Carriere v Bonefish Grill, LLC
2018 NY Slip Op 30281(U)
January 11, 2018
Supreme Court, New York County
Docket Number: 154297/2013
Judge: Gerald Lebovits
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NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: IAS PART 7

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MICHAEL CARRIERE and
LORI CARRIERE,

Plaintiffs,

-against-

BONEFISH GRILL, LLC and
CROSSECTION, INC.,

Defendants.

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CROSSECTION, INC.,

Third-Party Plaintiff,

-against-

SOUZA DRYWALL COMPANY, INC.,

Third-Party Defendant.

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Index Number:
154297/2013
Motion seq. no. 006

Gerald Lebovits, J.:

Defendant Crossection, Inc. (Crossection) moves under CPLR 3212 for summary judgment to dismiss plaintiffs' complaint against it and for summary judgment against Souza Drywall Company, Inc. (Souza Drywall) on its claims for contractual and common-law indemnification. Souza Drywall cross-moves for summary judgment under CPLR 3212 to dismiss the claims against it.

Underlying Allegations

Plaintiff Michael Carriere alleges that, on January 17, 2013, he was working as a union representative employed by District Council 9 Painters Union (DC 9) (bill of particulars, item 10; plaintiff EBT at 8, 10, 76). He states that as part of his duties to ensure that Souza Drywall was using union labor, he went to a restaurant in the process of construction known as Bonefish Grill (Bonefish), located in the Ridgefield Shopping Center (the Mall), Yonkers, New York (bill of particulars, items 1-2; plaintiff EBT at 13-16).

Plaintiff states that after speaking with Gilbert Souza, the owner of Souza Drywall, and briefly to the workers, he then spoke with Charlie Hartman, the supervisor of Crossection, the

general contraction of the project (the Project) to build Bonefish (*id.* at 20, 28-29). He further states that, after leaving the building, he and Hartman were walking on the sidewalk inside the Mall, a narrow pathway which was cleared of snow (*id.* at 33-35). Plaintiff asserts that after walking about three feet, he slipped and fell on the snow and ice, causing him injuries to his left elbow and left shoulder (bill of particulars, items 3, 16; plaintiff EBT at 37-38, 49, 52, 55, 70-72, 99-11).

Plaintiff states that he was not supervised in the performance of his work by either Souza Drywall or Crossection (*id.* at 86-87). Plaintiff also presented the one paragraph affidavit of Joseph Donofrio, a drywall finisher, who states that he was working on the Project and he saw Crossection laborers "attempting to clean up the snow around [Bonefish] . . . anytime it snowed". Plaintiff has brought claims under Labor Law §§ 240 (1), 241, and various regulations under it, and regulations under O.S.H.A., Labor Law § 200, and common-law negligence. Plaintiff Lori Carriere is plaintiff's wife and her claims are derivative (Lori Carriere EBT at 4).

In support of its motion for summary judgment, Crossection has presented the testimony of Souza, the sole owner and president of Souza Drywall (Souza EBT at 8) and Paul Petruzelli , an employee of Bonefish Grill, LLC (Grill LLC (Petruzelli EBT at 7-10). Crossection states that it was the general contractor on the Project, pursuant to a written contract with Grill LLC (the Prime Contract), and that Souza Drywall was a subcontractor on the Project for carpentry and drywall, pursuant to a written contract between Crossection and Souza Drywall (the Souza Subcontract) (Petruzelli EBT at 7, 9, 16; Souza EBT at 11-12, 33, 83).

Crossection contends that plaintiff was at the Mall to ensure that Souza Drywall was using union labor in its work on the Project (*id.* at 40-41, 45-47, 79, 96). It states that it did not instruct plaintiff or Souza in how to perform their work, but only directed the order in which the work was to be performed (*id.* at 29). It further states that plaintiff did not perform any work or labor on the Project (plaintiff EBT at 86). Crossection further asserts that it had no responsibility for snow and ice removal inside the Mall and that was performed by the Mall's owner, Forest City Ratner (Souza EBT at 70). It also states that there were no complaints to it regarding snow and ice conditions inside the Mall near Bonefish (*id.* at 68).

Crossection also notes that the Souza Subcontract contains a provision (the Indemnity Clause) requiring Souza Drywall to "defend, indemnify and hold harmless [Crossection] . . . from and against all claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or related to, or alleged to arise out of or relate to, the performance or nonperformance of [Souza Drywall's] work."

By order dated March 9, 2016, the court precluded Crossection from offering the testimony of any of its former employees because it had failed to produce a witness for deposition. The action and all cross-claims against Grill LLC were discontinued by stipulation dated March 21, 2016.

Summary Judgment Standard

A party seeking summary judgment must make a prima facie case showing that it is entitled to judgment as a matter of law by proffering sufficient evidence to demonstrate the absence of any material issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the movant fails to make this showing, the motion must be denied (*id.*). Once the movant meets its burden, then the opposing party must produce evidentiary proof in admissible form sufficient to raise a triable issue of material fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding the motion, the court must draw all reasonable inferences in favor of the nonmoving party and deny summary judgment if there is any doubt as to the existence of a material issue of fact (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]; *Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]). "[I]ssues as to witness credibility are not appropriately resolved on a motion for summary judgment" (*Santos v Temco Serv. Indus.*, 295 AD2d 218, 218-219 [1st Dept 2002]; *accord Santana v 3410 Kingsbridge LLC*, 110 AD3d 435, 435 [1st Dept 2013]).

Labor Law § 240 (1)

Labor Law § 240 (1) (the Scaffold Law) provides, in pertinent part:

> "All contractors and owners . . . 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 Scaffold Law is to be liberally construed to accomplish its purpose, which is to protect workers against the special hazards and risks involved in elevation differentials, by placing responsibility for safety practices at building construction sites on owners and contractors *(Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-513 [1991]). However, "[a] fall from a ladder does not in and of itself establish that the ladder did not provide appropriate protection" (*Campos v 68 E. 86th St. Owners Corp.*, 117 AD3d 593, 593-594 [1st Dept 2014], *citing Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 288-289 [2003]). Also, "courts must take into account the practical differences between 'the usual and ordinary dangers of a construction site, and . . . the extraordinary elevation risks envisioned by [the Scaffold Law]'" (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011] [internal citation omitted]).

Labor Law § 241 (6)

Labor Law § 241 provides:

> "All contractors and owners and their agents . . . when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:
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> * * *
>
> "[6] All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to [workers] . . . [in accordance with rules promulgated by the Commissioner of Labor]."

A cause of action under Labor Law § 241 (6) must allege violation of a specific, rather than a general, safety standard set forth in 12 NYCRR Part 23, the New York State Industrial Code, (the Code), and that this violation was a proximate cause of the accident (*Ross v Curtis-Palmer Hydro-Elec. Co.,* 81 NY2d 494, 501-505 [1993]).

Labor Law §§ 240 (1) and 241 (6) apply to owners and contractors because they are "'best situated to bear [the] responsibility [for the safety of workers]'" (*Nicometi v Vineyards of Fredonia, LLC*, 25 NY3d 90, 96 [2015], quoting *Ross*, 81 NY2d at 500).

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of common-law negligence and, to be held liable, a party must have the authority to control the activity that caused the plaintiff's injury where the claim relates to the means and methods of the work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878 [1993]). There is no liability under this section of the Labor Law for an owner or general contractor that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]). "An implicit precondition to [the duty under Labor Law § 200] to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1st Dept 2012]). An owner may also have liability under Labor Law § 200 where it has "actual or constructive notice of the hazardous condition" (*Garcia v DPA Wallace Ave. I, LLC,* 101 AD3d 415, 417 [1st Dept 2012]; *accord Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 [1st Dept 2010]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350-351 [1st Dept 2006]). But "[t]he label of construction manager versus general

contractor is not necessarily determinative ... [A party will be considered the agent of the owner or general contractor if it is the] coordinator and overall supervisor for all the work being performed on the job site" (*Walls v Turner Constr. Co.*, 4 NY3d 861, 864 [2005]).

Discussion

Crossection contends that the special elevation-related risks contemplated by the Scaffold Law are not applicable to this case, that the Code violations of 23-1.5, 23-1.7, 23-1.30, 23-2.1 are either too general or inapplicable, that O.S.H.A. claims are not cognizable under Labor Law § 241 (6), that plaintiff is not among the class of workers protected by the Labor Law, and that because it neither supervised nor controlled plaintiff's work nor was aware of the allegedly dangerous condition, plaintiff's Labor Law § 200 and common-law negligence claims against it should be dismissed. It also seeks summary judgement against Souza Drywall pursuant to the Indemnity Clause.

Souza Drywall has cross-moved for summary judgment dismissing plaintiffs' claims against it "incorporat[ing] the arguments advanced by [Crossection's attorney]" (Stewart affirmation, ¶ 4). It notes that Souza Drywall was the drywall contractor and had no authority to, and did not, supervise plaintiff's work. It also contends that Crossection's motion for summary judgment on indemnification against it should be denied because "[n]egligence, . . . if established, . . . would preclude summary judgment" (id., ¶ 20).

Plaintiffs have stated that they do not oppose the dismissal of the Scaffold Law claim against all defendants (Mayer affirmation, ¶2) and they do not oppose dismissal of the claims under Labor Law § 241 (6) for all regulations except section 23-1.7 (d), and the claims for violating O.S.H.A. regulations (*id.*, ¶ 32). Consequently, the portion of Crossection's motion and Souza Drywall's cross-motion that seeks summary judgment dismissing plaintiff's claims under Labor Law § 240 (1) and Labor Law § 241 (6), except for claims under section 23-1.7 (d) and the claims for violating O.S.H.A. regulations is granted without opposition.

Plaintiffs have not contested that Souza Drywall was the drywall subcontractor and it neither controlled nor supervised plaintiff's work. Accordingly, the portion of Souza Drywall's cross-motion that seeks dismissal of plaintiff's claims against it under Labor Law § 200 and common-law negligence must be granted (*see Lombardi*, 80 NY2d at 295; *Russin*, 54 NY2d at 317). Plaintiffs have also not contested that Souza Drywall is not an owner or contractor with responsibility for the safety of workers at a construction site (*see Nicometi*, 25 NY3d at 96). Consequently, the portion of Souza Drywall's cross motion that seeks dismissal of plaintiff's claim under Labor Law § 241 must be granted.

Plaintiffs have also not contested that Crossection did not supervise or direct plaintiff in the performance of his work. Therefore, the portion of Crossection's motion for summary judgment that seeks dismissal of plaintiff's claims against it under Labor Law § 200 and common-law negligence, based upon the means and methods of the work, is granted.

Code Section 23-1.7 (d) provides that:

> (d) Slipping hazards. Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

Plaintiffs assert that because plaintiff slipped and fell while he was leaving the Mall and his work related to the Project, they have raised an issue of fact about whether Crossection violated the slipping hazard regulation. They also contend that the Donofrio affidavit raises an issue of fact as to Crossection's actions in cleaning snow and ice in the Mall at the job site and, thereby, its responsibility under Labor Law § 200 and common-law negligence.

"[I]n order to invoke the protections afforded by the Labor Law and to come within the special class for whose benefit liability is imposed upon contractors, owners and their agents, a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent" (*Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 576-577 [1990] internal citations omitted; *accord Spadola v 260/261 Madison Equities Corp.*, 19 AD3d 321, 323 [1st Dept 2005], *lv denied* 6 NY3d 770 [2006]). "Although an individual need not actually be engaged in physical labor to be entitled to coverage under the Labor Law, . . . [he must] perform work integral or necessary to the completion of the construction project . . . [or be] 'a member of a team that undertook an enumerated activity under a construction contract'" (*Coombs v Izzo Gen. Contr., Inc.*, 49 AD3d 468, 468-469 [1st Dept 2008], *quoting Prats v Port Auth. of N.Y. & N.J.*, 100 NY2d 878, 882 [2003]; *cf. DeSimone v City of New York*, 121 AD3d 420, 421 [1st Dept 2014], where an on-site project manager was held to be within the scope of Labor Law § 241 (6), because his job duties "related to ongoing work on the construction project"). Put another way, "the Legislature's principal objective and purpose underlying [Labor Law §§ 200, 240 and 241] was to provide for the health and safety of employees" (*Mordkofsky*, 76 NY2d at 577). In this case, plaintiff did not perform any work on the Project nor did he inspect any work on the Project (plaintiff EBT at 86-87).

Because plaintiff was not an employee of the owner of the Mall, Crossection, the general contractor, or even Souza Drywall, the drywall subcontractor, but rather of DC 9, and his work of ensuring that Souza Drywall used union labor was not "integral or necessary to the completion of the [Project]," his claims under Labor Law §§ 241 (6) and 200 cannot be sustained" (*Coombs*, 49 AD3d at 468-469). Accordingly, the portion of Crossection's motion that seeks summary judgment dismissing plaintiff's claims under Labor Law §§ 241 and 200 must be granted. Because Lori Carriere's claims are derivative, her claims are also dismissed.

Crossection also seeks summary judgment on its indemnification claim against Souza Drywall, based upon the Indemnity Clause in the Souza Subcontract. Souza Drywall's opposition

was that negligence by Crossection, if established, would preclude summary judgment. In light of the court's determination above dismissing plaintiffs' claims against Crossection, Crossection is entitled to enforce its right to indemnity under the Souza Subcontract, and the portion of its motion for summary judgment against Souza Drywall on this claim is granted. The amount cannot be determined on the papers and it is, therefore, referred to a special referee for a hearing.

Accordingly it is therefore,

ORDERED that the portion of Crossection, Inc.'s motion for summary judgment underCPLR 3212 to dismiss plaintiff Michael Carriere's claims against it under Labor Law § 240 (1) and Labor Law § 241 (6), except for Industrial Code § 23-1.7(d) and the claims under O.S.H.A., is granted without opposition; and it is further

ORDERED that the portion of Crossection, Inc.'s motion for summary judgment under CPLR 3212 to dismiss plaintiff Michael Carriere's claims under Labor Law § 241 (6) in relation to Industrial Code § 23-1.7 (d), Labor Law § 200, and common-law negligence is granted; and it is further

ORDERED that the portion of Souza Drywall Company Inc.'s cross-motion that seeks summary judgment underCPLR 3212 to dismiss plaintiff Michael Carriere's claims against it under Labor Law § 240 (1), Labor Law § 241, and all regulations under it and claims under O.S.H.A. is granted without opposition; and it is further

ORDERED that the portion of Souza Drywall Company, Inc.'s cross-motion that seeks summary judgment under CPLR 3212 dismissing plaintiff Michael Carriere's claims against it under Labor Law § 200 and common-law negligence is granted; and it is further

ORDERED that the claims of plaintiff Lori Carriere are dismissed; and it is further

ORDERED that the portion of Crossection, Inc.'s motion for summary judgment under CPLR 3212 on its claim against Souza Drywall Company, Inc. for contractual indemnification is granted; and it is further

ORDERED upon service of a copy of this order with notice of entry on the Office of the Special Referee, 60 Centre Street, Room 119, the clerk shall place the matter on the calendar for assignment to a referee to hear and report with recommendations the amount of expenses including attorney fees for Crossection on its claim for indemnification against Souza Drywall Company, Inc.; and it is further

ORDERED that Crosssection, Inc. serve a copy of this decision and order on all parties

and on the County Clerk's Office, which is directed to enter judgment accordingly, with costs and disbursements as taxed by the Clerk, upon submission of an appropriate bill of costs.

Dated: January 11, 2018

J.S.C.