

Tayupanda v Breezy Point Coop. Inc.

2021 NY Slip Op 30504(U)

February 19, 2021

Supreme Court, Kings County

Docket Number: 510012/2017

Judge: Peter P. Sweeney

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 510012/2017
Motion Date: 2-8-21
Mot. Seq. No.: 5

-----X
RICARDO TAYUPANDA,

Plaintiff,

-against-

BREEZY POINT COOPERATIVE INC. and SANDBAR
CONTRACTORS, INC.,

Defendants.

-----X
SANDBAR CONTRACTORS, INC.,

Third-Party Plaintiff,

DECISION/ORDER

- against -

J. CHIRCH CONSTRUCTION, INC., J. CHIRCH INC.,
and CASABELLA CONSTRUCTION CORPORATION,

Third-Party Defendants.

-----X
BREEZY POINT COOPERATIVE, INC.,

Second Third-Party Plaintiff,

- against -

J. CHIRCH CONSTRUCTION, INC., J. CHIRCH INC.,
and CASABELLA CONSTRUCTION CORPORATION,

Second Third-Party Defendants.

-----X
BREEZY POINT COOPERATIVE, INC.,

Third Third-Party Plaintiff,

- against -

THOMAS WASHINGTON and BARBARA WASHINGTON,

Third Third-Party Defendants.

-----X

The following e-filed documents, listed by NYSCEF as item numbers 95-123, were read on this motion:

The third-third party defendants, THOMAS WASHINGTON and BARBARA WASHINGTON (“the Washingtons”) move for an order (a) granting them summary judgment dismissing the third third-party complaint and (b) granting them summary judgment on their cross claims against SANDBAR CONTRACTORS, INC. (“Sandbar”) and J. Chirch Construction Inc./J. Chirch Inc. (“Chirch”).

Background:

The plaintiff, RICARDO TAYUPANDA, commenced this action claiming that he suffered personal injuries on April 14, 2017 while performing work on the construction of a one family home located at 102 Beach 217th Street, Breezy Point, New York. More specifically, he alleges that at the time of the accident, he was standing on a ladder performing framing work when the ladder failed causing him to fall. The ladder was owned by plaintiff's employer, Chirch. BREEZY POINT COOPERATIVE INC. (“Breezy Point Cooperative”) is the cooperative owner of the property where the accident occurred, and Sandbar was the general contractor in charge of the project. The Washingtons are shareholders of the Breezy Point Cooperative and their home was being re-constructed at the time of the accident. The new construction was to replace their existing home, which was damaged due to various storms.

The plaintiff commenced the action against Breezy Point Cooperative and Sandbar alleging causes of action under the Labor Law and in common law negligence. After appearing in the action, Breezy Point Cooperative commenced a third-third party action against the

Washingtons alleging causes of action for common law indemnification, contribution, and contractual identification. The claim for contractual indemnification arises out of a contract between the Washingtons in Breezy Point Cooperative dated November 7, 2016, which in relevant part, provides

The shareholder(s) who have signed below agree that the Cooperative is not responsible for the design or construction of the home improvement covered by the application submitted, and agree to hold the Cooperative harmless in the event of any injury or damage resulting from the construction of the home improvement.

In their answer to the third-third party complaint, the Washingtons cross-claimed against Sandbar and Chirch for contractual indemnification. The Washington's claim for contractual indemnification against Sandbar arises from a document entitled "CONTRACTOR RULES, REGULATIONS AND CONTRACT AGREEMENT" signed by principles of Sandbar and the Breezy Point Cooperative on October 8 and 9, 2019, which contains that the following indemnification provision:

To the fullest extent permitted by law, the Contractor shall, at its own cost and expense, defend, indemnify and hold harmless the Breezy Point Cooperative, Inc., its agents, employees, officers, directors, **Shareholders**, affiliated, related, parent and subsidiary companies (the "Indemnitees"), from and against any and all claims, losses, damages, liabilities, causes of action, liens, mechanics liens, encumbrances, penalties, fines, suits, proceedings, demands, professional fees, costs (including attorney's fees, costs, expenses and disbursements) of whatsoever kind or nature, including claims for damage to property, loss of use, bodily injury, sickness, disease, or death, injury to any person, including the employees of the Contractor or employees of any of its subcontractors, sub-subcontractors, suppliers, or any of their agents, employees, officers, directors or partners, claimed to arise out of or claimed to be in connection with or claimed to be a consequence of the performance of the work of the contractor, subcontractors, subsubcontractors, suppliers, or any of their agents, employees, officers, directors or partners while on BPC property, property leased by the BPC, or property leased or owned by

shareholders of the BPC, and while performing work or services for the BPC or for any shareholder of the BPC or any tenant of the BPC. Nothing in this paragraph shall require the Contractor to indemnify the Indemnitee for any liability created by the Indemnitee's sole and exclusive negligence (*emphasis added*).

The Washingtons maintain that as shareholders of the Breezy Point Cooperative, they are entitled to indemnification pursuant to this provision.

With respect to their cross-claim against Chirch for contractual indemnification, the contract between Sandbar and Chirch dated January 1, 2017 contains the following indemnification provision:

To the fullest extent permitted by law, Vendor [Chirch] agrees to indemnify, defend, and hold harmless the purchaser [Sandbar] and **additional Indemnitees**, if any, their officers, directors, agents, employees and partners (hereinafter collectively "Indemnitees") from any and all claims, suits, damages, liabilities, professional fees, including attorney's fees, costs, court costs, expenses and disbursements related to death, personal injuries or property damage brought or sued against any of the Indemnitees by any person or firm, arising out of or in connection with or as a result of or consequence of performance of the Work of the Vendor under this agreement (*emphasis added*).

The Washingtons contend that they are additional indemnitees under this contract, since the contract between the Breezy Point Cooperative and Sandbar requires Sandbar to indemnify them. In this regard, the contract between Sandbar and Chirch provides:

"Indemnitees" shall include Purchaser, and all parties Purchaser [Sandbar] is obligated by contract or otherwise, to indemnify, defend and hold harmless.

Discussion:**A. Breezy Point Cooperative's Claims Against the Washingtons for Common Law Indemnity and Common Law Contribution:**

Where a person is subject to liability for damages for the same personal injury as a defendant based on either a breach of a duty owed directly to the plaintiff or a breach of some duty owed to the defendant, contribution may be sought (*see, Grossman v. Franklin Hosp. Med. Ctr.*, 222 A.D.2d 403, 403, 635 N.Y.S.2d 43, 44; CPLR 1401; *Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp.*, 71 N.Y.2d 599, 603, 528 N.Y.S.2d 516, 523 N.E.2d 803; *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 N.Y.2d 559, 568, 516 N.Y.S.2d 451, 509 N.E.2d 51; *Garrett v. Holiday Inns*, 58 N.Y.2d 253, 258, 460 N.Y.S.2d 774, 447 N.E.2d 717; 2A Weinstein–Korn–Miller, N.Y.Civ.Prac. ¶¶ 1401.10a, 1401.10b). Similarly, the key element of a common-law cause of action for indemnification” is a duty owed from the indemnitor to the indemnitee arising from “the principle that ‘everyone is responsible for the consequences of his own negligence, and if another person has been compelled ... to pay the damages which ought to have been paid by the wrongdoer, they may be recovered from him’ ” (*Raquet v. Braun, supra* at 183, 659 N.Y.S.2d 237, 681 N.E.2d 404, quoting *Oceanic Steam Nav. Co. v. Compania Transatlantica Espanola*, 134 N.Y. 461, 468, 31 N.E. 987). Accordingly, the viability of Breezy Point Cooperative’s claims against the Washingtons for common law indemnity and common law contribution turn on whether the Washingtons owed a duty of care to either the plaintiff or to the Breezy Point Cooperative which was breached.

Labor Law § 200 is a codification of the common-law duty of landowners and general contractors to provide workers with a reasonably safe place to work (*see Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 501–502, 601 N.Y.S.2d 49, 618 N.E.2d 82; *Lombardi v. Stout*, 80 N.Y.2d 290, 294–295, 590 N.Y.S.2d 55, 604 N.E.2d 117). Where, as here, a claim

arises out of alleged defects or dangers arising from a subcontractor's methods or materials, recovery against the owner cannot be had unless it is shown that the party to be charged had the authority to exercise supervisory control over the operation (*see Ross v. Curtis–Palmer Hydro–Elec. Co.*, 81 N.Y.2d 494, 505, 601 N.Y.S.2d 49, 618 N.E.2d 82). A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed (*see Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323).

Here, the Washingtons demonstrated their prima facie entitlement to summary judgment dismissing the Breezy Point Cooperative's claims for common law contribution and common law indemnification by submitting admissible proof, including their own affidavits, which demonstrated that they lacked authority to exercise direction and control over plaintiff's work. Hence, they demonstrated, prima facie, and thus did not owe the plaintiff a duty of care (*see Dennis v. City of New York*, 304 A.D.2d 611, 612, 758 N.Y.S.2d 661; *Warnitz v. Liro Group*, 254 A.D.2d 411, 411–412, 678 N.Y.S.2d 910). Likewise, the Washingtons made prima facie showing that they did not owe the Breezy Point Cooperative a duty of care, a breach of which, could be construed as causing the accident. The Breezy Point Cooperative failed to raise a triable issue of fact. Accordingly, those branches of the Washington's motion for summary judgment dismissing Breezy Point cooperative's claims against them for common law contribution and common law indemnity are **GRANTED**.

B. Breezy Point Cooperative's Claims Against the Washingtons for Contractual Indemnity:

Pursuant to General Obligations Law § 5–321, every covenant, agreement or understanding in or in connection with or collateral to any lease of real property which purports

to exempt a lessor from liability for its own acts of negligence is void and unenforceable (*Rego v. 55 Leone Lane, LLC*, 56 A.D.3d 748, 749, 871 N.Y.S.2d 169, *see also, Wagner v. Ploch*, 85 A.D.3d 1547, 1547–48, 925 N.Y.S.2d 273, 274). Likewise, General Obligations Law § 5-322.1, precludes contractual indemnification where the indemnification clause in the contract seeks to impose complete and total indemnification notwithstanding the indemnitee's negligence (*see Itri Brick & Concreted Corp. v. Aenta Casualty & Surety Company*, 89 NY2d 786, 794). Whether the contractual indemnity provision contained in the contract between the Breezy Point Cooperative and the Washingtons is governed by General Obligations Law § 5–321, General Obligations Law § 5-321, or both, since the provision requires the Washingtons to indemnify the Breezy Point Cooperative for its own negligence, it is unenforceable. Accordingly, that branch of the motion in which the Washingtons seek summary judgment dismissing the Breezy Point Cooperative's claim for contractual indemnity is **GRANTED**.

C. The Washington's Claim Against Sandbar for Contractual Indemnity:

The Washingtons have not proven their prima facie entitlement to contractual indemnity from Sandbar since there is no evidence that the contract that they rely on was in effect at the time of the accident. The document entitled "CONTRACTOR RULES, REGULATIONS AND CONTRACT AGREEMENT", although signed by principals of both the Breezy Point Cooperative and Sandbar, it is dated October 8, 2019, which is after the date of the accident. Unless an indemnity agreement signed after a worker's accident was intended by parties to have retroactive effect, it does not apply retroactively (*see, e.g., Regno v City of New York*, 88 AD3d 610 [holding that indemnity agreement signed seven months after worker's accident did not apply retroactively]; *Temmel v 1515 Broadway Assocs., LP.*, 18 AD3d 364 [holding that post-accident indemnification agreement in purchase order did not apply absent indication that it was

intended by parties to have retroactive effect]; *Burke v Fisher Sixth Ave. Co.*, 287 AD2d 410 [holding that since there was nothing about the parties' contracts, which were signed after the plaintiff's accident date, to suggest they were intended to have a retroactive effect, dismissal of the third-party complaint for contractual indemnity was properly granted]). Accordingly, that branch of the Washington's motion for summary judgment on its claim against Sandbar for contractual indemnity is **DENIED** regardless of the sufficiency of the opposing papers.

D. The Washington's Claim Against Chirch for Contractual Indemnity:

The Washington's claim for contractual indemnity against Chirch is based on a contract between Chirch and Sandbar. In the affidavit, James Chirchirillo, the President and sole shareholder of Chirch, which was submitted in opposition to the motion, Mr. Chirchirillo averred that he did not sign the contract and that in the thirty years of doing business with Sandbar, he never entered into a written agreement with Sandbar. For the above reasons, there are triable issue of fact as to whether the contract is enforceable. That that branch of the Washington's motion for summary judgment on its claim against Chirch for contractual indemnity is therefore **DENIED**.

Accordingly, it is hereby

ORDERED that the motion is **GRANTED** solely to the extent that the third-third party claims asserted by the Breezy Point Cooperative against the Washingtons for common law contribution and common board indemnity are **DISMISSED**.

This constitutes the decision and order of the Court.

Dated: February 19, 2021



PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020