

Llanos v Casale Constr. Servs., Inc.

2019 NY Slip Op 34084(U)

November 4, 2019

Supreme Court, Westchester County

Docket Number: 60625/2017

Judge: John P. Colangelo

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----x
LIZA LLANOS,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 60625/2017
Motion Sequence # 4

CASALE CONSTRUCTION SERVICES, INC. F/K/A
CASALE EXCAVATING, INC. D/B/A CASALE
INCORPORATED and THE COUNTY OF
WESTCHESTERomn

Defendants.

-----x

COLANGELO, J.

The following papers were read on the motion by Defendant Westchester County for an Order pursuant to CPLR §2221(d):

	NYSCEF
Notice of Motion-Affirmation-Exhibits A-G	121-130
Opposition-Affirmation in Partial Opposition-Affirmation	133, 135
Reply Affirmation	136

Upon the foregoing papers it is ORDERED that the motion is disposed as follows:

Defendant County of Westchester (the "County") brings the instant motion for an Order granting leave to reargue the Decision and Order of this Court dated August 9, 2019, as it pertains to the County's motion for contractual indemnification, and, upon reargument, a finding that Defendant Casale Construction owes the County indemnification as a matter of law for the accident which gives rise to this litigation based on the contractual obligations set forth in the agreement between the parties and at common law.

This is an action for personal injuries allegedly sustained by Plaintiff Liza Llanos ("Plaintiff") as a result of falling into a 20 foot deep excavation trench on the property of Rye

Playland on February 18, 2017 that Plaintiff claims was not covered and not barricaded and lacked warning of a fall hazard. The trench was the result of work performed by Defendant Casale Construction Services, Inc. f/k/a Casale Excavating, Inc. d/b/a Casale Incorporated (“Casale”) as part of an Agreement dated March 17, 2016 with the County for the Relocation of the Sanitary Sewer Line at Playland Park in Rye, New York.

CPLR §2221(d) governs motions to reargue and states in pertinent part, as follows:
A motion for leave to reargue:

1. shall be identified specifically as such;
2. shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any matters of fact not offered on the prior motion; and
3. shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry. This rule shall not apply to motions to reargue a decision made by the appellate division or the court of appeals.

The County contends that this Court overlooked or misapprehended the law applicable to the County’s contractual indemnity claim, which claim can be decided as a matter of law and does not first require a determination as to whether Casale was negligent. The County takes the position that Casale’s contractual indemnity obligations arose, irrespective of whether Casale is ultimately found negligent, based on the fact that Plaintiff’s accident arose out of the work to be performed by Casale.

In reviewing the motion papers upon which the Decision and Order was based, and in light of the arguments raised by the County in the instant motion, the Court grants the County’s motion to reargue and finds that under the agreement between the County and Casale, Casale agreed to “erect and maintain during construction all necessary guards, rails and signals to prevent accidents to persons, vehicles or to the adjoining property and also agrees to use all necessary precautions in blasting and that he will indemnify and save the

County of Westchester harmless from all suits and actions of any kind and nature whatsoever from or on account of the construction of said work. (Agreement, Exh. P., p. 9). Further as counsel for the County correctly contends, the contract specifically references and incorporates the plans and specifications for the project, which also contain an indemnify obligation. (See General Requirements and Proposals for Bidders , Section 2.3) (County Exh. Q).

Pursuant to Paragraph 6 entitled “Indemnification Agreement”, the contractor agrees as follows:

A. That except for the amount if any, of damage contributed to, caused by or resulting from the negligence of the County, the Contractor agrees to indemnify, and hold harmless the County of Westchester . . . from and against any and all liability . . . arising directly or indirectly out of the performance or failure to perform hereunder by the Contractor. . .and

B. To provide defense for and defend, at its sole expense, any and all claims, demands or causes of action directly or indirectly arising out of the Agreement and to bear all costs and expenses related thereto. (*Id.*, p. 153).

In Roldan v. New York Univ., 81 A.D.3d 625 (2d Dept. 2011), the Second Department reiterated the well-settled principle that “the right to contractual indemnification depends upon the specific language of the contract.” In *Roldan*, the indemnification agreement obligated Defendant ABM to indemnify the NYU defendants from all claims “caused by, resulting from, arising out of or occurring in connection with the performance of the work or service specified” in the Agreement. The Second Department found that NYU had met its burden of establishing entitlement to indemnification as a matter of law by showing that the subject accident arose out of or occurred in connection with the performance of the agreement between NYU and ABM, and the Supreme Court should have granted NYU’s motion for contractual indemnification. *Roldan*, 81, A.D.3d at 628.

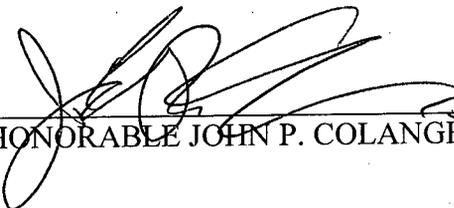
The same situation obtains here, since this Court found that Plaintiff claims to have fallen in an excavation trench dug by Casale as part of their contractual duties and obligations for the Playland project.

Accordingly, the Court grants reargument and upon reargument, finds that, based upon the foregoing, the County has established that it is entitled to contractual indemnification as a matter of law.

This determination supercedes any determination to the contrary in this Court's Decision and Order dated August 9, 2019. The Court notes that Plaintiff does not oppose the relief requested by the County herein, and the opposition filed by Casale fails to raise any issue of fact.

The foregoing constitutes the Decision and Order of the Court.

Dated: November 4, 2019
White Plains, New York



HONORABLE JOHN P. COLANGELO, J.S.C.