

Williams v Port Auth. of N.Y. & N.J.

2020 NY Slip Op 30293(U)

February 3, 2020

Supreme Court, Kings County

Docket Number: 513944/2016

Judge: Debra Silber

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his employment, was pushing Patricia Saravia¹ in a wheelchair toward her departure gate along the right side of the hallway when he slipped, lost his balance and fell. The wheelchair and Ms. Saravia then fell on top of him. Plaintiff has had three surgeries, to his right knee, right shoulder and lumbar spine, which he claims were necessitated by the accident, and has brought this action to recover damages.

The surveillance video provided in the motion indicates that the entire floor of what appears to be a hallway of sorts at this part of the terminal is sloped. It is referred to by some of the deponents as a "ramp." It is approximately eighteen feet wide. On the left half of the hallway, from the view from above provided by the video camera, there were workers with yellow vests working inside of an area demarcated by orange cones and striped plastic poles ("sticks") to keep people away. One worker was standing on a scissor lift and working on pipes in the ceiling. The other worker was on the ground with an equipment cart. There were other workers further away, using a second scissor lift and equipment cart. These workers were employed by non-party Cardoza Plumbing and were performing work on the plumbing lines in the ceiling, as a subcontractor of defendant Holt Construction, the general contractor hired by American Airlines.

As is viewable on the video, a few minutes before the plaintiff's accident, the workers, all in yellow vests, moved the cones, poles/sticks, scissor lift and work cart from the area where they were working to a new area on the same side of the hallway/ramp, adjacent to their previous work area and closer to the video camera. One worker raised the scissor lift and began working on the pipes in the ceiling. As soon as these workers

¹Ms. Saravia was at the airport with her parents and her husband. She filed a separate action.

moved to the new work area, another worker, Mr. Perri, also in a yellow vest and employed by Holt (and not Cardoza according to his testimony), pushed a yellow mop bucket on wheels to the area and began mopping the area where the workers had been working. He then moved the bucket and the mop across the hallway, from left to right on the screen, and left it at the bottom of the ramp, just to the right of the area where people would be walking and out of sight of the camera. He then proceeded to mop the area to the right of where the workers had been working, where people are seen in the video walking in both directions, up and down the ramp. He did not put up any wet floor signs or barriers to prevent people from walking up or down the ramp.

Mr. Perri testified that there was no reason to put up warning signs or barriers as there was no water in the bucket and no water on the mop [EBT Tr. Doc. 135 Page 49]. He states that the dirt he decided to mop up on the left side of the hallway had fallen from the ceiling tiles that the plumbing workers had removed. He described it as gray, powdery and about six inches in diameter, and not a coffee stain [EBT Page 57]. Mr. Perri said this was a common occurrence when ceiling tiles were removed, for dust to fall to the floor. He later testified that he did not know where the dust came from [Page 91 Lines 12-21]. He testified that cleaning the floor is not his usual task, as he is a supervisor [EBT Page 62]. He acknowledged that a dry mop was not the best tool to use to clean dust. He was shown the video at his deposition, and testified that he was the man who was mopping the floor and the man who placed the wet floor sign on the floor after the plaintiff's accident. He did not explain why he did so if there was no water on the mop or in the bucket. While Mr. Perri was mopping, another Holt worker, Dave Samaroo, with a broom and dustpan, swept the area. At his deposition, Mr. Samaroo testified that Mr. Perri was cleaning a

coffee stain with a dry mop. He testified that there was no water in the bucket or on the mop. He was sure of this as he came to help Mr. Perri when the mop head fell off the stick and he put it back on.

Almost immediately after Mr. Perri finished mopping, plaintiff pushed the wheelchair down the ramp, followed by another worker with another passenger in a wheelchair. When plaintiff reached the bottom of the right side of the ramp, a few feet from the mop bucket, the wheelchair appears to slip out from under him and fall backwards, along with him. A crowd then gathered and people began to assist them. After plaintiff, Saravia (his wheelchair passenger) and the people with them left, Mr. Perri, an employee of Holt, put out a wet floor sign at the top of the ramp. Then, after a few minutes, he removed the wet floor sign and closed off all access to the hallway with the orange cones and plastic striped sticks. Mr. Perri testified that he did not know why the hallway was closed off [Tr. Pages 95-96]. He testified that he was not sure if he inspected the ramp area where the accident took place [Page 96].

Williams and Saravia² testified that after they fell they observed a wet area on the floor. They both testified that there were no “wet floor” signs. Williams described it as a “puddle” and testified that he both saw it and felt it [EBT Tr. Pages 62-65]. He testified that a man with a yellow vest was standing next to a mop bucket at the location where he fell. Plaintiff claims in his testimony that the man apologized to him and he responded angrily. Saravia testified that the wet area was approximately three by three feet in size, and that her clothes became wet from the water [EBT Tr. Page 30]. Ms. Johnson, the wheelchair attendant who was pushing Saravia’s father in the wheelchair behind Saravia

²Saravia has settled her separate action (Ind. No. 521554/17).

testified that she saw that the area where Williams fell was wet. She filled out an incident report. In it, Ms. Johnson wrote that she saw Williams slip and fall and that the floor was wet [Tr. Page 50]. A Port Authority Police Officer completed an accident report at the scene (Doc. 131) and reports that Williams lost control of the wheelchair on a wet floor and fell. An ambulance was called.

Holt Construction Corp. ("Holt") had been hired by American Airlines to construct a new lounge in the terminal. Holt, as general contractor, was responsible for making sure the work did not interfere with the use of the terminal and that the work area did not create an unsafe condition for passengers. Holt was also responsible for cleaning the areas where work was performed.

The testimony of the plumbing workers was that the pipes they were working on did not have the water turned on, and thus their plumbing work could not have produced a wet area. They both testified that Holt always had workers who stayed with them, to move the cones and sticks, to mop and sweep. There were also two security guards who accompanied them. Mr. Kristyensen, one of the plumbing workers, testified that he did not see the accident or any water. He was working on the lift and turned around only when he heard a commotion. He did not come down from the lift, but continued to work.

American Airlines moves for an order granting it a defense, reimbursement of its counsel fees and disbursements incurred thus far, and either summary judgment or conditional summary judgment on its cross claim against Holt for contractual indemnification, pursuant to the indemnification clause in their agreement. American Airlines contends that the accident occurred in an area where Holt and its subcontractor Cardoza were working, so indemnification is required by the agreement. Movant

American Airlines avers that there is no evidence that the accident was caused by American Airlines' negligence. Thus, American Airlines argues it is entitled to an order granting it a defense and either summary judgment or conditional summary judgment on the issue of indemnification.

Holt opposes the motion and avers that the indemnification clause is only applicable if Holt is found negligent, and claims American Airlines has failed to establish that Holt or its subcontractor were negligent. Holt maintains that at best there are issues of fact as to whether Holt or its subcontractor were negligent, and that if there was a wet area, it cannot be seen in the video, and the fact that a wet floor sign was placed in the area after the accident has no bearing on whether Holt or its subcontractor were negligent or if its negligence caused the accident. Holt also argues that neither its employees, the plumbing company's employees, nor Saravia's father, who was present and was deposed, saw any wet area on the floor. Finally, Holt suggests that there is support for the conclusion that plaintiff was simply walking too fast down the ramp and he fell because his feet got "tangled up" and not because of a wet area. Counsel for Holt points out that Saravia testified at her deposition that plaintiff was going "too fast" [affirmation in support Doc. No. 108 ¶¶ 15-16]. To be clear, Holt does not claim that the liquid which plaintiff claims caused his fall was there for reasons unrelated to their work, such as because someone spilled a drink on the floor or that people were tracking in rain water on a rainy day. Holt's position is that there was no water or other liquid on the floor at all. Therefore, Holt's counsel argues that as American Airlines has not proved that Holt was negligent, they are not entitled to be defended or indemnified.

Discussion

“The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case” (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat summary judgment, the opposing party must come forward with admissible evidence showing that there are material issues of fact that require a trial (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). “A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987] [internal quotation marks omitted]).

The agreement between American Airlines and Holt provides in pertinent part at ¶13.3 (Doc. No 96 and Exhibit Y) that:

To the fullest extent permissible by law, a Party³ shall indemnify and hold harmless the other Parties and the agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorneys’ fees, arising out of or resulting from performance of such Party’s portion of the Work required under the Contract Documents, provided that such claim, damage, loss or expense is attributable to bodily injury . . . but only to the extent caused by the negligent acts or omissions of the Party providing the indemnification, [or] anyone directly or indirectly employed by it.

The court finds that American Airlines has established that the area where the accident occurred was under Holt’s control at the time of the accident, and American Airlines’ liability would therefore be solely vicarious. Thus, American Airlines has established that it bore no fault for the accident (see *Jamindar v Uniondale Union Free*

³The Agreement defines Party as American, Holt or Manicini-Duffy (the architect).

School Dist., 90 AD3d 612, 616 [2d Dept 2011] ["To obtain conditional relief on a claim for contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of statutory or vicarious liability" (internal quotation marks omitted)]).

However, a party's right to contractual indemnification depends upon the specific language of the relevant contract. Here, the clause in question provides that the duty to indemnify requires a negligent act or omission on the part of Holt, its employees or its subcontractors (see *Tolpa v One Astoria Square, LLC*, 125 AD3d 755, 756 [2d Dept 2015]). Thus, the inquiry is whether American Airlines is entitled to a defense and an order of conditional indemnification, conditioned on a finding of negligence.

Recent Second Department decisions have held that conditional summary judgment is the appropriate relief where the contract requires a showing of negligence, but the party seeking indemnification has demonstrated that it is free from any negligence and that it may be held liable solely by virtue of statutory or vicarious liability (see *Graziano v Source Bldrs. & Consultants, LLC*, 175 AD3d 1253 [2d Dept 2019]; *Jamindar v Uniondale Union Free School Dist.*, 90 AD3d 612 [2d Dept 2011]; *George v Marshalls of MA, Inc.*, 61 AD3d 931, 932 [2d Dept 2009]; see also *Hughey v RHM-88, LLC*, 77 AD3d 520, 523 [1st Dept 2010]; *State of New York v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757 [3d Dept 2001]). In *Jardin v A Very Special Place, Inc.*, 138 AD3d 927, 930-931 [2d Dept 2016], the court states "[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," citing *Arriola v City of New York*, 128 AD3d 747, 748-749.

Movant American Airlines has shown that these decisions are applicable to the facts here. Its motion for summary judgment on its contractual indemnification claim includes a request for the alternative relief of a conditional grant of summary judgment pending a finding of negligence.

Accordingly, this court finds that American Airlines has demonstrated that its liability is vicarious only, that it is entitled to conditional summary judgment on its contractual indemnification claim against Holt, with American Airlines' recovery conditioned on a finding of negligence against Holt or its subcontractors by the trier of the facts.

With regard to the branch of the motion which seeks an order that Holt assume American Airlines' defense and directs reimbursement of its counsel fees and disbursements incurred thus far, the court is required to determine whether the indemnification clause conditions the payment of expenses and counsel fees on a finding of fault on Holt's part. (see *Simone v Liebherr Cranes, Inc.*, 90 AD3d 1019, 1020 [2d Dept 2011]). The court finds that it does. Where the indemnification clause in the contract does not require as a condition for contractual indemnification that the acts or omissions be negligent or wrongful, whether those acts or omissions constituted negligent conduct is not relevant to the party's liability for contractual indemnification with respect to attorneys' fees and costs. However, where, as here, the contract requires a finding of negligence on the part of the indemnifying party, it would be premature to require defendant Holt to provide American Airlines with a defense, or to reimburse it for the attorneys' fees and expenses incurred thus far (see *Bryde v CVS Pharmacy*, 61 AD3d 907, 908 [2d Dept 2009] ["It would also have been premature [for the court to have granted that branch of CVS's motion which was for summary judgment on so much of the contractual

indemnification claim as sought the provision of a defense by Jato since Jato is not an insurer and its duty to defend is no broader than its duty to indemnify, which has yet to be established”].

Accordingly, it is

ORDERED that the branch of American Airlines, Inc.’s motion for an order granting it a defense by Holt and reimbursement by Holt of its counsel fees and disbursements incurred thus far is denied as premature, with leave to renew if necessary. The branch of American Airlines’ motion for conditional summary judgment on its cross claim for contractual indemnification as against defendant Holt Construction Corp. is granted to the extent that it is hereby **ORDERED** that American Airlines is entitled to indemnification against Holt under their contract, provided there is a finding of negligence (whether by a jury or an arbitrator) against Holt, one of Holt’s subcontractors, or the employees of either of them.

This shall constitute the decision and order of the court.

Dated: February 3, 2020

ENTER :



Hon. Debra Silber, J.S.C.

**Hon. Debra Silber
Justice Supreme Court**