

Tulovic v Chase Manhattan Bank, N.A.

2001 NY Slip Op 30023(U)

September 4, 2001

Supreme Court, Kings County

Docket Number: 0029613/9613

Judge: Theodore T. Jones

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At an IAS Term, Part 14 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 4th day of September, 2001

P R E S E N T:

HON. THEODORE T. JONES,
Justice.

-----X
OSMAN TULOVIC and NAIMA TULOVIC,

Plaintiffs,

- against -

Index No. 29613/95

THE CHASE MANHATTAN BANK, N.A., EDWARD S. GORDON COMPANY, INC., MORSE DIESEL INTERNATIONAL, NICO/MDI, a division of Morse Diesel International, NICO GENERAL CONTRACTORS, INC., and MORSE DIESEL, INC.,

Defendants.

-----X
THE CHASE MANHATTAN BANK, N.A., EDWARD S. GORDON COMPANY, INC.,

Third-Party Plaintiffs,

- against -

Index No. 77464/96

ISS CLEANING SERVICES GROUP, INC., f/k/a NATIONAL CLEANING CONTRACTORS, INC.,

Third-Party Defendants.

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The following papers numbered 1 to 11 read on this motion:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	1-5 _____
Opposing Affidavits (Affirmations) _____	8-9 _____
Reply Affidavits (Affirmations) _____	10-11 _____
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, third-party defendant ISS International Service System, Inc. s/h/a ISS Cleaning Services Group, Inc., formally known as National Cleaning Contractors, Inc. (hereinafter "ISS") moves for an order, pursuant to CPLR 3212, granting summary judgment dismissing the third-party complaint of defendants/third-party plaintiffs, The Chase Manhattan Bank, N.A. (hereinafter "Chase") and Edward S. Gordon Company, Inc. (hereinafter "ESG") and all cross claims insofar as asserted against it. Chase and ESG cross-move for an order, pursuant to CPLR 3212, granting summary judgment dismissing plaintiffs' complaint and all cross claims insofar as asserted against them, or alternatively, granting Chase and ESG summary judgment on their claims against ISS and defendant Morse Diesel International ("Morse") for contractual indemnity and breach of contract for failure to procure insurance.

Factual Background

Plaintiff Osman Tulovic ("plaintiff") and his wife, Naima Tulovic, seek to recover damages for personal injuries plaintiff allegedly sustained as the result of a trip and fall accident which occurred on October 4, 1994 at a construction site at One New York Plaza in New York City. At the time of the accident, the premises, which was owned by Chase, was undergoing extensive renovations. ESG was the construction supervisor for the renovation project, and Morse was the construction manager. Pursuant to a written agreement, ISS, a cleaning contractor, was hired by ESG to provide general cleaning services throughout the building, including the loading dock area and garage driveway/ramp. Plaintiff was employed by ISS as a porter at the time of the accident. The accident occurred

when the plaintiff tripped and fell over iron wires which protruded out of the base of a wall that had been partially demolished.

At his deposition, the plaintiff testified that, on the morning of the incident, he arrived at the building at approximately 6:00 a.m.. Upon his arrival, plaintiff was instructed by ESG's night building manager, Joseph Durand, to sweep the loading dock area and collect the garbage (consisting of soda cans, bottles and plastic bags) from said area. According to plaintiff, the loading dock area was undergoing construction. However, plaintiff claimed that he had not been instructed to clean any of the construction materials or debris. The loading dock was one flight lower than the first floor of the building. The driveway, which led from the street to the loading dock, was approximately 50 to 60 feet long. The accident occurred as plaintiff was sweeping the driveway. After plaintiff swept his way down the right side of the driveway, he reached the loading dock, turned around and began sweeping his way up the left side. Plaintiff had worked up about 10 to 15 feet on that side of the driveway when he heard a truck coming out from the loading dock heading upward. In order to make room for the truck to pass, plaintiff hurried to collect some papers which were on the ground. As he did so, the heel of his shoe stumbled on a piece of iron wire, causing him to fall into the driveway wall and onto the sidewalk. Plaintiff described the incident as follows:

The accident happened at the time when I was sweeping and I was trying to expedite the sweeping because I had so much to do, and then I heard a truck coming out from the loading dock headed upward. I hurried up to collect some papers which were lying down there so I could make room for the truck to pass,

and then my leg, my heel of my shoe, stumbled on a piece of iron wire, piece of wire, a rod. (Tulovic dep, July 14, 1997, at 42)

The wire on which the plaintiff stumbled was one of many which protruded downward out of the corner of the wall adjacent to the driveway. According to plaintiff, the wall in question had been partially demolished by a construction company two to four weeks prior to his accident, and the wires had remained exposed on the driveway since that time. During this two to four week period before the accident, plaintiff had observed the wires everyday whenever he went to the loading dock area. Plaintiff further testified that he noticed the wires on the ground immediately before the accident, while he was cleaning the garbage in the driveway area, and that he had complained about the wire on many occasions to ESG's building manager and to the construction foreman.

Ralph Ardolina testified on behalf of ESG at a deposition. Ardolina was the Executive Property Manager for ESG at the subject premises at the time of the accident. According to Ardolina, ESG managed the building for Chase and acted as the construction supervisor for the renovation project. As the Executive Property Manager, Ardolina's duties consisted of overseeing the day to day operations. ESG acted as a liaison between Chase and Morse. Ardolina testified that the renovations involved working in areas surrounding the loading dock and the ramp/driveway where plaintiff was allegedly injured. According to Ardolina, the wall adjacent to the subject ramp was partially demolished sometime in 1994 by a subcontractor under the supervision of Morse. Ardolina further testified that he

was responsible for making sure that ISS completed its work and adhered to the terms of its contract. In order to accomplish this task, Ardolina made periodic inspections of ISS's work. Ardolina testified that ISS was not responsible for cleaning up after the contractors or removing construction debris on the project. Rather, the contractors were responsible for cleaning up after themselves.

Edward Bigley testified on behalf of Morse at a deposition. Bigley was the general superintendent assigned to the renovation project from 1993 through the summer of 1995. Morse had approximately 12 other employees on the site, consisting of several other superintendents and assistant superintendents, project managers, assistant project managers and a safety project manager. During that time, Bigley was responsible for the coordination/administration of daily on-site activities at the building. Bigley was present at the site five days a week (Monday through Friday), and walked through the premises twice daily, once in the morning and once after lunch. He also attended "safety meetings" which were conducted by Morse. According to Bigley, the purpose of the meetings was to ensure compliance with building codes. Bigley further testified that each contractor was responsible for cleaning up any debris generated by the work it performed. Bigley testified that, to his knowledge, ISS had no responsibilities with regard to removing construction debris in the loading dock area. Morse supervised the demolition work that had been performed on the adjacent wall. Bigley did not recall any complaints about debris or metal wires/rods in the area. Nor did he recall receiving any complaints regarding any of the subcontractors' work at the building.

David Einstoss testified on behalf of ISS. At the time of the accident Einstoss was employed by ISS as a District Manager. Einstoss' duties consisted of overseeing the performance of ISS's cleaning and maintenance responsibilities at the various buildings within the area. ISS was not responsible for removing construction debris from the loading dock ramp. According to Einstoss, ISS employed approximately 12 porters at the building during the daytime hours in October 1994. Two head porters were assigned to the building, and the remainder were standard cleaners. The head cleaners were responsible for delegating the work to the cleaners. If ESG had a specific work request for ISS, an ESG representative would normally speak to one of the head porters, who in turn would delegate the work to the cleaners. However, ESG occasionally gave orders directly to ISS's porters.

On or about September 13, 1995, plaintiffs commenced the within action ("Action No. 1") against Chase and ESG alleging common-law negligence and violations of Labor Law §§ 240(1), 200 and 241. On or about September 30, 1997, plaintiffs commenced a separate action ("Action No. 2") against Morse and defendant Nico General Contractors, Inc. ("Nico") alleging the same causes of action as in Action No. 1. Chase and ESG subsequently commenced a third-party action against ISS asserting claims sounding in common-law indemnity and/or contribution, contractual indemnity, and breach of contract for failure to procure insurance. Chase and ESG also asserted cross-claims against Morse and Nico seeking common-law indemnity and/or contribution. By order dated October 14, 1998, Actions Nos. 1 and 2 were consolidated for all purposes. On or about November 22,

2000, the plaintiffs filed a note of issue and certificate of readiness certifying that all discovery has been completed. These motions ensued.

Discussion

In their cross motion, Chase and ESG (collectively “defendants”) seek summary judgment dismissing plaintiffs’ complaint and all cross claims insofar as asserted against them, or in the alternative, for summary judgment on their claims against ISS and Morse for contractual indemnity and breach of contract for their failure to procure insurance. In their bill of particulars, plaintiffs allege that the defendants are liable for common-law negligence and violations of Labor Law §§ 240(1), and 241 and 200.

Labor Law §§ 240 and 241(6)

In response to defendants’ cross motion, plaintiffs assert that they no longer intend to pursue claims under Labor Law § 240(1) and § 241(6) in this action (Fireman Affirmation, April 26, 2001, at pg. 8, fn 1). Accordingly, plaintiffs’ Labor Law §§ 240(1) and 241(6) claims are hereby dismissed, and that portion of defendants’ cross motion seeking to dismiss same will not be addressed herein.

Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty of a landowner to provide workers with a reasonably safe place to work (see, Lombardi v Stout, 80 NY2d 290, 294). Such a duty presupposes that the “party charged with that responsibility have the authority to control the activity bringing about the injury” (see, Comes v New York State Elec. & Gas Corp., 82 NY2d 876, 877; Russin v Picciano & Son, 54 NY2d 311, 317; Retamal v Osborne

Mem. Home Assoc., 256 AD2d 506, 507). Thus, liability will be imposed upon an owner under Labor Law § 200 only where the plaintiff's injuries were sustained as the result of a dangerous condition at the work site, rather than as the result of the manner in which the work was performed, and then only if the owner exercised supervision and control over the work performed at the site or had actual or constructive notice of the unsafe condition causing the accident (see, Lombardi v Stout, *supra*, at 294; Allen v Cloutier Constr. Corp., 44 NY2d 290, 299; Sprague v Peckham Materials Corp., 240 AD2d 392).

In moving to dismiss plaintiffs' Labor Law § 200 and common-law negligence causes of action, defendants argue that the condition (exposed wire) that allegedly caused plaintiff's injury was "open and obvious" and, therefore, defendants had no duty to protect him from such a readily observable condition. Further, defendants contend that they did not exercise any control or supervision over plaintiff's work. In addition, defendants argue that plaintiff's accident occurred as a result of his own negligence.

In opposition, the plaintiffs do not dispute that the exposed wire was an "open and obvious" condition, or that plaintiff was aware of said condition prior to the incident. Rather, plaintiffs argue that the alleged open and obvious nature of the condition is only relevant to the issue of plaintiff's comparative negligence, and does not negate the duty of defendants to maintain their worksite in a reasonably safe condition. This court disagrees.

The Appellate Division, Second Department, by which this court is bound to follow, has consistently held that liability under Labor Law § 200 and common-law negligence will not attach where the dangerous condition complained of was open and obvious (see, Stasiak

v Sears, Roebuck and Co., __ AD2d __, 722 NYS2d 251; Gonzalez v Fastflex, Inc., 270 AD2d 229; Rose v A. Servidone, Inc., 268 AD2d 516; Panetta v Paramount Communications, 255 AD2d 568, lv denied 93 NY2d 806; Bellofatto v Frengs, 246 AD2d 566; Wilhouski v Canon U.S.A., 212 AD2d 525), particularly where the plaintiff was actually aware of the condition (see, Bojovic v New York City Housing Authority, __ AD2d __, 2001 WL 661221; Tarrazi v 2025 Richmond Ave. Assocs., 260 AD2d 468). Thus, contrary to plaintiffs' assertion, the general statutory duty imposed by Labor Law §200 does not extend to situations where the condition was readily observable (see, Gonzalez v Fastflex, Inc., supra, at 229; Rose v A. Servidone, Inc., supra, at 517; Panetta v Paramount Communications, supra, at 568).

Applying the foregoing principles to the instant matter, the court finds that the exposed wire which allegedly caused plaintiff's injuries was an open and obvious condition (see, Panetta v Paramount Communications, supra, at 568). The plaintiff, at his examination before trial, admitted that for at least two weeks before the accident, he had readily observed the exposed wire in the loading dock area. Further, plaintiff admitted that he observed the wire immediately before the accident as he was cleaning garbage in the area. In fact, plaintiff testified that he was deliberately attempting to clean around the wire just before the accident occurred. Under such circumstances, the court concludes, as a matter of law, that any danger posed by the exposed/protruding wires was open and obvious to plaintiff. Inasmuch as the plaintiffs have failed to present sufficient evidence to raise a triable issue

of fact establishing otherwise, that branch of defendants' cross motion seeking to dismiss plaintiffs' Labor Law § 200 and common-law negligence claims is granted.

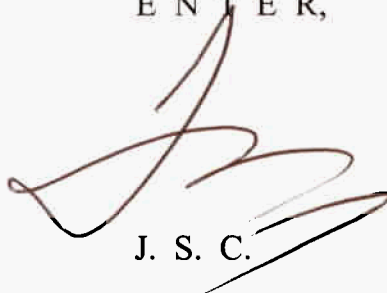
Since all of the causes of action in the complaint asserted against Chase and ESG are dismissed, the third-party action commenced by Chase and ESG against ISS for, *inter alia*, indemnification/contribution must also be dismissed (see, Kim v Herbert Const. Co., 275 AD2d 709, 712; Dilena v Irving Reisman Irrevocable Trust, 263 AD2d 375; Somerville v Usdan, 255 AD2d 500). In light of the foregoing, ISS's motion seeking summary judgment dismissing Chase and ESG's third-party action is moot.

Conclusion

In sum, Chase and ESG's cross motion is granted to the extent that plaintiffs' Labor Law §§ 240(1), 241(6) 200 and common-law negligence claims and all cross claims are hereby dismissed as against Chase and ESG. The motion by ISS seeking summary judgment dismissing the third-party complaint is denied as moot, and the third-party complaint is hereby dismissed as against ISS. The Clerk is directed to enter judgment accordingly.

The foregoing constitutes the decision and order of this court.

E N T E R,

A handwritten signature in dark ink, appearing to be 'J. S. C.', written over the printed name 'J. S. C.'.

J. S. C.

HON. THEODORE T. JONES