Milek v Rapperport
2016 NY Slip Op 31398(U)
July 21, 2016
Supreme Court, New York County
Docket Number: 154227/2012
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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DAWID MILEK

Plaintiff,

Index No. 154227/2012

v

DECISION AND ORDER

JANE RAPPEPORT, also known as JANE ELLEN RAPPEPORT, STUART SEROTA, SEROTA, KAUFMAN and SEROTA, and SWEENEY & CONROY, INC.

Defendants.

JANE RAPPEPORT, also known as JANE ELLEN RAPPEPORT and SWEENEY & CONROY, INC.

Third-party plaintiffs,

v

NORI ELECTRIC,

Third-party defendant.

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BANNON, J.:

I. INTRODUCTION

In this action to recover damages for personal injuries arising from a construction accident, the defendants Jane Rappeport, also known as Jane Ellen Rappeport, and Sweeney & Conroy (S&C) together move for summary judgment dismissing the complaint insofar as asserted against Rappeport and on their third-party cause of action for contractual indemnification against third-party defendant, Nori Electric (Nori). The

plaintiff and Nori oppose the motion. Those branches of the motion which are for summary judgment dismissing the complaint insofar as asserted against Rappeport are granted, and the motion is otherwise denied.

II. BACKGROUND

The plaintiff fell from an unsecured extension ladder provided to him by S&C in the course of his work as an electrician employed by Nori, the electrical contractor for a construction project in which two adjacent buildings were being converted into a single, one-family residence. Rappeport owned the building, and intended to reside in the finished structure as her private residence. Rappeport retained S&C as her construction manager, and S&C thereafter subcontracted with Nori. The plaintiff commenced this action against Rappeport and S&C, among others, seeking to recover damages for common-law negligence and alleged violations of Labor Law §§ 200, 240(1), and 241(6). Rappeport and S&C impleaded Nori, seeking contractual indemnification and alleging breach of a contractual insurance procurement provision. Rappeport and S&C together move for summary judgment dismissing the complaint against Rappeport and on the third-party causes of action for contractual indemnification and alleging breach of a contractual insurance procurement provision. Although Rappeport and S&C also purport

to move for summary judgment dismissing all cross claims asserted against Rappeport, the court notes that Nori has not asserted a cross claim against Rappeport, and the parties have stipulated to the discontinuance of the action against all of Rappeport's codefendants other than S&C.

III. DISCUSSION

A. STANDARDS FOR SUMMARY JUDGMENT

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidentiary proof in admissible form to eliminate any material issues of fact from the case. See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposition papers. See Winegrad v New York Univ. Med. Ctr., supra, at 853. Once the movant establishes its prima facie entitlement, the burden shifts to the opponent to raise a triable issue of fact in order to defeat summary judgment. See id. "In determining whether summary judgment is appropriate, the motion court should draw all reasonable inferences in favor of the nonmoving party and should not pass on issues of credibility." Garcia v J.C. Duggan, Inc., 180 AD2d 579, 580 (1st Dept 1992).

B. CAUSES OF ACTION ASSERTED AGAINST RAPPEPORT

1. COMMON-LAW NEGLIGENCE and LABOR LAW § 200

"Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work." Hartshorne v Pengat Tech. Inspections, Inc., 112 AD3d 888, 889 (2nd Dept 2013); see Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877 (1993); Quituizaca v Tucchiarone, 115 AD3d 924 (2nd Dept 2014). Inasmuch as the plaintiff asserts that S&C provided him with an inappropriate, insufficient, or defective ladder, his claim arises from the means, methods, and materials of the work, rather than from an alleged defect in the premises themselves. See Lombardi v Stout, 80 NY2d 290, 295 (1992); Ortega v Puccia, 57 AD3d 54, 61 (2nd Dept 2008). Accordingly, recovery against a landowner such as Rappeport cannot be had under principles of common-law negligence or Labor Law § 200 for failure to provide a safe workplace unless it is shown that he or she had the authority to supervise or control the performance of the work. See Rizzuto v L.A. Wenger Contr. Co., 91 NY2d 343, 352 (1998); Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 (1981); Ortega v Puccia, supra, at 61. Although property owners often have a general authority to oversee progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose

liability under Labor Law § 200. See Ortega v Puccia, supra, at 61; Natale v City of New York, 33 AD3d 772, 773 (2nd Dept 2006). Rather, a landowner has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed. See Tomecek v Westchester Additions & Renovations, Inc., 97 AD3d 737, 739 (2nd Dept 2012); Reyes v Arco Wentworth Mgt. Corp., 83 AD3d 47, 51 (2nd Dept 2011); Ortega v Puccia, supra, at 61. Rappeport established her prima facie entitlement to judgment as a matter of law dismissing the negligence and Labor Law § 200 causes of action insofar as asserted against her through her affidavit, in which she asserts that she did not supervise or bear the responsibility for the manner in which the work was performed. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, those branches of the motion which are for summary judgment dismissing those causes of action against her are granted.

2. LABOR LAW §§ 240(1) AND 241(6)

In 1980, the Legislature amended Labor Law §§ 240 and 241 to exempt "owners of one and two-family dwellings who contract for but do not direct or control the work" from the absolute liability imposed by these statutory provisions. The amendments, intended by the Legislature to shield homeowners from "the harsh consequences of strict liability under the provisions of the

Labor Law, reflect the legislative determination that the typical homeowner is no better situated than the hired worker to furnish appropriate safety devices and to procure suitable insurance protection." Bartoo v Buell, 87 NY2d 362, 367 (1996). The applicability of the homeowner exemption is determined by a "site and purpose" test (id. at 367-368), which "hinges upon the site and the purpose of the work" and "must be employed on the basis of the homeowners' intentions at the time of the injury." Farias v Simon, 122 AD3d 466, 467 (1st Dept 2014); see Del Carmen Diaz v Bocheciamp, ____AD3d ____, 2016 NY Slip Op 04305 (1st Dept 2016). Rappeport established her prima facie entitlement to judgment as a matter of law dismissing the Labor Law §§ 240(1) and 241(6) causes of action against her by demonstrating that she did not control the work, and that the construction project consisted of the consolidation of two adjacent structures into one single-family residence in which she intended to reside, thus entitling her to the protection of the statutory homeowner's exemption from liability. In opposition, the plaintiff failed to raise a triable issue of fact. Accordingly, those branches of the motion which are for summary judgment dismissing those causes of action against Rappeport must be granted.

C. THIRD-PARTY CAUSES OF ACTION

Contractual indemnification clauses must be "construed as to

achieve the apparent purpose of the parties" (Hooper Associates, Ltd. v AGS Computers, Inc., 74 NY2d 487, 491 [1989]; see Arrendal v Trizechahn Corp., 98 AD3d 701, 703 [2nd Dept 2010]), and are enforced only where "the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances." Campos v 68 E. 86th St. Owners Corp., 117 AD3d 593, 595 (1st Dept 2014), quoting Margolin v New York Life Ins. Co., 32 NY2d 149, 153 (1973); see Drzewinski v Atlantic Scaffold & Ladder Co., 70 NY2d 774, 777 (1987). In the subcontract executed by S&C and Nori, Nori agreed, "[t]o the fullest extent permitted by law," to "indemnify, defend, and otherwise forever hold harmless" both Rappeport and S&C "from . . . (claims) arising directly or indirectly from the performance" of Nori's contractual obligation "to the extent that such Claims are caused solely . . . by any act or omission on that part of" Nori or its agents or employees.

Since the court holds that Rappeport is not liable for the plaintiff's injuries, those branches of the motion which are for summary judgment in her favor on the cause of actions against Nori for contractual indemnification and failure to procure insurance have been rendered academic. See Espinal v Trezechahn 1065 Ave. of Ams., LLC, 94 AD3d 611, 612 (1st Dept 2012). With respect to S&C, "[a] party seeking contractual indemnification must prove itself free from negligence, because to the extent its

negligence contributed to the accident, it cannot be indemnified therefor." Cava Constr. Co., Inc. v. Gealtec Remodeling Corp., 58 AD3d 660 , 662 (2nd Dept 2009); see General Obligations Law § 5-322.1). Although S&C characterizes itself as a construction manager, and not a general contractor, a construction manager may nonetheless be held liable in negligence and for violation of Labor Law § 200 arising from a failure to provide a safe place to work where it exercises sufficient control of the activities of subcontractors to justify the imposition of liability. See Narducci v Manhasset Bay Assoc., 96 NY2d 259, 269 (2001); Lombardi v Stout, supra, at 294. Here, in opposition to the motion, Nori submitted deposition transcripts of S&C's representative, who asserted that he was responsible for overseeing safety on the job site, and that his responsibility included the oversight of subcontractors to assure that they performed their jobs correctly. S&C's witness also confirmed that the ladder provided to the plaintiff was owned by S&C. Since the record reveals the existence of triable issues of fact as to whether S&C exercised sufficient control over Nori's activities to justify the imposition of liability under the negligence standard of Labor Law § 200 and the common law, and whether it was free from negligence with regard to the underlying accident, summary judgment in favor of S&C on the cause of action for contractual indemnification is not warranted. See Jackson v

Manhattan Mall Eat LLC, 111 AD3d 519, 520 (1st Dept 2013); All Am. Moving & Stor., Inc. v Andrews, 96 AD3d 674, 676 (1st Dept 2012). The court notes that S&C may ultimately be able to enforce the indemnification provision if it is found by the jury to be not negligent (see Linarello v City Univ. of N.Y., 6 AD3d 192, 194 [1st Dept 2004]), but is nonetheless held liable under Labor Law §§ 240(1) or 241(6) as Rappeport's statutory agent by virtue of her delegation of the authority to supervise and control the work. See Walls v Turner Constr. Co., 4 NY3d 861, 863-864 (2005).

Moreover, in opposition to the movants' prima facie showing that Nori did not secure a policy of insurance as required by the subcontract, Nori raised a triable issue of fact by submitting a copy of an insurance policy naming S&C and Rappeport as additional insureds.

IV. CONCLUSION

Accordingly, it is

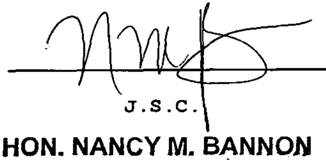
ORDERED that the branches of the motion which are for summary judgment dismissing the complaint against Jane Rappeport, also known as Jane Ellen Rappeport, are granted, those branches of the motion which are for summary judgment on the third-party causes of action asserted by Rappeport against Nori Electric for contractual indemnification and alleging failure to procure

insurance are denied as academic, and the motion is otherwise denied on the merits, and it is further,

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

Dated: July 21, 2016



J.S.C.

HON. NANCY M. BANNON