Frank v Frank
2017 NY Slip Op 30220(U)
February 2, 2017
Supreme Court, New York County
Docket Number: 156632/2013
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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JAMES FRANK and RITA FRANK, Index No.: 156632/2013

Plaintiffs,

-against-

1100 AVENUE OF THE AMERICAS ASSOCIATES, JT MAGEN & CO., INC., STATEWIDE DEMOLITION CORP., TIME WARNER ENTERTAINMENT COMPANY, L.P., TIME WARNER CABLE INC. and HOME BOX OFFICE INC.,

Defendants.

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Schecter, J.:

This is an action to recover damages for personal injuries sustained by James Frank (Frank) on July 8, 2011, when, while working at a construction site located on the 15th floor of 1100 Avenue of the Americas, New York, New York (the Premises), and as he was stepping down from a ladder, he slipped on a crowbar allegedly placed under the ladder by a demolition worker.

Defendants 1100 Avenue of the Americas Associates (1100 Associates), JT Magen & Co., Inc. (JT) and Home Box Office Inc. (HBO) (collectively, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing the common-law negligence and Labor Law §§ 200 and 240(1) claims against them, as well as for summary judgment in their favor on their cross claims for common-law and contractual indemnification against defendant Statewide Demolition Corp. (Statewide).[1]

[1] Defendants do not move for dismissal of the Labor Law § 241(6) claim or the loss of consortium claim. Plaintiffs--Frank and his wife Rita Frank--as well as defendant Statewide, have discontinued all claims and cross claims as against defendants Time Warner Entertainment Company, L.P. and Time Warner Cable, Inc.

BACKGROUND

1100 Associates owned the Premises and leased it to HBO. A renovation project (the Project) was underway at the Premises, which entailed, among other things, demolition work performed by the demolition contractor, Statewide. At the time of the accident, Statewide's workers were removing carpeting on the 15th floor of the Premises. Frank, an electrician, was employed by Hugh O'Kane Electric (Hugh).

Frank's Testimony

Frank testified that, on the day of the accident, he was employed by Hugh as an electrician. He explained that his Hugh foreman gave him his daily assignments. In addition, his Hugh foreman was the only person who directed his work on the day of the accident. On the morning of the accident, Frank's foreman instructed him to install temporary lighting on the 15th floor. In order to perform his work, it was necessary for Frank to use a six-foot A-frame ladder, which was owned by Hugh.

From his position on the ladder, Frank observed five or six demolition workers "peeling up carpet" (Frank's tr at 39). Specifically, "they were using a pry bar to peel it up" (*id.* at 40). Frank asserted that the closest demolition worker to him at this time was approximately 10 feet away from him. Frank maintained that, at this time, other than the demolition

contractor, he did not notice any other trades working on the floor. Frank described the demolition area as having tools and other materials "scattered all over the place" (*id.* at 42). Frank did not make any complaints to anyone about the mess.

After installing a light and a drop, Frank descended the ladder in order to move on to his next installation location. Frank testified that the accident occurred as he was descending the ladder and while looking forward. As he was stepping from the last rung of the ladder to the ground, his left foot stepped on a pry bar as he was taking his right foot off the ladder. The pry bar then "slid out from underneath" his foot, causing him to fall and land on the ground (*id.* at 66). Frank could not recall whether or not he looked either down at the ground or directly under the ladder prior to the accident. He also testified that he did not use a pry bar to perform his own work, and that he did not see the pry bar prior to descending the ladder.[2]

Testimony of Marco Olivo (JT's Superintendent)

Marco Olivo testified that he was JT's superintendent on the day of the accident. Pursuant to a construction contract,

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[2] Three accident reports, annexed to defendants' motion as exhibit X, indicate that Frank's accident occurred when Frank stepped off the ladder and onto a pry bar left underneath the ladder by a Statewide employee.

HBO hired JT to serve as the general contractor. Olivo explained that, as superintendent, he was "the person who coordinates the construction by the subs between each other . . . and he speak[s] to the architects and engineers about how the job is going to be built" (Olivo tr at 16). Olivo was also involved with job safety at the site, which entailed instructing the subcontractor foremen and supervisors "to adhere to job safety and specifically ladder safety," and to notify him "immediately if they see an unsafe condition" (*id.* at 40).

Olivo testified that Statewide was performing demolition work at the Premises on the day of the accident, and that Statewide was the only trade working that day that required pry bars for its work. He explained that it was customary at construction sites for the trades to be in charge of clearing their own tools from the work areas and that JT laborers were never instructed to clear away the subcontractor's tools. While working on the Project, he never encountered any tools scattered about at the Premises, and no one ever made any complaints regarding the same. Olivo also maintained that he never had to "personally tell a subcontractor to not leave tools scattered about the floor" (*id.* at 44). He also maintained that HBO's only involvement with the Project was via its in-house architect who served as a liaison to make sure the work that was contracted for was, in fact, being performed.

Testimony of Steve Mount (JT's CFO and Treasurer)

Steve Mount testified that he was JT's CFO and treasurer on the day of the accident. JT was responsible for site safety, as well as job sequencing and coordination. In addition, JT hired Statewide, pursuant to a purchase order (the Purchase Order), to perform certain demolition work. Mount acknowledged that, pursuant to the Purchase Order, "Statewide Demolition was responsible for initiating, maintaining, and supervising all safety precautions and programs in connection with the work it was doing" (Mount tr at 46; *see also* defendants' notice of motion, exhibit W, Purchase Order, Terms and Conditions, ¶ 5).

Testimony of Andrzej Chojnowski (Statewide's Foreman)

Andrzej Chojnowski testified that he was Statewide's foreman on the day of the accident. At the time, Statewide's workers were removing carpet as part of Statewide's demolition duties. Chojnowski explained that he told his workers "what and how to do [their work]" (Chojnowski tr at 108). When asked if anyone from JT ever told Statewide where to perform its work, he responded, "Yes. They were pointing to me, what should be done without any instructions" (Chojnowski tr at 106). When asked if anyone from JT ever instructed anyone from Statewide in regard to "how to do the demolition," he

responded, "No" (*id.*). In addition, no one else ever told Statewide workers how to perform their work on the Project.

Chojnowski maintained that he warned his employees to never leave their tools scattered around the job site and to "not work if someone else [was] in the same area," because he was concerned that the workers might trip on them (*id.* at 44-45). Accordingly, he instructed his workers to store their tools in either a container or on a cart when they were not in use. Chojnowski acknowledged that, in addition to using brushes, hammers and brooms, Statewide workers used L-shaped "crowbars" to perform their carpet removal work (*id.* at 64).

Testimony of Fernando Rei (a JT Laborer)

Fernando Rei testified that he was one of JT's laborers on the day of the accident. As a laborer, Rei was responsible for keeping the job site clean, watching out for tripping hazards and having them removed. He was not, however, responsible for cleaning up after demolition crews during the demolition phase of the Project. Rei asserted that he observed Statewide workers using pry bars to rip up the carpet on the 15th floor.

ANALYSIS

"'The 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 eliminate any material issues of fact from the case'" (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006], citing *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *see also DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]).

Labor Law § 240(1)

The Labor Law § 240(1) claims asserted against defendants are dismissed without opposition.

Common-Law Negligence and Labor Law § 200

Defendants move for dismissal of the common-law negligence and Labor Law § 200 claims against them. Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work'" (*Cruz v Toscano*, 269 AD2d

122, 122 [1st Dept 2000] [citation omitted]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 316-317 [1981]).

Labor Law § 200(1) provides:

> "All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons."

There are two distinct standards applicable to Labor Law § 200 cases depending on whether the accident resulted from a dangerous condition or whether it was a consequence of the means and methods used by a contractor to do its work (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

"Where an existing defect or dangerous condition caused the injury, liability [under Labor Law § 200] attaches if the owner or general contractor created the condition or had actual or constructive notice of it" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 144 (1st Dept 2012); *Murphy v Columbia Univ.*, 4 AD3d 200, 202 [1st Dept 2004] [it was not necessary to prove general contractor's supervision and control over plaintiff's work because the injury arose from the condition of the workplace created by or known to contractor rather than the method of the work]).

In cases where the defect or dangerous condition arose from a contractor's methods, to find liability under Labor Law § 200 it must be shown that the owner or agent exercised some supervisory control over the injury-producing work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993] [no § 200 liability where plaintiff's injury was caused by lifting a beam and there was no evidence that defendant exercised supervisory control or had any input into how the beam was to be moved]).

Moreover, "general supervisory control is insufficient to impute liability pursuant to Labor Law § 200, which liability requires actual supervisory control or input into how the work is performed" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 311 [1st Dept 2007]; *see also Bednarczyk v Vornado Realty Trust*, 63 AD3d 427, 428 [1st Dept 2009] [common-law negligence and § 200 claims dismissed where the deposition testimony established that, while defendant's "employees inspected the work and had the authority to stop it in the event they observed dangerous conditions or procedures," they "did not otherwise exercise supervisory control over the work"]; *Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 381 [1st Dept 2007] [no § 200 liability where defendant construction manager did not tell subcontractor or its employees how to perform subcontractor's work]; *Smith v 499 Fashion Tower, LLC*, 38 AD3d 523, 524-525 [2d Dept 2007]).

Here, the accident was caused due to the improper placement/storage of the pry bar in an area where Frank might step and slip on it while descending the ladder. Frank was injured not because of any inherently dangerous condition of the property itself, but rather, because of "'a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work'" (*Lombardi v Stout*, 178 AD2d 208, 210 [1st Dept 1991], *affd as mod* 80 NY2d 290 [1992], quoting *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145 [1965]; *McCormick v 257 W. Genesee, LLC*, 78 AD3d 1581, 1582 [4th Dept 2010] [tripping hazard created by pin, which was stored on a wooden form and was to be inserted into a form to hold it together during a concrete pour, was created by the manner in which plaintiff's employer performed its work, rather than by an unsafe premises condition]; *Ortega v Puccia*, 57 AD3d 54, 62 [2d Dept 2008]; *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] [protruding bolt in the concrete slab that plaintiff tripped on was not a defect inherent in the property, but instead, was the result of the manner in which plaintiff's employer performed its work]).

Therefore, to find defendants liable under common-law negligence and Labor Law § 200 theories, it must be shown that they exercised some supervisory control over the manner in

which the pry bar was placed. There is absolutely no evidence

demonstrating that either 1100 Associates or HBO controlled or supervised the action that caused the injury--the improper placement of the pry bar underneath the ladder. Therefore, they are entitled to dismissal of the common-law negligence and Labor Law § 200 claims against them.

As to JT, though it may have been in charge of overall safety at the job site, Chojnowski testified that no one, including JT, ever told Statewide workers how to perform their work. In addition, Rei, a laborer for JT, testified that, although his duties included clean-up at the site, he was not responsible for cleaning up after demolition crews during the demolition phase of the Project. Finally, the Purchase Order provided that Statewide maintain and supervise safety issues associated with its own work on the Project. Because JT did not supervise or direct the work that caused the accident, JT is also entitled to dismissal of the common-law negligence and Labor Law § 200 claims against it.

Indemnification Against Statewide

Defendants move for summary judgment on their cross claim for contractual indemnification against Statewide.

An indemnification provision contained in the "Terms and Conditions" section of the Purchase Order states, in pertinent part, as follows:

> "To the fullest extent permitted by law, [Statewide] agrees to fully indemnify and hold harmless [JT,

> 1100 Associates, HBO], their officers, directors, agents and employees . . . from and against any and all claims, loss, suits, damages, liabilities, professional fees, including attorney fees, costs, court costs, expenses and disbursements, whether arising before or after completion of [Statewide's] work, related to death, personal injuries . . . arising out of or in connection with or as a result of or as a consequence of [the work]"

(notice of motion, exhibit W, Purchase Order, Terms and Conditions, at ¶ 18).

"A party is entitled to full contractual indemnification provided that 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 Scaffold & Ladder Co.*, 70 NY2d 774, 777 [1987], quoting *Margolin v New York Life Ins. Co.*, 32 NY2d 149, 153 [1973]; *see Tonking v Port Auth. of N.Y. & N.J.*, 3 NY3d 486, 490 [2004]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

The party seeking contractual indemnification need only establish that it was free from any negligence and was held liable solely by virtue of its vicarious liability. The proposed indemnitor's negligence is irrelevant (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003]; *Keena v Gucci Shops*, 300 AD2d 82, 82 [1st Dept 2002]).

Here, while performing work on the Project, Frank was injured when, as he was stepping off the ladder, he slipped on a pry bar used by Statewide workers. Important to this issue,

the language "arising out of or in connection with" the work, which is present in the subject indemnification provision, "provides for indemnification when the claim arises out of the subcontractor's work even though he has not been negligent" (*Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 178 [1990]).

Thus, as the accident arose in connection with Statewide's work on the Project, defendants are entitled to summary judgment in their favor on their cross claim for contractual indemnification as against Statewide and the issue of common-law indemnification need not be addressed.

Accordingly, it is

ORDERED that the summary-judgment motion of defendants 1100 Avenue of the Americas Associates, JT Magen & Co., Inc. and Home Box Office Inc. is granted and the common-law negligence and Labor Law §§ 200 and 240(1) claims against them are severed and dismissed; and it is further

ORDERED that defendants' motion for summary judgment on their cross claim for contractual indemnification as against defendant Statewide Demolition Corp. is granted; and it is further

ORDERED that the remainder of the action shall continue.

Dated: February 2, 2017

HON. JENNIFER G. SCHECTER