

Rosenfeld v Consolidated Edison Co. of N.Y., Inc.

2023 NY Slip Op 31965(U)

June 12, 2023

Supreme Court, New York County

Docket Number: Index No. 155083/2017

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LORI S. SATTLER PART 02TR

Justice

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IRA ROSENFELD, RICHARD ROSENFELD,

Plaintiff,

INDEX NO. 155083/2017

MOTION DATE 04/17/2023

MOTION SEQ. NO. 004

- v -

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC.,CONSOLIDATED EDISON, INC.,CITY OF NEW
YORK, NEW YORK CITY DEPARTMENT OF
TRANSPORTATION, R & A ASSETS LLC,THE SIDEROW
ORGANIZATION RESIDENTIAL, LLC,TRIUMPH
CONSTRUCTION CORP.,

**DECISION + ORDER ON
MOTION**

Defendant.

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CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.

Plaintiff,

Third-Party
Index No. 595614/2018

-against-

TRIUMPH CONSTRUCTION CORP.

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

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

In this personal injury action, Defendant/Third Party Plaintiff Consolidated Edison Company of New York, Inc. (“Con Ed”) moves for an Order granting summary judgment in favor of it and against Defendant/Third Party Defendant Triumph Construction Corp. (“Triumph”) pursuant to CPLR 3212. Triumph opposes the motion.

In the Verified Complaint (NYSCEF Doc. 1), Plaintiff Ira Rosenfeld as Attorney in Fact for Richard Rosenfeld (“Plaintiff”) claims that Richard Rosenthal was injured on March 12, 2016

when he tripped and fell over a defective condition in the sidewalk. He contends that work was being performed by Con Ed on East 81st Street and East End Avenue in Manhattan on or about the time of the fall. The Complaint states that Plaintiff tripped and fell on a wood plank (NYSCEF Doc. 122, Plaintiff EBT at 38). The “wood plank” was subsequently identified as a shunt box that covers live electrical cables for temporary power and was built and installed by Triumph on February 16, 2016 (NYSCEF Doc. 125, Triumph EBT at 13). Triumph was hired by Con Ed to perform this work.

Con Ed argues that summary judgment must be granted as a matter of law because it is entitled to contractual indemnification pursuant to the plain language of the contract it entered with Triumph. It further claims that it is entitled to common law indemnification because no negligence or omission on its part contributed to Plaintiff’s injuries, as the wooden shunt box on which Plaintiff alleges that he tripped was constructed by Triumph. Con Ed asserts that Triumph was responsible for repairing the shunt box in the event that it needed to be repaired, maintaining the shunt box, and removing it when the work was completed.

Triumph opposes the motion, contending that, although the contract did provide that Triumph was to indemnify Con Ed if an accident or claim arises out of its work, Triumph’s work is only to be maintained for two weeks after installation. Triumph points to a Con Ed trenching manual and states that at a minimum it creates a question of fact as to whether Triumph had any further obligation after two weeks. Triumph further claims that Con Ed has not established an entitlement to common law indemnification because there is no evidence of a negligent act or omission on its part which caused the condition complained of by Plaintiff.

Plaintiff testified to tripping on a wooden plank while he was on East 81st Street walking away from East End Avenue towards York Avenue on March 12, 2016 at 10 p.m. (Plaintiff EBT

at 12, 22). Plaintiff claims that his foot struck the wooden plank which was the cause of the fall (*id.* at 45).

Jennifer Grimm, a senior specialist at Con Ed was also deposed. She performed a record search for the location in question for the time period from March 12, 2014 to March 12, 2016. (NYSCEF Doc. 123 Con Ed EBT at 14). Her search included DOT permits, opening tickets, paving orders, corrective action requests, notices of violation, and emergency control system tickets (*id.*). She testified that Triumph was the contractor for “record purposes only” which means that it performed the excavation and was also responsible for the restoration (*id.* at 20; NYSCEF Doc. 124).

John McCan, a general supervisor for Triumph was also deposed. He identified the shunt box in question and indicates that Triumph builds the shunt boxes (NYSCEF Doc. 125 at 13). Triumph constructs the shunt box and their laborers install them (*id.* at 15). The shunt boxes are painted orange and are placed around the area “to let you know that there’s hazard there” (*id.* at 17). These measures are taken to give “pedestrians warning that there’s an incline so they could see depth . . .” (*id.*). McCan did not know whether a Con Ed inspector was on the project (*id.* at 19). Although McCan testified that Triumph’s work is warrantied by contract for two weeks, he acknowledged that Con Ed would have Triumph go back and make the repairs to the boxes if needed after the two-week period and would receive additional compensation to do so (*id.* at 24).

A contract was executed between Con Ed and Triumph with an effective start date of May 13, 2013, and an end date of August 31, 2017. The issue of indemnification is addressed in paragraph 36 of the contract:

Indemnification. To the fullest extent allowed by law, Contractor agrees to defend, indemnify and hold harmless Con Edison and its affiliates . . . from and against all claims, damage, loss and liability, . . . for injury to or death of persons . . . resulting in whole or in part from, or connected with, the performance of the

Work by Contractor any subcontractor or their respective agents, servants, employees or representatives, and including claims, loss, damage and liability arising from the partial or sole negligence of Con Edison

(NYSCEF Doc. 31 at 48). The contract further provides that Triumph was to obtain commercial general liability insurance and that “the insurance policy or policies shall name Consolidated Edison Company of New York Inc. . . . and Consolidated Edison Inc. as additional insureds with respect to the work and completed operations” (*id.* at 49).

On a motion for summary judgment, a movant must make 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]). After the movant makes this showing, “the burden shifts to the party opposing the motion . . . to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact” such that trial of the action is required (*id.*). The Court must view the facts “in the light most favorable to the non-moving party” (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]).

“A contract that provides for indemnification will be enforced as long as the intent to assume such role is ‘sufficiently clear and unambiguous’” (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007], quoting *Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427, 433 [2005]). The Court must determine if the “intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances” (*Drzewinski v Atlantic Scaffolding & Ladder Co., Inc.*, 70 NY2d 774, 777 [1987] [internal quotation and citation omitted]). “When a party is under no legal duty to indemnify, a contract assuming the obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491

[1989]). The Court has held that ambiguity in a contract must be determined by looking within the four corners of the document, not outside sources (*Kass v Kass*, 91 NY2d 554, 162-163 [1998]).

The contract between the parties clearly delineates that Triumph will indemnify Con Ed for negligence resulting from its work and for any liability arising from the partial or sole negligence of Con Ed. Although Triumph acknowledges that the contract provides for indemnification, it claims that these provisions only applied for the two weeks it was required to maintain the work under the trench manual. There is no ambiguity as to the indemnification language within the four corners of the contract, therefore the contract itself governs. In the absence of any ambiguity, there is no need for the Court to look to outside sources, and no two-week requirement can be read into the contract itself. Triumph must indemnify Con Ed to the extent that there is a negligence finding against Triumph or Con Ed. Accordingly, Con Ed’s motion for summary judgment is granted in favor of Con Ed and against Triumph as to contractual indemnification. In light of this finding, the Court need not consider whether Con Ed is entitled to summary judgment on its common law indemnification claim. Accordingly, it is hereby:

ORDERED that summary judgment is granted in favor of the Third Party Plaintiff as against the Third Party Defendants as to contractual indemnification.

All matters not decided herein are hereby denied.

6/12/2023

DATE



LORI S. SATTLER, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: