Hanna v New York & Presbyt. Hosp.
2021 NY Slip Op 31876(U)
June 3, 2021
Supreme Court, New York County
Docket Number: 162278/2015
Judge: Lewis J. Lubell
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SUPREME COURT OF THE STATE of NEW YORK
COUNTY OF NEW YORK

PRESENT: HON. LEWIS J. LUBELL, J.S.C. PART IAS MOTION 29

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JOHN T. HANNA,

INDEX NO.: 162278/2015

Plaintiff(s),

-against-

DECISION & ORDER

THE NEW YORK AND PRESBYTERIAN HOSPITAL, JOHN DOE a fictitious and unknown name, CAULDWELL-WINGATE COMPANY, INC., CAULDWELL-WINGATE, LLC and CAULDWELL-WINGATE HOLDING COMPANY, INC.,

Defendant(s).

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THE NEW YORK AND PRESBYTERIAN HOSPITAL and CAULDWELL-WINGATE, LLC,

Third-Party Plaintiff(s),

-against-

DOOLEY ELECTRIC COMPANY, INC.,

Third-Party Defendant(s).

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Introduction

By way of background, in or about January 2015, plaintiff was a foreperson for third-party defendant Dooley Electric Company, Inc. (Dooley), which was an electrical subcontractor retained by defendant/third-party plaintiff Cauldwell-Wingate, LLC (Cauldwell) to perform certain work at the Harkness Eye Institute at defendant/third-party plaintiff The New York and Presbyterian Hospital (NYPH) located at 635 West 165th Street, New York, New York. On January 15, 2015, plaintiff was allegedly walking through a basement tunnel on the way to Dooley's onsite office (referred to as a "shanty"). Plaintiff alleges that he was pinned against the wall of the tunnel by a passing garbage container attached to an electric cart and suffered various personal injuries. This action ensued against NYPH, defendant/third-party plaintiff Cauldwell-Wingate, LLC

(Cauldwell), and defendants Cauldwell-Wingate Company, Inc. and Cauldwell-Wingate Holding Company, Inc. (together with Cauldwell, the Cauldwell Defendants). The complaint sets forth two causes of action, the first for negligence and the second for defendants' alleged failure to comply with Labor Law §§ 200, 240, 241, and 241-a. Subsequently, NYPH and Cauldwell commenced a third-party action against Dooley, setting forth claims for indemnification, failure to procure insurance, and contribution. Now, plaintiff, NYPH and the Cauldwell Defendants, and Dooley move for summary judgment.

On a motion for summary judgment, the Court is to determine whether triable issues of fact exist or whether judgment can be granted to a party on the proof submitted as a matter of law (*see Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The movant must set forth a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issue of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). If the movant sets forth a *prima facie* case, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 557 [1980]).

Plaintiff's Motion for Summary Judgment (Motion #3)

In support of the motion, plaintiff notes that NYPH's representative testified that the only people who drove electric carts in the basement tunnels were employees of NYPH. Plaintiff also notes plaintiff's deposition testimony surrounding the accident. Plaintiff asserts that there is no evidence to cast doubt on plaintiff's version of events. Based hereon, plaintiff contends that he has made a *prima facie* showing of NYPH's negligence.

Plaintiff has made a *prima facie* showing and, as such, the burden of going forward shifts to the opponent of the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman*, 49 NY2d at 557).

In response, NYPH proffers evidence that there were five people working at the time of plaintiff's alleged accident that would have been operating the electric carts in the basement tunnels. NYPH also proffers affidavits from each of these five individuals, who all aver that they were not involved in any accident with plaintiff.

Viewing the evidence in the light most favorable to the non-moving party (*Stonehill Capital Mgt., LLC v Bank of the W.*, 28 NY3d 439, 448 [2016]), NYPH has succeeded in raising a material issue of fact. Accordingly, Motion #3 is denied.

The Motion for Summary Judgment filed by NYPH and Cauldwell (Motion #4)

In support of their motion, defendants contend that Labor Law §§ 240, 241 (6), and 241-a are inapplicable to plaintiff and plaintiff's alleged accident. Regarding plaintiff's claim under Labor Law § 200, defendants contend, among other things, that the basement tunnel where the alleged accident occurred was not part of the jobsite. Further, defendants contend that plaintiff's claims for common law negligence and under Labor Law § 200 against the Cauldwell Defendants are untenable because all the testimony and evidence indicates that the Cauldwell Defendants did not control the area where the accident occurred, did not direct or instruct any of the contractors on the use of the basement tunnels, and did not have actual or constructive notice of the alleged dangerous condition. Moreover, defendants note that the testimony and evidence also indicates that the electric cart involved in the alleged accident was not owned, maintained, or operated by the Cauldwell Defendants or driven by an employee of the Cauldwell Defendants. Lastly, NYPH and Cauldwell contend that they are entitled to contractual indemnification from Dooley. NYPH and Cauldwell assert that the subcontract (Subcontract) between Cauldwell and Dooley provides that Dooley is required to defend, hold harmless, and fully indemnify NYPH and Cauldwell for the claims made by plaintiff.

In response, plaintiff does not address the movants' arguments for summary judgment as to the claims under Labor Law §§ 240, 241 (6), and 241-a. Plaintiff proffers evidence that the basement tunnels were the regular manner to travel from the jobsite to Dooley's shanty. Thus, plaintiff contends, there is a material issue of fact as to whether the subject tunnel was part of the jobsite, as it provided access to Dooley's shanty. Plaintiff also notes that he testified that the electric cart was traveling "very fast" just prior to the accident and that the garbage container, which the electric cart was pulling, struck the wall of the tunnel opposite him, bounced off, and pinned him against the wall. Thus, plaintiff contends, there is a material issue of fact as to whether NYPH was operating the electric cart erratically.

In response, Dooley notes, among other things, that plaintiff does not allege that any negligence on the part of Dooley contributed to plaintiff's accident and NYPH and Cauldwell have not produced any evidence that Dooley's actions caused or contributed to the accident. Dooley asserts that the mere fact that plaintiff was working for Dooley at the time of the accident is insufficient to trigger the indemnity provision of the Subcontract. Dooley contends that, even if the Subcontract so provided, General Obligations Law § 5-322.1 renders unenforceable an agreement to indemnify the negligent party.

Defendants have made a *prima facie* showing as to plaintiff's claims under Labor Law §§ 240, 241 (6), and 241-a and, as such, the burden of going forward shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman*, 49 NY2d at 557). Plaintiff did not oppose this aspect

of the motion. Next, the Court considers the motion as to plaintiff's claims for common law negligence and under Labor Law § 200.

NYPH has failed to make a *prima facie* showing as to plaintiff's claims for common law negligence and under Labor Law § 200. The proffered evidence does not demonstrate an absence of any material issue of fact as to whether its employee was negligent in operating the electric cart in NYPH's tunnel at the time of the alleged accident (*cf. Richardson v County of Nassau*, 156 AD3d 924, 925-26 [2d Dept 2017]).

The Cauldwell Defendants have made a *prima facie* showing as to plaintiff's claims for common law negligence and under Labor Law § 200 by proffering evidence that they had no responsibility over the location of plaintiff's alleged accident and no responsibility over the alleged mechanism (that is, the garbage container attached to the electric cart) involved in plaintiff's alleged accident (*see Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 [1st Dept 2012]). As a result, the burden of going forward shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman*, 49 NY2d at 557). Although a worksite within the meaning of Labor Law § 200 is not limited to the actual area where construction work occurs (*see Rivera v Squibb Corp.*, 184 AD2d 239, 240 [1st Dept 1992]; *Zito v Occidental Chem. Corp.*, 259 AD2d 1015, 1016 [4th Dept 1999]), plaintiff's testimony that the basement tunnel was the regular manner to travel from the jobsite to Dooley's shanty does not, without more, raise a material issue of fact as to the scope of the worksite. Next, the Court considers the motion as to plaintiff's claim for contract indemnification.

NYPH and Cauldwell have failed to make a *prima facie* showing on their motion for summary judgment on their claim for contractual indemnification against Dooley. Summary relief is appropriate on a claim for contractual indemnification where the contract is unambiguous and clearly sets forth the parties' intention that one contracting party must indemnify another for the injuries sustained (*see Hong-Bao Ren v Gioia St. Marks, LLC*, 163 AD3d 494, 496 [1st Dept 2018]). As such, "[t]he right to contractual indemnification depends upon the specific language of the contract" (*Trawally v City of New York*, 137 AD3d 492, 492-93 [1st Dept 2016]).

Section 8 of the Subcontract, which is entitled "Indemnity," provides in relevant part that "[t]o the fullest extent permitted by law, SUBCONTRACTOR agrees to indemnify, hold harmless and defend CONTRACTOR and OWNER . . . from and against any of the following claims . . . ." Section 8.3 provides in relevant part:

> "Any claim . . . on account of injury to [] persons . . . arising directly or indirectly out of the acts or omissions of SUBCONTRACTOR . . . in the performance of the work, including, without limitation, such claims, loss or liability arising under non-delegable duties of CONTRACTOR or

> OWNER (such as claims by OSHA) or arising from the use or operation by SUBCONTRACTOR of construction equipment, tools, scaffolding or facilities furnished to SUBCONTRACTOR by CONTRACTOR or OWNER to perform the Work."

NYPH and Cauldwell assert, among other things, that this language requires Dooley to indemnify NYPH and Cauldwell for any claims resulting from the work or operations of Dooley. The cited portions of the Subcontract do not require Dooley to indemnify NYPH (purportedly the Owner) and Cauldwell (purportedly the Contractor) for claims "resulting from Dooley's work," but from the acts or omissions of Dooley in the performance of its work or in Dooley's use or operation of construction equipment, tools, scaffolding or facilities furnished to Dooley by Cauldwell or NYPH to perform the work. Plaintiff was allegedly struck by a garbage container operated by an NYPH employee while plaintiff was walking in a basement tunnel on the way to Dooley's shanty. No party has alleged or submitted evidence that plaintiff was injured as a result of the acts or omission of Dooley or that plaintiff was injured as a result of Dooley's use or operation of anything provided by Cauldwell and NYPH.

Accordingly, Motion #4 is granted as to plaintiff's claims under Labor Law §§ 240, 241 (6), and 241-a; Motion #4 is denied as to plaintiff's claims for common law negligence and under Labor Law § 200 as against NYPH; Motion #4 is granted as to plaintiff's claims for common law negligence and under Labor Law § 200 as against the Cauldwell Defendants; and Motion #4 is denied as to the claim of NYPH and Cauldwell for contractual indemnification against Dooley.

Dooley's Motion for Summary Judgment (Motion #2)

In support of the motion, Dooley cites the indemnification provision of the Subcontract and contends that the claim for contractual indemnification fails because the party seeking indemnity was the alleged active tortfeasor. Dooley notes that plaintiff alleges and all the supporting evidence indicates that the active tortfeasor was an employee of NYPH and not Dooley. As such, Dooley contends that NYPH and Cauldwell cannot seek contractual indemnification, citing General Obligations Law (GOL) § 5-322.1, cannot obtain common law indemnification, and is not entitled to contribution. Dooley also proffers evidence that it procured the insurance as required by the Subcontract.

Dooley has made a *prima facie* showing (*see* GOL § 5-322.1; *Glaser v M. Fortunoff of Westbury Corp.*, 71 NY2d 643, 646 [1988]). As a result, the burden of going forward shifts to plaintiff to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (*see Zuckerman*, 49 NY2d at 557).

NYPH and Cauldwell contend, among other things, that they are entitled to contractual indemnification because the evidence establishes that plaintiff was employed by Dooley, that he was working at the time of the accident, and was using NYPH's "facilities" in connection with Dooley's work.

NYPH and Cauldwell have failed to raise a material issue of fact. Initially, the Court finds that the facts of plaintiff's alleged accident do not trigger the indemnity provision of the Subcontract; specifically, the Court finds that plaintiff's alleged claims do not arise out of the acts or omissions of Dooley in the performance of its work or in Dooley's use or operation of construction equipment, tools, scaffolding or facilities furnished to Dooley by Cauldwell or NYPH to perform the work and NYPH and Cauldwell have not produced any evidence to the contrary. Regardless, even if the Court were to interpret the indemnity provision as urged by NYPH and Cauldwell, such an interpretation vis-à-vis NYPH would be violative of GOL § 5-322.1 (1), which provides in pertinent part that an agreement to indemnify a party for damage arising from that party's own negligence is against public policy and is void and unenforceable (*see Cackett v Gladden Properties, LLC*, 183 AD3d 419, 422 [1st Dept 2020]). To the extent not specifically addressed herein, the Court finds the remaining arguments of NYPH and Cauldwell to be without merit. Accordingly, Motion #2 is granted.

Conclusion

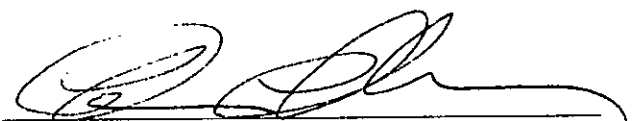
Based on the foregoing, it is hereby

ORDERED that Motion #2 is GRANTED in its entirety and the third-party action is dismissed; and it is further

ORDERED that Motion #3 is DENIED in its entirety; and it is further

ORDERED that Motion #4 is GRANTED as to plaintiff's claims under Labor Law §§ 240, 241 (6), and 241-a, DENIED as to plaintiff's claims for common law negligence and under Labor Law § 200 as against NYPH, GRANTED as to plaintiff's claims for common law negligence and under Labor Law § 200 as against Cauldwell; and DENIED as to their claim for contractual indemnification against Dooley.

Dated: New York, New York
June 3, 2021



HON. LEWIS J. LUBELL, J.S.C.