

Vergara v SS 133 West 21, LLC

2004 NY Slip Op 30182(U)

December 20, 2004

Supreme Court, New York County

Docket Number:

Judge: Rosalyn H. Richter

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

PRESENT: HON. ROSALYN RICHTER
Justice

PART 24

0120407/2001

VERGARA, RUBEN
VS
SS 133 WEST 21, LLC

SEQ 5

REARGUMENT/RECONSIDERATION

EX NO. _____

ION DATE _____

ION SEQ. NO. _____

ON CAL. NO. _____

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

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH THE ATTACHED MEMORANDUM DECISION**

FILED
DEC 23 2004
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/20/04

[Signature]
HON. ROSALYN RICHTER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 24

-----X
RUBEN VERGARA and ODALIS VERGARA,

Plaintiffs,

-against-

SS 133 WEST 21, LLC, HMF CONSTRUCTION CORP.
and SCHOOL OF VISUAL ARTS, INC.,

Defendants.

-----X
SS 133 WEST 21, LLC,

Third-Party Plaintiff,

-against-

HMF CONSTRUCTION CORP. and SCHOOL OF
VISUAL ARTS, INC.,

Third-Party Defendants.

-----X
HMF CONSTRUCTION CORP.,

Second Third-Party Plaintiff,

-against-

BAL CONSTRUCTION CORPORATION and ANGIE
CONSTRUCTION CORP.

Second Third-Party Defendants.

-----X

ROSALYN H. RICHTER, J.:

Plaintiff Ruben Vergara (and his wife, derivatively) commenced this action to recover for

DECISION AND ORDER
Index No. 120407-01
Motion Seq. No. 5

Third-Party
Index No. 590615-02

Second Third-Party
Index No. 590045-03

personal injuries that Vergara allegedly sustained on August 20, 2001, while performing renovations on the fourth floor of a building owned by defendant SS 133 West 21, LLC ("SS 133"). Vergara claims that he was plastering the ceiling while on a scaffold with wheels, and the scaffold suddenly toppled over, causing him to fall to the ground.

SS 133 leased all but the twelfth floor of the building to defendant-third-party defendant School of Visual Arts, Inc. ("SVA"), pursuant to a standard form loft lease agreement dated August 1, 1997 ("the Lease"). SVA allegedly contracted with defendant-third-party defendant HMF Construction Corporation ("HMF") to perform renovations, and HMF allegedly hired second third-party defendant Bal Construction Corporation ("Bal") as the principal painting/plastering subcontractor. Bal allegedly hired second third-party defendant Angie Construction Corporation, Vergara's employer, to do plastering work.

SS 133 now renews its motion for summary judgment on its cross claims and third-party claims against SVA for common-law and contractual indemnification. By a decision dated July 1, 2004, the court denied SS 133's previous motion, with leave to renew. Only SVA opposes this motion.

As an initial matter, SVA argues that SS 133 has not met the requirements for renewal or reargument under C.P.L.R. § 2221. However, the Court expressly granted SS 133 leave to renew the motion in the July 1, 2004 decision (*see* Blackman Affirm., Ex J, at 3). In that decision, the Court denied SS 133's motion on procedural grounds because SS 133 had failed to cite to specific deposition testimony in its initial motion papers, and had made improperly made substantive arguments in its reply papers. Since the original papers contained substantive arguments that the Court believed would result in a resolution of the merits of the motion, the Court denied the motion

with leave to renew, so that all parties could further brief the issues. In any event, the Court may, in the interest of justice, dispense with the formal prerequisites for a motion to renew. *Garner v. Latimer*, 306 A.D.2d 209 (1st Dept. 2003); *Tishman Construction Corp. v. City of New York*, 280 A.D.2d 374 (1st Dept. 2001).

The standards for summary judgment are well settled.

"[T]he proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action".

Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986)(internal citations omitted).

SS 133 establishes a prima facie case for summary judgment against SVA for contractual indemnification. Paragraph 8 of the Lease provides that

"[t]enant shall indemnify and save harmless Owner against and from all liabilities, obligations, damages, penalties, claims, costs, and expenses for which Owner shall not be reimbursed by insurance Tenant's liability under this lease extends to the acts or omissions of any of sub-tenants and any agent, contractor, employee, invitee, or licensee of any sub-tenant"

(Blackman Affirm., Ex G). Here, the building superintendent, Lorato Camilleri, states that SS 133 neither supervised nor controlled the work of SVA's contractors (Camilleri Aff. ¶ 5). Neither he nor the persons whom he supervised were involved in the construction or renovation during the time of the accident (*see id.*, ¶ 7). Nor did SS 133 hire anyone to assist or supervise SVA's construction (*id.*, ¶ 8). SVA's president testified at his deposition that SS 133 did not direct any work in regards to the painting of the fourth floor (Blackman Affirm., Ex J, at 32). Therefore, SS 133 establishes that

it was free from negligence, and that its liability is solely vicarious. *See Correia v. Professional Data Mgt.*, 259 A.D.2d 60, 65 (1st Dept 1999).

In opposition, SVA argues that there is an issue of fact as to Camilleri's authority to stop work. SVA also argues that SS 133 retained some authority over the work pursuant to Paragraph 3 of the Lease, which requires SS 133's approval for certain improvements, and points to Paragraph 13 of the Lease, which grants SS 133 a right of entry to perform any work "for the purpose of complying with laws, regulations, and other directions of governmental authorities." Finally, SVA argues that SS 133 was negligent because it had notice of a dangerous condition.

SVA's arguments are unavailing. To begin, the retention of inspection privileges, the right to stop work if a safety violation is observed and the general power to supervise do not alone constitute sufficient control to impose liability. *Fraioli v. St. Joseph's Seminary of City of New York*, 1 A.D.3d 280 (1st Dept 2003); *Dennis v. City of New York*, 304 A.D.2d 611 (2d Dept. 2003); *Brown v. New York City Economic Dev. Corp.*, 234 A.D.2d 33 (1st Dept 1996). Moreover, the duty to provide a safe workplace is not breached where, as here, plaintiff's alleged injuries arose out of an alleged defect in his employer's tools and methods. *See Cruz v. Toscano*, 269 A.D.2d 122 (1st Dept. 2000). Notably, there is no evidence in the record that SS 133 owned or provided the allegedly defective scaffold. *See Masciotta v. Morse-Diesel Int'l, Inc.*, 303 A.D.2d 309 (1st Dept. 2003).

Nevertheless, SVA cites portions of Camilleri's deposition testimony where he states that he observed the progress of the work, the construction of the scaffolding, the safety equipment the workers were using, and whether the scaffolding had outriggers or ropes attached (Camilleri Dep., at 25-27, 35-37, 44-45). However, these notice arguments are unavailing, since the dangerous condition to which SVA refers is not a condition of the premises itself. *See Lombardi v. Stout*, 80

N.Y.2d 290 (1992); *Jurgens v. Whiteface Resort*, 293 A.D.2d 924 (3d Dept. 2002). In *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876, 878 (1993), the court specifically rejected the argument that notice to the owner of the allegedly unsafe manner in which the work was performed created, in itself, liability under Labor Law § 200. Because the statute codifies the common-law duty to provide a safe place to work (*id.* at 877), it follows that such notice does not create liability under the theory of common-law negligence. See *Dennis v. City of New York*, 304 A.D.2d at 611. Therefore, SS 133 is granted conditional summary judgment on its cross claim and third-party claim against SVA for contractual indemnification, pending the determination of the underlying action.

SS 133's motion for summary judgment is denied as to common-law indemnification.

“[I]n the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident”

Correia, 259 AD2d at 65. Here, SS 133 has not shown SVA's negligence as a matter of law. Some of its arguments are based on SVA's liability under Labor Law § 240 (1), which does not require a showing of negligence, and its status as the lessee of the premises. Other arguments are based on the fact that SVA retained and directed HMF to perform construction work, but there is no evidence of negligent hiring. Although SS 133 contends that SVA provided construction materials for this project, this is not supported in the record. The deposition testimony indicates that SVA purchased labor and materials from HMF, and not for it (*see Blackman Affirm.*, Ex J, at 17). Moreover, SS 133 provides no evidence that SVA owned or provided the allegedly tipping scaffold at issue. Accordingly, it is

ORDERED that defendant SS 133 West 21 LLC is granted conditional summary judgment

on its cross claim and third-party claim against SVA for contractual indemnification, pending the determination of the underlying action; and it is further

ORDERED that defendant SS 133 West 21 LLC' s motion for summary judgment on its common-law indemnification claim is denied; and it is further

ORDERED that the action shall continue.

December 20, 2004



Justice Rosalyn Richter

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