Pierce v Tenly Corp.
2020 NY Slip Op 33349(U)
October 2, 2020
Supreme Court, Kings County
Docket Number: 501687/2016
Judge: Robin K. Sheares

SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF KINGS: Part 96

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Jeffrey Pierce and Lysa Pierce
Plaintiffs,

Index No.: 501687/2016
Motion Sequences
#5, #6, #7, and #8

DECISION/ORDER

-against-

Present: HON. ROBIN K. SHEARES
Acting Justice Supreme Court

Tenly Corporation a/k/a The Tenly Corp, William Hardy and Bobcat of New York, Inc.
Defendants.

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The Tenly Corporation a/k/a The Tenly Corp.,
Third-Party Plaintiff,

-against-

Austin Interiors, Inc.
Third-Party Defendant,

---X

Bobcat of New York, Inc.
Second Third-Party Plaintiff,

-against-

Austin Interiors, Inc.
Second Third-Party Defendant.

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

Papers	Numbered	Papers	Numbered
Sequence #5		***Sequence #6***	
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	1 – 2	Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	6 - 7
Exhibits	A – J	Exhibits	A – Q
Opposition	3	Affidavit in Support	8
Exhibits	A - M	Exhibits	A
Opposition	4	Opposition	9
Exhibits	A	Exhibits	A - M
Reply	5	Opposition	10
		Exhibits	A
		Opposition	11
		Exhibits	A - C
		Reply	12
Sequence #7		***Sequence #8***	
Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	13 – 14	Order to Show Cause/Notice of Motion and Affidavits/Affirmations Annexed	17 - 18
Exhibits	A – N	Exhibits	A - M
Opposition	15	Opposition	19
Exhibits	A - B	Exhibits	A - C
Reply	16	Reply	20

BOBCAT of NEW YORK's Motion for Summary Judgment against AUSTIN INTERIORS
(Motion Sequence #5)

Based on the foregoing papers, and after oral arguments, the Court GRANTS BOBCAT's[1] Motion for Summary Judgment pursuant to CPLR §3212.

"Labor Law § 200 (1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Martinez v City of New York*, 73 AD3d 993, 997, 901 NYS2d 339 [2010], citing *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 693 NE2d 1068, 670 NYS2d 816 [1998]). "Where . . . a claim arises out of the means and methods of the work, a [defendant] may be held liable for common-law negligence or a violation of Labor Law § 200 only if he or she had 'the authority to supervise or control the performance of the work' " (*Forssell v Lerner*, 101 AD3d 807, 808, 956 NYS2d 117 [2012], quoting *Ortega v Puccia*, 57 AD3d 54, 61, 866 NYS2d 323 [2008]). "A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed" (*Ortega v Puccia*, 57 AD3d at 62). " *Gonzalez v. Perkan Concrete Corp.*, 110 AD3d 955, 958-959 (2nd Dept. 2013).

[1] For clarity sake, note the following:
Defendant/Second Third-Party Plaintiff BOBCAT OF NEW YORK, INC will be referred to as BOBCAT.
Third-Party Defendant/Second Third-Party Defendant AUSTIN INTERIORS, INC will be referred to as AUSTIN INTERIORS.
Defendant/Third Party Plaintiff TENLY CORPORATION a/k/a THE TENLY CORP. will be referred to as TENLY CORP.

Here, AUSTIN INTERIORS rented the equipment from BOBCAT. BOBCAT was not an owner, contractor, or agent, and did not have the authority to supervise or control the performance of the work. As such, the Court GRANTS that part of the motion which seeks dismissal on Labor Law § 200 or Labor Law § 241(6) violations.

Furthermore, The Court GRANTS that part of the motion which seeks dismissal on the basis of negligent. The Court finds that since BOBCAT did not supervise or control the performance of the work, it was not negligent in the causing of the accident. Moreover, there exist no evidence that the equipment was faulty.

Finally, based on the above, the indemnification claim is moot.

AUSTIN INTERIORS, INC's Motion for Summary Judgment against THE TENLY CORPORATION and BOBCAT of NEW YORK (Motion Sequence #6)

The Court GRANTS in Part and DENIES in Part AUSTIN INTERIORS's Motion for Summary Judgment pursuant to CPLR §3212.

New York's Workers' Compensation Law §11 states in pertinent part:.

> For purposes of this section the terms "indemnity" and "contribution" shall not include a claim or cause of action for contribution or indemnification based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.
>
> An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.

Since Plaintiff's Bill of Particulars fails to state that the Plaintiff suffered a grave injury as delineated in New York's Worker's Compensation Law §11, the Court GRANTS the motion in that the claims for contribution and indemnification listed in the Third-Party Complaint of THE TENLY CORP and in the Second Third-Party Complaint of BOBCAT are dismissed.

Additionally, the Court GRANTS that part of the motion which seeks summary judgment on TENLY CORP's claim for indemnification and breach of contract. While the parties disagree as to *when* the lease was executed, the lease itself is for the property located at 99 East Main Street. Plaintiff testified that the accident occurred at 97 East Main Street. Therefore, since the accident did not occur at the leased location, the claims for indemnification and breach of contract are dismissed.

Furthermore, the Court restates that the contractual indemnification claim based upon the rental contract between AUSTIN INTERIORS and BOBCAT is moot.

Finally, the Court finds that AUSTIN INTERIORS provided the contractually required insurance in that it produced a copy of the Certificate of Insurance dated October 7, 2015 which lists AUSTIN INTERIORS, INC as the Insured, and BOBCAT OF LONG ISLAND as the Certificate Holder[2]. Therefore, that portion of the motion seeking summary judgment is GRANTED.

TENLY CORPORATION a/k/a THE TENLY CORP. and WILLIAM HARDY's Cross-Motion for Summary Judgment against AUSTIN INTERIORS, INC. (Motion Sequence #7)

The Court DENIES TENLY CORP's and WILLIAM HARDY's Cross-Motion for Summary Judgment on its third-party claim against AUSTIN INTERIORS for contractual indemnification. The lease in issue between TENLY CORP and AUSTIN INTERIORS is for the commercial building located at 99 East Main Street and does not reference 97 East Main Street, or any work to be performed at that address. Plaintiff testified in his deposition that the that incident occurred at 97 East Main Street. Since the incident occurred at 97 East Main Street and not at 99 East Main Street, summary judgment is DENIED.

TENLY CORPORATION a/k/a THE TENLY CORP. and WILLIAM HARDY's Cross-Motion to Amend their Answer and for Summary Judgment against Jeffrey and Lysa Pierce (Motion Sequence #8)

The Court GRANTS TENLY CORP.'s and WILLIAM HARDY's Cross-Motion to amend their Answer to assert the Affirmative Defense of Workers' Compensation §29(6) as the Plaintiff will not be surprised or prejudiced since he filed for and received Worker's Compensation benefits.

However, the Court DENIES the Cross-Motion for Summary Judgment. "Workers' compensation qualifies as an exclusive remedy when both the plaintiff and the defendant are acting within the scope of their employment, as coemployees, at the time of injury (*see, Maines v Cronomer Val. Fire Dept.*, 50 NY2d 535 [1980]). Here, the Court find that there is a question of fact as to whether or not the Plaintiff was acting within the scope of his employment, at the time of the injury.

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[2] The Court notes that both the Rental Agreement and the Certificate of Insurance lists Bobcat of Long Island with the address as 24 Industrial Boulevard in Medford, New York. The Court notes that the rental agreement was signed on October 15, 2015, after AUSTIN INTERIORS obtained the required insurance.

This constitutes the Decision/Order of the Court.

Dated: October 2, 2020

ROBIN K. SHEARES, AJSC

ROBIN K. SHEARES
A.J.S.C.

KINGS COUNTY CLERK
FILED
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