Sanchez v 11a Spencer Owner
2021 NY Slip Op 30434(U)
February 16, 2021
Supreme Court, Kings County
Docket Number: 501580/2018
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73

Index No.: 501580/2018
Motion Date: 11-9-20
Mot. Seq. No.: 3-5

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SINENCIO A. SANCHEZ,

Plaintiff,

-against-

DECISION/ORDER

11A SPENCER OWNER,

Defendant.

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11A SPENCER OWNER, LLC,

Third-Party Plaintiff,

-against-

BUILDING MAINTENANCE & RENOVATION, LLC,

Third-Party Defendant.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 48-64, 70-77, 80-113, the motions and cross-motions are decided as follows:

In this action to recover damages for personal injuries, the following motions and cross-motions are before the Court:

In Mot. Seq. No. 3, the plaintiff, SINENCIO A. SANCHEZ, moves for an order pursuant to CPLR § 3212 granting him summary judgment against the defendant, 11A SPENCER OWNER ("Spencer"), on his causes of action under Labor Law §§240(1); 241(6), 200 and the common law.

In Mot. Seq. No. 4, defendant Spencer cross-moves for an order pursuant to CPLR § 3212 granting it summary judgment dismissing plaintiff's complaint in its entirety, granting it summary judgment against third-party defendant BUILDING MAINTENANCE & RENOVATION ("BMR") on its claims for contractual indemnification and breach of contract to procure insurance and denying plaintiff's motion in its entirety.

In Mot. Seq. No. 5, BMR cross-moves for an order pursuant to CPLR § 3212 dismissing Spencer's claims for common law indemnification, common law contribution and contractual indemnification.

The motion and cross-motions are consolidated for disposition.

Background:

The plaintiff, Sinencio Sanchez, commenced this action against defendant Spencer claiming that he was injured when he fell from the top rung of an unsecured A-frame ladder while performing work at the premises located at 11A Spencer Place, Brooklyn, New York. Defendant Spencer is the owner of the premises. Plaintiff maintains that at the time of the accident, he was standing on the top rung of the ladder and was attempting to screw a piece of sheet rock to the ceiling. He claims that when the ladder suddenly moved, he was caused to fall to the ground.

The plaintiff commenced this action against defendant Spencer alleging causes of action pursuant to Labor Law §§ 200, 240(1), 241(6) and a cause of action sounding in common-law negligence. Defendant Spencer, in turn, commenced a third-party action against BMR, plaintiff's employer, seeking, *inter alia*, contractual, and common-law indemnification, contribution and damages for BMR's alleged breach of contract in failing to procure insurance for Spencer.

At his deposition, plaintiff testified as follows: On the day of the accident, the plaintiff was installing sheetrock on the ceiling of the third floor of the premises. The height from the floor to the ceiling was approximately 11 feet. Even though installing the sheetrock on the ceiling involved the use of both hands, plaintiff was only given a 5-foot A-frame ladder.

The ladder did not have any rubber or stops at the bottom. Plaintiff's co-worker, Gabriel, was standing on a similar ladder positioned close by and was assisting the plaintiff in lifting the sheetrock and nailing it into the ceiling. In order to reach the height of the ceiling, the plaintiff testified that he had to stand on the 5th rung of the ladder. At the time of the accident, both of plaintiff's feet were positioned on the 5th rung while he held the sheet rock steady with his left hand and nailed it with his right hand. No other safety equipment was available on-site. The plaintiff was not offered a scaffold, brace, or panel holder to install the sheet rock.

Immediately before the accident, the plaintiff was holding the sheet rock and had begun to nail it in. Without notice, the ladder suddenly moved, throwing plaintiff against the wall and

then to the ground below. He maintained that the ladder had lost strength and one of its legs bent, which caused it to move.

A. Plaintiff's Motion for Summary Judgment under Labor Law § 240(1):

" 'Labor Law § 240(1) imposes upon owners and general contractors, and their agents, a nondelegable duty to provide safety devices necessary to protect workers from risks inherent in elevated work sites' " (*Corchado v. 5030 Broadway Props., LLC,* 103 A.D.3d 768, 768, 962 N.Y.S.2d 185, quoting *McCarthy v. Turner Constr., Inc.,* 17 N.Y.3d 369, 374, 929 N.Y.S.2d 556, 953 N.E.2d 794). "To impose liability pursuant to Labor Law § 240(1), there must be a violation of the statute and that violation must be a proximate cause of the plaintiff's injuries" (*Nunez v. City of New York,* 100 A.D.3d 724, 724, 954 N.Y.S.2d 163 [internal quotation marks omitted]). "Where there is no statutory violation, or where the plaintiff is the sole proximate cause of his or her own injuries, there can be no recovery under Labor Law § 240(1)" (*Treu v. Cappelletti,* 71 A.D.3d 994, 997, 897 N.Y.S.2d 199; *see Blake v. Neighborhood Hous. Servs. of N.Y. City,* 1 N.Y.3d 280, 288, 771 N.Y.S.2d 484, 803 N.E.2d 757).

Although "[a] fall from a ladder, by itself, is not sufficient to impose liability under Labor Law § 240(1)," liability will be imposed when the evidence shows "that the subject ladder was ... inadequately secured and that ... the failure to secure the ladder, was a substantial factor in causing the plaintiff's injuries" (*Melchor v. Singh,* 90 A.D.3d 866, 868, 935 N.Y.S.2d 106; *see Canas v. Harbour at Blue Point Home Owners Assn., Inc.,* 99 A.D.3d 962, 953 N.Y.S.2d 150).

"Here, the plaintiff made a prima facie showing of his entitlement to judgment as a matter of law on the issue of liability under that statute by showing that, although he was provided with a ladder, as required by the statute, the ladder was not secured so as to prevent it and him from falling" (*Baugh v. New York City Sch. Const. Auth.,* 140 A.D.3d 1104, 1105–06, 33 N.Y.S.3d 472, 473–74, *citing Canas v. Harbour at Blue Point Home Owners Assn., Inc.,* 99 A.D.3d at 963, 953 N.Y.S.2d 150). In opposition to the plaintiff's prima facie showing, neither Spencer or BMR raised a triable issue of fact as to whether the plaintiff's alleged misuse of the ladder was the sole proximate cause of the accident (*see Canas v. Harbour at Blue Point Home Owners Assn.,*

Inc., 99 A.D.3d at 964, 953 N.Y.S.2d 150; *Hossain v. Kurzynowski,* 92 A.D.3d 722, 939 N.Y.S.2d 89). "Since the plaintiff was provided only an unsecured ladder and no safety devices, the plaintiff cannot be held solely at fault for his injuries (*Baugh,* 140 A.D.3d at 1106, 33 N.Y.S.3d at 474 [citations omitted]).

Accordingly, that branch of plaintiff's motion for summary judgment against Spencer on his claim pursuant to Labor Law § 240(1) is **GRANTED** and those branches of Spencer's and BMR's motions to dismiss the Labor Law § 240(1) claim is **DENIED**. In light of this determination, the remaining branches of plaintiff's motion and that branch of Spencer's for summary judgment dismissing plaintiff's Labor Law § 241(6) is moot.

B. Spencer's Motion for Summary Judgment Dismissing Plaintiff's Claims Under Labor Law § 200(1) and the Common Law:

Contrary to plaintiff's contention, plaintiff's accident arose out of the means and methods of his work and not as a result of a defective condition on the premises. Labor Law § 200 codifies the common-law duty imposed on an owner or a general contractor to provide construction site workers with a safe place to work (*see Niewojt v. Nikko Constr. Corp.,* 139 A.D.3d 1024, 1025, 32 N.Y.S.3d 303; *LaRosa v. Internap Network Servs. Corp.,* 83 A.D.3d 905, 908–909, 921 N.Y.S.2d 294). Where a plaintiff's claims implicate the means and methods of the work, an owner or a contractor will not be held liable under Labor Law § 200 unless it had the authority to supervise or control the performance of the work. General supervisory authority to oversee the progress of the work is insufficient to impose liability (*see LaRosa v. Internap Network Servs. Corp.,* 83 A.D.3d at 909, 921 N.Y.S.2d 294; *see also Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d at 505, 601 N.Y.S.2d 49, 618 N.E.2d 82). " 'A defendant has the authority to control the work for the purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed' " (*Erickson v. Cross Ready Mix, Inc.,* 75 A.D.3d 519, 522, 906 N.Y.S.2d 284, quoting *Cambizaca v. New York City Tr. Auth.,* 57 A.D.3d 701, 702, 871 N.Y.S.2d 220; *see Ortega v. Puccia,* 57 A.D.3d 54, 866 N.Y.S.2d 323). If the challenged means and methods of the work are those of a subcontractor, and the owner or contractor exercises no supervisory control over the work, no liability attaches under Labor Law § 200 or the common law (*see LaRosa v. Internap Network Servs. Corp.,* 83 A.D.3d at 909, 921 N.Y.S.2d 294; *see also Ross v. Curtis–Palmer Hydro–Elec. Co.,* 81 N.Y.2d at 505, 601 N.Y.S.2d

49, 618 N.E.2d 82; *Sullivan v. New York Athletic Club*, 162 A.D.3d 955, 958, 80 N.Y.S.3d 93, 96).

Here, Spencer made a prima facie showing of entitlement to judgment as a matter of law dismissing the Labor Law § 200 and common-law negligence causes of action by demonstrating that it did not have authority to supervise or control the performance of plaintiff's work. The plaintiff failed to raise a triable issue of fact. Accordingly, that branch of Spencer's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is **GRANTED.**

C. Spencer's Motion for summary judgment against BMR on its claim for contractual indemnification:

The contract between 11A Spencer and BMR contains the following provision:

> To the fullest extent permitted by law, the Contractor shall indemnify and hold harmless the owner and their agents from and against claims, damages, loss and Expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Contractors work or work of the subcontractors hired by the Contractor, provided that such claim, damage, loss or expense is attributable to bodily injury . . . cause in whole or in part by negligent acts or omissions of the Contractor . . . ."

"The right to contractual indemnification depends upon the specific language of the contract," and "[t]he promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances" (*George v. Marshalls of MA, Inc.*, 61 A.D.3d 925, 930, 878 N.Y.S.2d 143, see also, *LaRosa v. Internap Network Servs. Corp.*, 83 A.D.3d 905, 909, 921 N.Y.S.2d 294, 299). BMR correctly contends that its obligation to indemnify Spencer under the contract is dependent upon a determination that plaintiff's injuries were due to BMR's negligence. The record does not establish BMR's negligence as a matter of law. Accordingly, that branch of Spencer's motion for summary judgment on its claim against BRM for contractual indemnity is **DENIED.**

D. Spencer's Motion for summary judgment against BMR on its claim for breach of contract to procure insurance:

The contract between Spencer and BMR obligated BMR to procure Commercial General Liability insurance in the amount of $1,000,000 per occurrence and to name Spence as an additional insured. In this regard, the contract provided:

> The Contractor [BMR] shall purchase and maintain insurance of the following types of coverage and limits of liability: Commercial General Liability – including $1,000,000 Each Occurrence Contractual Liability $2,000,000 Aggregate, PER PROJECT Workers' Compensation and Employers Liability – $1,000,000 Each Employee. The Owner, their agents, officers, directors and employees are to be named as an additional insured on a primary, noncontributory basis to the Contractor's Comprehensive General Liability using appropriate ISO forms that include Premises Operations Liability, Contractual Liability, Advertising and Personal Injury Liability and Products/Completed Operations Liability, with Completion Operations Additional Insured status (CG2010 or CG2037) or by using a company, specific endorsement that provides equivalent protection. The owner, their agents, officers, directors, and employees shall be named as additional insured under all Comprehensive General Liability policies of subcontractors hired by the Contractor, Contractor shall provide waiver of subrogation for Owners and their agents by endorsement to the GL policy. 2.3 Certificates of Insurance shall be filed with the Owner prior to commencement of the Contractor and all subcontractor's work. The certificates and insurance policies required by Article 2 shall contain a provision that coverage afforded under the policies will not be canceled or allowed to expire until at least 30 days' prior written notice has been given to the Owner. If any of the foregoing insurance coverages are required to remain in force after final payment and are reasonably available, an additional certificate evidencing continuation of such coverage shall be submitted with the final application for payment as required. If any information concerning reduction of coverage is not furnished by the insurer, it shall be furnished by the Contractor with reasonable promptness according to the Contractor's information and belief.

"A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required that such insurance be procured and that the provision was not complied with." (R*odriguez v. Savoy Boro Park Assocs. Ltd. P'ship,* 304 A.D.2d 738, 739).

Here, while the contract between Spencer and BMR required BMR to procure insurance for Spencer, there has been no showing that BMR breached its obligation to do so. Accordingly, that branch of Spencer's motion for summary judgment against BMR on its failure to procure insurance claim is **DENIED.**

E. BMR's Cross-Motion for Summary Judgment Dismissing Spencer's Claims for Common Law Indemnification and Contribution:

The Workers' Compensation Law limits third party claims for common-law indemnity and contribution against employers in personal injury actions to cases in which the employee, acting within the scope of his or her employment, sustained a statutorily enumerated "grave injury" (Workers' Compensation Law § 11; Castillo v. 711 Group, Inc., 41 AD3d 77, 79 [2007], citing *Castro v. United Container Mach. Group, Inc.*, 96 N.Y.2d 398, 401 [2001]; *see also Angwin v. SRFP Partnership, L.P.*, 285 A.D.2d 568, 569 [2001]). Here, since the plaintiff is not alleging a grave injury as defined in Workers' Compensation Law § 11, that branch of BMR's motion for summary judgment dismissing the third-party claims for common-law indemnity and contribution is **GRANTED**.

F. BMR's Cross-Moves for Summary Judgment Dismissing Spencer's Claims for Contractual Indemnification:

As discussed above, BMR's obligation to indemnify Spencer pursuant to its contract with Spencer is contingent upon a finding that BMR's negligence was a substantial factor in causing plaintiff's accident. Since there are triable issues of fact as to whether BMR's negligence was a substantial factor in causing the accident, that branch of BMR's motion to dismiss Spencer's third-party claim for contractual indemnification is **DENIED**.

Accordingly, it is hereby

ORDRED that the motions and cross-motions are decided as indicated above.

This constitutes the decision and order of the Court.

Dated: February 16, 2021

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020