Woodson v CVS Pharmacy, Inc.
2014 NY Slip Op 33422(U)
December 3, 2014
Supreme Court, Bronx County
Docket Number: 304899/2010
Judge: Julia I. Rodriguez
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF BRONX: Part IA 27

Index No. 304899/2010

---X
WALTER WOODSON,
Plaintiff,
-against-
CVS PHARMACY, INC.,
Defendant.
---X
CVS ALBANY, LLC,
Third-Party Plaintiff,
-against -
RGIS, LLC,
Third-Party Defendant.
---X

DECISION and ORDER

Present:
Hon. Julia I. Rodriguez
Supreme Court Justice

Dated: 12/3/2014

Recitation, as required by CPLR 2219 (a), of the papers considered in review of these motions by Plaintiff for re-argument and by Third-Party Defendant for clarification of Decision and Order dated April 1, 2014:

Papers	Numbered
Plaintiff's Motion, Affirmation & Exhibits	1
RGIS's Cross-Motion, Affirmation & Exhibits	2
Opposition by CVS ALBANY dated 6/16/14 to Motion to Reargue	3
Opposition by CVS ALBANY dated 6/16/14 to Motion for Clarification	4
Plaintiff's Reply Affirmation dated 6/29/14	5
Opposition by RGIS to Plaintiff's Motion to Reargue	6
Reply by RGIS in support of clarification	7

After review of the aforementioned papers, motion for clarification by Third-Party Defendant **RGIS, LLC** is **granted** as follows; motion for reargument by Plaintiff **Walter Woodson** of this Court's Orders (1) dated March 31, 2014, which denied his motion seeking amendment of the BOP, and (2) dated April 1, 2014, which denied summary judgment on his Labor Law claims premised upon §§240(1) and 241(6), is also **granted**, and upon reargument, the Orders dated March 31, 2014 and April 1, 2014 are recalled and vacated, and the parties' respective underlying motions decided as follows:

As an initial matter, the Court finds that the within accident falls under the rubric of the Labor Law. It is undisputed that the CVS facility was undergoing renovation and was in its final stage of construction before opening as a new store. Plaintiff was employed in a site that included "electricians. . . plumbers and general construction

people" [Tr. pg. 62], and was injured in the course of his work installing lighting fixtures which required the use of a ladder.

I. Upon reargument, that branch of Plaintiff's underlying motion(s) seeking leave to amend his Bill of Particulars to include a violation of Industrial Code sections 23-1.13 and 23-1.21(7) is hereby **granted**. The court agrees that leave for amendments "shall be freely granted" absent prejudice or surprise to the adverse party [CPLR 3025(b)]. Here, the proposed amendment does not present new facts with respect to the accident, as it remains that Plaintiff claims safety issues regarding the same ladder. In paragraph 4 of the BOP dated December 2010 Plaintiff alleged that Defendants failed to provide a safe place to work by violating "all applicable . . . . statutes, codes;" paragraph 5.b of the BOP set forth that the alleged condition complained of "consisted of a defective, broken, worn, inadequate and otherwise dangerous electrical fixture, casing and wires." The subject of electrocution cannot come as a surprise in light that at his deposition in February 2012 Plaintiff stated he felt "buzzing" while installing the light fixtures and was ~~being~~ told by a manager/ supervisor that he was "probably" feeling electricity flowing [Tr. Pg. 66, L. 18-23; Pgs. 66 - 69].

Labor Law 241(6) imposes a nondelegable duty upon owners, contractors and their agents to provide reasonable and adequate protection and safety for construction workers. *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494(1993); 241(6) provides that

> (6) All areas in which construction, excavation or demolition work is being performed shall be so construed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. . . .

Section 23-1.13(b)(4) reads, in pertinent part:

> Protection of Employees. No employer shall . . . permit an employee to work in such proximity to any part of an electric power circuit that he may contact such circuit in the course of the course of his work unless the employee is protected against electric shock by de-energizing the circuit and grounding it or by guarding such circuit by effective insulation or other means. . . .

Section 23-1.21(7) reads, in pertinent part:

> Limited use of Metal Ladders. Metal ladders shall not be used or placed in any location where they may come into contact with an energized electric power line, power facility or any exposed electrical parts or apparatus or equipment.

However, in fairness to Defendants the Court shall permit further discovery and afford Defendants the opportunity to depose Plaintiff on the aforementioned alleged violations. Accordingly, it is

ORDERED that the parties shall schedule a further Examination of Trial of Plaintiff within 60 days after service of a copy of this Order with Notice of Entry; the deposition shall be limited solely to questions regarding the aforementioned two violations. In the event that Defendants require a further independent medical examination of Plaintiff resulting from the amendment of the BOP, then Defendants shall make such demand within 30 days after Plaintiff's EBT; if the IME demand is not made within 30 days thereof, then the request for an additional IME shall be deemed waived.

II. Labor Law §240 (1).

Labor Law §240 (1) is to be construed as liberally as possible for the accomplishment of the purpose for which it was framed. *Ross v. Curtis-Palmer Hydro-Electric Co.,* 81 N.Y.2d 494 (1993). The statute provides for extra safety protection to the laborer engaged in certain contemplated occupational hazards. While the contemplated hazards are not spelled out in the statute, they can be inferred from the types of protective devices set forth in the statute. The hazards that are to be afforded the exceptional statutory protection are identified as two distinct sources of elevation risk and are related to the effects of gravity. They entail a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be hoisted or secured. *Toeffer v. Long Island Rail Road,* 4 N.Y.3d 399 (2005). The statute encompasses extraordinary elevation risks, not the usual and ordinary dangers of a

construction site. *Nieves* at 916.

Here, the Court finds that plaintiff's accident did not involve an elevated risk covered under 240(1) for the reason that his task is not associated with a dangerous activity and/or encompassed an extraordinary elevation risk. Rather, Plaintiffs' task was to "start hanging light fixtures" [pg. 43] on a "back wall" that had no shelving [pg. 46]. To support a 240(1) claim plaintiff must establish that he was exposed to an elevation risk while in the course of performing his duties and the *risk of some injury from defendants' conduct was foreseeable*. *Vasquez v. Urbahn Associates, Inc., et al*, 79 A.D.3d 493, 496, 918 N.Y.S.2d 1, 3 (1st Dep't 2010). According to plaintiff, he was three to five feet off the ground when he fell off the ladder, which ladder did not require safety devices. Plaintiff's claim is that he fell when he was "shocked" by the lights he was installing. The risk of being "shocked" was not a foreseeable risk which ordinarily flowed from the task of using the six-foot A-frame ladder [pg.52], and where Plaintiff claimed he had "no problem" with the ladder and it that "looked fine" to him before the incident [pgs.54, 56].

III. Labor Law §200

Labor Law §200 is a codification of the common law duty of an owner or employer to provide employees with a safe place to work. *Comes v. New York State Electric and Gas Company,* 82 N.Y.2d 876 (1993) ; *Jock v. Fien*, 80 N.Y.2d 965 (1992). Where the claim stems from the alleged defects or dangers arising from a subcontractor's methods or materials, liability under the common law or statute cannot be imposed unless the party to be charged exercised some supervisory control over the operation or had notice of a dangerous condition. *Comes v. New York State Electric and Gas Company,* supra.; see also, *Murray v. South End Improvement Corp.*, 263 A.D.2d 577, 578 (3rd Dept. 1999); *Butigian v. Port Authority of New York and New Jersey*, 266 A.D.2d 133 (1st Dept. 1999). This rule arises from the basic common law principle that an owner or general contractor should not be held responsible for the negligent acts of others over

whom the owner or contractor had no direction or control. *Ross v. Curtis Palmer Hydro Electric Co.,* 81 NY2d 494 (1993). In addition, a construction manager whose duties are limited to observing the work and reporting safety violations does not thereby become liable when the contractor's employee is injured by a dangerous condition arising from the contractor's negligent methods. The construction manager's authority to stop the contractor's work, if the manager notices a safety violation, does not give the manager a duty to protect the contractor's employees. *Buccini v. 1568 Broadway Associates,* 250 A.D.2d 466 (1st Dept. 1998).

An implicit precondition for such liability is that the party charged with that responsibility have the authority to control the activity which brought about the injury. *Russin v. Picciano & Son,* 54 N.Y.2d 311, 317 (1981). Where the subcontractor's agent/inspector's responsibilities were limited to observing and reporting, that does not amount to control. *Comes,* supra. Where an inspector had the authority to stop the work and insure compliance with safety regulations, such authority does not amount to supervision and control of the work site to that degree necessary to supplant the liability of the contractor who performs the day-to-day operations. *Reilly v. Newireen Assoc.,* 303 A.D.2d 214 (1st Dept. 2003); *D'Antuono v. Goodyear Tire & Rubber Co. Chemical Division,* 231 A.D.2d 955 (4th Dept. 1996). *Bink v. F.C. Queens Place Associates*, 27 A.D.2d 408 (2nd Dept. 2006) (where the construction manager had a general supervisory role, made daily inspections of the work site and would stop work that failed to comply with accepted safety standards, the Court found that to be insufficient to establish that he exercised direction, control or supervision.)

Plaintiff testified that he was given instructions on how to hang the light fixtures by the RGIS manager [pg. 58], and it was the RGIS retail manager whom Plaintiff told about "the buzzing sensation" [pg. 69]. The deposition testimony [Plaintiff, John Bray, Steven McKeand] presents that CVS provided the ladder and that **John Bray**, the CVS

crew coordinator, was the individual in charge of the project at the premises, and that he was guided by the Time and Action Plan created by CVS. **Steve McKeand**, the RGIS retail manager referred to by Plaintiff in his deposition, was under the supervision of Mr. Bray. While it was Mr. McKeand who actually instructed Plaintiff as to his duties, Mr. McKeand did not act independently of Mr. Bray, and both Bray and McKeand had authority to stop Plaintiff in the performance his duties at any time [Bray Tr. Pg. 90; McKeand Tr. Pg. 45]. Notably, this case cannot be easily compared to cases involving a larger landscape involving contractors and subcontractor with distinct duties. Cf. *Reilly v. Newireen Assoc.*, supra; *D'Antuono v. Goodyear Tire & Rubber Co. Chemical Division,* supra; *Bink v. F.C. Queens Place Associates*, supra. Instead, the work site was an enclosed area and all worked within close proximity to each other, such that both Bray and McKeand were within hearing distance at the time of Plaintiff's incident. Under these circumstances there exists questions of fact and credibility, *including but not limited to*, whether either Defendant CVS and/or RGIS exercised more than "general supervisory powers," and whether either Defendant created or had actual or constructive notice of a dangerous condition at the work site. *Reilly-Geiger v. Doherty*, __ A.D.3d ____, ___ N.Y.S.2d ____, 2011 WL 2474271 (2nd Dep't 2011); *Hughes v. Tishman Construction Corp., et al*, 40 A.D.3d 305, 836 N.Y.S.2d 86 (1st Dep't 2007. Consequently, that branch of motion by CVS motion seeking summary judgment dismissing Plaintiff's cause of action under Labor Law §200 claim and common law negligence is **denied.**

IV. Motion by CVS for defense and contractual indemnification against RGIS is **denied** as premature; paragraphs 7 and 12 of the contract implicate a determination of negligence (or absence thereof) as a predicate for indemnification. *Auriemma v. Biltmore Theatre, LLC*, 82 A.D.3d 1, 917 N.Y.S.2d 130 (1st Dep't 2011) (enforceability of the contractual indemnification clause cannot be decided until the issue of the contractor's negligence has been litigated); *Barracks v. Metro North Commuter Railroad, et al*, 8

Misc.3d 1024(A), 803 N.Y.S.2d 17, 2005 WL 1919100 (Sup. Ct. N.Y. Co. 2005) (until the issue of negligence is determined at trial claims based on contractual and common law indemnification are premature).

In addition, RGIS denies the claim by CVS that RGIS failed to procure the requisite insurance coverage. RGIS claims that it indeed obtained insurance from Discover Property & Casualty Insurance Company for the period January 2009 through January 1, 2010. Consequently, RGIS makes a prima facie case that it did not breach the contract for failure to obtain insurance.

For the foregoing reasons and to recap:

Plaintiff's motion seeking amendment of the Bill of Particulars is **granted**;

Parties' motion and cross-motion seeking summary judgment pursuant to CPLR 3212 on the issue of liability pursuant to Labor Law section 241(6) is **denied without prejudice** pending further discovery as hereinabove directed;

That branch of Plaintiff's motion seeking summary judgment pursuant to CPLR 3212 on the issue of liability pursuant to Labor Law section 240(1) is **denied**;

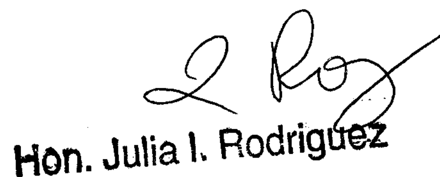
That branch of Plaintiff's motion seeking summary judgment pursuant to CPLR 3212 on the issue of liability pursuant to Labor Law section 200 and common law negligence is **denied;**

That branch of cross-motion by Defendant CVS seeking summary judgment pursuant to CPLR 3212 dismissing Plaintiff's cause of action pursuant to Labor Law section 200 and common law negligence claims is **denied;**

That branch of cross-motion by Defendant CVS seeking summary judgment pursuant to CPLR 3212 on the issue of liability pursuant to Labor Law section 240(1) is **granted;** and

That branch of motion by Defendant CVS seeking defense and indemnification from Defendant RGIS, LLC is **denied** as premature.

Dated: Dec. 3, 2014



Hon. Julia I. Rodriguez