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

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Scalzi

-v-

Rencorp Realty et al.

INDEX NO. 110985/08

MOTION DATE

MOTION SEQ. NO. 01

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

FILED
APR 06 2010
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 3/31/10

LOUIS B. YORK J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

EUGENE SCALZI,

Plaintiff,

-against-

REXCORP REALTY, LLC, RIVKIN RADLER, LLP, and LEHR CONSTRUCTION CORP.,

Defendants.

Index No. 110985/2008

LOUIS B. YORK, J.:

In this action, co-defendant Rivkin Radler, LLP. ("Rivkin") moves for conditional summary judgment against co-defendant Lehr Construction Corporation ("Lehr") on its cross-claim for contractual indemnification and moves for summary judgment on its claim of common law indemnification. In addition, by virtue of a lease between itself and Rexcorp Realty, LLC ("Rex"), Rivkin moves for the same relief in Rex's favor as well. Lehr opposes the motion on various grounds and also cross-moves for discovery.

This is a Labor Law case in which plaintiff asserts that he was electrocuted, sustaining serious injuries, while he worked at a construction project in which defendants were involved. Rexcorp owned the property at the time of the incident but leased it to Rivkin. Rivkin hired Lehr for the renovation and other work on the property. Plaintiff worked as an electrician for DiFazio Electric, one of Lehr's subcontractors, when he sustained his injuries. Plaintiff's claims are based on Labor Law § § 200 and 241(6).

The request for judicial intervention was filed in this case in January of 2009. A preliminary conference took place before Justice Martin Shulman on March 10, 2009. In October, the case was reassigned to this Part. Under the March 10, 2009 preliminary conference order, the Note of Issue was due January 29, 2010. However, as of the date of this order, no party has filed the Note of Issue.

Rivkin wrote to Lehr and demanded that the latter represent it and Rex in the litigation based on common law and contractual representation theories. When Lehr refused to take over the representation, the parties unilaterally adjourned the depositions without date – that is, they did so without notifying the Court of their intent to violate the preliminary conference order. In July 2009, Rivkin initiated this motion, which was fully submitted and then scheduled for argument in this Part, in December 2009.

Analysis

In support of its contractual indemnification claim, Rivkin notes that under the contract Lehr was responsible for the safety of the workers. Rivkin also cites the following provision of the contract:

> To the fullest extent permitted by law, [Lehr] shall indemnify to owner Rivkin . . . [Rex] . . . from . . . all claims, damages, losses and expenses, including but not limited to attorney's fees . . . to the extent caused in whole or in party by negligent acts or omissions of the contractor, a subcontractor . . . or anyone for whose acts they may be liable . . . .

Rivkin notes that the contract between itself and Lehr relates to DiFazio as subcontractor in charge of light fixtures and electrical work. Thus, Rivkin claims that this provision applies here, requiring indemnification by Lehr for the work of its subcontractor DiFazio. Rivkin further

claims that Lehr is solely responsible to indemnify under this provision. In support of its motion, Rivkin submits the affidavit of Paul Czeladnicki, its own Executive Director, who states that his company had no direct involvement in plaintiff's project and had no ability to supervise or control this work.

In addition, Rivkin points to plaintiff's Verified Bill of Particulars, which states that "[t]he power distribution should have been locked out or tagged out, the circuit identification did not correspond to the plans, many changes were made without notifying plaintiff." Verified Bill of Particulars ¶ 3. Plaintiff also claims that Rivkin "created the defective condition by failing to lock or tag the electrical outlets and wires" and "is in possession of information pertaining to the duration in which said condition existed. The inquiry is more properly reserved for depositions . . ." Id. at ¶ 25. Rivkin is the "defendant" to whom the Bill of Particulars refers, because the document was prepared in response to Rivkin's demand. The contract also mandates that Lehr shall provide a safe workplace.

Also, the Czeladnicki affidavit asserts his company's lack of responsibility for these problems. Czeladnicki also states that Rexcorp had no involvement in the construction project and no control over the locking or tagging. As for the source of his knowledge regarding Rexcorp's involvement, Czeladnicki, simply states, "I am aware of their involvement, or lack thereof, in this construction project." Czeladnicki, Aff. at ¶ 7. On the same basis he also disavows Rexcorp's control over power distribution.

Based on the above, Rivkin states that there is no doubt that it is not responsible for the problem at issue and that under contractual and common law indemnification Lehr must indemnify Rivkin and Rexcorp. It further states, preemptively, that depositions will not raise any

factual issues and that if Lehr makes an argument to the contrary necessarily is in bad faith.

In opposition, Lehr states that Rivkin's motion is conclusory and unsupported by adequate evidence. In addition Lehr states that (1) the affidavit of the Executive Director is conclusory and self serving and (2) it is unclear whether his answer is based on firsthand knowledge and therefore of evidentiary value. Moreover, Rivkin has not produced the Executive Director for deposition. Therefore, Lehr points out, it is unable to question him regarding the basis of his knowledge. Discovery is necessary in order to allow this questioning and also to determine whether Rivkin or Rexcorp exerted control over the power distribution at any pertinent time. In reply, Rivkin states that it is Lehr's own argument which is conclusory and lacks an evidentiary basis.

A movant must satisfy a high burden to obtain summary judgment, for it must overcome the State's strong preference in favor of allowing all parties their day in court. See Rennie v. Barbarosa Transport, Ltd., 151 A.D.2d 379, 380-81, 543 N.Y.S.2d 429, 429-30 (1st Dept. 1989). The court's role is issue finding and not issue determination. Miller v. Metropolitan 810 7th Ave., LLC, Index No. 0101342/2003 (Sup. Ct. N.Y. County April 10, 2008) (avail at 2008 WL 2032378, at *5), aff'd, 50 A.D.3d 474, 855 N.Y.S.2d 519 (1st Dept. 2008). Moreover, when it comes to the more complex facts involving electrical systems and electrocutions, e.g., id.; Lorefice v. Reckson Operating Partnership, L.P., 269 A.D.2d 572, 703 N.Y.S.2d 507 (2nd Dept. 2000), a moving party should set forth the law and fully explain its argument. This is especially true where, as here, the party seeks dispositive relief on a critical argument.

After careful consideration, the Court concludes that Rivkin has failed to satisfy its hefty burden. Turning to the claim for contractual indemnification, the contract mandates

indemnification only "to the extent caused in whole or in party by negligent acts or omissions of the contractor, a subcontractor . . . or anyone for whose acts they may be liable . . . ." Rivkin acknowledges that to prevail on this motion it must establish beyond dispute that (1) Rivkin and Rexcorp were not negligent and (2) they did not exert any control over the project and/or the power distribution. Dipasquale v. M.J. Ogiony Builders, Inc., 60 A.D.3d 1338, 1340, 875 N.Y.S.2d 375, 377 (4th Dept. 2009). It also must show that Lehr and/or its subcontractors were "guilty of some negligence that caused or contributed to the accident or, in the absence of any negligence, . . . had the authority to direct, supervise, and control the work giving rise to the injury." Mid-Valley Oil Co., Inc. v. Hughes Network Systems, Inc., 54 A.D.3d 394, 395, 863 N.Y.S.2d 244, 247 (2nd Dept. 2008), lv dismissed in part, denied in part, 12 N.Y.3d 881, 883 N.Y.S.2d 175 (2009).

Here, although the general contractor had oversight of the work, at this early juncture it is impossible to determine whether Rivkin or Rexcorp exerted any control regarding the site and in particular the power distribution system. Accordingly issues of fact remain as to their potential negligence. Rivkin might have been able to prevail on this motion with sufficient evidentiary support from a party with knowledge of the project. However, the Czeladnicki affidavit does not satisfy Rivkin's evidentiary burden. The statements in the affidavit are conclusory and self serving. One critical defect is that "the basis of [Czeladnicki's] knowledge and representations is not revealed or inferable and, given the failure to demonstrate that he had personal knowledge of the circumstances of this accident, the affidavit is without evidentiary value and insufficient to defeat plaintiffs' showing." Jock v. Landmark Healthcare Facilities, LLC, 62 A.D.3d 1070, 1072, 879 N.Y.S.2d 227, 230 (3rd Dept. 2009). Moreover, counsel's affirmation and the papers in

support do nothing to explain the project or the alleged violation. The Court easily can imagine a scenario where the owner or lessee of a space had some control over or access to the power/electrical system and where one of the employees of the owner or lessee turned a switch or pulled a cord that triggered a problem. It also can imagine scenarios where this did not occur. Because no details have been provided – about the project, about whether Rivkin remained in the offices while the work was ongoing, about the precise adjustments that had to be made to the electrical and power system, about who had access to the power system during the critical period – the Court has no idea whether any of these scenarios are plausible on the facts of the case. Compare with Nankervis v. Casco Devel. Corp., Index Nos. 26393/97, 18-220, 18-282 (Sup. Ct. Suffolk County April 2, 2002)(avail at 2002 WL 1363264, at *3) (court evaluated evidence in support of and in opposition to motion to determine whether issues of fact regarding code violations existed and whether summary judgment was proper on various contractual indemnification claims).

Under common-law indemnification "one who has been compelled to pay for the wrong of another [can] recover from the wrongdoer the damages it paid to the injured party." George v. Marshalls of MA, Inc., 61 A.D.3d 925, 929, 878 N.Y.S.2d 143, 148 (2nd Dept. 2009). Liability exists under this principal if "an injury can be attributed solely to the negligent performance or nonperformance of an act solely within the province of the contractor. Id. Summary judgment on the issue of common law indemnification therefore is proper only if "there are no triable issues of fact concerning the degree of fault attributable to the parties." Mendelsohn v. Goodman, 67 A.D.3d 753, 764, 889 N.Y.S.2d 608, 609 (2nd Dept. 2009). As stated above, the affidavit of Czeladnicki is insufficient to establish beyond dispute that Rivkin and Rexcorp had

nothing to do with the power distribution at any relevant time. Accordingly and for the same reasons discussed in connection with the contractual indemnification claim, summary judgment is premature on common law indemnification as well.

Rivkin is correct that to satisfy its burden in opposing this motion Lehr would have to assert more than a "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered during the discovery process." Davila v. New York City Transit Authority, 66 A.D.3d 952, 953-954, 888 N.Y.S.2d 138, 139 (2nd Dept. 2009); see Global Minerals and Metals Corp. v. Holme, 35 A.D.3d 93, 103, 824 N.Y.S.2d 210, 218 (1st Dept. 2006). However, "[t]he adequacy or sufficiency of the opposing party's proof is not an issue until the moving party sustains its burden." Brown v. City of New York, 22 Misc.3d 893, 899, 870 N.Y.S.2d 217, 222 (Sup. Ct. N.Y. County 2008). As Rivkin's motion papers "failed to make a prima facie showing, their . . . motion must be denied, regardless of the claimed insufficiency of the opposing papers." Bray v. Rosas, 29 A.D.3d 422, 424, 815 N.Y.S.2d 69, 71 (1st Dept. 2006); see Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 852, 487 N.Y.S.2d 316, 318 (1985).

Finally, the Court turns to Lehr's cross-motion. When Rivkin decided to cease discovery, its decision violated Justice Shulman's preliminary conference order. It should have sought permission from Justice Shulman to deviate from the terms of the court order. Moreover, any party wishing to obtain discovery should have sought Court assistance in a timely fashion. This is made explicit in the preliminary conference orders of this Part but is implicit in every Part's discovery orders. The parties cannot simply ignore the deadline in a court order without court approval. In the future, the parties to this action will be held strictly to this standard. Moreover,

Lehr is entitled to responsive discovery – both to respond to the indemnification arguments at issue here and to develop its own claims and defenses.

For the reasons above, it is

ORDERED that the motion is denied; and it is further

ORDERED that the cross-motion is granted to the extent of scheduling a discovery conference; and it is further

ORDERED that the parties are scheduled to appear in Part 2, 71 Thomas Street, room 205, on April 21, 2010 to set up an expedited timetable for all remaining discovery.

Dated: March 31, 2010

Enter:

LOUIS B. YORK, J.S.C.

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