

Lopez v Bovis Lend Lease LMB, Inc.

2004 NY Slip Op 30046(U)

September 30, 2004

Supreme Court, New York County

Docket Number: 0118327/3272

Judge: Diane A. Lebedeff

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: DIANE A. LEBEDEFF PART 8
Justice

0118327/2001

LOPEZ, WILLIAM
vs
BOVIS LEND LEASE LMB

INDEX NO. _____

MOTION DATE 8/20/04

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

SEQ 4

SUMMARY JUDGMENT

The following papers, numbered 1 to _____ were read on this motion to/for S.J.

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED

OCT 13 2004

NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 9/30/04

DIANE A. LEBEDEFF
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: I.A.S. PART 8
-----X

WILLIAM LOPEZ,

Plaintiff,

-against-

Index No. 118327/01
Mot. Seq. No. 004

BOVIS LEND LEASE LMB, INC., and MANHATTAN
SCHOOL OF MUSIC,

Defendants.

FILED

OCT 13 2004

BOVIS LEND LEASE LMB, INC., and MANHATTAN
SCHOOL OF MUSIC,

NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Plaintiffs,

-against-

Index No. 590140/02

WOODWORKS CONSTRUCTION CO., INC.,

Third-Party Defendant.

-----X

WOODWORKS CONSTRUCTION CO., INC.,

Fourth-Party Plaintiff,

-against-

Index No. 591060/02

F&M TAPING, INC.,

Fourth-Party Defendant.

-----X

DIANE A. LEBEDEFF, J.:

Plaintiff William Lopez moves for summary judgment, as to liability only, on his claims pursuant to Labor Law § 240. Defendants and third party-defendant cross-move on their breach of contract and contractual indemnification claims against fourth-party defendant F&M Taping, Inc. (“F&M”).¹ Fourth-party defendant F&M cross-moves for summary judgment dismissing the fourth-party complaint of Woodworks Construction Co., Inc. (“Woodworks”), and all cross-claims or alternatively, dismissing the common law contribution and indemnification claims on the grounds that plaintiff did not suffer a “grave injury” within the meaning of section 11 of the Workers Compensation Law and F&M did not enter an express indemnification agreement.

Factual Record Regarding Accident

Plaintiff alleges he was injured on June 19, 2001, when he fell off a scaffold while working at a construction project in a building located at 132 Claremont in Manhattan. The building is owned by defendant Manhattan School of Music. Defendant Bovis Lend Lease LMB, Inc. (“Bovis”), was the general contractor on the project. Plaintiff’s employer, F&M, was hired by third party defendant Woodworks to provide labor and material to tape and spackle all drywall surfaces.

Plaintiff alleges his supervisor told him to scrape a 15 foot area using a stick and showed him the scaffold to stand on. Plaintiff testified, through an interpreter, that the

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As the parties all concur that delay in completion of discovery warrants extension of the time to move for summary judgment, the court grants defendants’ request for an extension of time to make the instant motions.

scaffold was erected on the staircase landing or platform between the fourth and fifth floors of the building, and that he had seen the scaffold in place days before his accident (exhibit 2, Lopez dep., pp. 13-14). He described the scaffold as about ten feet wide, about ten feet high, with four wheels sticking out two feet on top, and boards laid over the top, with spaces between them to make an "improvised" platform (exhibit 1, Lopez dep., pp. 45-46, 51-56, 58; exhibit 2, Lopez dep., pp. 14-15). He testified that he was injured about 30 minutes after he started the work, when he tripped or his foot got stuck between the boards, his body hit one of the wheels of the scaffold, and he then fell to the floor (exhibit 1, Lopez dep., pp. 63, 71).

In opposition, defendants rely on testimony of plaintiff's supervisor, Santiago Luzero, which contradicts plaintiff's testimony in crucial respects, and they contend that plaintiff was not directed to use a scaffold and that he erected the upside down scaffold himself. Plaintiff's supervisor testified that he directed plaintiff to scrape the walls of the stairwell using a long pole. He further testified no scaffold was in place when he showed plaintiff the work required, that the work did not require plaintiff to use a scaffold, and that he did not direct plaintiff to use or erect any scaffold (exhibit 4, Luzero dep., pp. 45-48, 53, 26). He testified that when he went back to the area after he was told of plaintiff's accident, plaintiff was lying in the stairwell under a red baker-type scaffold, about six feet high, and the pole was next to him (*id.*, pp. 53, 57). From this testimony, defendants infer that the unwitnessed accident occurred because plaintiff himself improperly erected the scaffolding, and that his own actions were the sole proximate cause of the accident.

Plaintiff's Motion for Partial Summary Judgment

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (*Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851 [1985]; *Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher*, 299 A.D.2d 64 [1st Dept. 2002]). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

There can be no liability under section 240 (1) when there is no violation and the worker's actions are the "sole proximate cause" of the accident (*Blake v. Neighborhood Housing Services of New York City, Inc.*, 1 N.Y.3d 280 [2003]). Here, the conflicting testimony of plaintiff and his supervisor raises an issue of fact as to whether plaintiff made his own decision to use a scaffold and erected it improperly, proximately causing his accident. Accordingly, issues of fact preclude a grant of summary judgment in favor of plaintiff (*see Meade v. Rock-McGraw, Inc.*, 307 A.D.2d 156 [1st Dept. 2003], supervisor's testimony raised question of fact as to whether plaintiff's improper use of a closed ladder was the sole proximate cause of the accident; *Robinson v. City of New York*, 4 Misc.3d 542 [Sup. Ct. Bronx Co. 2004], issue of fact as to whether plaintiff's negligence was sole proximate cause of accident).

Cross Motions as to F&M's Indemnification Obligation

As to the cross-motions concerning F&M's obligations, there is no opposition to the branch of the motion seeking dismissal of the claims for common law indemnification and contribution on the grounds that these claims are unsupported because plaintiff did not suffer a "grave injury" within the meaning of Workers Compensation Law § 11. Accordingly, the common law contribution and indemnification claims against F&M must be and are severed and dismissed.

As to the contractual indemnification claims against plaintiff's employer, the applicable principles are set forth in *Rodrigues v. N & S Bldg. Contractors, Inc.*, 8 A.D.3d 876 (3d Dept. 2004):

"Workers' Compensation Law § 11 precludes third-party indemnification claims against employers, ... unless ... the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.' We note initially the Legislature's intent that Workers' Compensation Law § 11 limit employers' exposure to third-party liability [citations omitted]. With respect to indemnification clauses generally, '[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed' (*Hooper Assoc. v. AGS Computers*, 74 N.Y.2d 487, 491 [1989])."

To support their contract-based claims, defendants rely on a one-page purchase order, which incorporates the terms of the prime contract between Woodworks and Bovis, to assert that F&M "stands in the shoes of" Woodworks. Article 12 of the prime contract requires Woodworks to indemnify Bovis for injury arising out of "performance of the Work by Subcontractor, its subcontractors and suppliers," and Article 13, concerning assignment, provides that subcontractors must be approved by Bovis and that "each

subcontractor and supplier shall be bound by all Contract Documents to the same extent and with the same effect as if the subcontractor or supplier were the Subcontractor [Woodworks].”

Tellingly, there is no provision in the contract which requires Bovis to secure indemnification agreements from its subcontractors or sub-subcontractors nor that any such entities shall be required to provide insurance. Thus, even assuming incorporation of the prime contract’s terms, there is no provision which imposes the obligations at issue upon an entity such as F&M.

Additionally, mere incorporation language in a purchase order cannot be stretched to impose an indemnification and insurance obligation not otherwise stated to exist between the parties. “Under New York law, incorporation clauses in a construction subcontract, incorporating prime contract clauses by reference into a subcontract, bind a subcontractor only as to prime contract provisions relating to the scope, quality, character and manner of the work to be performed by the subcontractor” (*Bussanich v. 310 East 55th St. Tenants*, 282 A.D.2d 243, 244 [1st Dept. 2001]).

In light of the foregoing, the court finds that the unsigned purchase order does not constitute an unambiguous and “express agreement” by F&M to indemnify Woodworks, Bovis and/or Manhattan School of Music for injuries sustained by F&M employees in the scope of their employment nor an agreement to provide insurance protecting them.

Accordingly, F&M’s cross-motion to dismiss the fourth-party complaint and all cross-claims is granted, and the cross-motion of Bovis and Manhattan School of Music is denied.

Conclusion

Plaintiff's motion for summary judgment is denied, defendants' cross-motion is denied, and fourth-party defendant F&M's cross-motion is granted. No sooner than five days after service of a copy of this order with notice of entry and a proposed judgment upon defendants, the clerk shall enter judgment in favor of F&M upon the presentation of appropriate papers.

This decision constitutes the order of the court.

Dated: September 30, 2004



J.S.C.

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