

Cordero v SL Green Realty Corp.

2006 NY Slip Op 30497(U)

June 6, 2006

Supreme Court, New York County

Docket Number: 103318/04

Judge: Doris Ling-Cohan

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

PRESENT. *Hon. Doris Ling-Cohan*

PART 3C

Index Number : 103318/2004

CORDERO, FREDDI

INDEX NO. _____

vs

SL GREEN REALTY

MOTION DATE _____

Sequence Number : 004

MOTION SEQ. NO. _____

PARTIAL SUMMARY JUDGMENT

MOTION 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 ...

1, 2

Answering Affidavits - Exhibits _____

7

Replying Affidavits _____

3, 4, 5, 6

Cross-Motion: ^② Yes No

Upon the foregoing papers, it is ordered that this motion + cross motions for Summary judgment are decided in accordance with the attached memorandum decision

FILED

JUN 26 2006

NEW YORK COUNTY CLERK'S OFFICE

HON. DORIS LING-COHAN

Dated: 6/6/06

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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 36**

-----X
FREDDI CORDERO,

Plaintiff,

- against -

Index No. 103318/04

Motion Seq. No.: 004

SL GREEN REALTY CORP., SL GREEN
LEASING, LLC, and SLG 17 BATTERY, LLC,

Defendants.

-----X
SL GREEN REALTY CORP., SL GREEN
LEASING, LLC, and SLG 17 BATTERY, LLC,

Third-Party Plaintiffs,

- against -

Third-Party Index No.
591068/04

CITY STORE GATES MGF. CORP. and
CITY-GATES,

Third-Party Defendants.

-----X

LING-COHAN, J.:

While working on a gate at a commercial/residential condominium complex, plaintiff fell off a ladder and was injured. He sued the condominium managers (defendants/third-party plaintiffs, hereinafter, SL Green), who own an apartment at the complex and who contracted for the work. The managers brought a third-party action against the contractors, City Store Gates Mgf. Corp. and City-Gates (hereinafter, City-Gates in the singular), seeking indemnification. City-Gates answered, seeking indemnification and contribution from SL Green.

Non-party All Boro Installers Company (All Boro) was allegedly plaintiff's employer.

City-Gates subcontracted the actual work to All Boro. The same individual owns and manages City-Gates and All Boro; he testified that City-Gates sells overhead doors and All Boro installs and repairs the doors.

SL Green moves for summary judgment dismissing the complaint. City-Gates cross-moves for summary judgment dismissing the complaint and the third-party action. Plaintiff cross-moves for summary judgment on his Labor Law § 240 (1) claim.

The accident occurred on January 2, 2004. The gate was a roll-up motorized security gate, in between two buildings, attached on each side to a building. Plaintiff's boss, the president of City-Gates and All Boro, instructed him and another worker to remove eight flat metal slats from within the cover or hood of the gate and replace them with new slats. According to an invoice, each slat was 299 inches long. Plaintiff testified at his deposition that a slat was less than an inch wide. To access the slats, the workers had first to remove the gate's cover by taking out screws at the top of the gate. Plaintiff leaned an extension ladder against the gate. He mounted the ladder and took out two of the three screws. Plaintiff testified that while he was in the process of removing the third screw with a drill, the ladder fell to the side and he fell. Plaintiff fractured his right elbow. He was eight or nine feet off the ground when he fell. Plaintiff commenced this action, alleging negligence and violations of Labor Law § § 200, 240 (1), and 241 (6).

I. SL Green's Motion

Plaintiff does not oppose the motion and cross motion to dismiss his common-law negligence, Labor Law § 200, and Labor Law § 241 claims. As often stated, if the proponent of a summary judgment motion fails to make a prima facie showing of entitlement to judgment as a

matter of law, the motion will be denied, regardless of the sufficiency of the opposing papers (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). A motion for summary judgment is decided on the version of the facts most favorable to the opponent of the motion (*Henderson v City of New York*, 178 AD2d 129, 130 [1st Dept 1991]).

Labor Law § 200 codifies "the common-law duty imposed upon an owner or general contractor to maintain a safe construction site" (*Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 352 [1998]). The duty may also be imposed on property managers, as the definition of owner "encompass[es] a person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit" (*Copertino v Ward*, 100 AD2d 565, 566 [2d Dept 1984]; *see also Zaher v Shopwell, Inc.*, 18 AD3d 339 [1st Dept 2005]).

The party with the authority to control the work bears the responsibility of maintaining a safe worksite (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under Labor Law § 200 (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

In this case, SL Green contends that it did not control or supervise plaintiff's work. As there is no evidence in the record before the Court that SL Green exercised supervisory control or had any input into how plaintiff did his work, it is entitled to summary judgment dismissal of the common-law negligence and Labor Law § 200 claims. Thus, such claims will be dismissed.

To state a claim under Labor Law § 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 503 [1993]). SL Green contends that plaintiff's Labor Law §

241 (6) is without merit, because plaintiff fails to allege that his injury resulted from a violation of a sufficiently specific provision of the Industrial Code. However, plaintiff's bill of particulars lists several sections of the Code which were allegedly violated. It is defendant's duty, as movant, to explain that the listed regulations are not sufficiently specific or do not apply to plaintiff's claim. As defendant does not do so, the Labor Law § 241 (6) claim will not be dismissed.

Labor Law § 240 (1), known as the scaffold law, provides that in regard to "the erection, demolition, repairing, altering ... of a building or structure" owners, contractors, and their agents must "furnish or erect ... scaffolding, hoists, stays, ladders ... and other devices" for the protection of the laborers. The statute is designed to minimize injuries to employees by placing the ultimate responsibility for safety practices on owners and contractors, rather than on the workers, who as a practical matter lack the means of protecting themselves from accidents (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). The liability placed on owners, contractors and their agents is regardless of whether they actually exercised supervision or control over the work (*Haimes v New York Tel. Co.*, 46 NY2d 132, 136-137 [1978]). An owner or contractor whose liability is vicarious, because it did not control or direct the work, however, is entitled to indemnification from the entity whose liability is direct, because it did control or direct the work (*Aarons v 401 Hotel, L.P.*, 12 AD3d 293, 294 [1st Dept 2004]; *Vanriel v A. Weissman Real Estate*, 283 AD2d 260 [1st Dept 2001]).

Liability under Labor Law § 240 (1) depends upon a showing that the owner violated the statute by failing to provide the necessary safety devices, and that said failure contributed to the accident (*Blake v Neighborhood Hous. Services of New York City, Inc.*, 1 NY3d 280, 288-289

[2003]). Comparative negligence is not a defense to liability under the statute (*id.*). To be awarded summary judgment here, SL Green must show that there was no violation of the statute and that plaintiff was the sole cause of his own accident (*id.* at 289, n 8).

SL Green argues that Labor Law § 240 (1) does not apply to plaintiff, because he was engaged in routine maintenance, a task not covered by the statute. Alternatively, in the event that the court determines that plaintiff's activity comes under the statute, SL Green argues that the accident was solely the fault of plaintiff and not due to any statutory violation on its part.

Plaintiff maintains that he fell while in the process of repairing the gate, a task that is enumerated in the statute. Labor Law § 240 (1) protects workers injured in the course of performing repairs, but not those injured in the course of performing routine maintenance that is not done in the context of construction or renovation work (*Esposito v New York City Indus. Dev. Agency*, 1 NY3d 526, 528 [2003]; *Smith v Shell Oil Co.*, 85 NY2d 1000, 1001-1002 [1995]; *Jehle v Adams Hotel Assoc.*, 264 AD2d 354, 355 [1st Dept 1999]; *Koch v E.C.H. Holding Corp.*, 248 AD2d 510, 511 [2d Dept 1998]). In determining whether the plaintiff was engaged in repair or maintenance when injured, the paramount question for some courts has been whether the item being worked on was inoperable or malfunctioning before the work began (*Stadtmuller v Metropolitan Life Insurance Co.*, 271 AD2d 361 [1st Dept 2000]; *Papapietro v Rock-Time, Inc.*, 265 AD2d 174 [1st Dept 1999]; *Piccione v. 1165 Park Ave., Inc.*, 258 AD2d 357, 358 [1st Dept 1999]. If the item was inoperable prior to the work, it was being repaired, and the work was deemed inside the purview of the statute (*id.*).

In other decisions, the distinction between routine maintenance and repair has not turned solely on whether the work involved fixing something that was not functioning properly (*see*

Abbateiello v Lancaster Studio Assoc., 3 NY3d 46, 53 [2004] [working on a malfunctioning cable box constituted routine maintenance]; *Esposito*, 1 NY3d at 528 [fixing air conditioning unit with a worn motor and chewed up belts constituted routine maintenance]). Some cases have established a rule that a worker replacing parts that routinely wear out is doing maintenance work, outside the purview of Labor Law § 240 (1) (*Esposito*, 1 NY3d at 528; *see also Smith v Shell Oil Co.*, 85 NY2d at 1002; *Jehle*, 264 AD2d at 355).

In addition to repairing, Labor Law 240 § (1) applies to “altering” buildings or structures. For the purposes of the statute, altering requires making “a significant physical change to the configuration or composition of the building or structure” (*Joblon v Solow*, 91 NY2d 457, 465 [1998]; *see also Maes v 408 W. 39 LLC*, 24 AD3d 298, 300 [1st Dept 2005]; *Kretzschmar v New York State Urban Dev. Corp.*, 13 AD3d 270 [1st Dept 2004], *lv denied* 5 NY3d 703 [2005]). Under the statute, a structure is “any production or piece of work artificially built up or composed of parts joined together in some definite manner” (*Lewis-Moors v Contel of New York, Inc.*, 78 NY2d 942, 943 [1991]; quoting *Caddy v Interborough Rapid Transit Co.*, 195 NY 415, 420 [1909]).

Here, the record before the Court on the state of the gate is not definitive. Thus, there are factual issues as to whether plaintiff was performing a repair, routine maintenance or altering such gate at the time of the subject accident. The managers’ representative testified that a motor on the gate was replaced in December 2003 (Egan Deposition, at 41). He did not remember whether the gate was “operable” on the date of the accident (*id.* at 42). At his deposition, plaintiff testified that the gate was not working properly (Cordero Deposition, at 106). In his affidavit, plaintiff states that the slats were broken. Thus, whether the gate was broken or

malfunctioning cannot be determined on this limited record. In addition, there is no evidence that plaintiff was replacing parts that routinely wear out. Therefore, it cannot be said as a matter of law whether the gate was being repaired, altered or whether routine maintenance was being performed, at the time of plaintiff's accident.

Thus, summary judgment cannot be awarded to SL Green on the ground that plaintiff's work was outside the statute. In addition, defendants fail to make a prima facie showing that there was no violation of Labor Law § 240 (1), and that plaintiff's own actions were the sole cause of his accident (*see Blake*, 1 NY3d at 289 n 8); there is no evidence that plaintiff was the sole cause of the subject accident. Accordingly, SL Green's motion is denied in regard to Labor Law § 240 (1).

II. Plaintiff's Cross Motion

As stated above, as there are factual issues as to whether at the time of plaintiff's accident he was performing work which is covered by Labor Law § 240 (1), plaintiff's cross-motion for summary judgment is denied.

III. City-Gates' Cross Motion

City-Gates' cross motion for summary judgment can only be granted if it had no duty to indemnify SL Green. SL Green has shown that it did not supervise or control plaintiff's work. Therefore, SL Green is entitled to be indemnified by the party who had such supervision or control.

To establish a claim for common-law indemnification, the one seeking indemnity must prove that it was not guilty of any negligence and that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident (*Correia v Professional Data*

Mgt., 259 AD2d 60, 65 [1st Dept 1999]). In the absence of any negligence by the proposed indemnitor, the one seeking indemnity must show that the proposed indemnitor “had the authority to direct, supervise, and control the work giving rise to the injury” (*Hernandez v Two E. End Ave. Apt. Corp.*, 303 AD2d 556, 557 [2d Dept 2003]; *see also Reilly v S. DiGiacomo & Son, Inc.*, 261 AD2d 318, 318 [1st Dept 1999]). The party disclaiming indemnity must show that it was not negligent or that it was not responsible for supervising the work.

City-Gates alleges that, apart from arranging for All Boro to fix the gate, it had nothing to do with plaintiff’s work. During his deposition, the president of City-Gates testified that City-Gates did not inspect the work performed by All Boro. He stated that City-Gates and All Boro were separate entities. Mr. Greco also testified, however, that the trucks used by All Boro had a City-Gates decal and that he performed the functions of safety coordinator and personnel director for All Boro. In addition, Mr. Greco testified that he provided All Boro employees with a handbook instructing them to tell him if a tool, including a ladder, used by them was defective; in such instance, he would then, personally, inspect the damaged tool and replace it with a new one.

Based upon the above, City-Gates has failed to establish that it was not negligent, or that it was not obligated to, or did not in fact, supervise plaintiff’s work. Whether City-Gates was negligent in causing the subject accident or whether it had authority to direct and supervise plaintiff’s work are questions of fact, precluding this Court from granting summary judgment in favor of City-Gates.

In accordance with the above, it is

ORDERED that defendants/third-party plaintiffs’ motion for summary judgment dismissing the complaint is granted only as to the common-law negligence and Labor Law § 200

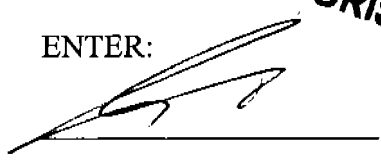
claims, and is otherwise denied; and it is further

ORDERED that the cross motion by third-party defendants City Store Gates Mgf. Corp. and City-Gates for summary judgment dismissing the complaint and the third-party complaint is granted in regard to the complaint's common-law negligence and Labor Law § 200 claims and is otherwise denied, and is denied in regard to the third-party complaint; and it is further

ORDERED that plaintiff's cross motion for partial summary judgment on his Labor Law § 240 (1) claim is denied; and it is further

ORDERED that within 30 days of entry of this decision/order, plaintiff shall serve a copy upon all parties with notice of entry.

Date: 4/6/06

ENTER: 
J.S.C.
HON. DORIS LING-COHAN

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JUN 26 2006
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