Catalano v Abraldes
2014 NY Slip Op 32038(U)
July 21, 2014
Sup Ct, Suffolk County
Docket Number: 10-32508
Judge: Joseph C. Pastoressa

[* 1]

SHORT FORM ORDER

INDEX No. 10-32508

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

MOTION DATE 2-6-14 (#001)
MOTION DATE 3-8-14 (#002 & #003)
ADJ. DATE 4-2-14
Mot. Seq. # 001 - MotD
002 - XMG
003 - MG

CHRISTOPHER CATALANO,

Plaintiff,

- against -

ALEXANDER ABRALDES, DONNA ABRALDES, JACK CAMPO, COURTYARD HOMES, INC., WHITFORD DEVELOPMENT INC., and ICAG PROPERTIES, LTD.,

Defendants.

DELL & DEAN, PLLC
Attorney for Plaintiff
1325 Franklin Avenue, Suite 120
Garden City, New York 11530

TRAUB LIEBERMAN STRAUS & SHREWSBERRY LLP
Attorney for Defendants/Third-Party Plaintiffs Courtyard, Whitford and ICAG
7 Skyline Drive
Hawthorne, New York 10532

COURTYARD HOMES, INC., WHITFORD DEVELOPMENT, INC., and ICAG PROPERTIES, LTD.,

Third-Party Plaintiffs,

- against -

BEST TEMP CENTRAL AIR CONDITIONING & HEATING CORP., a/k/a BEST TEMP RESIDENTIAL, INC.,

Third-Party Defendant.

BELLO & LARKIN
Attorney for Third-Party Defendant
Best Temp Central Air Conditioning
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

Upon the following papers numbered 1 to 55 read on these motions and cross motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 23; 27 - 47 ; Notice of Cross Motion and supporting papers 24 - 26; Answering Affidavits and supporting papers 48 - 49; Replying Affidavits and supporting papers 50 - 51; 52 - 53; 54 - 55 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that this motion (001) by plaintiff for summary judgment and this motion (003) by defendants Courtyard Homes, Inc., Whitford Development Inc. and ICAG Properties, Ltd. for summary judgment are consolidated for the purposes of this determination and are considered together with the cross motion (002) by defendants/third-party plaintiffs Whitford Development Inc. and ICAG Properties, Ltd. for summary judgment; and it is further

ORDERED that this motion (001) by plaintiff for an order pursuant to CPLR 3212 granting him summary judgment on his Labor Law §§ 240 (1) and 241 (6) claims is granted solely with respect to his Labor Law § 240 claims; and it is further

ORDERED that this cross motion (002) by defendants Courtyard Homes, Inc., Whitford Development Inc. and ICAG Properties, Ltd. for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint as against Whitford Development Inc. and ICAG Properties, Ltd. and for summary judgment dismissing plaintiff's Labor Law § 200 claims against all of the defendants in the main action is granted; and it is further

ORDERED that this motion (003) by defendants/third-party plaintiffs Courtyard Homes, Inc., Whitford Development Inc. and ICAG Properties, Ltd. for an order pursuant to CPLR 3212 granting summary judgment on the contractual indemnification claims against third-party defendant Best Temp Central Air Conditioning & Heating Corp., a/k/a Best Temp Residential, Inc. is granted.

This is an action to recover damages for injuries allegedly sustained by plaintiff on September 17, 2007 in an approximately eight-foot fall when the four-foot A-frame ladder he was using kicked out from underneath him as he was lowering himself onto it from ceiling beams. The accident occurred on the second floor of a residential home under construction located at 11 Harley Court, Holbrook, New York. The property was owned by Courtyard Homes Inc. (Courtyard), which as general contractor had subcontracted work to Best-Temp Central Air Conditioning & Heating Corp. a/k/a Best-Temp Residential Inc. (Best-Temp). At the time of the accident, plaintiff had been employed for three days by Best-Temp as a helper insulation technician and was using an A-frame fiberglass ladder from his employer's truck that his supervisor, lead man and install mechanic, Joseph Alexander had directed him to use. It was his first day on the job site and he was installing, pursuant to the directions of his supervisor, metal collars against the second floor ceiling beams for the vents of a new air-conditioning unit. Joseph Alexander witnessed plaintiff's fall.

Plaintiff commenced this action on September 1, 2010. By his first, second and third causes of action, plaintiff alleges negligence, and violations of Labor Law §§ 200 and 240, respectively. He claims that the ladder was defective because it lacked rubber feet and leaned or swayed. By his fourth and fifth causes of action, plaintiff alleges violations of Labor Law § 241 and New York State Industrial Code (12 NYCRR) sections 23-1.5, 23-1.16 and 23-1.21, respectively. Defendants Courtyard, Whitford Development Inc. (Whitford) and ICAG Properties, Ltd. (ICAG) answered. The action was discontinued

as against defendant Jack Campo by stipulation of discontinuance dated March 1, 2011 and against defendants Abraldes by separate stipulation.

Courtyard, Whitford and ICAG commenced a third-party action against Best-Temp for common-law and contractual indemnification, contribution, and for breach of contract for failure to obtain general liability insurance naming them as additional insureds under its commercial liability policy. Best-Temp answered asserting, among other things, that plaintiff did not sustain a grave injury as defined in the Workers' Compensation Law and that plaintiff was the sole proximate cause of the accident. It also asserted a counterclaim for contribution or indemnification.

Defendants Courtyard, Whitford and ICAG request (002) summary judgment dismissing plaintiff's claims against Whitford and ICAG and dismissing his Labor Law § 200 claims against all the defendants in the main action. They assert that the Labor Law § 200 claims must be dismissed as there is no proof that any of the defendants directed or controlled the means and methods of plaintiff's work, they did not provide him with any equipment, and there was no defect in the floor. They also assert that Whitford and ICAG are not proper parties inasmuch as they were not present at the site. In reply, plaintiff indicates that he does not oppose dismissal of the Labor Law § 200 claims against all the defendants and dismissal of the claims against Whitford and ICAG. Therefore, the cross motion (002) is granted and plaintiff's Labor Law § 200 claims are dismissed against all the defendants, and his claims against Whitford and ICAG are dismissed. Based on the foregoing, Courtyard is the sole remaining defendant in the main action.

Plaintiff seeks summary judgment (001) on his Labor Law §§ 240 and 241 claims on the ground that the proximate cause of his fall was the unsafe ladder provided by his employer. He asserts that Labor Law § 240 was violated in that the ladder was not secured, chocked, braced or tied and he was not directed to use a different ladder; he was not provided safety devices such as lifelines, safety ropes or harnesses; and he did not refuse to use any equipment. Plaintiff also asserts that the ladder did not have footings in violation of 12 NYCRR 23-1.21(b)(4)(ii), had a lean or sway of about half an inch to either side in violation of 12 NYCRR 23-1.21(b)(3)(ii), and lacked bracing in violation of 12 NYCRR 23-1.21(e)(2).

In opposition, defendant Courtyard argues that plaintiff is not entitled to summary judgment on his Labor Law § 240 (1) claims and is contributorily or comparatively negligent with respect to the Labor Law 241(6) claims. It argues that there is no causal connection between plaintiff's fall and the ladder being an improper height or missing rubber feet and that instead, plaintiff was improperly using his elbows and forearms to hoist himself into the ceiling area and then back down onto the ladder. In reply, plaintiff contends that defendant's claims that his use of his elbows to lower himself onto the ladder was the sole proximate cause or a contributing cause of his fall constitutes mere speculation, and emphasizes that he has no claim concerning the height of the ladder.

It is well settled that the party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence in admissible form to demonstrate the absence of any material issues of fact (see, Alvarez v Prospect Hosp., 68 NY2d 320; Zuckerman v City of New York, 49 NY2d 557; Friends of Animals, Inc. v Associated Fur Mfrs., Inc., 46 NY2d 1065). The

failure to make such a prima facie showing requires the denial of the motion regardless of the sufficiency of the opposing papers (see, Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). "Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action" (Alvarez v Prospect Hosp., supra at 324, citing to Zuckerman v City of New York, supra at 562).

"Labor Law § 240 (1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites" (McCarthy v Turner Constr., Inc., 17 NY3d 369, 374). "To prevail on a cause of action alleging a violation of Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries" (Lopez–Dones v 601 W. Assoc., LLC, 98 AD3d 476, 479; see, Morocho v Plainview-Old Bethpage Cent. School Dist., 116 AD3d 935).

Here, plaintiff established his prima facie entitlement to judgment as a matter of law on the Labor Law § 240 (1) cause of action by demonstrating that he fell from a defective or unsecured ladder that according to Joseph Alexander's deposition testimony had "a lean to it or a sway," and that the defect or failure to secure the ladder was a proximate cause of his injuries (see, Corchado v 5030 Broadway Properties, LLC, 103 AD3d 768; Robinson v Goldman Sachs Headquarters, LLC, 95 AD3d 1096; Fox v H & M Hennes & Mauritz, L.P., 83 AD3d 889; McCaffery v Wright & Co. Constr., Inc., 71 AD3d 842; Ricciardi v Bernard Janowitz Constr. Corp., 49 AD3d 624). Defendant Courtyard failed to raise a triable issue of fact in opposition regarding whether plaintiff's conduct of lowering himself onto the ladder was the sole proximate cause of his accident inasmuch as plaintiff's deposition testimony and that of his supervisor Joseph Alexander indicate that they believed that the work could be performed with a four-foot ladder and that, in any event, a taller ladder was not readily available to plaintiff inasmuch as Alexander was using the only available six-foot A-frame ladder at the time of the accident (compare, Robinson v East Med. Ctr., LP, 6 NY3d 550; Probst v 11 West 42 Realty Investors, LLC, 106 AD3d 711). Therefore, plaintiff is granted summary judgment on his Labor Law § 240 claims as against defendant Courtyard.

"To recover under Labor Law § 241(6), a plaintiff must establish the violation in connection with construction, demolition or excavation, of an Industrial Code provision which sets forth specific, applicable safety standards" (Wein v Amato Props., LLC, 30 AD3d 506, 507; see, Ramirez v Metropolitan Transp. Auth., 106 AD3d 799, 800). However, "[c]ontributory and comparative negligence are valid defenses to a section 241(6) claim; moreover, breach of a duty imposed by a rule in the Code is merely some evidence for the factfinder to consider on the question of a defendant's negligence" (Misicki v Caradonna, 12 NY3d 511, 515; Riffo-Velozo v Village of Scarsdale, 68 AD3d 839, 842).

With respect to plaintiff's Labor Law § 241 (6) claim, the proffered proof indicates that no photographs were taken of the subject ladder and that it was not preserved for inspection. The deponents who observed the condition of the ladder immediately after plaintiff's fall, plaintiff and his supervisor Joseph Alexander, testified that they noticed that it lacked rubber footings and Alexander noted that it leaned or swayed. Based on the foregoing, plaintiff demonstrated a violation of 12 NYCRR 23-1.21

(b)(4)(ii) requiring that "[a]ll ladder footings shall be firm" and 12 NYCRR 23-1.21(b)(3)(ii) prohibiting use of a ladder "[i]f it has any insecure joints between members or parts." Notably, plaintiff failed to establish a violation of 12 NYCRR 23-1.21(e)(2) inasmuch as his deposition testimony revealed that before ascending the ladder he had complied with the requirement that "[w]hen in use every stepladder shall be opened to its full position and the spreader shall be locked." In opposition, defendant Courtyard raised triable issues of fact as to whether the aforementioned violations were the proximate cause of plaintiff's injuries and whether plaintiff was comparatively negligent in failing to ask to share the use of Alexander's six-foot ladder, with which Alexander testified he could access the ceiling beams without pulling himself up from the ladder or lowering himself down to the ladder, instead of using a four-foot ladder that was obviously too short (see, Riffo-Velozo v Village of Scarsdale, supra). Thus, plaintiff failed to establish his entitlement to judgment as a matter of law on the issue of liability under Labor Law § 241(6).

Defendants/third-party plaintiffs Courtyard, Whitford and ICAG seek (003) summary judgment on the contractual indemnification claims against Best-Temp for any liability from Best-Temp's failure to provide adequate and safe ladders. In opposition, Best-Temp argues that Courtyard is the relevant party to seek summary judgment and that the contract lacks specificity as to the job site or as to price and time for its indemnification provision to be enforceable under Workers' Compensation Law § 11. In reply, defendants/third-party plaintiffs assert that the owner of Best-Temp, Erik Hartenstein, confirmed during his deposition that the contract applied to work performed by Best-Temp at 11 Harley Court.

A party is entitled to contractual indemnification when the intention to indemnify is "clearly implied from the language and purposes of the entire agreement and the surrounding circumstances" (Canela v TLH 140 Perry St., LLC, 47 AD3d 743, 744; see, Torres v LPE Land Dev. & Constr., Inc., 54 AD3d 668, 670). The signatories of the contract dated April 13, 2007 between Courtyard and Best-Temp, Victor Irizarry of Courtyard and Erik Hartenstein of Best-Temp, stated at their depositions that said contract applied to the subject construction. Although the contract did not specify the location or price or date of the work, it did specify the party to be indemnified, was executed by both parties, and the deposition testimony of Irizarry and Hartenstein revealed the existence of an ongoing, approximately 10-year relationship, such that the contract is enforceable (see, Hopes v New Amsterdam Restoration Group, Inc., 83 AD3d 784; compare, Torres v LPE Land Dev. & Constr., Inc., 54 AD3d 668). The "Indemnification/ Hold Harmless Agreement" portion of the contract provided that, "[t]o the fullest extent permitted by law," the Sub-Contractor [Best-Temp] shall indemnify, hold harmless and defend the General Contractor, and Site-Owner [Courtyard]" with respect to all claims for injury or damage arising from work performed by or acts or omissions by Best-Temp. Said agreement does not violate the General Obligations Law (see, General Obligations Law § 5-322.1; Kielty v AJS Constr. of L.I., Inc.,83 AD3d 1004, 1006; Caballero v Benjamin Beechwood, LLC, 67 AD3d 849, 852). Courtyard is entitled to indemnification from Best-Temp based on said indemnification agreement inasmuch as Courtyard established that it was free from negligence in contributing to the happening of the accident and that its sole representative on site, Victor Irizarry, undertook general duties to oversee the work and to ensure compliance with safety regulations, which is insufficient to raise a triable issue of fact as to negligence (see, General Obligations Law § 5-322.1; Hopes v New Amsterdam Restoration Group, Inc., supra; Reisman v Bay Shore Union Free Sch. Dist., 74 AD3d 772). Therefore, defendant Courtyard is granted summary judgment on its contractual indemnification claims.

Accordingly, the cross motion (002) is granted and plaintiff's Labor Law § 200 claims are dismissed against all the defendants, and his claims against Whitford and ICAG are dismissed. Plaintiff's motion (001) for summary judgment is granted solely as to his Labor Law § 240 (1) claims. Defendant/third-party plaintiff Courtyard's motion (003) for summary judgment on its contractual indemnification claims is granted. The main action is severed and continued as against the remaining defendant Courtyard.

Dated: July 21, 2014

HON. JOSEPH C. PASTORESSA, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION