Jenkins v City of New York
2022 NY Slip Op 33025(U)
September 7, 2022
Supreme Court, New York County
Docket Number: Index No. 157880/2015
Judge: Alexander Tisch
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER TISCH** — *Justice* **PART** **18**

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CRISTINA JENKINS,

Plaintiff,

- v -

CITY OF NEW YORK, NEW YORK CITY TRANSIT AUTHORITY, METROPOLITAN TRANSPORTATION AUTHORITY, YONKERS CONTRACTING CORP.,

Defendants.

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INDEX NO. 157880/2015

MOTION DATE 04/02/2021

MOTION SEQ. NO. 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 003) 48, 49, 50, 51, 52, 53, 54, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 93, 95, 97

were read on this motion to/for JUDGMENT - SUMMARY.

Upon the foregoing documents, defendant Yonkers Contracting Corp. (Yonkers) moves pursuant to, inter alia CPLR 3212, dismissing plaintiff's complaint and all cross claims asserted against it. Defendants New York City Transit Authority and Metropolitan Transportation Authority (TA) cross move for summary judgment on their contractual indemnification claim against Yonkers.

The relevant facts concerning plaintiff's accident are as follows:

> "This is an action to recover damages for personal injuries allegedly sustained by plaintiff Cristina Jenkins, who alleges that on August 19, 2014, she slipped and fell as a result of an alleged wet condition on the sidewalk, located on 33rd Street between 10th and 11th Avenues in Manhattan, New York.
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> "Specifically, there is an elevated park, owned by the City, located on the northern side of 33rd Street in this area. There is a 'retaining wall' that separates the City park from the sidewalk, and this wall includes 'weep holes' to allow water to drain from the City park down onto the adjoining sidewalk. The general theory of liability in this action is that the water draining from the park via the weep holes in the retaining wall allowed the subject area of sidewalk to become unduly slippery, which caused plaintiff's accident" (NYSCEF Doc No 104, decision and order on mot seq no 2 at 1-2).

"[T]he 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 demonstrate the absence of any material issues of fact" (Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). The "evidence must be viewed in the light most favorable to the nonmoving party, and all reasonable inferences must be resolved in favor of the nonmoving party" (Valentin v Parisio, 119 AD3d 854, 855 [2d Dept 2014]). "In considering a motion for summary judgment, the function of the court is not to determine issues of fact or credibility, but merely to determine whether such issues exist" (Rivers v Birnbaum, 102 AD3d 26, 42 [2d Dept 2012]; see Ferrante v American Lung Assn., 90 NY2d 623, 631 [1997]), and the motion "should not be granted where there are facts in dispute, where conflicting inferences may be drawn from the evidence, or where there are issues of credibility" (Ferguson v Shu Ham Lam, 59 AD3d 388, 389 [2d Dept 2009]).

In support of its motion, Yonkers relies on, inter alia, the deposition transcript of Yonkers' representative, Jonathan Pulaski (NYSCEF Doc No 41, hereinafter Yonkers EBT) and the deposition testimony of the TA's representative, Ramesh Ramanathaiah (NYSCEF Doc No 42, hereinafter TA EBT). Pulaski testified that Yonkers was retained by TA to build a retaining wall, among other work, at the location of the accident. The plans for the wall, which included the specifications for the construction of the weep holes, were designed by non-party Parsons Brinckneroff (PB) (Yonkers EBT at 23; TA EBT at 55-56, 67). The purpose of the weep holes was to get water from one side of the wall (which was the park area) to the other side, onto the sidewalk, to help drainage (Yonkers EBT at 22; see TA EBT at 58). Construction of the retaining walls, including the weep holes, was completed around April or May of 2012 (Yonkers EBT at 51; TA EBT at 36). A substantial competition letter dated February 19, 2014 was issued by TA (NYSCEF Doc No 53), signifying that "the work is completed by Yonkers and that the work was

pursuant and in compliance with the drawings and the specs" (TA EBT at 58; see id. at 56 [TA testified that Yonkers "followed these drawings" and did not deviate from PB's specs and drawings]; see Yonkers EBT at 61]). There were no issues with the weep holes and no complaints about the weep holes from the time the work was completed in 2012 until the date of the substantial completion letter was issued, which was approximately six months before the accident (Yonkers EBT at 29, 62).

The substantial completion letter referenced a separate "punch list" and "list of remaining work" that was allegedly sent to Yonkers in a separate letter (see NYSCEF Doc No 53). Pulaski testified that he was not aware of any punch list or separate letter referenced in the substantial completion letter that had anything to do with the weep holes (Yonkers EBT at 33, 66). Yonkers had workers on site after the substantial completion letter was issued only in relation to waterproofing, but that work had nothing to do with the weep holes (Yonkers EBT at 47-48). Rather, the issue with the waterproofing is documented in RFI 91, when Yonkers requested clarification from PB about how to complete the waterproofing and PB responded as evidenced in the letter dated March 21, 2012 (NYSCEF Doc No 72) (see TA EBT at 34-36). That work concerned waterproofing the wall to just below the bottom of the weep hole and did not involve work to the weep hole itself (Yonkers EBT at 67, 38-40). The TA's representative testified that Yonkers followed the PB's procedures, as outlined in RFI 91, based upon his own personal examination of the work results (TA EBT at 34-36).

"As a general rule, '[a] builder or contractor is justified in relying upon the plans and specifications which he has contracted to follow'" (Nichols-Sisson v Windstar Airport Serv., Inc., 99 AD3d 770, 772 [2d Dept 2012], quoting Ryan v Feeney & Sheehan Bldg. Co., 239 NY 43, 46 [1924]). "A contractor that performs its work in accordance with contract plans may not

be held liable unless those plans are 'so patently defective as to place a contractor of ordinary prudence on notice that the project, if completed according to the plans, is potentially dangerous'" (Nichols-Sisson, 99 AD3d at 772, quoting West v City of Troy, 231 AD2d 825, 826 [3d Dept 1996]; see Diaz v Vasques, 17 AD3d 134, 135-36 [1st Dept 2005]).

The Court finds that Yonkers met its prima facie burden entitling it to judgment as a matter of law in light of the evidence that the Yonkers was given specifications and drawings by PB and it completed the work according to those specifications, which did not result in any known dangerous condition (see Nichols-Sisson, 99 AD3d at 772; Diaz, 17 AD3d at 135-36; cf. Nachamie v County of Nassau, 147 AD3d 770, 774-75 [2d Dept 2017] [cited by TA here, where experts claimed work performed was in accordance with plans and specifications but did not refer to any specific records relating to the work to support that conclusion]).

In opposition, TA[1] argues that Yonkers somehow had independent discretion over the construction of the weep holes and constructed them negligently (see NYSCEF Doc No 75 at ¶¶ 75-76, 81). However, TA submits no evidence refuting the evidence showing that Yonkers relied upon the contract drawings and RFI 91 (see Yonkers EBT at 54), all of which show that Yonkers followed the specifications as directed by PB and did not do anything independently (see TA EBT at 34-36, 56, 58). The Court also rejects any contention that the subsequent waterproofing work was negligent or created a dangerous condition. No evidence was submitted refuting the evidence that the waterproofing had nothing to do with the construction of the weep holes; and that such waterproofing work was properly done according to PB's specifications.

TA also argues that, even if the specifications were followed, the Yonkers representative acknowledged that drainage from the weep holes created a dangerous condition. However, the

[1] Plaintiff also opposes the motion by affirmation of counsel adopting arguments made by the TA (see NYSCEF Doc No 78).

fact that Pulaski acknowledged that when the City turned sprinklers on in the park area, water would come out through the weep holes on to the sidewalk (Yonkers EBT at 46) does not raise an issue of fact as to any dangerous condition. Instead, water draining from the weep holes is the purpose of the weep holes, and the water drains as intended (see TA EBT at 58). The claim that further discovery is warranted on the work Yonkers did in response to RFI 91 is without merit and unsubstantiated (see, e.g., McGinley v Mystic W. Realty Corp., 117 AD3d 504, 505-06 [1st Dept 2014], quoting Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; see also DaSilva v Haks Engineers, Architects & Land Surveyors, P.C., 125 AD3d 480, 482 [1st Dept 2015]).

TA also cross moves for summary judgment on its cross claim for contractual indemnification. "The right to contractual indemnification depends upon the specific language of the contract" (Roldan v New York Univ., 81 AD3d 625, 628 [2d Dept 2011]). "The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (id.). This is particularly important when considering language to indemnify for attorneys' fees, since it would be "contrary to the well-understood rule that parties are responsible for their own attorney's fees" (Hooper Assoc., Ltd. v AGS Computers, Inc., 74 NY2d 487, 492 [1989]).

TA relies upon the contract provisions at Article 6.02 and 6.03, which respectively state:

> "The Contractor [Yonkers] shall be solely responsible for (1) all injuries (including death) to persons, including but not limited to employees of the Contractor and Subcontractors and Indemnified Parties and (2) damage to property, including but not limited to property of the Indemnified Parties, the Contractor or its Subcontractors. The liability hereunder shall be limited to such injuries or damage occurring on account of, or in connection with, the performance of the Work, whether or not the occurrence giving rise to such injury or such damage happens at the Project Site or whether or not sustained by persons or to property while at the Project Site, but shall exclude injuries to such persons

> or damage to such property to the extent caused by the negligence of the Contracting Party [MTA] or the Authority [NYCTA].
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> * * *
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> "The Contractor [Yonkers] shall indemnify and save harmless the Indemnified Parties, to the fullest extent permitted by law, from loss and liability upon any and all claims and expenses, including but not limited to attorneys' fees, on account of such injuries to persons or such damage to property, irrespective of the actual cause of the accident, irrespective of whether it shall have been due in part to negligence of the Contractor or its subcontractors or negligence of the Indemnified Parties, or of any other persons, but excepting bodily injuries and property damage to the extent caused by the negligence of the Contracting Party [MTA] or the Authority [NYCTA]" (NYSCEF Doc No 52 at 99).

In opposition, Yonkers argues that the contract cannot be read to impose liability for an accident that occurred after Yonkers had completed its work. It relies on, inter alia, Article 6.04, which states that Yonkers would assume the risk of loss or damage, except loss or damage arising solely from the TA's negligence occurring prior to "Substantial Completion and risk of loss or damage to Remaining Work until Final Completion of all the Work" (id. at 100). The provision further states: "When risk of loss to the work (or a portion thereof) is transferred to the Authority, the Authority shall thereafter assume responsibility for the care, protection and ordinary upkeep . . . for said Work, except to the extent that Contractor remains responsible for Remaining Work or is otherwise responsible for loss or damage as provided in this chapter" (id.).

However, that part of the contract does not clearly implicate an "end date" for which Yonkers obligation to indemnify would end (see generally Greenfield v Philles Records, Inc., 98 NY2d 562, 569-70 [2002] ["if the agreement on its face is reasonably susceptible of only one meaning, a court is not free to alter the contract to reflect its personal notions of fairness and equity"]). Additionally, that language is not necessarily incompatible with the provisions cited by the TA — even if the risk of loss was transferred to the TA after completion of the work, Yonkers would remain "responsible for loss or damage as provided in [chapter 6]" which includes articles 6.02 and 6.03 upon which the TA relies. More specifically, as the TA points out

in reply, paragraph C of 6.03 states that Yonkers liability under that article is "*absolute* and is not dependent upon any question of negligence on its part or on the part of its agents, officers or employees" (NYSCEF Doc No 52 at 100 [emphasis added]). That provision goes on to state that "The approval of the Authority of the methods of doing the Work . . . shall not excuse the Contractor in case of any such injury to person or damage to property" (id.). Thus, the TA's substantial completion letter does not provide a basis or an appropriate end-date for Yonkers' obligation to indemnify.

In any event, it is clear from the contractual language that the TA is not entitled to seek indemnification for their own negligence. As there has not yet been a finding as to the TA's negligence, the cross motion is denied as premature (see Pena v Intergate Manhattan LLC, 194 AD3d 576, 578 [1st Dept 2021]).

Accordingly, it is hereby ORDERED that the branch of Yonkers' motion for summary judgment dismissing the complaint insofar as asserted against it is granted; and it is further

ORDERED that the branch of Yonkers' motion seeking summary judgment dismissing the cross claim asserted against it is denied; and it is further

ORDERED that the TA's cross motion for contractual indemnification against Yonkers is denied without prejudice as premature.

This constitutes the decision and order of the Court.

9/7/2022
DATE

ALEXANDER TISCH, J.S.C.

CHECK ONE:	☐ **CASE DISPOSED**		☒ **NON-FINAL DISPOSITION**		
	☐ **GRANTED**	☐ **DENIED**	☒ **GRANTED IN PART**	☐ **OTHER**	
APPLICATION:	☐ **SETTLE ORDER**		☐ **SUBMIT ORDER**		
CHECK IF APPROPRIATE:	☐ **INCLUDES TRANSFER/REASSIGN**		☐ **FIDUCIARY APPOINTMENT**	☐ **REFERENCE**	