Talasazan v 4Matic Constr. Corp.
2020 NY Slip Op 31759(U)
June 4, 2020
Supreme Court, Kings County
Docket Number: 520673/2016
Judge: Dawn M. Jimenez-Salta

At an IAS Term, Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of June 2020

PRESENT

HON. DAWN JIMENEZ-SALTA, JUSTIC

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF KINGS

_____X

KAYVAN TALASAZAN,

Plaintiff,

-against-

4MATIC CONSTRUCTION CORP.,

TOLL BROTHERS CITY LIVING,

TOLL BROTHERS REAL ESTATE,

TOLL BROTHERS REAL ESTATE, INC.,

TOLL FIRST AVENUE, LLC and

TOLL GC, LLC,

Defendants.

_____X

Index Number 520673/2016

DECISION/ORDER

4MATIC CONSTRUCTION CORP.,

Third Party Plaintiff,

-against-

LIBROS MASONRY CORP.,

Third Party Defendant.

_____X

Recitation, as required by CPLR 2219(a) of the papers considered in the review of:

1) Defendants Toll First Avenue, LLC ("Toll First") and Toll GC, LLC's ("Toll GC") (collectively "Defendants Tolls") Notice of Motion for Summary Judgment, dated January 7, 2019 to Dismiss Plaintiff Kayvan Talasazan's ("Plaintiff") Complaint and All Cross Claims Against Defendants Toll

First and Toll GC and Granting Defendants Toll First and Toll GC's Cross Claim for Contractual and Common Law Indemnification Against Defendant 4Matic Construction Corp. ("4Matic") and for Such Other and Further Deemed Relief by this Court Along with Exhibits A-S and Attorney's Affirmation in Support;

2) Defendant 4Matic's Attorney Affirmation in Partial Opposition, dated March 18, 2019;
3) Plaintiff's Attorney's Affirmation in Opposition, dated March 25, 2019 with Exhibits A-J;
4) Third Party Defendant Libros Masonry's ("Libros") Attorney's Affirmation in Partial Opposition, dated April 8, 2019;
5) Defendants Tolls' Attorney's Reply Affirmation, dated May 8, 2019;
6) Third Party Defendant Libros' Cross Motion to Dismiss or Sever the Third Party Action pursuant to CPLR Section 1010 or to Vacate Plaintiff's Note of Issue and Certificate of Readiness, dated May 6, 2019;
7) Plaintiff's Attorney's Affirmation in Support, dated June 12, 2019;
8) Defendant 4Matic's Attorney's Affirmation in Partial Opposition, dated June 17, 2019;
9) Third Party Defendant Libros' Attorney's Reply Affirmation, dated October 8, 2019 with Exhibits A-C, all of which submitted on October 23, 2019.

Upon the foregoing cited papers, the Decision/Order on this Motion and Cross Motion is as follows: This Court grants Defendants Toll First and Toll GC's motion for summary judgment to dismiss Plaintiff's complaint and all cross claims against Defendants Tolls. It grants Defendants Tolls' cross claims for contractual and common law indemnification against Defendant 4Matic. It denies Third Party Defendant Libros' cross motion to dismiss or sever the third party action pursuant to CPLR Section 1010. It denies its request to vacate Plaintiff's Note of Issue and Certificate of Readiness.

BACKGROUND AND PROCEDUREAL HISTORY:

959 First Avenue, New York, NY 10022 was a 30-story residential building project (the "project" or "premises) owned by Defendant Toll First Avenue LLC ("Toll First"). Defendant Toll GC, LLC ("Toll GC") was the project general contractor. Defendant Toll GC hired Defendant 4Matic Construction Corp. ("4Matic") to install all the brick work at the project pursuant to a Trade Subcontract between Defendant Toll GC and Defendant 4Matic for brick façade and masonry, dated March 10, 2014. Defendant/Third Party Plaintiff 4Matic hired manpower from a subcontractor, Third Party Defendant Libros Masonry Corp. ("Libros"). Defendant 4Matic installed the brick on the outside of the building from the top to the bottom, using a hanging scaffold. The brickwork commenced in 2014, continuing into 2015.

On August 26, 2015 at 11:30 a.m., Plaintiff Kayvan Talasazan ("Plaintiff") was driving his automobile in the left lane on 53rd Street at the intersection of First Avenue in Manhattan. He noticed ongoing construction work at the 959 First Avenue building site located on the left side of his vehicle. While Plaintiff was stopped at a red light, a piece of red brick from the project on his left fell onto his windshield. After the brick struck his windshield, it hit the hood, bouncing into the roadway in front of his vehicle. As a result, the windshield was shattered, splaying glass shards into Plaintiff's eyes and onto his chest. Plaintiff did not observe the brick prior to the incident. When he initially saw the brick on the ground in front of his vehicle, he recognized it as coming from the construction site because it was the same color as the façade of the building. Consequently, Plaintiff seeks recovery for personal injuries

allegedly resulting from the incident near the project pursuant to Labor Law Section 200, Labor Law Section 240(1) and Labor Law Section 241(6) as well as negligence.

Plaintiff commenced the filing of this action by service of a Summons and Complaint on November 1, 2016 on Defendants 4Matic, Toll Brothers City Living, Toll Brothers Real Estate, Toll Brothers Real Estate, Inc., Toll First and Toll GC. Issue was joined by the service of the Verified Answers, dated December 28, 2016 and April 3, 2017 by Defendant 4Matic as well as Defendants Toll First and Toll GC.

Plaintiff filed his Verified Bill of Particulars, dated May 26, 2017.

Plaintiff testified at his Examination Before Trial ("EBT") on January 9, 2018. Joseph Clark ("Clark") testified on behalf of Defendant Toll GC at an EBT on May 16, 2018. Louis Lazzinnaro ("Lazzinnaro") testified on behalf of Defendant 4Matic at an EBT on May 16, 2018. Michael Kuhtenia ("Kuhtenia") also testified on behalf of Defendant 4Matic at an EBT on September 27, 2018.

Plaintiff discontinued the action against Defendants Toll Brothers City Living, Toll Brothers Real Estate and Toll Brothers Real Estate, Inc. by a Stipulation of Discontinuance, dated June 2, 2017.

Plaintiff filed a Note of Issue on August 22, 2018. As a result, Defendants filed a Motion to Vacate the Note of Issue, to Compel Remaining Discovery and to Extend the Time to File a Motion for Summary Judgment. The Court granted the motion on October 5, 2018 to the extent of compelling Plaintiff to provide remaining discovery and extending the time to file a motion for summary judgment to January 7, 2019.

Defendant/Third Party Plaintiff 4Matic commenced a third party action against Third Party Defendant Libros by the filing of a Third Party Summons and Verified Complaint on September 18, 2018. Issue was joined by Third Party Defendant Libros by service of its Third Party Verified Answer, dated November 20, 2018.

Defendants Toll First and Toll GC filed their Motion for Summary Judgment, dated January 7, 2019, seeking dismissal of Plaintiff's Complaint and all cross claims against them; requesting summary judgment in their favor against Defendant 4Matic in their cross claims for contractual and common law indemnification as well as for such further just and necessary relief as the Court deems proper.

Plaintiff filed his Attorney's Affirmation in Opposition, dated March 25, 2019.

Defendant/Third Party Plaintiff 4Matic filed its Attorney's Affirmation in Partial Opposition, dated March 18, 2019. Third Party Defendant Libros filed its Attorney's Affirmation in Opposition, dated April 8, 2019.

Defendants Toll First and Toll GC filed their Reply Affirmation, dated May 8, 2019.

Third Party Defendant Libros filed its Cross Motion to dismiss or sever the third party action pursuant to CPLR Section 1010 or to vacate Plaintiff's Note of Issue and Certificate of Readiness for Trial or to grant such further just and necessary relief as the Court deems proper, dated May 6, 2019.

Plaintiff filed his Attorney's Affirmation in Support to Dismiss or Sever the Third Party Action but in Opposition to Striking Plaintiff's Note of Issue, dated June 12, 2019.

Defendant/Third Party Plaintiff 4Matic filed is Affirmation in Partial Opposition, dated June 17, 2019.

Third Party Defendant Libros filed its Reply Affirmation, dated October 8, 2019.

COURT'S RULINGS:

This Court grants Defendants Toll First and Toll GC's motion for summary judgment, seeking dismissal of Plaintiff's Complaint and all cross claims against them. It grants their request for contractual and common law indemnification against Defendant/Third Party Defendant 4Matic. This Court denies Third Party Defendant Libros' cross motion to dismiss or sever the Third Party Complaint pursuant to CPLR 1010. It denies its request to strike Plaintiff's Note of Issue and Certificate of Readiness.

This Court dismisses Plaintiff's claims pursuant to Labor Law 200, Labor Law 240(1) and Labor Law 241(6) since he was merely driving by the project site. Consequently, he was not involved in the performance of construction work in the building in any manner. See Valinoti v. Sandvik Seamco, Inc., 246 AD2d 344 (1st Dept., 1998); Mordkofsky v. VCV Dev., 76 NY2d 573 (1990); Gibson v. Worthington Div. of McGraw-Edison Co., 78 NY2d 1108 (1991).

Although Plaintiff contends that Defendants Toll First and Toll GC created or had notice of the condition at issue, this Court finds that they did not. See Hendricks v. 691 Eighth Avenue Corp., 640 NYS2d 525 (1st Dept., 1996). It is Plaintiff who bears the burden of proof to show that Defendants either created the condition which caused the accident or had actual or constructive notice of it. See Gordon v. American Museum of Natural History, 67 NY2d 836 (1986); Piaquadrio v. Recine Realty Corp., 84 NY2d 967 (1994); Willard v. Columbia Univ., 28 AD3d 207 (1st Dept., 2006); Pirello v. Longwood & Assocs., Inc., 179 AD2d 744 (2nd Dept., 1992). To constitute constructive notice, a defect must be visible and apparent. It must exist for a sufficient length of time prior to the accident to permit a defendant's employees the opportunity to discover and remedy it. See Jenkins v. NYC Housing Auth., 784 NYS2d 32 (1st Dept., 2004); Smith v. Costco Wholesale Corp., 50 AD3d 499 (1st Dept., 2008). A "general awareness" of a dangerous condition is legally insufficient to constitute notice of a particular condition which caused a plaintiff's accident. Liability can only be predicated upon a defendant's failure to remedy the danger presented by the condition after actual or constructive notice. See Piaquadio v. Recine Realty Corp., supra; Gordon v. American Museum of Natural History, supra; Madrid v. City of New York, 42 NY2d 1039 (1977); Love v. NYC Housing Auth., 919 NYS2d 149 (1st Dept., 2011). Moreover, a defendant cannot be charged with constructive notice of an alleged condition based upon a prior occurrence of the same unless a plaintiff can prove the alleged condition was ongoing and routinely unaddressed. See Pfeuffer v. NYC Housing Auth., 93 AD3d 470 (1st Dept., 2012); Solazzo v. NYC Transit Auth., 21 AD3d 735 (1st Dept., 2005); aff'd 6 NY3d 734 (2005); Pagan v. NYC Housing Auth., 121 AD3d 622 (1st Dept., 2014).

Plaintiff's submission of an unsworn, uncertified alleged NYC Department of Buildings record is unavailing to prove Defendants Toll First and Toll GC had actual or constructive notice of a purported condition. According to the record, there was an alleged complaint on March 6, 2005 that a "valve fell from the building". However, a government record which lists information purportedly offered by an anonymous witness is uncorroborated hearsay evidence. See Rodriguez v. Sit, 91 NYS3d 694 (1st Dept., 2019); Matter of Allstate Ins. Co. v. Stricklin , 941 NYS2d 165 (2nd Dept., 2012). Thus, the condition was neither ongoing nor routinely unaddressed. See Pfeuffer v. NYC Housing Auth., supra; Solazzo v. NYC Transit Auth., supra; Paga v. NYC Housing Auth., supra.

The evidence clearly shows that Defendant 4Matic was the entity which was installing the bricks on the building on the date of the accident pursuant to its subcontract with Defendant Toll GC. Consequently,

it was Defendant 4Matic's responsibility for the inspection and maintenance of the hanging scaffold, its planking and its netting. Although a property owner and general contractor have a general authority to oversee the progress of work, mere general supervisory authority at a worksite for the purpose of overseeing the progress of work and inspecting the work product is insufficient to impose liability under a theory of negligence. The question of whether an owner is present at the jobsite to observe that the work was performed in compliance with safety standards is also insufficient to establish liability under a theory of negligence. In addition, the right to generally supervise the work, stop the contractor's work if a safety violation is noted or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability pursuant to a theory of common law negligence. Thus, an owner's or general contractor's authority to enforce general safety standards to determine the location of work is insufficient to establish negligence. See Comes v. NYS Elec. & Gas, Co., 82 NY2d 876 (1993); Mamo v. Rochester Gas & Electric Corp., 209 AD2d 948 (4th Dept., 1994), lv dismissed 85 NY2d 924; Enderun v. Herbert Industrial Insulation, Inc., 224 AD2d 1020 (4th Dept., 1999); Gasques v. State of New York, 873 NYS2d 717 (2nd Dept., 2009), affd 15 NY3d 869 (2009); Austin v. Consolidated Edison, 913 NYS2d 684 (2nd Dept., 2010); Russin v. Louis N. Picciano & Son, 54 NY2d 311 (1981).

Although a general contractor's on-site safety manager may have overall responsibility for the safety of the work performed by a subcontractor, such duty to supervise and enforce general safety standards at the worksite is insufficient to raise a question of fact regarding negligence. See Singh v. Black Diamonds LLC, 805 NYS2d 58 (1st Dept., 2005).

As the Court of Appeals found in Persichelli v. Triborough Bridge & Tunnel Auth., 16 NY2d 136 (1965), the duty of an owner or general contractor is not breached when the injury arises from a defect in the subcontractor's own plant, tools and methods or through negligent acts of the subcontractor occurring as a detail of the work. The evidence shows that Defendants Toll First and Toll GC did not supervise or control the means and methods of the work performed by Defendant 4Matic. They also did not provide any equipment to Defendant 4Matic. It was the employees of Defendant 4Matic who supervised the means and methods of its own work at the site. Moreover, Defendant 4Matic provided all tools and equipment to perform the work, including the scaffolding and netting. Thus, Defendants Toll First and Toll GC have affirmatively demonstrated that they neither created the alleged condition nor had actual or constructive notice of it since it was Defendant 4Matic which installed: 1) the bricks on the building on the date of the accident as well as 2) the hanging scaffold including the netting and planking which was meant to prevent objects including the bricks from falling below. Consequently, it was Defendant 4Matic's responsibility for the inspection, maintenance and repair of the hanging scaffold including the netting and the planking. Moreover, the alleged condition was not a recurring one which was routinely left unaddressed. See Pfeuffer v. NYC Housing Auth., supra; Hendricks v. 691 Eighth Avenue Corp., 226 AD2d 192 (1st Dept., 1996); Smith v. Costco Wholesale Corp., supra.

Plaintiff's argument that the work was "inherently dangerous" is unpersuasive because the accident occurred from the performance of Defendant 4Matic during its installation of the façade and brickwork pursuant to its subcontract with Defendant Toll GC. If an injury occurs from the negligence of the contractor in its performance of an operative detail of the work, the entity which hired the contractor is not required to anticipate such a danger. Therefore, the principal is not liable for the acts of the independent contractor because the principal cannot control the manner in which the independent contractor performed the work. See Nelson v. E&M 2710 Clarendon LLC, 129 AD3d 568 (1st Dept., 2015); Baraban v. Orient Express Hotels, Inc., 292 AD2d 203 (1st Dept., 2002)

Defendants Toll First and Toll GC are entitled to contractual indemnification from Defendant 4Matic because the accident occurred during Defendant 4Matic's installation of the façade and brickwork which Defendant 4Matic contractually agreed to perform in its subcontract with Defendant Toll GC. See Drzewinski v. Atlantic Scaffold & Ladder Co., Inc., 70 NY2d 774 (1987); Margolin v. NY Life Ins., 32 NY2d 149 (1973); Reyes v. Post & Broadway, Inc., 97 AD3d 805 (2nd Dept., 2012); Alfaro v. 65 W. 13th Acquisition LLC, 74 AD3d 1255 (2nd Dept., 2010); Sherry v. Wal-Mart Stores E., LLP, 67 AD3d 992 (2nd Dept., 2009); Canela v. TLH 140 Perry St., LLC, 47 AD3d 743 (2nd Dept., 2008).

A contract which contains an indemnification provision is enforceable even if it requires a party to be indemnified for its own negligence provided that it is coupled with an insurance procurement requirement since it becomes an agreement for the use of insurance to allocate the risk of liability to third parties. See Great Northern Ins. Co. v. Interior Construction Corp., 7 NY3d 412 (2006); Hogeland v. Sibley, Lindsay & Curr Co., 42 NY2d 153 (1977).

In addition, an owner who may be liable to an injured plaintiff is entitled to full common-law indemnification from a subcontractor whose negligence was the proximate cause of the plaintiff's injuries regardless of an indemnification covenant or agreement. See Kelly v. Diesel Const. Div. of Carl A. Mouse, Inc., 35 NY2d 1 (1974); Edlin v. Glinsky, 154 AD2d 648 (2nd Dept., 1989); Bulson v. 1929 Assocs., 152 AD2d 529 (2nd Dept., 1989); Allman v. Ciminelli Const. Co., 184 AD2d 1022 (1st Dept., 1993); Brown v. Sagamore Hotel, 184 AD2d 471 (3rd Dept., 1992); Serino v. Miller Brewing Co., 167 AD2d 917 (4th Dept., 1990). When the evidence establishes that a contractor controlled and supervised the procedures, safety measures and instrumentality which allegedly injured a plaintiff, the owner is entitled to common law indemnification from that contractor. See McNair v. Morris Avenue Assocs., 203 AD2d 433 (2nd Dept., 1994).

According to the Trade Subcontract, dated March 10, 2014 between Defendant 4Matic and Defendant Toll, GC Defendant 4Matic was contractually required to defend and indemnify Defendants Toll for this lawsuit which was the result of Defendant 4Matic's performance of its contractual duties in the installation of the façade and brickwork at the project, including the red brick which was involved in the incident. See Certificate of Liability Insurance, dated March 31, 2015 for Defendant 4Matic.

This Court finds Defendant 4Matic's argument that the indemnification clause is not enforceable pursuant to the General Obligations Law is unavailing because there is no evidence that Defendants Toll were negligent. Even when an indemnity provision may run afoul of General Obligations Law, a party is still entitled to its enforcement if the evidence establishes that a plaintiff's injuries were not attributable to a defendant's negligence. See Brown v. Two Exchange Plaza Partners, 76 NY2d 172 (1990); Crouse v. Hellman Const. Co., Inc., 38 AD3d 477 (1st Dept., 2007); Mahoney v. Turner Const. Corp., 37 AD3d 377 (1st Dept., 2007); Linarello v. City Univ. of New York, 6 AD3d 192 (1st Dept., 2004); Masdiotta v. Morse Diesel Intl Inc., 758 NYS2d 286 (1st Dept., 2003).

This Court denies Third Party Defendant Libros cross motion to dismiss or sever the third party action pursuant to CPLR Section 1010. It denies its request to vacate Plaintiff's Note of Issue and Certificate of Readiness for Trial. Because the material sought by Third Party Defendant is readily available, there is no compelling reason to delay the trial or to dismiss or sever the third party action. See CPLR Section

1010.

Based on the foregoing, it is hereby ORDERED as follows:

Defendants Toll First and Toll GC's motion for summary judgment to dismiss Plaintiff's complaint and all cross claims against Defendants Toll is GRANTED, and Plaintiff's complaint and all cross claims are DISMISSED against Defendants Toll First and Toll GC. Defendants Tolls' request for contractual and common law indemnification against Defendant 4Matic is GRANTED.

Third Party Defendant Libros' cross motion to dismiss or sever the third party action is DENIED pursuant to CPLR 1010. Its request to vacate Plaintiff's Note of Issue and Certificate of Readiness is DENIED.

This constitutes the Decision/Order of the Court.

DATE: June 4, 2020

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Dawn Jimenez-Salta
Hon. Dawn Jimenez-Salta
Justice of the Supreme Court

HON. DAWN JIMENEZ-SALTA, J.S.C.