

Carboy v Cauldwell-Wingate Co., Inc.

2006 NY Slip Op 30459(U)

February 21, 2006

Supreme Court, New York County

Docket Number: 107659/2002

Judge: Marcy S. Friedman

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

PRESENT: MARCY S. FRIEDMAN
Justice

PART 17

Corwin vs Carlson Jr.

INDEX NO. 10769/02

MOTION DATE _____

- v -

COULD NEW - Win Case R.

MOTION SEQ. NO. 006

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for summary judgment

and cross-motions
Notice of Motion/~~Order to Show Cause~~ - Affidavits - Exhibits _____

PAPERS NUMBERED	
1, 2, 3	_____
4	_____
5	_____

Answering Affidavits - Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion and cross-motions are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

FEB 27 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 2/21/06

Marcy S. Friedman
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ X
CORNELIUS CARBOY, JR. and ROSEANN
CARBOY,

Plaintiff(s),

Index No.: 107659/2002

- against -

DECISION/ORDER

CAULDWELL-WINGATE COMPANY, INC. et
al.,

Defendant(s).

_____ X

In this Labor Law action, plaintiff sues for injuries allegedly sustained on February 6, 2001, while he was working at 2 World Financial Center in Manhattan. Defendant Cauldwell-Wingate Co., Inc. (“Cauldwell”) cross-moves for summary judgment dismissing plaintiff’s complaint. Defendants Merrill Lynch, Pierce, Fenner & Smith Inc. (“Merrill Lynch”), WFP Tower B Co., L.P., WFP Tower B Co. G.P. Corp., WFP Retail Co. G.P. Corp. and WFP Retail Co., L.P. (“WFP entities”) (collectively “Merrill Lynch”), cross-move for summary judgment dismissing plaintiff’s Labor Law §§ 240(1) and 241(6) claims. Third third-party defendant Commodore Construction Co. (“Commodore”) cross-moves for summary judgment dismissing plaintiff’s complaint and Cauldwell’s third-party complaint against it. Third third-party defendant Consolidated Electric Constr. Co. (“Consolidated”) moves for summary judgment dismissing Cauldwell’s third-party complaint for common law and contractual indemnification and all cross-claims against it. Second third-party defendant Ashland Plumbing Corp. (“Ashland”) cross-moves for summary judgment dismissing Cauldwell’s second third-party

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complaint and all cross- claims against it.

By separate motion, Merrill Lynch moves for summary judgment on its contractual indemnification cross-claims against Cauldwell. Cauldwell cross-moves for summary judgment on its third-party complaint against Consolidated. Defendant Donnelly Mechanical Corp. (“Donnelly”) moves for summary judgment dismissing “Ashland’s cross- and/or counterclaims” against it. Defendant Plus One Health Management, Inc. (“Plus One”) cross-moves for summary judgment dismissing the complaint and all cross-claims against it. By separate cross-motions, Ashland, Consolidated and Commodore seek to sever the respective third-party actions against them. Cauldwell also moves to strike Consolidated’s and Commodore’s answers for failure to comply with discovery orders.

By order of this court dated October 24, 2005, Donnelly’s motion and Plus One’s cross-motion were granted. Cauldwell’s motion to strike was settled by so-ordered stipulation dated August 25, 2005. Cauldwell does not oppose Merrill Lynch’s motion for indemnification against it, or Ashland’s and Commodore’s cross-motions for summary judgment dismissing its third-party complaints against them. They will accordingly be granted.

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action “sufficiently to warrant the court as a matter of law in directing judgment.” (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers.” (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment “the opposing party must ‘show facts sufficient to require a trial of any issue of fact’ (CPLR 3212, subd. [b]).”

(Zuckerman, 49 NY2d at 562.)

The following relevant facts are undisputed: The WFP entities owned, and Merrill Lynch net-leased, the premises. The premises was undergoing construction of a fitness center on the ground floor. For purposes of this motion, Cauldwell acknowledges that it was the general contractor for the project. (Tola Aff. In Support of Cauldwell Cross-Motion, ¶ 4.) Cauldwell hired Donnelly as the HVAC sub-contractor and Consolidated as an electrical subcontractor. Plaintiff was employed by non-party Skyline Sheetmetal Corp. ("Skyline"), a subcontractor for ductwork.

On the day of the accident, plaintiff was working to design and install ducts for the HVAC system at the premises. Plaintiff was returning to his work area, and as he walked through what was to be the lobby of a fitness center, he stepped into a hole in the floor and fell.

Labor Law § 240(1)

Labor Law § 240 (1) provides:

All contractors and owners and their agents, * * * in the erection, demolition, repairing, altering, painting, cleaning or pointing 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, hangers, 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.

“The purpose of the section is to protect workers by placing the ‘ultimate responsibility’ for worksite safety on the owner and general contractor, instead of the workers themselves.”

(Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison Co., 78 NY2d 509 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused

injury.” (Gordon, 82 NY2d at 559.)

While section 240(1) should be construed liberally so as to effectuate its purpose, it is well settled that the statute applies only to “elevation-related hazards.” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 500 [1993]; Rocovich, 78 NY2d at 514.) The hazards contemplated by the 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 or secured.” (Rocovich, 78 NY2d at 514; Narducci v Manhasset Bay Assocs., 96 NY2d 259 [2001].)

Merrill Lynch and Cauldwell move for summary judgment dismissing plaintiff’s section 240(1) claim on the ground that plaintiff’s accident was not caused by an elevation-related hazard within the meaning of the statute. This contention is correct. It is undisputed that plaintiff fell into a trench approximately 15 by 20 feet wide and six to eight inches deep. (See P.’s Dep. at 41-42.) While plaintiff correctly contends that the extent of a height differential is not determinative as to whether an elevation-related risk exists (see Rocovich, 78 NY2d at 514-15; Amo v Little Rapids Corp., 301 AD2d 698 [3d Dept 2003], appeal dismissed, lv dismissed, and lv denied 100 NY2d 531), plaintiff’s accident involved a de minimis elevation differential at or very near ground level. Such an elevation differential is insufficient to support a claim under Labor Law § 240(1). (See, e.g., Rocovich, 78 NY2d at 514-15 [12 inch deep trough]; Piccuillo v Bank of New York Co., 277 AD2d 93 [1st Dept 2000] [eight inch deep opening]; Sousa v American Ref-Fuel Co. of Hempstead, 258 AD2d 514 [2d Dept 1999] [12 inch fall]; Duffy v Bass & D’Allesandro, Inc., 245 AD2d 333, 334 [2d Dept 1997] [eight inch fall]; Compare, e.g., Congi v Niagara

Frontier Transp. Auth., 294 AD2d 830 [4th Dept 2002] [30 inches]; DeLong v State St. Assocs. L.P., 211 AD2d 891 [3d Dept 1995] [four to five feet].) Rather, plaintiff's accident was the "type of 'ordinary and usual' peril a worker is commonly exposed to at a construction site." (Duffy, 245 AD2d at 334 [quoting Misseritti v Mark IV Constr. Co., 86 NY2d 487, 489 [1995]].) Finally, as plaintiff's accident does not involve an elevation-related risk, the safety devices set forth in section 240(1) were not called for. (See Rocovich, 78 NY2d at 514-515.) Accordingly, plaintiff's section 240(1) claim must be dismissed.

Labor Law § 241(6)

It is well settled that Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors "to 'provide reasonable and adequate protection and safety' for workers."¹ (Ross, 81 NY2d at 501.) In order to maintain a viable claim under Labor Law § 241(6), a plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with "concrete specifications," as opposed to a provision that "establish[es] general safety standards." (Id. at 505.)

Merrill Lynch and Cauldwell move for summary judgment dismissing plaintiff's section 241(6) claim, arguing that the Industrial Code provisions relied upon by plaintiff are inapplicable to the instant action.¹ In opposition to defendants' motions, plaintiff argues only that defendants violated section 23-1.7(c)(1) and (e)(2).

Industrial Code § 23-1.7(e)(1) provides:

(1) Passageways. All passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause

¹ Plaintiff alleges violations of Industrial Code §§ 23-1.7(d), 23-1.7(e)(1) & (e)(2), 23-2.1; and 23-1.5 (12 NYCRR). (See Verified Bill of Particulars, Ex. E to Merrill Lynch Motion.)

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tripping. Sharp projections which could cut or puncture any person shall be removed or covered.

It is undisputed that this provision is sufficiently specific to support a section 241(6) claim. (See Scannell v Mt. Sinai Med. Ctr., 256 AD2d 214 [1st Dept 1998].)

On this record, however, plaintiff fails to raise a triable issue of fact in opposition to defendants' prima facie showing that his accident did not occur in a passageway and therefore is not covered by this Code provision. It is undisputed that plaintiff fell in what was to be the lobby area of the fitness center, and that, as noted above, he stepped into a hole and fell. (P.'s Dep. at 39, 41.) While plaintiff's counsel characterized the area where he fell as an "entryway" (Gennarelli Aff. In Opp., ¶ 28), plaintiff himself described the area in which he fell as "one big area" and "one big hole," measuring 15 by 20 feet and six to eight inches deep. (P.'s Dep. at 41-42.) Thus, the area in which he fell was not a passageway, but rather an open working area not covered under Industrial Code § 23-1.7(e)(1). (See Maza v University Ave. Dev. Corp., 13 AD3d 65 [1st Dept 2004]; Vicira v Tishman Constr. Corp., 255 AD2d 235 [1st Dept 1998]; Alvia v Teman Elec. Contr., Inc., 287 AD2d 421 [2d Dept 2001], lv dismissed 97 NY2d 749 [2002].) The fact that plaintiff was traversing this area in order to get to his work space is insufficient to raise a triable issue of fact as to whether the area was a passageway. (See Maza, 13 AD3d at 65-66.)

Plaintiff also fails to raise a triable issue of fact as to whether defendants violated Industrial Code § 23-1.7(c)(2). This provision by its terms applies only to hazards caused by debris. (See Piazza v Frank L. Ciminelli Constr. Co., 2 AD3d 1345 [4th Dept 2003].) Here, it is undisputed that plaintiff did not trip or slip on debris. (See P.'s Dep. 45-46.) Accordingly,

plaintiff's Labor Law § 241(6) claim must be dismissed.

Labor Law § 200

Cauldwell moves for summary judgment dismissing plaintiff's Labor Law § 200 and common law negligence claims on the ground that it did not create the hole into which plaintiff fell, did not have actual or constructive notice of the condition, and did not supervise or control plaintiff's work.

On this record, Cauldwell fails to eliminate triable issues of fact as to whether it created the condition that caused plaintiff's accident. Claiming that Consolidated, its electrical subcontractor, created the condition, Cauldwell relies on the testimony of Chris Norris, Cauldwell's project manager at the site, that Consolidated dug a trench for installation of lighting in the floor and was responsible for keeping the trench covered. (Norris Dep. at 50, 78, 95.) However, Cauldwell merely assumes that plaintiff fell in that trench and, indeed, fails to controvert extensive evidence, submitted primarily on Consolidated's separate motion for summary judgment dismissing the third-party complaint, that plaintiff fell in a large hole separate from Consolidated's trench.

Plaintiff testified that he entered the area where he fell by opening glass doors, "took two steps," and "stepped in a hole" and fell. (P.'s Dep. at 39.) He also testified that the place where he fell "was one big area and it was one big hole." (Id. at 41.) He characterized the hole as "chopped out." (Id. at 45.) Consolidated's foreman, Robert Perreca, testified that at the same time as Consolidated was digging trenches for lighting, the "entire lobby floor was chopped out" so that marble flooring could be installed, and that he believed this chopping was done by Cauldwell or another subcontractor. (Perreca Dep. at 42, 82-84.) Mr. Perreca also

acknowledged that Consolidated had dug three trenches for lighting, but testified that they were 14 to 20 feet from the doors to the area where plaintiff fell. (Id. at 88.)

Cauldwell fails to submit any evidence contesting that there was a large hole separate from Consolidated's trenches, and that the hole in which plaintiff fell was two steps from the doors, whereas Consolidated's trenches were 14 to 20 feet away. Cauldwell also does not dispute, or even address, Consolidated's testimony that Cauldwell or a different subcontractor excavated the large hole. Even assuming that plaintiff fell in Consolidated's trench (notwithstanding the absence of any evidence in the record for such assumption), Cauldwell also fails to eliminate triable issues of fact as to whether it failed to provide protective covering. Consolidated's foreman testified that Cauldwell covered its trenches after they were dug. (Perreca Dep. at 54.) Although Cauldwell's project manager testified to the contrary, resolution of the conflict would require a credibility determination that is not proper on a motion for summary judgment. (See Capelin Assocs. v Globe Mfg. Corp., 34 NY2d 338 [1974].)

Cauldwell thus fails to demonstrate as a matter of law that it did not create the condition that caused plaintiff's accident. The branch of Cauldwell's motion to dismiss plaintiff's section 200 and common law negligence claims must accordingly be denied.

Merrill Lynch has not moved to dismiss plaintiff's Labor Law § 200 and common law negligence claims and, therefore, these claims will stand against it.

Indemnification

Consolidated moves for summary judgment dismissing Cauldwell's third-party complaint against it for common law and contractual indemnification, and Cauldwell cross-moves for summary judgment on those claims.

The subcontract between Cauldwell and Consolidated requires Consolidated to indemnify Cauldwell for any claim of personal injury “arising directly or indirectly out of the acts or omissions to act of [Consolidated] * * * in the performance of the work.” (Subcontract, § 7.3 [Ex. G to Consolidated Motion to Dismiss].) Based on the evidence discussed above, Consolidated makes a prima facie showing, which Cauldwell fails to controvert, that plaintiff did not fall in its trench. While Cauldwell claims that a triable issue of fact exists as to the precise location of plaintiff’s fall, Cauldwell fails to submit any evidence to counter Consolidated’s showing that Consolidated’s trench was at least 14 feet away from the location where plaintiff fell. Under these circumstances, the mere fact that Consolidated was working in the vicinity of that location is insufficient to raise a triable issue of fact as to Consolidated’s liability. (See Allman v Siegfried Constr. Co., 49 AD2d 357 [4th Dept 1975].) Consolidated’s motion should therefore be granted.

It is accordingly hereby ORDERED as follows: Cauldwell’s motion for summary judgment is granted only to the extent that plaintiff’s Labor Law §§ 240(1) and 241(6) claims are dismissed against it; and it is further

ORDERED that Merrill Lynch’s cross-motion for summary judgment is granted to the extent that plaintiff’s Labor Law §§ 240(1) and 241(6) claims are dismissed against it; and it is further

ORDERED that plaintiff’s Labor Law § 200 and common law negligence claims are severed and shall continue; and it is further

ORDERED that Merrill Lynch’s motion for summary judgment on its cross-claims against Cauldwell is granted to the extent that Merrill Lynch is awarded judgment against

Cauldwell on its contractual indemnification cross-claim as to liability, and an assessment of damages, including reasonable attorney's fees, shall be held at the time of trial or other disposition of the action; and it is further

ORDERED that Ashland's cross-motion for summary judgment is granted to the extent that Cauldwell's second third-party complaint and all cross-claims are dismissed as against it, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Commodore's cross-motion for summary judgment is granted to the extent that Cauldwell's third third-party complaint is dismissed as against it, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Consolidated's motion for summary judgment is granted to the extent that Cauldwell's third third-party complaint and all cross-claims are dismissed as against it, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Cauldwell's cross-motion for summary judgment on its third-party complaint against Consolidated is denied as moot; and it is further

ORDERED that Ashland's, Consolidated's, and Commodore's cross-motions to sever are denied as moot.

This constitutes the decision and order of the court.

Dated: New York, New York
February 21, 2006


MARCY FRIEDMAN, J.S.C.

FILED
FEB 27 2006
COUNTY CLERK'S OFFICE
NEW YORK