Caceres v 1000 Dean LLC
2021 NY Slip Op 30750(U)
March 12, 2021
Supreme Court, Kings County
Docket Number: 504666/2016
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS, PART 73
----------X
RICARDO CACERES,

Plaintiff,

-against-

1000 DEAN LLC,

Defendant.
----------X
1000 DEAN LLC,

Third-Party Plaintiff,

-against-

BERGEN PROJECTS LLC,

Third-Party Defendant.
----------X

Index No.: 504666/2016
Motion Date: 11-23-20
Mot. Seq. No.: 10-14

DECISION/ORDER

Upon the foregoing papers, which are filed with NYCEF as item Nos. 203-334, the motions are decided as follows:

In this action to recover damages for personal injuries, the following motions are before the court: In Mot. Seq. No. 10, defendant/third party plaintiff, 1000 DEAN LLC (hereinafter "1000 Dean"), moves to re-settle the Order of this Court dated October 3, 2019 pursuant to CPLR §§ 2001, 2005, 2221 and 5015 to clarify that plaintiff Ricardo Caceres ("plaintiff") was only granted leave to assert a new cause of action under Labor Law § 240(1) and not any other section. In Mot. Seq. No. 11, 1000 Dean moves for an order pursuant to CPLR 2004 extending its time to conduct plaintiff's deposition as set forth in the October 3, 2019 Order and pursuant to CPLR 3124 compelling plaintiff to appear for a deposition as required by said order. In Mot. Seq. No. 12, 1000 Dean moves for an order a). granting leave to renew that branch of the Court's October 3, 2019 Order that denied 1000 Dean summary judgment on the ground that it was an out of possession landlord and thus did not owe a duty to the plaintiff, and upon renewal, granting the motion on that ground; b). granting leave to renew that branch of the Court's October 3, 2019 Order that denied 1000 Dean summary judgment on the ground that it did not

create the condition that allegedly caused plaintiff's accident or have actual or constructive notice of it, and upon renewal, granting the motion, c). granting it summary judgment dismissing plaintiff's Labor Law § 240(1) claim and, should it be found to be plead, dismissing plaintiff's Labor Law § 241(6) causes of action; d). granting leave to renew that branch of the Court's October 3, 2019 Order that denied 1000 Dean summary judgment on its third-party claims for contractual indemnification and common law indemnification against Bergen Projects LLC ("Bergen"), and upon renewal, granting the motion. In Mot. Seq. No. 13, third-party defendant Bergen moves for an order granting summary judgment dismissing the third-party complaint in its entirety. Mot. Seq. No. 14 has been withdrawn. The motions are consolidated for disposition.

Background:

The plaintiff commenced this action claiming that he suffered injuries on January 18, 2016, when he fell from a 10-foot A-frame ladder below while cleaning an exterior window of a restaurant. At the time of the accident, he was employed as a porter by third-party defendant Bergen, the entity who owned and operated the restaurant. Defendant 1000 Dean owned the building. The gist of plaintiff's claim is that he was caused to fall because the bottom of the ladder slid on an accumulation of ice on the sidewalk. He maintains that the sidewalk was dry when he opened the ladder that day and that the ice formed sometime thereafter because someone, whom he identified as the superintendent of the building, hosed down the sidewalk when the outside temperature was below freezing.

1000 Dean previously moved for summary judgment dismissing the complaint and various other relief and in response, the plaintiff cross-moved to amend his complaint to assert a

cause of action pursuant to Labor Law 240(1). The Court granted plaintiff's motion to amend his complaint and denied 1000 Dean's motion, without prejudice, and granted leave to renewal the motion after a further deposition of plaintiff on his Labor Law 240(1) was held.

Mot. Seq. No. 10

When this court issued the order dated October 3, 2019 granting plaintiff leave to amend his complaint to assert a cause of action under Labor Law 240(1), the court deemed the proposed amended complaint annexed to plaintiff's moving paper served nun pro tunc. The proposed amended pleading, however, in addition to a alleging a cause of action pursuant to Labor Law 240(1), alleged additional causes of action, including causes of action pursuant to Labor Law Section 200, 241(6), 241-a and Rule 23 of the Industrial Cod. Plaintiff was not granted leave to assert these latter causes of action. The amended complaint that was annexed to plaintiff's motion to amend went beyond the relief the plaintiff requested and was awarded and does not correctly reflect the Court's order. The motion of 1000 Dean to resettle the October 3, 2019 order is therefore granted and that part of the order deeming the proposed amended complaint served nunc pro tunc is hereby deleted from the order and the plaintiff's is directed to file and serve, within 20 days hereof, an amended complaint consistent with the order deleting any causes of action other than causes of action pursuant to Labor Law 240(1) and common law negligence.

Mot. Seq. No. 11

Inasmuch as the plaintiff has now appeared for a further deposition, Mot. Seq. No. 11 is denied as moot.

Mot. Seq. No. 12

A. 1000 Dean's Claim That It Did Not Owe A Duty To The Plaintiff Because It Was An Out Of Possession Landlord:

There is no merit to 1000 Dean's claim that it did not owe the plaintiff a duty to maintain the sidewalk because it was an out of possession landlord with respect to the sidewalk because Bergen was required to maintain the sidewalk pursuant its lease with 1000 Dean. Administrative Code of the City of New York § 7–210 imposes a non-delegable duty upon owners of property to maintain an abutting sidewalk in a reasonably safe condition (*see* Administrative Code § 7–210[a], [b]). This non-delegable duty extends to out-of-possession landowners, and while out-of-possession landowners may shift the work of maintaining the sidewalk to another, they "cannot shift the duty, nor exposure and liability for injuries caused by negligent maintenance, imposed under [Administrative Code §] 7–210" (*Xiang Fu He v. Troon Mgt., Inc.*, 34 N.Y.3d 167, 174, 114 N.Y.S.3d 14, 137 N.E.3d 469; *Zamora v. David Caccavo, LLC*, 190 A.D.3d 895, 896, 136 N.Y.S.3d 751, 752). Even if, as 1000 Dean contends, plaintiff was required to plead defendant's violation of Administrative Code of City of New York § 7–210, plaintiff's reliance on this provision in opposition to defendant's motion for summary judgment was permissible since that doing so did not raise any new theory of liability or prejudice (see *Herrera v. Vargas*, 183 A.D.3d 542, 543, 124 N.Y.S.3d 675, 676). Accordingly, that branch of 1000 Dean's motion for leave to renew its prior motion for summary judgment dismissing plaintiff's complaint on the ground that it was an out-of-possession landlord and did not owe a legal duty to the plaintiff with respect to the sidewalk is granted, and upon renewal, the motion is denied on this ground.

B. Plaintiff's Common-Law Negligence Claims Against 1000 Dean:

While Administrative Code of the City of New York § 7–210 obligated 1000 Dean to maintain the sidewalk in the area of the accident, this provision does not impose strict liability upon property owners, and an injured party still has the obligation to prove the elements of negligence to demonstrate that an owner is liable (*see Gyokchyan v. City of New York*, 106 A.D.3d at 781, 965 N.Y.S.2d 521; *Martinez v. Khaimov*, 74 A.D.3d 1031, 1033, 906 N.Y.S.2d 274). Thus, to prevail on its summary judgment motion dismissing the common law claims of negligence, 1000 Dean was required to establish that it neither created the alleged hazardous condition nor had actual or constructive notice of its existence for a sufficient length of time to discover and remedy it (*see Weinberg v. 2345 Ocean Assoc., LLC*, 108 A.D.3d 524, 524–525, 968 N.Y.S.2d 551; *Gyokchyan v. City of New York*, 106 A.D.3d at 781, 965 N.Y.S.2d 521; *Martinez v. Khaimov*, 74 A.D.3d at 1033, 906 N.Y.S.2d 274).

Plaintiff contends that his accident was due to a hazardous icy condition on the sidewalk that was created by an employee of 1000 Dean when he hosed down the sidewalk in the area of the accident in below freezing weather. At his deposition, plaintiff testified as follows:

> Q. Do you know if anyone had done any working or cleaning or anything on the sidewalk before your accident on the date of your accident?
>
> A. Yeah.
>
> Q. Who?
>
> A. The super of the building. He hoses the front. We clean the front. We usually do it on Monday, but that day, he was doing it early.
>
> Q. Did you see the superintendent cleaning the sidewalk on the date of your accident?
>
> A. Yeah, around -- you can see -- like, in the restaurant, you look towards the street and you can see outside because everything is

covered with glass. And he was cleaning his area out in the front of the building.

Q. Now, when you say "his area," what did you mean by that?

A. I mean the sidewalk in the front of the building.

…

Q. Do you know the superintendent's name?

A. No, no.

Q. Do you know the company that he works for?

A. No.

Q. Have you ever spoken to this person? At any time.

A. No, just I see you. I greet you, hi and bye.

Q. Was this person wearing any type of uniform when you saw him cleaning the sidewalk on the date of your accident?

A. Yes. He had a light blue shirt with a name on it. I don't remember what it said. And he has -- what's it called. A navy blue working pants.

…

Q. When you mentioned the superintendent was cleaning the sidewalk, how was he cleaning it? What was he cleaning it with?

A. He was hosing it down like he regularly does.

With respect to the issue of constructive notice, the plaintiff testified as follows:

Q. When you put the ladder down approximately five minutes before your accident, did you put the ladder down on top of that piece of ice?

A. No, I didn't -- you can't -- it was -- I put the ladder down and I, you know, I locked it in form and just got up. You know, there weren't no ice. I didn't see ice.

Relying primarily on the deposition testimony and affidavit of Tamara Dupree, 1000 Dean's superintendent, 1000 Dean contends that the person described by the plaintiff was not one of its employees. She testified at a deposition that although 1000 Dean had a porter that washed the Dean Street sidewalk, which is not the sidewalk where plaintiff's accident took place,

he had light skin, black hair and did not have facial hair. She further testified that no one in 1000 Dean's employ matches the description given by the plaintiff of the person he saw hosing down the sidewalk and that no one from 1000 Dean cleans the sidewalk in the area of where plaintiff claims he fell. In the affidavit, she averred that no one in 1000 Dean's employ even cleaned the sidewalk on the day of the accident.

Here, inasmuch as the plaintiff claims that there was no ice on the sidewalk when he set up the ladder, which was approximately five minutes before the accident, 1000 Dean sufficiently demonstrated that it did not have constructive notice of the ice. The record also sufficiently demonstrated that 1000 Dean did not have actual notice of the ice. The plaintiff did not raise a triable issue of fact on these issues. However, in the Court's view, plaintiff's testimony was sufficient to create a triable issue of fact as to whether the person who hosed down the sidewalk was an employee of 1000 Dean. Accordingly, that branch of 1000 Dean's motion for leave to renew its prior motion for summary judgment dismissing plaintiff's common law claims is granted and upon renewal, the motion is denied.

C. Plaintiff's Claims Pursuant to Labor Law 240(1) and 241(6):

Labor Law § 240(1) imposes a non-delegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute (*see Rocovich v. Consolidated Edison Co*., 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932). To recover under the statute, a plaintiff must demonstrate that he or she was engaged in a covered activity - "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240[1] (emphasis added); *see Panek v. County of Albany*, 9 N.Y.2d 452, 457, 758 N.Y.S.2d 267, 788 N.E.2d 616 [2003]) - and must have suffered an injury as "the direct consequence of a failure to

provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865).

Here, while the plaintiff was engaged in the "cleaning" of a building at the time of the accident, not all cleaning activities are covered by the statute. Aside from commercial window cleaning, which is a covered activity (*see Broggy v. Rockefeller Group, Inc*., 8 N.Y.3d 675, 839 N.Y.S.2d 714, 870 N.E.2d 1144, *Swiderska v. New York Univ*., 10 N.Y.3d 792, 886 N.E.2d 155, 155-56), the Court of Appeals held “an activity cannot be characterized as "cleaning" under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project.” (*Soto v. 1 Crew Inc*., 21 N.Y.3d 562, 568-69, 998 N.E.2d 1045, 1049." Whether an activity constitutes "cleaning" within the meaning of Labor Law § 240(1) is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (id.)

Here, after reviewing all of the *Soto* factors and applying them to the facts of this case, the Court finds that 1000 Dean sufficiently demonstrated that the plaintiff was not engaged in “cleaning” within the meaning of Labor Law § 240(1). Clearly, the cleaning activity he was involved in at the time of the accident was routine, in the sense that it was the type of job that

occurred on a relatively frequent and recurring basis as part of the ordinary maintenance of the restaurant. The activity did not require specialized equipment or expertise or the unusual deployment of labor. Further, elevation risk that plaintiff was subject to in cleaning the window was similar to those inherent in typical domestic or household cleaning. Finally, the cleaning of the window did not occur in the context of ongoing construction, renovation, painting, alteration or repair of a building. The plaintiff failed to raise a triable issue of fact.

Accordingly, that branch of defendant 1000 Dean's motion for leave to renew the Court's October 3, 2019 Order addressing plaintiff's claim under Labor Law 240(1) is granted, and upon renewal, 1000 Dean's motion for summary judgment dismissing the Labor Law 240(1) claim is granted. Further, inasmuch as the plaintiff was not granted leave to amend his complaint to allege causes of action pursuant Labor Law 241(6), the Court need not address this claim.

C. 1000 Dean's Claim for Contractual and Common Law Indemnification Against Bergen:

The lease between 1000 Dean and Bergen required Bergen to procure general liability insurance in the amount of $1,000,000 per occurrence and $2,000,000 aggregate limit with respect to the maintenance, use and occupancy of the demised premises and required that 1000 Dean be named as an insured under the policy. The lease also required Bergen to repair and maintain the sidewalk.

Section 21(a) of the lease contained an indemnification clause running in favor of 1000 Dean which provided:

> Tenant will indemnify Landlord, it agents and employees against, and hold Landlord, its agents, and employees harmless from, any and all demands, claims, causes of action, fines, penalties, damages (including consequential damages), losses, liabilities, judgments, and expenses (including, without limitation, attorneys' fees and

> court costs) incurred in connection with or arising from: (1) the use or occupancy of the Demised Premises by Tenant or any person claiming under Tenant; (2) any activity, work or thing, done or permitted or suffered by Tenant in or about the Demised Premises; (3) any acts, omissions, or negligence of Tenant or any person claiming under Tenant or the contractors, agents, employees, invitees, or visitors of Tenant or any such person; (4) any breach, violation, or nonperformance by Tenant, any person claiming under Tenant or the employees, agents, contractors, invitees, or visitors of Tenant, or any such person of any term, covenant, or provision of this Lease or any law, ordinance, covenant, or provision of this Lease or any law, ordinance or governmental requirement of any kind; and/or (5) any injury or damage to the person, property or business of Tenant its employees, agents, contractors, invitees, visitors, or any other person entering upon the Demised Premises under the express or implied invitation of Tenant. If any action or proceeding is brought against Landlord, its employees or agents by reason of any such claim, Tenant, upon notice from Landlord, will defend the claim at Tenant's expense with counsel reasonably satisfactory to Landlord. Tenant will be responsible for Landlord's reasonable attorneys' fees and court costs hereunder whether such are suffered as a result of the assertion of liability against Landlord by a third party or the assertion of liability against Tenant by Landlord.

General Obligations Law § 5–321 provides that an agreement to exempt a lessor from its own negligence is void and unenforceable. While the language of the indemnification provision at issue is properly construed as exempting 1000 Bergen from its own negligence, "where, as here, the liability is to a third party, General Obligations Law § 5–321 does not preclude enforcement of an indemnification provision in a commercial lease negotiated at arm's length between two sophisticated parties when coupled with an insurance procurement requirement" (*Castano v. Zee-Jay Realty Co.*, 55 A.D.3d 770, 772, 866 N.Y.S.2d 700, 701, *Great N. Ins. Co. v. Interior Constr. Corp.*, 7 N.Y.3d 412, 417, 823 N.Y.S.2d 765, 857 N.E.2d 60; *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 397 N.Y.S.2d 602, 366 N.E.2d 263; *Schumacher v. Lutheran Community Servs.*, 177 A.D.2d 568, 576 N.Y.S.2d 162). As the *Castano* Court noted,

"in such circumstances, the landlord is not exempting itself from liability to the victim for its own negligence. Rather, the parties are allocating the risk of liability to third parties between themselves, essentially through the employment of insurance, and the courts do not, as a general matter, look unfavorably on agreements which, by requiring parties to carry insurance, afford protection to the public" (*Castano*, 55 A.D.3d at 772, 866 N.Y.S.2d at 702, *see also, Great N. Ins. Co. v. Interior Constr. Corp.*, 7 N.Y.3d 412, 417, 823 N.Y.S.2d 765, 857 N.E.2d 60; *Hogeland v. Sibley, Lindsay & Curr Co.*, 42 N.Y.2d 153, 397 N.Y.S.2d 602, 366 N.E.2d 263; *Schumacher v. Lutheran Community Servs., Inc.*, 177 A.D.2d 568, 576 N.Y.S.2d 162).

Here, the indemnification provision is not unenforceable pursuant to General Obligations Law § 5–321 even though it is properly construed as requiring Bergen to contractually indemnify 1000 Dean for its own negligence. Further, since plaintiff's action against 1000 Dean arises from "(1) the use or occupancy of the Demised Premises by [Bergen]…", 1000 Dean demonstrated its prima facie entitlement to summary judgment against Bergen on its claim for contractual indemnity. Bergen failed to raise a triable issue of fact. In light of this determination, 1000 Dean's remaining third-party claims against Bergen are moot. In any event, since the plaintiff is not alleging a grave injury, 1000 Dean's claims against Bergen for common law indemnification and contribution are without merit (Workers' Compensation Law § 11; *see Fleming v Graham*, 10 N.Y.3d 296, 299).

Mot. Seq. No. 13

Turning to Bergen's motion for summary judgment dismissing the third-party complaint in its entirety, the Court rejects Bergen's contention that the third-party complaint must be dismissed because plaintiff's only allegation of negligence is that the icy condition which caused plaintiff to fall was created by the negligence of 1000 Dean in hosing down the sidewalk in

winter. Bergen contends that under these circumstances, enforcing the contractual indemnification provision in its lease with 1000 Dean would violate General Obligations Law § 5–321. However, for the reasons stated above, General Obligations Law § 5–321 is not a bar to 1000 Dean's claim for contractual indemnification even if it is determined that 1000 Dean's negligence was the sole cause of the accident. Contrary to Bergen's contention, the fact that the plaintiff was cleaning the window of the demised premises sufficiently demonstrates that the action arose out of Bergen's use of the demised premises thus triggering 1000 Dean's entitlement to contractual indemnity. The Court rejects Bergen's contention that because the ladder was set up on the sidewalk, plaintiff's action did not arise out of Bergen's use of the demised premises. Accordingly, that branch of Bergen's motion for summary judgment dismissing 1000 Dean's claim for contractual indemnification is denied.

That branch of Bergen's motion to dismiss the claims against it for common law indemnity and contribution is granted. (Workers' Compensation Law § 11; *see Fleming v Graham*, 10 N.Y.3d 296, 299).

Finally, since Bergen demonstrated that it procured insurance for 1000 Dean pursuant to the lease agreement and 1000 Dean failed to raise a triable issue of fact on this issue, that branch of Bergen's motion for summary judgment dismissing 1000 Dean's failure to procure insurance claim is granted.

For all of the above reasons, 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: March 12, 2021

PETER P. SWEENEY, J.S.C.

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