Cruz-Acosta v 15 Fort Washington Ave. Hous. Dev. Fund Corp.
2011 NY Slip Op 34018(U)
October 26, 2011
Sup Ct, Bronx County
Docket Number: 20878/2006
Judge: Robert E. Torres
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NEW YORK SUPREME COURT - COUNTY OF BRONX

PART 29

Case Disposed	☐
Settle Order	☐
Schedule Appearance	☐

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

Cruz-Acosta, Ruben

Index Nº. 20878/2006

-against-

Hon. Robert E. Torres

15 Fort Washington et al

Justice.

The following papers numbered 1 to ____ Read on this motion,
Noticed on ____ and duly submitted as No. ____ on the Motion Calendar of 10/27

	PAPERS NUMBERED	
Notice of Motion - Order to Show Cause - Exhibits and Affidavits Annexed	1,2,3	
Answering Affidavit and Exhibits	4,5,6,7,8	
Replying Affidavit and Exhibits	9,10,11	
____ Affidavits and Exhibits	~~12,13~~	
Pleadings - Exhibit		
Stipulation(s) - Referee's Report - Minutes		
Filed Papers		
Memoranda of Law	12,13,14,15,16	

Upon the foregoing papers this Motions are decided in accordance with the attached decision

Motion is Respectfully Referred to:
Justice: ____
Dated: ____

Dated: 10/26, 2011

Hon. ____ J.S.C.

ROBERT E. TORRES
JUDGE

FILED Nov 16 2011 Bronx County Clerk

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX, PART 29
PRESENT: HONORABLE ROBERT E. TORRES, J.S.C.

RUBEN CRUZ-ACOSTA,

INDEX NUMBER:20878/2006

Plaintiff,

-against-

Present:
HON. **ROBERT E. TORRES**

15 FORT WASHINGTON AVENUE HOUSING DEVELOPMENT FUND CORPORATION, 14K MANAGEMENT, INC. and EXPO DEVELOPMENT

Defendants.

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15 FORT WASHINGTON AVENUE HOUSING DEVELOPMENT FUND CORPORATION and 14K MANAGEMENT, INC.

Third-Party Plaintiffs,

-against-

SHAMAS CONSTRUCTION CO., INC.,
Third-Party Defendant.

EXPO DEVELOPMENT CORP.,

Second Third-Party Plaintiff,

-against-

SHAMAS CONSTRUCTION CO., INC.,
Second Third-Party Defendants.

In this personal injury action, plaintiff seeks to recover damages for injuries sustained at a construction site accident on September 7, 2006, when he fell from a scaffold. Plaintiff alleges that he was not provided with proper protection to prevent a height-related injury. Defendants 15 FORT WASHINGTON HOUSING DEVELOPMENT (hereinafter "Fort") and 14K MANAGEMENT

(hereinafter "14K") now move pursuant to CPLR § 3212 for summary judgment on its claims for common-law indemnification and contractual indemnification against defendants EXPO DEVELOPMENT CORP. (hereinafter "EXPO") and SHAMAS CONSTRUCTION CO., INC. (hereinafter "SHAMAS"). Additionally, said defendants move for summary judgment pursuant to C.P.L.R.§ 3212 dismissing plaintiff's complaint in its entirety and all cross-claims against it. In response, plaintiff opposes the motion and cross moves for an order pursuant to CPLR § 3212 granting him partial summary judgment on liability as to FORT, 14K, and EXPO. Defendant EXPO opposes both motions and cross-moves for an Order pursuant to CPLR § 3212 dismissing plaintiff's complaint in its entirety and all cross-claims against it, granting EXPO summary judgment on its claims of contractual indemnification against SHAMAS, and dismissing FORT and 14K's First, Second, Third, Fourth, and Fifth cross claims. For the purposes of this decision, said motions are hereby consolidated.

On September 7, 2006, plaintiff was performing painting and caulking work on a scaffold (Plaintiff's deposition, pp. 55) located at 15 Fort Washington Avenue, New York, New York (hereinafter "the premises") (Plaintiff's deposition, p. 43). The building is owned by Fort and managed by 14K. EXPO was the general contractor of the building and they, in turn, subcontracted plaintiff's employer, SHAMAS, to perform exterior work at the building.

On the date of the accident, plaintiff started working on the 3rd floor where he painted the wall and put caulking around the windows (Plaintiff's deposition p. 55). Plaintiff was on the scaffold when the accident occurred (Plaintiff's deposition pp.55-56). After completing the work on the 3rd floor, the scaffold needed to be moved so work could be done in a different area (Plaintiff's deposition p. 66). SHAMAS supervised the moving of the scaffold (Plaintiff's deposition, pp. 66, 67). While the scaffold was being moved, plaintiff put his safety harness and his tools onto the scaffold and went to the bathroom (Plaintiff's deposition p. 67). When plaintiff returned from the bathroom, the scaffold was in the process of being raised to the roof (Plaintiff's deposition p. 67). SHAMAS told plaintiff to "go up to the roof and wait until the scaffold gets up there and at time it gets up, when it does get up there, go down onto the scaffold and to tie it." (Plaintiff's deposition p. 68).

When plaintiff got to the roof, he stepped onto the scaffold that connected to ropes being held by his co-workers and he told his co-workers to grab strong because he was going down (Plaintiff's

deposition p.69). Plaintiff was unable to see his co-workers from the roof and never heard a response from his co-workers after he yelled down to them to "grab on strong" (Plaintiff's deposition p. 73). Plaintiff did not put his safety harness on before stepping on the scaffold (Plaintiff's deposition p. 72). Plaintiff testified he that he fell to the ground from the scaffold (Plaintiff's deposition, p. 80).

The action was commenced by the filing of a complaint dated September 15, 2006, commencing an action against FORT. FORT interposed an answer. Subsequently, plaintiff filed a Supplemental Summons and Amended Complaint dated October 12, 2006 adding EXPO as a defendant and Expo served a Verified Answer. Thereafter, FORT filed and served a Third-party complaint while EXPO filed and served a Second third-party complaint. Both of these complaints named SHAMAS as defendant.

FORT and 14K

Defendants FORT and 14K now move pursuant to CPLR § 3212 for summary judgment on its claims for common-law indemnification and contractual indemnification against defendants EXPO and SHAMAS. Additionally, said defendants move for summary judgment pursuant to C.P.L.R.§ 3212 dismissing plaintiff's complaint in its entirety and all cross-claims against it. In support of its motion, defendants FORT and 14K submit a copy of the pleadings; a copy of plaintiff's affidavit; plaintiff's sworn deposition testimony; plaintiff's co-worker's affidavit; a copy of plaintiff's Verified Bill of Particulars; a copy of contract between FORT and 14K and Expo; a copy of the contract between Expo and Shamas; copies of third-party complaints; EBT transcript of Josh Koppel; EBT transcript of Cornelis Perniak; EBT transcript of Roberto Morales; EBT transcript of the plaintiff; and the EBT transcript of Mohammed Mushtaq.

Specifically, movants herein maintain that its contract with EXPO entitles it to contractual indemnification from EXPO. Additionally, movants argue that EXPO's contract with SHAMAS mandates SHAMAS to indemnify said movants since the indemnification clause is clear and unambiguous and plaintiff's claims arose out of the work of SHAMAS who was hired by EXPO. Movants also argues that it is entitled to common-law indemnification because it did not direct, control, or supervise the manner which plaintiff performed his work.

Movants also state that plaintiff's Labor Law §200 and common-law negligence claims should be dismissed because it did not supervise or direct the manner and means by which plaintiff

did his work nor did it have actual or constructive notice of any condition plaintiff contends caused his accident. Movants also seek to dismiss plaintiff's Labor Law §241(6) claims because plaintiff failed to cite an Industrial Code provision that is both specific and the violation of which caused the accident and he can not base such a claim on regulations that are not part of the Industrial Code. Finally, movants contend that plaintiff's Labor Law §240(1) claim should be dismissed because plaintiff's recalcitrant conduct in refusing to heed directions to wear a safety harness was the sole proximate cause of his injuries.

Although plaintiff opposes the instant motion and argues that it must be denied because plaintiff is not a recalcitrant worker since a safety line was not present and not available, he does not oppose dismissal of the plaintiff's Labor Law §200 and common-law negligence claims as against said movants.

EXPO opposes the motion and argues that said movants are not entitled to contractual or common law indemnification from EXPO.

SHAMAS opposes the instant motion on the ground that Fort and 14K were named as additional insureds under SHAMAS' general liability insurance and, as such, the Anti-Subrogation Rule prohibits their claims for contractual and common law indemnification. Moreover, SHAMAS argues that movants' request for contractual indemnification fail as a matter of law as premature; the clauses are ambiguous; and there is no evidence of active negligence on behalf of SHAMAS. Lastly, SHAMAS maintains that movants' request for common law indemnification as a matter of law as there is no evidence of active negligence on behalf of SHAMAS and movants have failed to carry their burden of establishing a "grave injury."

PLAINTIFF'S MOTION

In response, plaintiff opposes Fort's motion and cross moves for an order pursuant to CPLR § 3212 granting him partial summary judgment on liability under Labor Law § 240(1), Labor Law §240(2), and Labor Law §241(6) as to FORT, 14K, and EXPO. In support of his cross-motion, plaintiff submits a copy of the pleadings including the Supplemental Summons and Amended Verified Complaint, Defendants' Amended Answers, Third-party Summons and Complaint and Answer, Second Third-party Summons and Complaint and Answer; EXPO accident report; SHAMAS' accident report; plaintiff's EBT transcripts; OSHA worksheets; an affidavit of Frank Damiani; EBT transcript of Cornelias Perniak; EBT transcript of Josh Koppel; EBT transcript of

Roberto Morales; the preclusion order of Mohammad Sarwar; EBT transcript of Shams Sawar; EBT transcript of Mohammad Mushtaq; the contract between defendants, 15 Fort and EXPO, and contract between defendant EXPO and Third-Party Defendant/second Third-Party defendant SHAMAS; and a summary judgment decision order by Judge Green.

Specifically, plaintiff moves for partial summary judgment on liability on the grounds that he did not refuse to use an available safety device; was not a recalcitrant worker whose actions were the sole cause of his accident since the scaffold failed when an untrained worker released it, and plaintiff was told to access the scaffold after his harness had been raised on the scaffold in his absence so that it was not available to him; the collapse of the scaffold and the failure to properly guard said scaffold whether a safety line was available or not.

Notably, plaintiff does not oppose dismissal of the Labor Law §200 and common law negligence claims as against defendants Fort and 14K. Additionally, plaintiff takes no position regarding cross-claims between defendants/third-party defendants: As to EXPO, plaintiff argues it is not entitled to summary dismissal of the Labor Law §200 and common law negligence claims because it was responsible for coordinating and supervising the work at the site.

Fort and 14K oppose this motion and argue that it should be denied because plaintiff was recalcitrant in declining to wear a safety harness which was the proximate cause of his injury. Additionally, Fort and 14K maintain that there is no evidence that the alleged absence of a side or front rail were the proximate cause of plaintiff's injuries and the acts and omissions of plaintiff constitute intervening causes warranting the denial of the instant motion.

EXPO opposes the instant motion on the ground that plaintiff failed to establish a prima facie entitlement to judgment by submitting proof that is inadmissible. Specifically, EXPO argues that the mini-transcript attached to plaintiff's attorney's affirmation is unsigned and does not contain a certification by the stenographer that the transcript was accurate. Moreover, EXPO also argues that an incident report filed by Gary Gardine from EXPO; the unsigned C-2; and uncertified and redacted records from OSHA submitted by the plaintiff are not in admissible form and insufficient to establish prima facie entitlement to summary judgment. Additionally, EXPO contends that numerous questions of fact mandating the denial of the motion.

SHAMAS opposes plaintiff's motion on the ground that plaintiff failed to establish a prima facie case under the Labor Law § 240(1) because any alleged violation of the statute was not the

proximate cause of plaintiff's accident. Additionally, SHAMAS argues that plaintiff's Labor Law § 241(6) claim also fails as a matter of law because plaintiff can not prove the applicability of a specific Industrial Code violation.

EXPO's MOTION

Defendant EXPO opposes both motions and cross-moves for an Order pursuant to CPLR § 3212 dismissing plaintiff's complaint in its entirety and all cross-claims against it, granting EXPO summary judgment on its claims of contractual indemnification against SHAMAS, and dismissing FORT and 14K's First, Second, Third, Fourth, and Fifth cross claims. In support of its cross-motion, EXPO submits a copy of its Verified Answer to the Amended Complaint by its predecessor counsel; a copy of the substitution of Attorney; and an affidavit of its president, Christopher Ryan.

Movant herein argues that plaintiff's complaint must be dismissed because plaintiff can not sustain his claims pursuant to Labor Law §§§ 200, 240, 241(6). Specifically EXPO argues that there is no evidence that it was negligent. EXPO contends that plaintiff's Labor Law § 241(6) claim must be dismissed because plaintiff can not prove the applicability of a specific industrial code violation and plaintiff's Labor Law § 240 also fail because any alleged violation of this statute was not the proximate cause of plaintiff's accident.

EXPO also argues that Fort and 14K are not entitled to contractual or common law indemnification from EXPO. EXPO maintains that 14K has no standing to seek contractual indemnification because it was not a party to the contract between Fort and EXPO. Additionally, EXPO argues that the right of indemnification is limited by the terms of the contract between the parties in that it is only triggered if EXPO is found negligent. EXPO states that Fort's failure to come forward with any evidence on which a claim of negligence against EXPO can be based is fatal to Fort's summary judgment motion and the viability of Fort's First, Second, Third, and Fourth cross claims. Finally, EXPO also seeks dismissal of Fort's Fifth cross claim which seeks recovery for breach of contract upon an alleged failure to procure insurance in favor of Fort. EXPO maintains that the terms of the contract do not include a requirement that EXPO procure insurance on behalf of any entity other than EXPO.

EXPO contends that it is entitled to summary judgment on its claims for Indemnification, Contribution, and defense expenses from SHAMAS on the grounds that the contract between EXPO and SHAMAS provides for said relief.

Fort and 14K oppose the instant motion and contend that it must be denied because EXPO failed to make a prima facie showing of entitlement to summary judgment.

Plaintiff opposes EXPO's motion as meritless.

SHAMAS opposes the instant motion on the ground that EXPO was named as an additional insured under SHAMAS' general liability insurance and, as such, the Anti-Subrogation Rule prohibits EXPO's claim for contractual and common law indemnification. Moreover, SHAMAS argues that EXPO's request for contractual indemnification fails as a matter of law as premature; the clauses are ambiguous; and there is no evidence of active negligence on behalf of SHAMAS. Lastly, SHAMAS maintains that EXPO's request for common law indemnification as a matter of law as there is no evidence of active negligence on behalf of SHAMAS and EXPO have failed to carry their burden of establishing a "grave injury."

The proponent of a motion for summary judgment must make a 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. *See,* *Alvarez v. Prospect Hosp.*, 68 NY2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 NY2d 557, 562 (1980). The failure to make such a showing requires denial of the motion, irrespective of the sufficiency of the opposing papers. *See, Winegrad v. New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985). Once the moving party has established its entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial. *See, Zuckerman v. City of New York*, *supra*, 49 NY2d at 562. When considering a motion for summary judgment, the court must view the evidence in the light most favorable to the party opposing the motion. *See Makaj v. Metro. Trans. Auth.*, 18 AD3d 625, 626 (2d Dep't 2005).

Labor Law § 240(1) provides in relevant part:

> All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

To prevail on a cause of action pursuant to Labor Law § 240(1), a plaintiff must establish a violation of the statute and that the violation was a proximate cause of his or her injuries. *See, Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 289 (2003).

> Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240 (1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein (*Narducci v. Manhasset Bay Assoc.*, 96 NY2d 259, 267 (2001).

"[A] plaintiff must also establish that the absence of a protective device, or the presence of a defective one, of the type enumerated in the statute, was a proximate cause of the injuries alleged." *Buckley v. Columbia Grammar & Prepatory*, 44 AD3d 263, 268-69 (1st Dep't 2007).

Even viewing plaintiff's position in the light most favorable to him, plaintiff does not establish a scenario where entitlement to summary judgment can be granted.

Based on the record the Court finds as follows:

Plaintiff concedes that his plaintiff's Labor Law §200 and common-law negligence claims do not stand as it relates to the owner herein. Accordingly, the branch of Fort's motion seeking dismissal of plaintiff's Labor Law §200 and common-law negligence claims is hereby granted.

Court also finds that with regards to all the remaining motions, the parties have failed to meet their burden in establishing a prima facie entitlement to summary judgment. As such, said motions are hereby denied.

This constitutes the decision and order of this Court.

Dated: October 26, 2011

Hon. Robert E. Torres

ROBERT E. TORRES
JUDGE