between 170 Broadway NYC and DeMartino Construction, and between DeMartino Construction and Colgate Enterprise are authentic and admissible for the purpose of determining the motions and cross-motion for summary judgment.

Since the indemnification provisions in McGowan Builders' and DeMartino Construction's contracts with 170 Broadway NYC specify that the indemnification is to the fullest extent permitted by law, 170 Broadway NYC's negligence does not bar enforcement of the contracts to the extent that 170 Broadway was

not negligent. Enforcement to that extent respects the prohibition against 170 Broadway's indemnification for its own negligence. N.Y. Gen. Oblig. Law § 5-322.1; Brooks v. Judlau Contr., Inc., 11 N.Y.3d 204, 210-11 (2008); Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 452, 456 (1st Dep't 2018); Radeljic v. Certified of N.Y., Inc., 161 A.D.3d 588, 590 (1st Dep't 2018); Frank v. 1100 Ave. of the Ams. Assoc., 159 A.D.3d 537, 537 (1st Dep't 2018).

Although Colgate Enterprise undisputedly modified the door that caused Spielmann's injury, the conflicting testimony set forth above raises issues whether McGowan Builders or DeMartino directed Colgate Enterprise to perform that task. These issues preclude summary judgment on 170 Broadway NYC's contractual indemnification cross-claim against DeMartino Construction, because its duty to indemnify arises from acts or omissions in the performance of its or its subcontractor's work. DeMaria v. RBNB 20 Owner, LLC, 129 A.D.3d 623, 627 (1st Dep't 2015); Greco v. Archdiocese of N.Y., 268 A.D.2d 300, 301-302 (1st Dep't 2000). See McCullough v. One Bryant Park, 132 A.D.3d 491, 493 (1st Dep't 2015).

The same factual issues would preclude summary judgment on McGowan Builders' duty to indemnify for acts or omissions in

connection with its work under § 13.1.1(v) of its Construction Management Agreement with 170 Broadway, but this agreement also imposes duties to indemnify under § 13.1.1(i) for its breach of the agreement and under § 13.1.1(iv) for its violation of law. Under § 4.7.1.5 of the agreement, McGowan Builders was responsible for "initiating, maintaining and supervising all safety precautions and programs in connection with the Work, including safety of all persons and property during performance of the Work." Aff. of Doreen Correia Ex. J, at 20. By failing to maintain precautions against injury to pedestrians from the door that opened outward onto the sidewalk, McGowan Builders breached this provision of the agreement. McGowan Builders admits that its workers used the door for access to and egress from their work and observed the doors in the perimeter fence daily, but presents no evidence rebutting the breach of the agreement.

When DOB issued notices of violations of the Administrative Code and Building Code against McGowan Builders for the construction of the doors inconsistent with filed plans and for failure to implement safety measures and safeguard persons affected by McGowan Builders' operations, McGowan Builders also violated the law. N.Y.C. Admin. Code § 28-105.12.2; N.Y.C.

Building Code § 3301.2. McGowan Builders insists that the doors' construction was consistent with plans DeMartino Construction filed superseding McGowan Builder's original plans, but presents no admissible evidence of such a fact. Even if McGowan Builders did present that evidence, no evidence indicates that McGowan Builders implemented any safety measure to safeguard pedestrians against being struck when McGowan Builders' or its subcontractors' workers exited the site by opening a door that swung onto the sidewalk. Based on either the breach of the agreement or the violation of law, 170 Broadway NYC is entitled to contractual indemnification against McGowan Builders to the extent that 170 Broadway NYC was not negligent. Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 456; Guzman v. 170 W. End Ave. Assoc., 115 A.D.3d 462, 463 (1st Dep't 2014); Fiorentino v. Atlas Park LLC, 95 A.D.3d 424, 426-27 (1st Dep't 2012).

Similarly, since Colgate Enterprise agreed to indemnify the owner 170 Broadway NYC for actions arising from Colgate Enterprise's purchase order with DeMartino Construction dated March 18, 2014, and for its negligence in its subcontract with McGowan Builders dated November 15, 2012, 170 Broadway NYC is entitled to contractual indemnification from Colgate Enterprise. Farrugia v. 1440 Broadway Assoc., 163 A.D.3d 456; Guzman v. 170

W. End Ave. Assoc., 115 A.D.3d at 463; Fiorentino v. Atlas Park LLC, 95 A.D.3d at 426-27. Even though 170 Broadway NYC was not a party to those contracts, it may recover indemnification as a third party beneficiary. National Union Fire Ins. Co. of Pittsburgh, Pa. v. Red Apple Group, 309 A.D.2d 657, 657 (1st Dep't 2003); Polat v. Fifty CPW Tenants Corp., 249 A.D.2d 163, 164 (1st Dep't 1998). See Benitez v. Church of St. Valentine Williamsbridge N.Y., 171 A.D.3d 593, 594 (1st Dep't 2019); Nazario v. 222 Broadway, LLC, 135 A.D.3d 506, 510 (1st Dep't 2016), modified on other grounds, 28 N.Y.3d 1054 (2016). Again, however, the indemnification is limited to the extent that 170 Broadway NYC was not negligent

Since 170 Broadway NYC was negligent in violating Administrative Code § 7-210, 170 Broadway NYC is not entitled to implied indemnification. Haynes v. Boricua Vil. Hous. Dev. Fund Co., Inc., 170 A.D.3d 509, 511 (1st Dep't 2019); Imbriale v. Richter & Ratner Contr. Corp., 103 A.D.3d 478, 479-80 (1st Dep't 2013); Martins v. Little 40 Worth Assoc., Inc., 72 A.D.3d 483, 484 (1st Dep't 2010); Kramer v. City of New York, 35 A.D.3d 175, 176 (1st Dep't 2006). 170 Broadway NYC is liable for its own negligence, rather than vicariously liable for its general contractors' or their subcontractors' acts or omissions. Ramirez

v. Almah, LLC, 169 A.D.3d 508, 510 (1st Dep't 2019); Chunn v. New York City Hous. Auth., 83 A.D.3d 416, 417 (1st Dep't 2011).

B. CRSG's Cross-Motion for Summary Judgment

CRSG seeks dismissal of all claims against CRSG because it did not own, control, or make special use of the premises. Co-defendants 170 Broadway NYC, McGowan Builders, DeMartino Construction, and Colgate Enterprise all cross-claim against CRSG and oppose the cross-motion based on its untimeliness. C.P.L.R. § 3212(a); Kershaw v. Hospital for Special Surgery, 114 A.D.3d 75, 88 (1st Dep't 2013). Since plaintiffs filed a note of issue January 17, 2019, the deadline for motions for summary judgment was May 17, 2019. C.P.L.R. § 3212(a). 170 Broadway NYC timely served its motion March 20, 2019. C.P.L.R. § 2211; Esdaille v. Whitehall Realty Co., 61 A.D.3d 435, 436 (1st Dep't 2009); Gazes v. Bennett, 38 A.D.3d 287, 288 (1st Dep't 2007). CRSG served its cross-motion for summary judgment May 28, 2019, which when considered independently of 170 Broadway NYC's motion was untimely. C.P.L.R. § 3212(a).

CRSG's use of a cross-motion seeking relief beyond a cross-motion's permissible scope to circumvent the timeliness requirement for summary judgment motions affords an unfair advantage constituting prejudice. Kershaw v. Hospital for

Special Surgery, 114 A.D.3d at 88. Because CRSG's untimely cross-motion seeks relief on claims not raised by 170 Broadway NYC's motion, the court may not disregard the untimeliness on the premise that granting the relief is equivalent to granting summary judgment to a non-moving party on a claim "nearly identical" to a claim on which the moving party sought relief. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d 621, 628 (1st Dep't 2015); Guallpa v. Leon D. De Matteis Constr. Corp., 121 A.D.3d 416, 419 (1st Dep't 2014); Filannino v. Triborough Bridge & Tunnel Auth., 34 A.D.3d 280, 281 (1st Dep't 2006).

Although 170 Broadway NYC moved for summary judgment on indemnification cross-claims, 170 Broadway NYC sought that relief against only McGowan Builders, DeMartino Construction, and Colgate Enterprise, even though 170 Broadway cross-claimed for indemnification against CRSG. Because CRSG's untimely cross-motion seeks relief on claims and against parties uninvolved in 170 Broadway NYC's motion, the court may not consider the cross-motion. Maggio v. 24 W. 57 APF, LLC, 134 A.D.3d at 628-29; Guallpa v. Leon D. De Matteis Constr. Corp., 121 A.D.3d at 420; Kershaw v. Hospital for Special Surgery, 114 A.D.3d at 88; Filannino v. Triborough Bridge & Tunnel Auth., 34 A.D.3d at 281. See Alonzo v. Safe Harbors of the Hudson Hous.

Dev. Fund Co., Inc., 104 A.D.3d 446, 448-49 (1st Dep't 2013); Palomo v. 175th St. Realty Corp., 101 A.D.3d 579, 581 (1st Dep't 2012).

IV. CONCLUSION

In sum, the court grants plaintiffs' motion for partial summary judgment to the extent of holding defendants 170 Broadway NYC LP and Colgate Enterprise Corp. liable for plaintiffs' injuries. C.P.L.R. § 3212(b) and (e). The court also grants 170 Broadway NYC LP's motion for partial summary judgment on its contractual indemnification claims against defendants McGowan Builders Inc. and Colgate Enterprise Corp. to the extent that 170 Broadway NYC LP was not negligent. Id. The court otherwise denies those motions and denies defendant Construction Realty Safety Group Inc.'s cross-motion. C.P.L.R. § 3212(a), (b), and (e). This decision constitutes the court's order. The Clerk shall enter a judgment accordingly.

DATED: November 8, 2019

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.

spielmann1119