Abreu v LKPC Realty, Inc.
2001 NY Slip Op 30103(U)
August 20, 2001
Supreme Court, Kings County
Docket Number: 47260/98
Judge: Diana A. Johnson

At an IAS Term, Part 17 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 20th day of August, 2001

P R E S E N T:

HON. DIANA A. JOHNSON,
Justice.

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JOSE ABREU and JUAQUINA ABREU,

Plaintiff(s),

- against - Index No. 47260/98

LKPC REALTY, INC., CONSUMERS FURNITURE, INC., CONSUMER'S FURNITURE, INC., CUSTOMER FURNITURE, INC., and ROBERT ARTMAN,

Defendant(s).

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LKPC REALTY, INC.,

Third-Party Plaintiff(s),

- against -

Z.J. IRONWORKS,

Third-Party Defendant(s).

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CONSUMERS FURNITURE, INC., and ROBERT ARTMAN,

Second Third-Party Plaintiff(s),

- against -

Z. J. IRONWORKS,

Second Third-Party Defendant(s).

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The following papers number 1 to 23 read on this motion:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-3 6,7, 11-16
Opposing Affidavits (Affirmations)	4, 8,9, 17-18, 22
Reply Affidavits (Affirmations)	5, 10, 19-21, 23
_____ (Affirmations)	
Other Papers	

Upon the foregoing papers, plaintiffs Jose and Juaquina Abreu (hereinafter "plaintiffs") move, pursuant to CPLR 3212, for partial summary judgment on their Labor Law § 240 (1) claim as against defendants LKPC Realty, Inc. and Consumers Furniture Inc. (hereinafter "LKPC" and "Consumers" respectively). LKPC cross-moves for summary judgment on its cross claim for contractual and common-law indemnification against Consumers and for common law indemnity as against ZJ Ironworks. Consumers cross moves for summary judgment: (i) dismissing plaintiffs' claims as based upon Labor Law §§ 240(1), 241(6) and 200; (ii) dismissing LKPC's claims as based upon common law indemnity and for contribution and (iii) as against ZJ Ironworks for common law indemnification.

Background

The underlying action arises out of injuries sustained by plaintiff Jose Abreu on December 30, 1995. On this date plaintiff and some co-workers were installing a conveyor belt in a furniture warehouse that was owned by LKPC and leased by Consumers. The

conveyor belt was to be used as a means of transporting furniture between the first and second floors of the warehouse. The workers had manually hoisted the conveyor belt up to an opening in the second floor by a hook and chain apparatus. The chain was then tied off to hold the belt suspended until it was to be permanently affixed by welding the top portion to the second floor opening and the bottom portion to two floor bases located on the first floor. After hoisting the conveyor belt, the workers took a lunch break but stayed in the area in which they were installing the belt. As plaintiff was eating he noticed that there was a hammer on the floor under the conveyor belt. He stopped eating and went to retrieve the hammer. As he was returning from this task, the chain snapped and the conveyor belt fell and struck plaintiff causing him to sustain various injuries.

Plaintiffs' Motion

Plaintiffs move for partial summary judgment on their Labor Law § 240 (1) claim as against LKPC and Consumers. Plaintiffs argue that LKPC, as the owner of the building at which the conveyor belt was being installed, is absolutely liable for plaintiff's injuries resulting from the fall of the belt upon him. Additionally, plaintiffs contend that Consumers, as the lessee of the building, who had engaged the contractor for the installation of the conveyor belt, which is a "structure" within the meaning of Labor Law §240 (1) is also absolutely liable for plaintiff's injuries.

In pertinent part, Labor Law § 240(1) provides that:

> "All contractors and owners and their agents . . . in the . . . demolition, repairing, altering . . . 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, hangars, 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."

This statute was specifically enacted to ensure that employees performing construction-related activities are protected from injuries through the provision of proper safety devices (Joblon v Solow, 91 NY2d 457, 463, citing Zimmer v Chemung County Perf. Arts, 65 NY2d 513, 520-521; Gordon v Eastern Ry. Supp., 82 NY2d 555, 559, 561-562; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500-501). In fact, the court in Rocovich v Consolidated Edison Co. (78 NY2d 509, 513) cited the memorandum in support accompanying the enactment of § 240(1), stating that "[t]he legislative purpose behind this enactment is to protect workers by placing 'ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor' (1969 NY Legis. Ann., at 407), instead of on workers who are 'scarcely in a position to protect themselves from accident'" (see also, Klein v City of New York, 89 NY2d 834, 835).

Indeed, the duty to protect workers under § 240(1) is non-delegable and an owner will be held liable for a violation of this statute even in a situation in which the construction work is performed in the absence of the owner's supervision or control over the work

(Rocovich, supra, at 513; Gordon v Eastern Ry. Supp., supra, at 559; Ross v Curtis-Palmer Hydro-Elec. Co., supra, at 500).

However, § 240(1) is not applicable to every "hazard or danger encountered in a construction zone" (Misseritti v Mark IV Constr., 86 NY2d 487, 490). Rather, it was intended to protect workers from the special risks involved in construction projects involving elevation-related activities (Joblon v Solow, supra, at 462; Felker v Corning, 90 NY2d 219, 224; Covey v Iroquois Gas Transmission System, 89 NY2d 952, 954, affg 218 AD2d 197; Gordon v Eastern Ry. Supp., supra, at 559; Ross v Curtis-Palmer Hydro-Elec. Co., supra, at 501; Rocovich v Consolidated Edison Co., supra, at 514; Baker v Barron's Educ. Svc. Corp., 248 AD2d 655, 656; Del Vecchio v State, 246 AD2d 498, 499).

Specifically, the "special hazards" covered by this statute are "those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of the materials or load being hoisted" (Heizman v Long Is. Light. Co., 251 AD2d 289, 291, appeal denied 92 NY2d 1017, citing Rocovich v Consolidated Edison Co., supra). Moreover, special hazards do not include all perils related to the effects of gravity but rather "are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec.

Co., supra, at 501; Covey v Iroquois Gas Transmission System, supra, at 954; Del Vecchio v State, supra, at 498).

In opposition to plaintiffs' motion, Consumers argues that plaintiff was not involved in an activity covered under Labor Law §240 (1) at the time of the accident. Specifically, Consumers contends that the work plaintiff was performing was not an alteration. The Court of Appeals, in Joblon v Solow (91 NY2d 457, 465), held that "'altering' within the meaning of Labor Law §240 (1) requires making a significant physical change to the configuration or composition of the building or structure." In the instant case, plaintiff was engaged in installing a conveyor belt that would extend from the first to the second floor of a furniture warehouse. Consumers argues that based upon the Second Department's decision in the case of Kesselbach v Liberty Haulage Inc., (182 AD2d 741), in which the court held that the installation of a roof antenna did not constitute an alteration, the work that plaintiff was performing at the time of his accident does not fall under the aegis of Labor Law §240 (1).

However, the court notes that in the years since the Kesselbach decision was rendered, the Second Department has held that the term "altering" encompasses numerous activities including: hanging pipes from a ceiling (Mannes v Kamber Mgmt, 2001 LEXIS 5572); installing a new alarm system and motion detectors (Castelli v KDI Atlantic Foods, Inc., __ AD2d __, 2001 LEXIS 2608); removing and reinstalling a security camera onto a building (Guzman v Gumley-Haft Inc., 274 AD2d 555, 556; installing a cable wire into the

wall of a building (Bedassee v Snyder Avenue Owners Corp., 266 AD2d 250, 251; DiGiulio v Migliore, 258AD2d 903; Malsch v City of New York, 232 AD2d 1, 40); the removal of a video screen in an auditorium prior to the installation of a new one (Morales v City of New York, 245 AD2d 431, 432); and the erection of a "For Sale" sign on a commercial building (Buckley v Radovich, 211 AD2d 652, 654). Thus, the court finds that the installation of the conveyor belt between the first and second floors of the warehouse constituted a significant physical change to the configuration or composition of the building and is thus an alteration within the ambit of Labor Law 240 (1).

Moreover, plaintiff correctly points out that the conveyor belt itself was a structure within the ambit of the statute. The Court of Appeals in Lewis-Moors v Contel of N.Y.,(78 NY2d 942, 943), defined a structure for purposes of Labor Law 240 (1) as "any production or piece of work artificially built up or composed of parts joined together in some definite manner." The record reveals that the conveyor belt was in several separate parts when it arrived at the warehouse and had to be assembled by the workers.

Finally, it is undisputed that plaintiff was struck by a falling object that was improperly hoisted or inadequately secured" (Ross v Curtis-Palmer Hydro-Elec. Co., supra, at 501; Covey v Iroquois Gas Transmission System, supra, at 954; Del Vecchio v State, supra, at 498). Accordingly, the court finds that plaintiff was a worker entitled to the protections of Labor Law §240 (1) which was violated in the instant case. Thus, plaintiffs'

motion for partial summary judgment as against LKPC and Consumers on their Labor Law §240 (1) claim is granted.

Moreover, defendants contention that plaintiff's accident was unwitnessed does not alter this result. Courts have consistently held that the fact that a plaintiff is the sole witness to his own accident, and is possessed with the exclusive knowledge of the facts as to how such accident occurred, is not sufficient to avoid summary judgment (see, Klein v City of New York, supra at 834-835 (granting summary judgement on §240(1) liability to a plaintiff that was the sole witness to his accident); Acosta v 888 7th Avenue Assocs, 248 AD2d 284 (holding that defendants could not avoid summary judgment solely because plaintiff was the only witness to the accident); Rodriguez v Forest City Jay St. Assocs., 234 AD2d 68, 69-70; Rodriguez v NYCHA, 194 AD2d 460 [reversing lower court holding that denied summary judgment because plaintiff was sole witness to the accident and holding that denial is only mandated when the injured worker's version of the accident is inconsistent with either his own previous account or that of another witness]). As such, the court finds this argument without merit.

Consumer's Cross Motion for Summary Judgment Dismissing plaintiffs' claims

The court now turns to Consumer's cross motion for summary judgment dismissing plaintiffs' claims as based upon Labor Law §§ 240(1), 241(6) and 200. As discussed above, the court finds that plaintiffs' have established a valid claim under Labor Law §240 (1). It is well settled that the duty imposed by § 240(1) is nondelegable and a contractor, an owner

or their agent is liable for a violation of this section even where he exercises no supervision or control over the work (Rocovich v Consolidated Edison Co., supra, at 513; Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500; Zimmer v Chemung County Perf. Arts, supra, at 521). Accordingly, Consumers, as the lessee of the premises, and the entity responsible for hiring plaintiff and his co-workers to perform the installation of the conveyor belt, is subject to strict liability under Labor Law 240 (1).

Having granted plaintiffs' motion for summary judgment based on Labor Law § 240(1) and finding that absolute liability must be imposed upon defendants under the statute, the court "see[s] no need to consider the arguments addressing the validity of other theories of liability asserted in plaintiffs' complaint. It is clear from the record that plaintiff's damages are the same regardless of the theory of liability, and plaintiff can only recover these damages once . . . [As such] defendants' arguments concerning the validity of other theories of liability contained in the complaint are academic" (Covey v Iroquois Gas Transmission Sys., 218 AD2d 197, 201, affd 89 NY2d 952; see also, Torino v KLM Constr. Inc., 257 AD2d 541). Accordingly, the remainder of Consumers' motion is deemed moot.

LKPC's Cross Motion for Summary Judgment Against Consumers and ZJ Ironworks

LKPC cross-moves for summary judgment on its cross claim for contractual and common-law indemnification against Consumers and for common law indemnity as against ZJ Ironworks.

Contractual Indemnification

The court will first address that branch of LKPC's cross motion that seeks summary judgment as against Consumers. LKPC contends that it's entitled to contractual indemnity from Consumers as a result of language contained in the commercial lease that was in place between these parties. Paragraph 10 of the lease provides that

> Lessor [LKPC] shall not be liable for any damage or injury to Lessee [Consumers], or any other person, or to any property, occurring on the demised premises or any part thereof, and Lessee agrees to hold Lessor harmless from any claims for damages, no matter how caused.

LKPC argues that since it was simply the owner of the building in which plaintiff was injured, and was in no way involved with the installation of the conveyor belt, any liability that would be imposed upon it would be strictly vicarious. As such, LKPC seeks to enforce the terms of the indemnification clause contained in the lease. In opposition, Consumers contends that this indemnification provision is invalid as a matter of law because it violates General Obligations Law § 5-322.1 in that it contemplates a complete rather than a partial shifting of liability regardless of LKPC's own negligence.

However, as long as an owner is not itself negligent, as is the situation in the instant case, General Obligations Law § 5-322.1 does not bar a party from receiving contractual indemnification (Brown v Two Exch. Plaza Partners, 76 NY2d 172, 178-181; Kennelty v Darlind Constr. Inc., 260 AD2d 443, 446; cf. Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795[stating in a footnote that "we would note that without a finding

of negligence on the part of the general, the agreements as applied would not run afoul of the proscriptions of General Obligations Law §§ 5-322.1"]). This is true even if the contract purports to provide indemnification for an owners own negligence (see, Brown v Two Exch. Plaza Partners, supra; Delaney v Spiegel Assocs., 225 AD2d 1102, 1104). Accordingly, the court finds that enforcement of the indemnification provision in the subject lease is not violative of General Obligations Law §5-322.1.

Consumers further argues that LKPC is not entitled to contractual indemnification as a question of fact exists regarding the parties intentions concerning indemnification. Consumers appears to base this contention on the testimony of Madeline Artman, President of LKPC who Consumers argues failed to "negotiate the lease and/or read its terms prior to execution combined with deletion of language from the lease calling for Consumers to name LKPC as an additional insured." Mrs. Artman testified as follows:

> Q: Was the other writing on the lease before you put your initials on it and signed it?
>
> A: Yes, it was filled out first.
>
> Q: So the lease was completed before you signed it?
>
> A: Yes.
>
> Q: Did you read it before you signed it?
>
> A: Yes. No. Yes, I don't remember.

The Court of Appeals held in Drzewinisi v Atlantic Scaffold & Ladder Co., (70 NY2d 774, 777) that a contractual indemnification clause will be upheld if the "intention to

indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." The language contained in the lease between LKPC and Consumers evidences a clear intent for Consumers to indemnify LKPC. Moreover, Mrs. Artman initialed several provisions of the lease which included the insertion or deletion of various terms, no less than 20 times, including paragraph 10 related to indemnification. Thus, the court is satisfied that an intent to indemnify is clear from the language of the lease and further that the parties initialing and signing of the lease demonstrates their intent to be bound by all of its provisions.

That the contract purports to allow LKPC to recover for its own negligence is not a bar to LKPC obtaining indemnification from Consumers since there is no evidence that LKPC was negligent in any way (see, Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., supra). Thus, the above-referenced indemnification provision is enforceable and LKPC is entitled to conditional summary judgment from Consumers based upon its contractual indemnification claim.

LKPC's Cross Motion for Common Law Indemnification from Consumers & Consumer's Cross Motion for Dismissal of LKPC's Cross Motion for Common Law Indemnification

The court now turns to that branch of LKPC's cross motion that seeks common law indemnification from Consumers and to Consumers' cross motion that seeks dismissal of said claim.

It is well settled that an owner or general contractor held liable to an injured subcontractor's employee under Labor Law § 240 is entitled to full common-law indemnification from a subcontractor whose negligence was the sole cause of the worker's injuries (see, Werner v East Meadow Union Free Sch. Dist., 245 AD2d 367, 367-368; Mackey v Beacon City Sch. Dist., 216 AD2d 534, 535; McNair v Morris Ave. Assocs., 203 AD2d 433, 434). In order to be entitled to indemnity, however, the owner or the general contractor must have exercised no control over the work performed (see, Seecharran v 100 West 33rd St. Rlty. Corp., 198 AD2d 121, 122; see also, Buccini v 1568 Broadway Assocs., 250 AD2d 466; Guillory v Nautilus Real Est., 208 AD2d 336, 339; Aragon v 233 West 21st St., Inc., 201 AD2d 353, 354).

Here, while LKPC has established that it could only be vicariously liable, it has failed to establish, as a matter of law, that Consumers was negligent in any way or that it supervised and controlled plaintiff's work. In fact, during his deposition, the plaintiff testified that he received his instructions from his son Carlitos, and that he did not receive any direction from anyone from Consumers and that it was Carlitos that supervised and controlled the work in which he was engaged at the time of the accident. Thus, inasmuch as LKPC has made no showing of fault on Consumers' part, LKPC is not entitled to common-law indemnity from Consumers. Accordingly, that branch of LKPC's cross motion seeking common-law indemnity from Consumers is denied. Further, Consumers cross motion seeking dismissal of LKPC's claim for common law indemnification is granted.

LKPC's and Consumers' Cross Motions for Common Law Indemnity as against ZJ Ironworks

The court will now address that branch of LKPC's cross motion and Consumers' cross motion seeking common law indemnity as against ZJ Ironworks. As discussed above, an owner that did not exercise any supervision or control over an injured plaintiff's work and who is held vicariously liable for such injuries, is entitled to common law indemnification from a subcontractor whose negligence was the sole cause of the worker's injuries (see, Werner v East Meadow Union Free Sch. Dist., supra, at 367-368; Mackey v Beacon City Sch. Dist., supra, at 535; McNair v Morris Ave. Assocs., supra, at 434). LKPC argues that ZJ Ironworks, as plaintiff's employer, had control over the work that was performed and is responsible for any breaches in safety.

In opposition, ZJ Ironworks submits a sworn affidavit and the sworn deposition testimony of Zenon Abreu[1], the sole proprietor of ZJ Ironworks. Zenon Abreu affirms that ZJ Ironworks did not enter into a contract to perform any work for Consumers at the time and place of the events that gave rise to plaintiff's accident,[2] nor did it actually perform any work at said time and place. Further, Zenon Abreu was out of the country, in Panama, at the time the work giving rise to plaintiff's injuries occurred. His deposition testimony reveals that his nephew, Carlitos Abreu, had, on occasion borrowed the ZJ Ironworks pick

[1] The court notes that Zenon Abreu is the brother of plaintiff, Jose Abreu.

[2] It is undisputed that there was no written contract in place between these parties.

up truck. In addition, before he left for Panama, Zenon Abreu had given Carlitos the keys to the ZJ Ironworks premises so that he would feed the guard dog. He also gave him the keys to the pick up truck so that he would warm it up, but testified that he did not give him permission to use the truck at that time.

In reply and in support of its cross motion, LKPC argues that plaintiff testified that he was working for ZJ Ironworks on December 30, 1995 and that Consumers' witness testified that he had hired ZJ Ironworks to perform the installation of the conveyor belt. Consumers, in its reply, contends that on the day of the accident, Carlitos Abreu was acting as an agent of ZJ Ironworks, and as such, is liable for indemnification. Consumers argues that the fact that ZJ Ironworks had performed work for Consumers in the past; that Carlitos Abreu had worked on other jobs for ZJ Ironworks and that Zenon Abreu had previously given Carlitos permission to use the ZJ Ironworks pick up truck, demonstrates that Carlitos was acting as an agent of ZJ Ironworks on the day of the accident.

"An agency relationship by conduct may be established by 'words or conduct of a principal, communicated to a third party, that gives rise to an appearance and reasonable belief that an agency has been created and the agent possesses the authority to enter into a transaction'" (Pyramid Champlain Co., v R.P. Brosseau & Co., 267 AD2d 539, 544; quoting Hoysradt v Nilles Ford-Mercury, 168 AD2d 824, 825). The court finds that a question of fact exists regarding whether Carlitos was acting as an agent of ZJ Ironworks when the job of installing the conveyor belt was performed. As such, a question of fact

exists regarding whether LKPC and Consumers are entitled to common law indemnity as against ZJ Ironworks. Thus, that branch of LKPC's cross motion and Consumers' cross motion seeking common law indemnity as against ZJ Ironworks is denied.

Conclusion

Plaintiffs' motion for partial summary judgment as against LKPC and Consumers on their Labor Law §240 (1) claim is granted. That branch of Consumer's cross motion for summary judgment dismissing plaintiffs' claims as based upon Labor Law §§ 240(1) is denied and the remainder of the cross motion seeking summary judgment dismissing plaintiffs' claims as based upon Labor Law §§ 241(6) and 200 is deemed moot. That branch of LKPC's cross motion that seeks summary judgment on its cross claim for contractual indemnification against Consumers is granted and those branches of its cross motion seeking common law indemnity as against Consumers and ZJ Ironworks are denied. In addition, Consumers cross motion seeking dismissal of LKPC's claim for common law indemnification is granted and Consumers' cross motion seeking common law indemnity as against ZJ Ironworks is denied.

The foregoing constitutes the decision and order of this court.

ENTER,

Diana A. Johnson

J. S. C.