Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ROSENDO HERRERA,

Plaintiff,

- against -

UNION MECHANICAL OF NY CORP., CHARLES LABOSCO & SON, INC., ANNCHAR REALTY LLC and LOBOSCO FAMILY ANNCHAR REALTY LIMITED PARTNERSHIP,

Defendants.

Index Number 16945 2007

Motion Date June 17, 2009

Motion Cal. Numbers 14, 15 & 16

Motion Seq. Nos. 2, 3 & 4

The following papers numbered 1 to 25 read on this motion by defendants Charles Labosco & Son, Inc., Annchar Realty LLC, and Lobosco Family Annchar Realty Limited Partnership (Labosco defendants) for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence, for summary judgment dismissing the cross claims for common-law and contractual indemnification by defendant Union Mechanical of NY Corp. (Union Mechanical) asserted against the Labosco defendants, and for summary judgment on the Labosco defendants' cross claim for contractual indemnification against Union Mechanical; and on this motion by plaintiff for partial summary judgment on the Labor Law § 240(1) cause of action; and on this separate notice of motion by the Labosco defendants to strike plaintiff's modifications to his deposition testimony for failure to comply with CPLR 3116(a); and on this cross motion by plaintiff for leave to amend the complaint and for leave to submit an errata sheet to his deposition testimony.

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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Plaintiff was employed as a laborer by Quantum Sign Corp., which was hired by Union Mechanical to repair the exterior sign on its place of business. The premises was allegedly owned by the Labosco defendants and leased by Union Mechanical. On March 7, 2007, plaintiff fell from a ladder while attempting to pull the broken plastic off the sign. Plaintiff subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence.

The court first turns to the branch of plaintiff's cross motion for leave to amend the complaint to reflect that the proper name of defendant Charles Labosco & Son, Inc. is Chas. Lobosco & Son, Inc. CPLR 3025(b) provides that a party may amend or supplement a pleading at any time by leave of court, and leave of court shall be freely given upon such terms as may be just. Pursuant to CPLR 305(c), an amendment to correct a misnomer in the description of a party defendant may be granted if (1) there is evidence that the intended defendant was fairly apprised that it was the party the action was intended to affect and (2) the intended defendant would not be prejudiced by the amendment (*see Stillman v Kalikow*, 31 AD3d 431[2006]; *Opiela v May Indus. Corp.*, 10 AD3d 340 [2004]). Mistakes relating to the name of a party involving a misnomer fall within the category of those irregularities which are subject to correction by amendment, particularly when the other party is not prejudiced and should have been well aware from the outset that a misdescription was involved (*see* CPLR 2001; *see Cutting Edge, Inc. v Santora*, 4 AD3d 867 [2004]).

In support of his cross motion, plaintiff claims that, due to a clerical error, he mistakenly named Charles Labosco & Son, Inc. as a defendant instead of Chas. Lobosco &

Son, Inc. The evidence in the record reveals that Chas. Lobosco & Son, Inc. was fairly apprised that it was the party plaintiff intended to sue based on its status as the owner of the property where plaintiff's accident occurred (*see Simpson v Kenston Warehousing Corp.*, 154 AD2d 526 [1989]). The allegations in the complaint clearly indicate that plaintiff intended to proceed against the owner and lessee of 32-08 Farrington Street, where plaintiff was injured while repairing an exterior sign. The lease also demonstrates that Chas. Lobosco & Son, Inc. is the owner and Union Mechanical is the lessee of said premises. Moreover, the correct defendant would not be prejudiced by allowing the amendment because it has participated in the lawsuit from the outset (*see Dubar v Wilmorite, Inc.*, 298 AD2d 918 [2002]). In its answer, Charles Labosco & Son, Inc. denied the allegations in the complaint that it was the owner of the leased premises and that it was and is an existing corporation. Given the indisputable fact that an attorney cannot represent a thing which does not exist, it must be inferred that the attorneys who served an answer on behalf of Charles Labosco & Son, Inc. did so in the course of their representation of some other party (*see Ober v Rye Town Hilton*, 159 AD2d 16 [1990]). In the absence of proof to the contrary, the real party on whose behalf the answer was served was, in fact, the party which plaintiff now seeks permission to name, and on whose behalf the same attorneys have appeared, that is, Chas. Lobosco & Son, Inc. (*id.*). In addition, the Labosco defendants produced as their witness Lisa Silvestri, the vice president of Chas. Lobosco & Son, Inc., who testified at her deposition that Chas. Lobosco & Son, Inc., and not any of the named defendants, is the owner of 32-08 Farrington Street, where plaintiff's accident occurred. While the Labosco defendants assert that an amendment at this time would result in prejudice to Chas. Lobosco & Son, Inc. because the note of issue has already been filed, the papers are wholly devoid of any showing that the lapse of time has prejudiced the intended defendant in any way in preparing its defense, deprived it of material witnesses, or made unavailable pertinent evidence with which to defend its case. As such, plaintiff's application for leave to amend the summons and complaint so as to reflect the proper name of defendant Chas. Lobosco & Son, Inc. is granted (*see Stillman*, 31 AD3d at 432).

The court will now address the branch of plaintiff's cross motion for leave to submit errata sheets to his deposition testimony and the Labosco defendants' motion to strike plaintiff's modifications for failure to comply with CPLR 3116(a). Changes to deposition testimony must be made by the witness within 60 days after the transcript is submitted to him or her for examination and signature (CPLR 3116[a]). Pursuant to CPLR 2004, the 60-day period may be extended, at the court's discretion, upon a strong showing of good cause (*see Zamir v Hilton Hotels Corp.*, 304 AD2d 493 [2003]).

In this case, plaintiff was deposed on December 11, 2008. By letter dated January 9, 2009, defendants forwarded to plaintiff the transcript of his deposition testimony for examination and signature. On April 14, 2009, plaintiff returned to defense counsel the

executed transcript and two errata sheets. Two months later, on May 19, 2009, plaintiff executed a statement of reasons. Plaintiff claims that the one-month delay in furnishing the errata sheets was due to law office failure because the 60-day deadline was not calendared and the errors were not recognized until after the Labosco defendants made their motion for summary judgment. In light of the slight delay and the fact that the modifications to plaintiff's deposition testimony do not appear to be patently untrue or tailored to avoid the consequences of his earlier testimony, the amendments will be permitted (*see Binh v Bagland USA, Inc.*, 286 AD2d 613 [2001]).

Turning to the merits of the instant case, plaintiff is not entitled to judgment as matter of law on his Labor Law § 240(1) cause of action. Aside from the Labosco defendants' contentions regarding ownership of the subject premises, the evidence in this case established that plaintiff was performing "routine maintenance" in a nonconstruction context and, thus, is not entitled to the protections of Labor Law § 240(1) (*see Gallello v MARJ Distribs., Inc.*, 50 AD3d 734 [2008]). Plaintiff testified at his deposition that, while on the ladder, he was preparing to take measurements of the sign and, immediately before he fell, grabbed a piece of broken plastic, which was old and had been beaten badly by the wind. He further stated that the remainder of the sign, including the metal box and angles, was intact. Additionally, plaintiff indicated that the sign would be taken back to the shop and a new sign would be made. In view of the general context of the accident, plaintiff's work involved the replacement of a component, namely the plastic face of the sign, in the course of normal wear and tear due to harsh weather conditions (*see English v City of New York*, 43 AD3d 811 [2007]). Moreover, plaintiff's investigation of the plastic on the sign prior to the commencement of the maintenance work to be performed at a later time did not fall within the enumerated protected activities of Labor Law § 240(1) (*see Martinez v City of New York*, 93 NY2d 322 [1999]; *Ciesielski v Buffalo Indus. Park, Inc.*, 299 AD2d 817 [2002]). Therefore, plaintiff's motion for summary judgment on the Labor Law § 240(1) cause of action is denied, and the branch of the Labosco defendants' motion for summary judgment dismissing the Labor Law § 240(1) claim asserted against them is granted.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). The Labosco defendants established, prima facie, that plaintiff's work is not a protected activity within the meaning of Labor Law § 241(6). In opposition, plaintiff failed to raise a triable issue of fact. As previously discussed, plaintiff was engaged in routine maintenance (*see English*, 43 AD3d at 812-813). In addition, a review of plaintiff's deposition testimony reveals that there was no construction, demolition, or excavation work being done on the premises at the time of the

accident (*see Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]). Thus, plaintiff's Labor Law § 241(6) claim against the Labosco defendants is dismissed.

The Labosco defendants established their prima facie entitlement to summary judgment dismissing those claims asserted against them alleging a violation of Labor Law § 200 and common-law negligence. In opposition, plaintiffs failed to raise a triable issue of fact. Where, as here, a premises condition is at issue, a property owner may be liable under Labor Law § 200 and common-law negligence if the owner created the dangerous condition that caused the accident or failed to remedy the dangerous condition of which it had actual or constructive notice (*see Ortega v Puccia*, 57 AD3d 54 [2008]). The record makes clear that the Labosco defendants did not create the accumulation of snow and/or ice on the driveway that allegedly caused plaintiff's injuries and they did not have actual or constructive notice of such condition (*cf. Aguilera v Pistilli Constr. & Dev. Corp.*, 63 AD3d 763 [2009]). Therefore, plaintiff's Labor Law § 200 and common-law negligence causes of action asserted against the Labosco defendants are dismissed.

The court will next turn to the branch of the Labosco defendants' motion for summary judgment on their cross claim for contractual indemnification against Union Mechanical. The Labosco defendants rely entirely on the section of paragraph 32 of the lease agreement between Chas. Lobosco & Son, Inc. and Union Mechanical, which states, "[T]he tenant will indemnify and save harmless the landlord from and against any and all liability, damages, expenses and judgements for injury or damage to person or property ...." Notwithstanding the fact that Union Mechanical did not submit any opposition to the Labosco defendants' summary judgment motion, the broad indemnification provision is void and unenforceable under General Obligations Law § 5-321 because it shifts to the tenant all responsibility for third-party claims regardless of the landlord's own negligence (*see DeSabato v 674 Carroll St. Corp.*, 55 AD3d 656 [2008]; *Wolfe v Long Is. Power Auth.*, 34 AD3d 575 [2006]; *Gibson v Bally Total Fitness Corp.*, 1 AD3d 477 [2003]). As such, the Labosco defendants are not entitled to summary judgment on their cross claim for contractual indemnification against Union Mechanical.

Inasmuch as Union Mechanical's verified answer (Labosco defendants' exhibit 8) does not allege any cross claims against the Labosco defendants, the branch of the Labosco defendants' motion for summary judgment seeking dismissal of Union Mechanical's cross claims for common-law and contractual indemnification asserted against them is denied as moot.

Accordingly, the branch of plaintiff's cross motion for leave to amend the complaint is granted. The court deems the proposed amended complaint attached to plaintiff's moving papers to be served on all defendants. The note of issue shall also be amended to reflect the

proper names of all parties. In addition, the branch of plaintiff's cross motion for leave to submit the errata sheets to his deposition testimony is granted, and the Labosco defendants' motion to strike the modifications to plaintiff's deposition testimony is denied. Plaintiff's motion for partial summary judgment on the Labor Law § 240(1) cause of action is denied in its entirety. The branch of the Labosco defendants' motion for summary judgment dismissing plaintiff's complaint is granted. In all other respects, the Labosco defendants' summary judgment motion is denied.

Dated: 9/9/09
D:39

J.S.C.