Benitez v Church of St. Valentine Williamsbridge N.Y.
2015 NY Slip Op 31885(U)
September 16, 2015
Supreme Court, Bronx County
Docket Number: 300659/11
Judge: Howard H. Sherman
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FILED Sep 22 2015 Bronx County Clerk

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

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Cesar A. Benitez

Plaintiff

Decision and Order

-against-

Church of St. Valentine Williamsbridge New York and **St. Thomas Syro-Malabar Catholic Diocese of Chicago in New York**

Defendants

Index No. 300659/11

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Church of St. Valentine Williamsbridge New York

Third-Party Plaintiff

Third -Party
Index No. 84104/11

-against-

St. Thomas Syro-Malabar Catholic Diocese of Chicago in New York and **Kuzhikodil Enterprise Inc.,**

Third-Party Defendants

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In this action Cesar A. Benitez ("Benitez") seeks damages for injuries alleged to have been sustained when, while in the course of installing sheet rock, he fell from an A-frame ladder after it slid, and then collapsed. The sheet rock installation was part of the renovation of a church facility being performed under a construction contract between Benitez's employer, Kuzhikodil Enterprise ("Kuzhikodil"), and St. Thomas Syro Malabar Catholic Diocese of Chicago in New York ("St. Thomas"), the net lessee of a church building and adjoining property located at 822 East 221st Street,

Bronx New York. The land and building is owned by defendant Church of St. Valentine Williamsbridge New York ("St. Valentine") .

Plaintiff now moves for an award of partial summary judgment on liability on his claims of violation of Labor Law § § 240(1) , and 241(6) , [1]the latter as predicated upon New York State Industrial Code § 12 NYCRR 23-1.21 (b)(1) and (3), on the grounds that there is no issue of fact that his injuries were caused by the failure of the defendant owners to provide him with an adequate safety device with which to perform his elevation -related task, nor an issue of fact that the ladder that was provided was defective as it lacked rubber footing

, and this defect caused the ladder to slide, precipitating the breaking of the spreader and the ladder's ultimate collapse .

The motion is supported by the transcript of plaintiff's 06/20/12 deposition testimony, and copies of the lease between the defendants, and the construction contract.

In pertinent part, plaintiff testified that he began working for Kuzhikodil about two weeks before the accident at another location at which he assisted in the installation of a wooden floor [BENITEZ EBT: 8-10]. The date of the accident was his first at the church renovation project. He was one of five or six workers driven in a van to the location by Kuzhikodil's principal, "Baby Thomas" a/k/a/ "Sabu " [Id. 11-

[1] Plaintiff also asserted claims of common law negligence , and violation of Labor Law § 200.

13]. Plaintiff started his work in a second-floor classroom cutting sheet rock, and with the use of a screw-gun , installing it [15-18]. After about three hours, he stepped onto a folding aluminum ladder to install the "top ones." [19-20]. Sabu had brought the ladder to the location in the van that morning [20]. Benitez had never used the ladder before, but he encountered no difficulty in setting it up, or in placing the four legs on the floor, nor did he observe it to "wobble", or to move in any direction as he ascended [26-27]. While standing with both feet on the third of the four steps,[2] and holding the screw-gun in his right hand , Benitez observed that the ladder began to slip, and then the legs opened , and the ladder collapsed [25:7-8]. As he fell, plaintiff's neck and right shoulder hit the wall to the right, and then his back hit the floor [29]. After the accident, he saw that the brace [3]on the right side of the ladder had broken [26-30], and two of the legs were bent [26], and the back portion of the bottom of the ladder did not have rubber feet [119-121;125]. Benitez 's co-workers came to his assistance , and after reporting the accident to Sabu,[4] who had returned to the site after purchasing supplies, and icing his shoulder, plaintiff continued to hang sheet-rock in the classroom, however, because he could not raise his arm, he confined his installation to the bottom portion of the wall [29-30]. He stayed home for a month to rest, and then

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[2] The ladder measured four feet in height [20].

[3]The "spreader" , or "hinge that holds the two rails of each side of a ladder." [121].

[4] Plaintiff testified that when Sabu was not at the job site, no one else was working as a supervisor [30].

sought medical attention because "the pain never went away." [33:11-12]. He applied for and received workers' compensation benefits in connection with the accident [35-36].

Defendants oppose the motion , St. Thomas contending that the record demonstrates both its entitlement to summary judgment dismissal of the Labor Law § 200 claim against it , and issues of fact precluding dispositive relief on the remaining statutory claims , specifically, whether in light of the less than four-feet height of plaintiff's fall , plaintiff is to be afforded 240(1) protection. St. Valentine maintains that there are issue of fact devolving from the circumstances of the unwitnessed accident precluding an award of summary judgment.

Third-Party and "Cross-Claims "

St. Valentine commenced a third-party action against St. Thomas and Kuzhikodil seeking, *inter alia,* contractual indemnification as predicated respectively upon the indemnification provisions of the lease, and those of the construction contract, and now moves for summary judgment on these claims , and also seeks dispositive relief dismissing the Labor Law § 200 /common law negligence claims on the grounds that there is no issue of fact that it exercised supervision or control over the work being performed by Kuzhikodil.

With respect to its claim for indemnification as against the contractor, it is St. Valentine's contention that although St. Thomas was identified for purposes of the

agreement as the "owner", it is St. Valentine that is is entitled to the indemnification provisions of the contract because " the owner of the premises is actually the movant herein." [Affirmation of Counsel in Support of Motion p.7].

The motion is supported by the affidavit of the Associate Director of Real Estate for the Archdiocese of New York who attests that St. Valentine's Church is no longer an operating parish, and though the corporate entity has not been dissolved, it has no employees. He further attests that the church premises are, and at the time of the accident were, leased to St. Thomas, and until receipt of process here, neither St. Valentine's nor the Archdiocese was aware that any renovation work was being performed at the church.

In opposition, Kuzhikodil argues that the motion to the extent that it seeks summary judgment on the indemnification claim against it should be denied as it is unsupported by evidence of any relationship between the contractor and St. Valentine's, while the construction agreement on which the third-party plaintiff relies fails to identify St. Valentine's as "owner", or to list it as an additional indemnitee .[5]

In its 02/03/12 answer to Benitez's amended complaint , St. Thomas asserted six affirmative defenses, and despite the fact that plaintiff's employer was not a party to the action, interposed "cross-claims" for "indemnification from and to be held harmless by

[5] It is acknowledged that the Archdiocese is listed as a proposed beneficiary.

Kushikodil for the amount of any verdict or judgment that plaintiff may recover against" it. In its answer to the third-party complaint, St. Thomas interposed no cross-claims against the co-defendant contractor.

St. Thomas now cross-moves for an award of partial summary judgment against Kuzhikodil on the "cross-claim." The cross-motion is supported by the affirmation of counsel and a copy of the construction contract. St. Thomas argues that it is entitled to contractual indemnification from Kuzhikodil under the explicit terms of the agreement with the contractor , and to the extent the evidence points to the contractor's affirmative negligence, and only vicarious liability , if any, as against St. Thomas, common law indemnification, as well.

Kuzhikodil opposes the motion as unsupported by an affidavit demonstrating the authenticity of the contract on which St. Thomas relies, and maintains that any claim for common law indemnification is barred pursuant to Section 11 of the Workers Compensation Law because the contractor has provided worker's compensation benefits to plaintiff, and there is no issue of fact that he sustained an accident-related "grave" injury. Copies of Plaintiff's application and Notices of Decision of the State of New York - Workers Compensation Board awarding disability benefits and directing Kuzhikodil as employer to make such payments for the period 02/23/10 through 10/19/11 are annexed.

The Lease

The Agreement between St. Valentine as landlord and St. Thomas as tenant provides in Paragraph 12 thereof the following.

> To the extent permitted by law, Tenant shall indemnify and save harmless Landlord, The Archbishop of New York , the Archdiocese of New York and Central Services , Archdiocese of New York from all claims actions, damages, penalties, costs , and expenses including reasonable attorneys' fees (hereinafter collectively referred to as "liabilities") for or by reason of any injuries to or loss of life of persons or damage to property during the term of this lease due to any cause or causes whatsoever while in or upon the premises or any part thereof , or occasioned by any occupancy or use of the premises by the Tenant, its employees , agents, contractors, invitees or licensees. The obligation of Tenant to indemnify the above indemnitees shall apply to the extent that the amount of the liabilities shall exceed the amounts collected by the indemnitees from insurance , which Tenant provides.

The Contract Between St. Thomas and Kuzhikodil

On February 22, 2010, "Baby Thomas" on behalf of Kuzhhikodil Enterprise Inc., executed the "Contractor Insurance, Defense ,Indemnification and Hold Harmless Agreement " with St. Thomas as owner, whereby the contractor agreed to "protect , defend , hold harmless and fully indemnify the OWNER and the Archdiocese of New York for any claim or cause of action whatsoever arising out of the performance of services contemplated by the above REFERENCED AGREEMENT that is brought against the OWNER and/or the Archdiocese of New York by any person including all employees, agents, partners, family members, customers, contractors and associates

of the CONTRACTOR , even if such claim arises from the alleged negligence of the OWNER , its employees , agents , or the negligence of any other individual or organization. "

The motions and the cross-motion are consolidated for purposes of disposition.

Discussion and Conclusions

It is by now well settled that 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 a material issues of fact (Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]). To support the granting of such a motion , it must clearly appear that no material and triable issue of fact is presented , the "drastic remedy should not be granted where there is any doubt as to the existence of such issues (Braun v. Carey, 280 App.Div. 1019) or where the issue is 'arguable' (Barrett v. Jacobs, 255 N.Y. 520, 522); 'issue-finding, rather than issue-determination, is the key to the procedure' (Esteve v. Avad, 271 App. Div. 725, 727)." Sillman v. Twentieth Century-Fox Film Corp., 3 NY2d 395, 404 [1957].

Moreover, " '[a]s a general rule, a party does not carry its burden in moving for summary judgment by pointing to gaps in opponent's proof , but must affirmatively demonstrate the merit of its claim or defense'" (Pace v. International Bus. Mach., 248 AD2d 690,691 [2d Dept 1998], quoting Larkin Trucking Co. V. Lisbon Tire Mart, 185

AD2d 614, 615 [4th Dept. 1992]; see also, Peskin v. New York City Transit Auth., 304 AD2d 634 [2d Dept. 2003]).

Failure to make such a showing requires the denial of the motion , regardless of the sufficiency of the papers in opposition (Alvarez v. Prospect Hospital , 68 NY2d 320,324 [1986]; see also, Smalls v. AJI Industires, Inc., 10 NY3d 733, 735 [2008]) .

Once this burden is met, the opposing party may defeat the motion with proof "sufficient to require a trial of any issue of fact" (CPLR 3212 [b]). The court is required at this stage to discern whether any material issues of fact exist (Sillman v Twentieth Century-Fox Film Corp., op.cit at 404).

Labor Law 240(1) Clain

Labor Law § 240 (1), commonly known as the Scaffold Law, provides, in pertinent part, that:

> All contractors and owners and their agents . . . 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.

The law "imposes a nondelegable duty and absolute liability upon owners or contractors for failing to provide safety devices necessary for protection to workers subject to the risks inherent in elevated work sites who sustain injuries proximately

caused by that failure." (Jock v Fien, 80 NY2d 965, 967-968 , 605 N.E.2d 365, [1992]).

As pertinent here, despite the fact that the property was the subject of a net lease at the time of the accident, St. Valentine, the out-of-possession owner in fee is considered an "owner" for purposes of Labor Law §§ 240(1) and 241(6) (see, Gordon v. Eastern Ry. Supply, 82 N.Y.2d 555, 561, 626 N.E.2d 912 [1993]), and to the extent that the term "encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit.'" (Zaher v. Shopwell, Inc., 18 A.D.3d 339, 795 N.Y.S.2d 223 [1st Dept. 2005] *quoting* Copertino v Ward, 100 AD2d 565, 566, 473 NYS2d 494 [1st Dept. 1984]) , St. Thomas as the net lessee that hired the contractor and had the right to control the work at the church facility, is also an owner within the contemplation of the statute (see, Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 618, 852 NYS2d 138 [2d Dept 2008]; Bell v Bengomo Realty, Inc., 36 AD3d 479, 481, 829 NYS2d 42 [2d Dept. 2007]; compare, Guzman v. L.M.P. Realty Corp., 262 A.D.2d 99, 691 N.Y.S.2d 483 [1st Dept. 1999] , Crespo v. Triad, Inc., 294 A.D.2d 145, 742 N.Y.S. 2d 25 [1st Dept. 2002]).

In Blake v. Neighborhood Hous. Servs. of N.Y. City, Inc., 1 N.Y.3d 280, 287 , 803 N.E.2d 757 [2003], the Court of Appeals observed that the term absolute liability

> is"absolute" in the sense that owners or contractors not actually involved in construction can be held liable (see *Haimes v New York Tel. Co.*, 46 N.Y.2d 132, 136, 385 N.E.2d 601, 412 N.Y.S.2d 863 [1978]), regardless of whether they exercise supervision or control over the work (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 500, 618 N.E.2d 82, 601

> N.Y.S.2d 49 [1993]). Intending the same meaning as absolute liability in Labor Law § 240 (1) contexts, the Court in 1990 introduced the term "strict liability" (*Cannon v Putnam*, 76 N.Y.2d 644, 649, 564 N.E.2d 626, 563 N.Y.S.2d 16 [1990]) and from that point on used the terms interchangeably.

To prevail on a motion for partial summary judgment on a Labor Law § 240(1) claim, a plaintiff bears the burden of establishing as a matter of law that he/ she was not provided with proper safety devices (or that the devices actually furnished were inadequate) and that such failure was the proximate cause of his/ her gravity-related injuries (see, Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y.3d 35, 39, 823 N.E.2d 439 [2004]; Auriemma v. Biltmore Theatre, LLC, 82 A.D.3d 1, 9-10, 917 N.Y.S.2d 130 [1st Dept. 2011]). In this procedural context, "[a] lack of certainty as to exactly what preceded plaintiff's accident does not create an issue of fact as to proximate cause (see *Vegarra v. SS 133 W. 21, LLC.*, 21 A.D.3d 279, 800 N.Y.S.2d 1134 [2005]." (Arnaud v. 140 Edgecomb LLC., see also, Heer v. North Moore Developers, L.L.C., 61 A.D.3d 617, 878 N.Y.S.2d 310 [1st Dept. 2009]; Agresti v. Silverstein Properties, Inc., 104 A.D.3d 409, 959 N.Y.S. 2d 915 [1st Dept. 2013]).

For purposes of statutory application, it is not here disputed that at the time of the accident , plaintiff was engaged in work that constituted an alteration within the meaning of the statute, and in so doing he was subject to an elevation-related risk.

Upon review of the submissions here, including unrebutted evidence not only

of a fall , but of the sliding and the collapse of the ladder preceding this event , and observations of defects immediately subsequent to the incident, it is the finding of this court that plaintiff has demonstrated as a matter of law that the ladder he was required to use was inadequate to afford proper protection , and that the failure to provide him with an appropriately functioning protective device was a substantial factor in causing his gravity-related injuries.

In opposition, defendants fail to come forward with any probative evidence to raise a triable issue of fact rebutting plaintiff's prima facie showing . The fact that the accident was not witnessed does not bar an award of summary judgment in plaintiff's favor where, as here, " nothing in the record contradicts his version of the events or raise an issue as to his credibility "(Ortiz v. Burke Avenue Realty, Inc., 126 A.D.3d 577,578, 3 N.Y.S.3d 582 [1st Dept. 2015]), citing Klein v. City of New York , 89 NY2d 833, 675 N.E. 2d 458; Verdon v. Port Auth. Of N.Y. & N.J., 111 AD3d 580,581, 977 NYS2d 4 [1st Dept. 2013]; see also, Wise v. 141 McDonald Avenue, LLC , 297 A.D.2d 515, 748 N.Y.S. 2d 539 [1st Dept. 2002]). Nor does defendant cite any authority for the contention that plaintiff would not be afforded the protection of the statute because the fall from the third step precipitated by the ladder's collapse is deemed *de minimis*.

Labor Law 241(6) Claim

Labor Law § 241(6) requires owners to provide reasonable and adequate protection and safety for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor, imposing non-delegable duty on property owners, a plaintiff need not show that the defendants exercised supervision or control over the worksite in order to establish a right of recovery under § 241(6). Unlike a violation of an explicit and definite statutory provision which demonstrates negligence as a matter of law, a violation of Labor Law § 241(6) is merely some evidence which the jury may consider on the question of defendant's negligence (see, Rizzuto v. L.A. Wenger Contr. Co., 91 N.Y.2d 343, 349, 693 N.E.2d 1068 [1998]). To support such a claim, a plaintiff must allege that the owner violated a regulation that sets forth a specific applicable positive command, and not simply a recitation of common-law safety principles (see, Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494, 618 N.E.2d 82 [1993]; Gammons v. City of New York, 24 N.Y.3d 562 , 576 , 25 N.E.3d 958 [2014]).

The predicate regulation relied upon here , 12 NYCRR 23-1.21 (b) provides for the following:

> (b) General requirements for ladders. *(1) Strength. Every ladder shall be capable of sustaining without breakage, dislodgment or loosening of any component at least four times the maximum load intended to be placed thereon.*

(2) Opaque protective coatings prohibited. The use of an opaque protective coating on any ladder is prohibited.

(3) *Maintenance and replacement. All ladders shall be maintained in good condition. A ladder shall not be used if any of the following conditions exist:*

(i) If it has a broken member or part.

(ii) If it has any insecure joints between members or parts.

(iii) If it has any wooden rung or step that is worn down to three-quarters or less of its original thickness.

(iv) *If it has any flaw or defect of material that may cause ladder failure.*

This court finds that the predicate Industrial Code regulations are sufficiently specific to support the statutory claim, and that the conditions alleged, i.e., the collapse of the ladder and its component part, as well as the lack of complete rubber footing in the rear of the bottom legs, are within the scope of the above provisions. It is the further finding of this court that plaintiff has made a prima facie showing that defendants violated § 12 NYCRR 23-1.21 (b)(1) as the ladder was incapable of sustaining plaintiff's weight without breakage, and with respect to the allegation of improper maintenance , that it had a defect of material in its rubber footing that might cause the ladder to slip, and to fail [§ 12 NYCRR 23-1.21 (b)(3)(iv)].

In opposition, defendants fail to come forward with evidence to raise a material issue of fact on the issue of statutory liability.

Labor Law § 200 and Common Law Negligence Claim

Where , as here, a worksite accident arises out of the means and methods of the

work, as opposed to a dangerous condition on the site, liability under Labor Law § 200 or for common law negligence may be imposed only where the defendant exercised control or supervision over the work and had actual or constructive notice of the purportedly unsafe condition (see, Singh v. Black Diamonds LLC, 24 A.D.3d 138, 805 N.Y.S.2d 58 [1st Dept. 2005]. The record here demonstrates as a matter of law that neither defendant had responsibility for overseeing the work performed by plaintiff or his employer, and, as such, the claims are severed and dismissed.

Third-Party Claims

Defendant / third-party plaintiff St. Valentine has made a prima facie showing for an award of summary judgment on liability on its contractual indemnification claim as against its lessee (see, Gary v. Flair Beverage Corp., 60 A.D.3d 413, 875 N.Y.S.2d 4 [1st Dept. 2009]. However , St. Valentine, neither a party to the construction contract , nor a named indemnitee pursuant to its terms, fails to make the requisite showing with respect to its contractual indemnification claim as against Kuzhikodil.

Finally, the cross-motion of St. Thomas for an award of summary judgment against the contractor on its "claims" for common-law [6]and contractual indemnification must be denied without prejudice to renew upon proper papers to include a copies of

[6] The contractor may not be held liable for common-law indemnification of defendants since plaintiff does not allege, nor does his bill of particulars evince, a "grave injury" within the meaning of Workers' Compensation Law § 11 (see Meis v ELO Org., 97 NY2d 714, 767 NE2d 146 [2002]).

the pleadings by which such claims were interposed. As above noted, the contractor was not a party to the main action, and as such the "cross-claims" attempted to have been interposed against it by St, Thomas in its answer are a "nullity." The papers here do not include any showing that St. Thomas impleaded the contractor or asserted cross-claims in the third-party action. The cross-movant should be afforded an opportunity to come forward with these pleadings.

In view of the above, it is hereby

ORDERED that the motion by plaintiff for partial summary judgment on the issue of liability under Labor Law § 240(1) and Labor Law § 241(6) , as predicated upon § 12 NYCRR 23-1.21 (b)(1) and (b)(3) , is granted , and summary judgment awarded in favor of plaintiff as against defendants Church of St. Valentine Williamsbridge New York and St. Thomas Syro-Malabar Catholic Diocese of Chicago in New York on the liability with respect to these statutory claims, and it is further

ORDERED that upon proof of service of a copy of the decision and order herein , and the filing of the Note of Issue , and payment of the fee therefor, if any, this matter be set down for trial on the issue of damages, and it is further

ORDERED that the motion of defendant/third-party plaintiff Church of St. Valentine be and hereby is granted to the extent of awarding summary judgment dismissing and severing the claims of common law negligence and violation of Labor

Law §200 asserted here, and upon a search of the record, dismissing these claims as asserted against co-defendant Sr. Thomas, and it is further

ORDERED that the branch of the motion of St. Valentine seeking summary judgment on its third-party claims for contractual indemnification be and hereby is granted solely to the extent of granting an award of summary judgment on the issue of liability on the third-party claim of contractual indemnification in favor of St. Valentine as against third-party defendant St. Thomas, and it is further

ORDERED that the cross-motion of the defendant St. Thomas for an award of summary judgment against third-party defendant Kuzhikodil Enterprise Inc., on indemnification claims is denied without prejudice to renewal upon the terms set forth above.

This shall constitute the decision and order of this court.

Dated: September 16, 2015

Howard H. Sherman