Borja v CPG Partners, C.P.
2016 NY Slip Op 32111(U)
June 17, 2016
Supreme Court, Queens County
Docket Number: 700915/2012
Judge: Denis J. Butler

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

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MARCO BORJA,

Plaintiff(s),

-against-

CPG PARTNERS, C.P., TOM FORD INTERNATIONAL LLC and SHAWMUT WOODWORKING & SUPPLY, INC.,

Defendant(s).
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TOM FORD INTERNATIONAL LLC and SHAWMUT WOODWORKING & SUPPLY, INC.,

Third-party Plaintiffs,

-against-

MANHATTAN DEMOLITION,

Third-party Defendant.
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Index Number 700915/2012

Motion Date April 18, 2016

Motion Seq. No. 7

The following papers were read on this motion by defendants/third-party plaintiffs, Tom Ford International LLC (Ford)and Shawmut Woodworking & Supply, Inc. (Shawut) for summary judgment pursuant to CPLR 3212 and dismissal of plaintiff's Labor Law § 200 and negligence claims and all cross-claims and counterclaims against Ford and Shawmut in their entirety and for summary judgment pursuant to CPLR 3212 on their third party complaint.

	Papers Numbered
Notice of Motion, Affirmation, Exhibits.....	E92-117
Affirmation In Opposition, Exhibits.....	E162-166

Reply Affirmation.....E168
Affirmation In Opposition.....E169
Reply Affirmation, Affidavit.....E171-172

Upon the foregoing papers it is ordered that the motion is determined as follows:

The branch of the motion to dismiss plaintiff's Labor Law § 200 claims, insofar as asserted against Tom Ford and Shawmut, is granted. Labor Law § 200(1) is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work (see *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 352 [1998]; *Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Lombardi v Stout*, 80 NY2d 290, 294 [1992]; *Ortega v Puccia*, 57 AD3d 54 [2008]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d at 847 [2006]; *Brown v Brause Plaza, LLC*, 19 AD3d 626, 628 [2005]; *Everitt v Nozkowski*, 285 AD2d 442, 443 [2001]). Cases involving Labor Law § 200 fall into two broad categories, namely, those where workers are injured as a result of dangerous or defective premises conditions at a worksite, and those involving the manner in which the work is performed. (*Ortega v Puccia*, *supra*.) These two categories should be viewed in the disjunctive (*Id.*).

Where a premises condition is at issue, a property owner may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident (see *Azad v 270 5th Realty Corp.*, 46 AD3d 728, 730; *Kerins v Vassar Coll.*, 15 AD3d 623, 626; *Kobeszko v Lyden Realty Invs.*, 289 AD2d 535, 536). When a claim arises out of alleged defects or dangers in the methods or materials of the work, recovery against the owner or general contractor cannot be had under Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work. (see *Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352; *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317; *Gallello v MARJ Distrib., Inc.*, 50 AD3d 734, 735; *Dooley v Peerless Importers, Inc.*, 42 AD3d 199, 204-205; *Guerra v Port Auth. of N.Y. & N.J.*, 35 AD3d 810, 811.) Although property owners often have a general authority to oversee the progress of the work, mere general supervisory authority at a work site for the purpose of overseeing the progress of the work and inspecting the work product is insufficient to impose liability under Labor Law § 200. (see *Natale v City of New York*, 33 AD3d 772, 773; *Perri v Gilbert Johnson Enters., Ltd.*, 14 AD3d 681, 683; *Dos Santos v STV Engrs., Inc.*, 8 AD3d 223, 224.) A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that

defendant bears the responsibility for the manner in which the work is performed (*Ortega v Puccia*, 57 AD3d at 61).

In this case, plaintiff's accident did not involve any dangerous or defective condition on the subject premises. The accident instead involved the manner in which plaintiff performed his work, which was performed on equipment provided by plaintiff's employer, not by Tom Ford or Shawmut. As stated by the Court of Appeals, "the duty to provide a safe place to work is not breached when the injury arises out of a defect in the subcontractor's own plant, tools and methods, or through negligent acts of the subcontractor occurring as a detail of the work" (*Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d 136, 145). In addition, while a subcontractor must furnish safe ladders and scaffolds to its employees, a subcontractor's failure to provide safe appliances does not render the "premises" unsafe or defective. The ladder at issue should instead be viewed as a device involving the methods and means of the work. Under such circumstances, Labor Law § 200 imposes no liability upon owners (see *Persichilli v Triborough Bridge & Tunnel Auth.*, 16 NY2d at 146), absent evidence of the owner's authority to supervise or control the manner and methods of the work.

Here, there is nothing in the record to indicate that Tom Ford or Shawmut either had the authority to supervise or control the manner or method by which plaintiff performed his work or provided the subject ladder. In opposition, plaintiff failed to rebut Tom Ford and Shawmut's proof that they lacked such authority. In addition, "to the extent that the defendants had general supervisory authority over the work, this was insufficient in itself to impose liability under the Labor Law." (*Fucci v Plotke*, 124 AD3d 835, 836-837 [2d Dept 2015]; *Sanchez v Metro Builders Corp.*, 136 AD3d 783 [2d Dept 2016].) Thus, plaintiff failed to satisfy the requisite elements of Labor Law § 200 (see *Dupkanicova v Vasiloff*, 35 AD3d 650, 651; *Reilly v Loreco Constr.*, 284 AD2d 384, 385). Manhattan Demolition's opposition similarly fails to rebut the showing of proof.

Accordingly, the branch of the motion to dismiss the causes of action based on Labor Law § 200 and negligence is granted. In light of this Court's decision and order, dated June 16, 2016, the branch of the motion that seeks to dismiss the cross claims against moving defendants is denied.

With respect to the branch of the motion seeking summary judgment on the third-party action, Tom Ford and Shawmut contend that they are entitled to contractual indemnification from third-party defendant Manhattan Demolition pursuant to their agreement.

"[A] party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefor" (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 659 [2d Dept 2014]).

As movant has failed to establish that it is free from negligence, the branch of the motion seeking contractual indemnification is denied. (*Rodriguez v Flushing Town Center III, L.P.*, 133 AD3d 647, 647-648 [2d Dept 2015]; *Gonzalez v Magestic Fine Custom Home*, 115 AD3d 796 [2d Dept 2014].) Therefore, it is unnecessary to reach the question of whether the third party defendant's papers are sufficient to raise a triable issue of fact. (*see Coscia v 938 Trading Corp.*, 283 AD2d 538 [2d Dept 2001].)

Accordingly, the branch of the motion for summary judgment on their claim for contractual indemnification is denied.

The branch of the motion for summary judgment on the third party claim for insurance coverage against Manhattan Demolition is denied. In accordance with the agreement between the parties, Manhattan Demolition demonstrated its compliance with the requirement to obtain insurance. Third party plaintiffs do not contest this showing in reply.

This constitutes the Decision and Order of the Court.

Dated: June 17, 2016

Denis J. Butler, J.S.C.

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