Nunez v LMJ Vision, Inc.
2015 NY Slip Op 32425(U)
December 23, 2015
Supreme Court, New York County
Docket Number: 150346/11
Judge: Ellen M. Coin
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 63

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JUNIOR NUNEZ and SULLY NUNEZ,

Plaintiffs,

-against-

Index No.:150346/11
Motion Date: July 29, 2015
Motion Sequence: 007

DECISION AND ORDER

LMJ VISION, INC. d/b/a VISIONARY OPTICS and/or THE GELMAN'S OPTICAL, INC. d/b/a VISIONARY OPTICS, THE WEST 17th STREET COMPANY and INTER-NEXT NYC, INC.,

Defendants.

---X

LMJ VISION, INC. d/b/a VISIONARY OPTICS and/or THE GELMAN'S OPTICAL, INC. d/b/a VISIONARY OPTICS,

Third-Party Plaintiffs,

-against-

Index No.:590786/12

INTER-NEXT NYC, INC. and GILBERT DISPLAYS, INC.,

Third-Party Defendants.

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no appearance

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[* 2]

Papers Submitted in Support of the Motion to Compel and Cross-Motion for Summary Judgment:

Notice of Motion, Affirmation with Supporting Exhibits..1
Notice of Cross-Motion, Affirmation with Supporting Exhibits...2
Affirmation in Opposition to Cross-Motion...3
Reply Affidavit in Support of Cross-Motion...4

COIN, J.:

By decision and order dated June 16, 2014, the Court previously granted plaintiff Junior Nunez summary judgment on his claim under Labor Law § 240(1) as against defendants LMJ Vision, Inc. and The West 17th Street Company; dismissed the third-party action, together with all cross-claims, as against Gilbert Displays, Inc.; and dismissed on consent all claims and cross-claims as against The Gelman's Optical, Inc. The prior decision shall serve as a reference to the underlying factual background. On this motion, the Court will relate only that part of the record that is relevant to the issues raised herein.

Defendant/third-party plaintiff LMJ Vision, Inc. d/b/a Visionary Optics and defendant The West 17th Street Company (collectively LMJ)[1] move pursuant to CPLR 3212 to dismiss plaintiffs' claims for common-law negligence and violations of Labor Law § 200. LMJ also moves pursuant to CPLR 3212 for summary judgment on the first cause of action in the third-party complaint, as well as the first cross-claim in West 17th's answer, for common-law indemnification as against defendant/third-party defendant Inter-Next NYC, Inc., sued herein as

[1] By stipulation dated April 25, 2014, West 17th has discontinued with prejudice its cross-claim for contractual indemnification and defense against LMJ and Gelman's as part of LMJ's assumption of its defense and indemnification obligations.

Internext, Inc. (Inter-Next).[2] Inter-Next cross-moves for summary judgment dismissing the third-party complaint and all cross-claims as against it.

FACTUAL ALLEGATIONS

West 17th is the owner of the premises located at 123A Seventh Avenue, New York, New York. In March of 2010, LMJ entered into an agreement with West 17th to lease the premises for use as a store selling optical wear. LMJ retained Inter-next, a contractor, to perform work at the location. Inter-next was to install new flooring, a basement door, and handrails around the stairwell opening leading into the basement.

On April 21, 2010, LMJ entered into an agreement with Gilbert Displays (Gilbert) for Gilbert to deliver and install merchandising display cabinets and furniture for the store. George Munoz (Munoz) worked for Gilbert as a supervisor in charge of its projects. Plaintiff testified that on the day of his accident, it was Munoz who told him what work he was going to perform and how to do it (Affirmation of Joshua M. Jemal, dated February 27, 2015, Ex. O [Nunez Deposition]). No one other than his Gilbert supervisors instructed him on how to perform his job (Nunez Dep., 108:21-25; 109:2, 22-25; 110:2-3, 10-16). Plaintiff testified that he had not heard of a company called Inter-Next (Nunez Dep., 110:20-25; 111:2-4). While at the premises, plaintiff noticed an open hole with a stairway leading to the basement (Nunez Dep. 141: 10-18). Plaintiff first observed the open stairwell during his prior visit to the site because he had to go the

2 In addition to the first cause of action for common-law indemnification, LMJ's third-party complaint asserts the second cause of action for common-law contribution, the fourth cause of action for contractual indemnity, and the fifth cause of action for breach of contract to obtain insurance coverage in LMJ's name. The third cause of action appears to be a redundancy. West 17th also asserts its fourth cross-claim in part as against Inter-Next for common-law contribution. As LMJ's motion omits these claims, the Court deems them abandoned.

basement several times (*id.*; 142:18-25; 143:2-16). On the date of his accident, plaintiff did not observe any board or plywood covering the hole (Nunez Dep., 141: 19-25; 142: 2-17).

Steven Beberman (Beberman), the property manager for West 17th's property located at 123A Seventh Avenue, submitted an affidavit sworn to February 25th, 2015 (Beberman Aff.). Beberman states that West 17th is an out-of-possession landowner that leased commercial space to LMJ (*id.*, ¶ 2). Beberman avers that West 17th was not involved with any of the renovations to be made at the premises in or around June 2012 and that West 17th was not made aware of the nature of the project: West 17th did not hire any trades or contract for any of the work including the work performed by Inter-Next or Gilbert, nor did it provide any supervision, direction, or control over the means and methods of plaintiff's work or furnish tools of trade; West 17th was not aware that an existing trap door entry to the basement level had been removed by Inter-next; and West 17th was not notified that the stairwell leading to the basement was left unguarded at any time (*id.,* ¶¶ 5-14). Beberman states that neither he nor anyone else on behalf of West 17th visited the location or conducted inspections (*id.*, ¶ 9).

Edward Zeis (Zeis) was also deposed (Jemal Aff., Ex. U [Zeis Dep.]). Gilbert employed Zeis as an electrician. Zeis was sent to assist the workers from Gilbert with cleaning and touching up the cabinetry on the first floor of the premises. Zeis testified that other than George Munoz, Gilbert's project manager, no one would give directions or supervise Gilbert employees at the premises. He maintains that on the morning of plaintiff's accident, the stairwell at the premises was open and uncovered and that there was no planking, guardrail, or handrail in place (Zeis Dep., 25:11-25; 26, 27:2-3). Zeis also testified that some time before plaintiff's accident,

whoever did the renovation removed the pull-up door to widen the steps leading into the basement and also poured new concrete to reshape the steps (Zeis Dep., 66:10-25; 67:2).

Lee Andrew Gelman (Gelman), an owner of LMJ, was also deposed (Jemal Affirm., Ex. T [Gelman Dep.]). Gelman testified that he was not at the work site on the date of plaintiff's accident, nor was anyone else from LMJ (Gelman Dep., 51:23-25; 52:2-4). He would visit the site once a week in order to check the status of the work (Gelman Dep., 54:14-18). He believes that it was LMJ's intention to put a handrail or a guardrail around the stairwell which led from the first floor to the basement and thinks that it was put in place following the accident (Gelman Dep., 57:22-25; 58:2-11; 63:17-25; 64:2). He remembers seeing a brown board covering the entire stairwell opening before the accident and during the project, but that he did not know who placed it there (*id.*, 59:2-17). Gelman maintains that LMJ did not supply anything to Inter-Next or Gilbert at any time during the project or have discussions regarding safety (*id.*, 70: 8-23).

Gelman also submits an affidavit, sworn to on February 24, 2015, in which he states that at no time did LMJ direct removal of the plywood that covered the staircase (¶ 15) and that the staircase was always covered when he was present at the cite (*id.*). He also avers that Inter-Next was responsible for placing a protective covering over the exposed stairwell after removal of the old trap door entry into the basement because Inter-Next was responsible for the safety of workers at the premises (*id.*, ¶¶17-18). Gelman argues that pursuant to the agreement with Inter-Next, Inter-Next was specifically responsible for removing the floor-mounted trap door and installing safety railings and an entry gate around the stairwell opening for safety purposes (*id.*, ¶ 19).

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DISCUSSION

Having granted plaintiff summary judgment on the Labor Law § 240 (1) cause of action in the prior round of motion practice, the Court declined to address plaintiff's alternative theories of relief as academic.[3] The purpose of LMJ's attempt to dismiss plaintiff's claim of negligence, now moot, is to establish LMJ's lack of wrongdoing or negligence and thereby pave the way to recovery on its third-party claim for common-law indemnification against Inter-Next (*see Cunha v City of New York*, 12 NY3d 504, 509 [2009]). Plaintiff, understandably, does not oppose the motion. Inter-Next, while it has an interest in establishing a modicum of negligence attributable to LMJ, does not have standing to prop up plaintiff's Labor Law § 200 claim against LMJ. The first part of LMJ's motion is effectively unopposed. The Court, nonetheless, cannot grant it, as plaintiff's direct negligence claim was abandoned, and is now dismissed as moot without prejudice to renewal in the event that the Court's June 17, 2014 decision and order are reversed on appeal. This, however, does not avoid determination of the issue of negligence: it merely transfers the burden of proof on this issue from plaintiff to LMJ as third-party plaintiff on its claim for common-law indemnification.

Common-Law Indemnification in the Construction Accident Context

Indemnification is the right of one party to shift the entire loss to another and is based on either common law or on a contractual obligation (*see Bellevue S. Assoc. v HRH Constr. Corp*, 78 NY2d 282, 296 [1991]; *see also Zurich Ins. Co. Lumbermen's Cas. Co.*, 233 AD2d 186, 187 [1st Dept 1996]). Common-law, also known as implied, indemnification "is a restitution concept

[3] Inter-Next mistakenly views the Court's prior denial of LMJ's summary judgment motion as to plaintiff's Labor Law §§ 241(6) and 200 claims to be on the merits.

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which permits shifting the loss because to fail to do so would result in the unjust enrichment of one party at the expense of the other" (*McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011][internal quotation marks and citations omitted]). It "is generally available in favor of one who is held responsible solely by operation of law because of his relation to the actual wrongdoer" (*id.* [internal quotation marks and citations omitted]). The Court of Appeals has recognized the application of this doctrine in cases of liability imposed under non-delegable-duty provisions of Labor Law §§ 240(1) and 241(6) (*Kelly v Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 NY2d 1, 6 [1974]).

There are two requirements to indemnification. First, the party seeking indemnification must be free of culpability and obligation to supervise the work involved in the accident (*McCarthy*, 17 NY3d at 378; *see generally Cunha*, 12 NY3d at 509). Second, the party from whom indemnification is sought must have either itself caused the accident or exercised actual supervision of the injury-producing work. Mere authority or obligation to "supervise the work and implement safety procedures is not alone a sufficient basis" (*McCarthy*, 17 NY3d at 378 [citations omitted]; *see also Naughton v City of New York*, 94 AD3d 1, 10 [1st Dept 2012]).

> Thus, if a party with contractual authority to direct and supervise the work at a job site never exercises that authority because it subcontracted its contractual duties to an entity that actually directed and supervised the work, a common-law indemnification claim will not lie against that party on the basis of its contractual authority alone

(*McCarthy*, 17 NY3d at 378 [indemnification not available from general contractor that subcontracted work and as a result had no supervisory authority over, or directed, injured plaintiff's activities]). Therefore, the Court must gauge to what degree both LMJ and Inter-Next's actions could be deemed negligent under the Labor Law.

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Negligence Standard under Labor Law § 200

Labor Law § 200 is a "'codification of the common-law duty imposed upon an owner or general contractor to prόvide construction site workers with a safe place to work' [citation omitted]" (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d at 316-317). Labor Law § 200 (1) states, in pertinent part, as follows:

> 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 section 200 cases, depending on the kind of situation involved: when the accident is the result of the means and methods used by the contractor to do its work, and when the accident is the result of a dangerous condition (*see McLeod v Corporation of Presiding Bishop of Church of Jesus Christ of Latter Day Sts.*, 41 AD3d 796, 797-798 [2d Dept 2007]).

To find an owner or his agent liable under Labor Law § 200 for defects or dangers arising from a subcontractor's methods or materials, such as the alleged improper placement of the ladder in this case, 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 Labor Law § 200 liability where plaintiff was injured as he was lifting a beam, and no evidence was put forth that defendant exercised supervisory control or had any input into method of moving beam]).

Where, however, 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] [to support finding of Labor Law § 200 violation, not necessary to prove general contractor's supervision and control over plaintiff's work, "because the injury arose from the condition of the work place created by or known to contractor, rather than the method of [the] work"]). "[I]t logically follows that a property owner's liability should be predicated upon evidence of the owner's creation of the condition or actual or constructive notice of it, since the property owner in charge of the site has authority to remedy any dangers or defects existing at its own premises" (*Chowdhury v Rodriguez*, 57 AD3d 121, 130 [2d Dept 2008]). In order "[t]o constitute constructive notice, a defect must be visible and apparent and it must exist for a sufficient length of time prior to the accident to permit defendant's employees to discover and remedy it" (*Gordon v American Museum of Natural History*, 67 NY2d 836, 837 (1986); *see also Lopez v Dagan*, 98 AD3d 436, 444 [1st Dept 2012]).

West 17th and LMJ are Not at Fault for Plaintiff's Accident

With regard to West 17th, there is no indication that it either had any role to play in the renovation or had notice that the stairwell's covering was removed. Pursuant to Beberman's undisputed testimony, no one on behalf of West 17th visited the premises or conducted any inspections. Therefore, West 17th is without fault in plaintiff's accident.

a. LMJ did not supervise, direct or control Inter-Next's work

LMJ ordered the work and tracked its progress, but this alone is insufficient to establish the requisite elements of supervision, direction or control (*Putnam v Karaco Indus. Corp.*, 253 AD2d 457, 459 [2nd Dept 1998] [in context of one- or two-family dwelling exception to Labor § 240 (1) liability and for purposes of Labor Law § 200, mere fact that owner visited site once or twice a week and complained about rate of progress cannot support finding of direction and control]). LMJ argues that it did not supervise or control the means and methods of either Intern-Next's or Gilbert's work. Gelman testified that he never instructed or supervised any of Gilbert's or Inter-Next's workers during his weekly visits to check on the progress of the work.

b. Whether LMJ had notice of defective condition is irrelevant as the exposed stairwell opening resulted from means and methods of Inter-Next's work

LMJ denies that prior to the accident it had actual or constructive notice of the unguarded stairwell opening into which plaintiff fell. Gelman testified that he would check the site once a week in order to view the status of the work. He believes that it was LMJ's intention to put a handrail or a guardrail around the stairwell which led to the basement, and thinks that it was placed there following the accident. He remembers seeing a brown board covering the entire hole during the improvement project, but he did not know who placed it there. Gelman testified that before the accident, the open stairwell was covered by a plank, and that it was there every time during the period in which he visited. LMJ theorizes that the wooden board which was protecting the open stairwell must have been removed by Inter-Next.

However, according to plaintiff's testimony, there was no board covering the stairwell on at least two occasions. Plaintiff had been to the site on June 21, 2010, and the stairwell was not

covered. Plaintiff also testified that on the date of his accident, he noticed that the stairwell was also not covered. This conflict in evidence does appear to create an issue of fact, but nonetheless it does not warrant a trial. Although an exposed opening is a type of defective condition, the notice of which alone (without supervisory control) would ordinarily trigger non-supervising owner's duty to remedy it, here, the unguarded stairwell was not a " 'defect inherent in the property,' but instead resulted from the 'manner [and means] in which [contractor] performed its work'" (*Cappabianca v Skanska USA Building Inc.*, 99 AD3d 139, 144 [1st Dept 2012] [water accumulating on floor from chain saw operation], quoting *Dalanna v City of New York*, 308 AD2d 400, 400 [1st Dept 2003] [tripping hazard left over from work]).

When LMJ initially leased the space, access to the stairwell lay through a trapdoor entry. While there is no first-hand testimony, the only inference that may be made from all of the evidence is that the trapdoor was removed as part of the renovation. LMJ argues that Inter-Next was responsible for the placement of temporary rails or other devices around the exposed stairwell opening to protect on-site workers from falling. Inter-Next counters that the job contract lacks any mention of tasks related to the stairwell, handrails, or job site safety and dismisses Gelman's statements as speculative.

Inter-Next further relies on CPLR 4519, colloquially known as the "Dead Man's Statute," arguing that Gelman's statements regarding the responsibilities of Inter-Next at the premises should not be considered because they cannot be refuted by any living person, with Inter-Next's principal now deceased and the company "wound down."

"CPLR 4519 disqualifies parties interested in litigation from testifying about personal transactions or communications with deceased or mentally ill persons" (*Poslock v Teachers' Retirement Bd. of Teachers' Retirement Sys.*, 88 NY2d 146, 150 [1996]). It likewise applies to conversations with deceased corporate principals, precluding consideration of that portion of Gelman's testimony detailing his conversations with the late owner of Inter-Next, Barry White (*Five Corners Car Wash, Inc. v Minrod Realty Corp.*, 2015 NY Slip Op 08806, *3-4 [2nd Dept 2015]). However, CPLR 4519 does not in any way preclude Gelman from testifying to his own observations and factually sound conclusions that it was Inter-Next that placed glass-and-metal guard railing around the open stairwell and the handrail tracing steps downward, as LMJ did not hire or pay anyone else to do this work (Gelman Aff., 58:9-11; *cf. Phillips v Joseph Kantor & Co.*, 31 NY2d 307, 315 [1972]; *see also Coogan v D'Angelo*, 66 AD3d 1465, 1466 [4th Dept 2009] [as to use of non-objectionable evidence]).

The one-page contract (Jemal Aff., Ex. CC), while not expressly providing for trap door entry conversion, does in item eight provide for "[n]ew basement door (metal fabricated)," which, even though it does not expressly specify the stairwell area (there were at least two additional doors inside the basement floor), places the basement level within the ambit of Inter-Next's work. Items two and seven of the contract, provide respectively for "Reconstructing store according to the plans attached at high end job" and "Remodel back room according to plan and need of Dr. Gelman." Zeis also testified that the contractor in charge of the renovation removed the trap door, widened the opening and poured concrete steps. The photographs of the renovated space also show the finished guard railing. The only reasonable conclusion that may drawn from

the evidence is the Inter-Next left open the unguarded stairwell as part of its work. Therefore, because the Court finds that the unguarded staircase opening was not a defective condition inherent in the property, but resulted from the manner and the means of Inter-Next's work, no fault is attributable to LMJ, because it did not supervise or control Inter-Next's work (*see Ocampo v Bovis Lend Lease LMB, Inc.*, 123 AD3d 456, 457 [1st Dept 2014]).

Inter-Next Must Indemnify LMJ

While aware of the handicap that counsel for Inter-Next faces when defending the action with a deceased witness, the Court cannot overlook the overarching fact that Inter-Next was the only contractor that was paid for and worked on the renovation and alteration of the premises (Gelman Dep., 39:9-25; 40:6; 46:2-4). Gilbert only provided display casings and display lighting. There is no proof of any other ephemeral contractor that Inter-Next alludes to, but does not identify, in its submissions. Inter-Next's attempt to exclude evidence of post-accident remedial measures (i.e, placement of the railing) falls of its own weight. By disclaiming custody, control or work supervision of the stairwell area as part of the renovation, it has placed in controversy the very exceptions to the exclusion of such evidence (*see e.g., Cooke v City of New York*, 95 AD3d 537, 538 [1st Dept 2012]). The unguarded stairwell opening, flush with the floor level, created a significant and inherently dangerous elevation exposure to the workers of both Gilbert and Inter-Next. Even assuming that a board was placed over the opening, the fact that the subject accident occurred establishes the insufficiency of such protective measures and the resulting negligence. Referring this matter to the jury would be futile: none of the issues of fact that the parties may argue will change the result that this accident was Inter-Next's fault, either

directly or through insufficient supervision of the staircase access to the basement level under its control.

CONCLUSION and ORDER

Accordingly, it is

ORDERED that so much of the motion of LMJ Vision, Inc. d/b/a Visionary Optics and The West 17th Street Company for summary judgment seeking to dismiss plaintiff's causes of action for common-law negligence and violations of Labor Law § 200 is denied as moot; and it is further

ORDERED that the balance of the motion of LMJ Vision, Inc. d/b/a Visionary Optics and The West 17th Street Company for summary judgment on their third-party claim for common-law indemnification against third-party defendant Inter-Next NYC, Inc., sued herein as Inter-Next, Inc., is granted, and an inquest shall be held at or about the time of trial of the main action setting forth amounts due to be indemnified; and it is further

ORDERED that the cross-motion of Inter-Next NYC, Inc., sued herein as Inter-Next, Inc., for summary judgment dismissing the third-party action is denied.

Dated: 12/23/15

ENTER:

Ellen M. Coin, A.J.S.C.