

Bradley v Ibex Constr., LLC

2006 NY Slip Op 30563(U)

May 31, 2006

Supreme Court, New York County

Docket Number: 108416/04

Judge: Rosalyn H. Richter

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

ROSALYN RICHTER
J.S.C.

PRESENT:

Index Number : 108416/2004

PART 24

— BRADLEY, ROBERT

vs

IBEX CONSTRUCTION LLC

DEX NO. _____

Sequence Number : 010

OTION DATE _____

PARTIAL SUMMARY JUDGMENT

OTION SEQ. NO. _____

OTION CAL. NO. _____

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

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

PAPERS NUMBERED

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
JUN 08 2006
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 5/31/06

ROSALYN RICHTER
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 24

-----X

ROBERT BRADLEY and ROBIN BRADLEY,

Plaintiffs,

-against-

IBEX CONSTRUCTION, LLC, HOME DEPOT U.S.A.,
23rd STREET PROPERTIES, LLC., AND RUTTURA &
SONS CONSTRUCTION CO.,

DECISION AND ORDER
Index No. 108416/04
Motion Seq. Nos. 10, 11

Defendants.

-----X

IBEX CONSTRUCTION, LLC,

Third-Party Plaintiff,

-against-

RUTTURA & SONS CONSTRUCTION CO.,

Third-Party Defendant.

-----X

IBEX CONSTRUCTION, LLC,

Second Third-Party Plaintiff,

-against-

SAGE ELECTRICAL CONTRACTING, INC.,

Second Third-Party Defendant.

-----X

Rosalyn Richter, J.:

On April 27, 2004, during the renovation of a building for a new Home Depot store at 40 West 23rd Street in Manhattan, plaintiff Robert Bradley, an electrician employed by Sage Electrical Contracting, Inc. ("Sage"), was working on the

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installation of a fire alarm system. According to plaintiff, he was standing on a ladder, pulling cable through a pipe above his head. Polyethylene (plastic) sheeting covered the entire concrete floor and the six-foot, wooden A-frame ladder had been placed on the plastic sheeting. Plaintiff alleges that the sheeting caused the ladder to slip, he fell off the ladder, and was injured. However, an accident report prepared by Sage on the very day plaintiff was injured indicates that plaintiff did not fall off the ladder as he now claims. Although there is a dispute over whether plaintiff's accident was witnessed by anyone else, no party has submitted deposition testimony or an affidavit from any purported witness.

Defendant 23rd Street Properties, LLC ("23rd") was the owner of the premises and defendant Home Depot U.S.A., Inc. ("HD") was the lessee of the space where the renovations were taking place. HD retained defendant IBEX Construction, LLC ("IBEX") as general contractor, and defendant Ruttura & Sons Construction Co. ("Ruttura") as the contractor responsible for installing concrete for the project. In its turn, IBEX hired Sage as the electrical subcontractor at the site. Non-party Jacobson & Company, Inc. ("Jacobson") was apparently retained to hang plastic around the area where Ruttura was laying concrete, in order to keep the

exhaust created by Ruttura's work from spreading throughout the rest of the premises.

According to Ruttura, the process of laying concrete is fairly straightforward, at least with respect to the use of plastic sheeting. The first application of the sheeting is placed on top of the old, damaged concrete floor, in order to prevent a bonding between the old floor and the new, so as to prevent the same problems present in the old floor from appearing in the new. Once that sheeting is put down, the new concrete floor is poured. Thus, that layer of sheeting remains on the floor, underneath the new concrete. Once the new concrete is poured, a second sheeting is laid, this time a sheeting that is felt on one side, and plastic on the other. The sheeting is called a curing blanket, and it is used to keep the moisture in the concrete from dissipating too quickly. Once the new concrete is fully dry, this blanket is removed. The last step in installing a new concrete floor is the application of a diamond-hard sealant to the new concrete. This time the floor is left uncovered, so the sealant can dry properly.

There is no dispute that there was plastic covering the whole floor at the time of plaintiff's accident. There is substantial disagreement about which party is responsible for its

presence there. Plaintiff attests that he does not know which party's laborers placed the sheeting, but suggested that they might have been from "IBEX or people that were doing the floors." Ruttura's field supervisor for the project, Peter Ruttura, testified that Ruttura laborers placed plastic sheeting, but only the "membrane" beneath the new layer of concrete (Ruttura Depo., at 51-52). Ruttura maintains that it removed its curing blankets eight days before the accident, and denies that it placed the sheeting present on the day that plaintiff fell. Instead, Ruttura speculates that the entity that did place the sheeting might have been Jacobson.

The complaint alleges two causes of action, the first, by plaintiff, for common-law negligence, and violations of Labor Law §§ 200, 240[1], and 241; the second, by plaintiff's wife, asserts a claim for loss of consortium. FN 1 In motion sequence number 10, plaintiffs move, pursuant to C.P.L.R. § 3212, for partial summary judgment against HD and 23rd on the issue of their liability pursuant to Labor Law § 240[1]. "Labor Law § 240[1] imposes absolute liability upon owners and contractors for their failure to provide workers with safety devices that properly

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The complaint was subsequently amended to add Ruttura as a direct defendant, but does not allege any further causes of action.

protect against elevation related hazards". *Keaney v. City of New York*, 24 A.D.3d 615, 617 (2d Dept. 2005). The liability is imposed "for any breach of the statute that proximately causes a worker's injury", *Moniuszko v. Chatham Green, Inc.*, 24 A.D.3d 638, 638 (2d Dept. 2005), and the statute was designed "to prevent those types of accident in which the . . . ladder . . . proved inadequate to shield the injured worker *from harm directly flowing from the application of the force of gravity to an object or person*". *Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 N.Y.2d 494, 501 (1993) (emphasis in original). However, when information as to how the accident happened is within the exclusive knowledge of the plaintiff and when a defendant proffers some evidence contradicting plaintiff's version of events, "an award of summary judgment on liability is inappropriate because the defendant should have the opportunity to subject the plaintiff's testimonial account to cross-examination and have his credibility determined by the trier of fact". *Manna v. New York City Housing Authority*, 215 A.D.2d 335 (1st Dept. 1995).

The Court concludes that summary judgment is unwarranted because there is an issue of fact as to how the accident occurred. Defendants have submitted an accident report stating that plaintiff "tripped on plastic on floor" and "fell while

carrying ladder". Thus, this accident report raises an issue of fact as to whether plaintiff even fell off the ladder. See *Potter v. NYC Partnership Housing Development Fund Company, Inc.*, 13 A.D.3d 83 (1st Dept 2004) (differing versions of accident, some of which indicated that plaintiff did not even fall from a ladder, raise triable issues of fact as to whether plaintiff's injuries were caused by an elevation-related accident); *Woodworth v. American Ref-Fuel*, 295 A.D.2d 942 (4th Dept. 2002) (plaintiff's conflicting versions of unwitnessed accident raise an issue of fact as to Labor Law § 240[1] liability); *Colazo v. Tower 45 Associates, Inc.*, 209 A.D.2d 339 (1st Dept. 1994) (differing accounts of how accident occurred preclude summary judgment on Labor Law § 240[1] claim). Of course, if plaintiff's injuries occurred as a result of his tripping on the plastic covering while carrying the ladder, there would be no liability whatsoever under Labor Law § 240[1]. *Cook v. Presbyterian Homes of Western New York, Inc.*, 234 A.D.2d 906 (4th Dept. 1996) ("if [the] plaintiff did not slip on the ladder, he was not a falling worker in the context of Labor Law § 240[1]").

Plaintiff does not dispute that the accident report would warrant the denial of summary judgment. Instead, plaintiff urges this Court to find that the report is inadmissible. However,

plaintiff's foreman testified that, in accord with Sage procedures, he reported the details of plaintiff's accident by telephone to Ms. Costa at Sage's office. The foreman further testified that Ms. Costa transcribed the report and then read it back to the foreman who confirmed that it was accurately recorded. In addition, the foreman testified that he received the information about the accident directly from plaintiff. Ms. Costa testified that she prepared the report in the regular course of Sage's business, and the report is dated the same day as plaintiff's accident.

Under these circumstances, the report is properly admissible as a business record. See *Petrocelli v. Tishman Construction Co.*, 19 A.D.3d 145 (1st Dept. 2005) (accident report prepared by foreman in the regular course of business and based on the account provided to him by the injured plaintiff was admissible"). Plaintiff's remaining complaints about the accident report go to its weight, not its admissibility, and the Court does not find the report to be inherently unreliable as a matter of law. Accordingly, plaintiffs' motion for partial summary judgment on the Labor Law § 240[1] claim is denied.

Ruttura cross-moves, pursuant to C.P.L.R. § 3212, for summary judgment dismissing all claims and cross claims asserted

against it. Ruttura's motion is denied as untimely. The Court's November 21, 2005 Order directed that summary judgment motions be filed within sixty days of the date of the Order. The 60 day deadline expired on January 20, 2006 and Ruttura did not file its motion until three days later on January 23, 2006. Ruttura's only explanation for the late filing is that it miscalculated the date. The Court finds that this excuse does not constitute the requisite good cause for this Court to allow the late filing. In the absence of a showing of good cause, Ruttura's motion must be denied as untimely. See *Brill v. City of New York*, 2 N.Y.3d 648 (2004) (perfunctory excuse cannot be "good cause"); *Miceli v. State Farm Mutual Automobile Insurance Co.*, 3 N.Y.3d 725 (2004); *Levy v. Deer Trans. Corp.*, 27 A.D.3d 279 (1st Dept. 2006) (summary judgment motions made after the prescribed time set by Court are untimely without showing of good cause for the delay); *Buckner v. City of New York*, 9 Misc.3d 510 (Sup. Ct. N.Y. Cty. 2005).

There is no merit to Ruttura's argument that its request for summary judgment is timely because it was made in a cross-motion to a timely submitted motion for summary judgment. See *Thompson v. Leben Home for Adults*, 17 A.D.3d 347 (2d Dept. 2005) (untimely cross-motion should not have been considered); *Colon v. City of New York*, 15 A.D.3d 173 (1st Dept. 2005) (same). The Court

recognizes that there are a small number of cases which allow an untimely cross-motion if it can be shown that it was made in response to a "nearly identical" timely and still-pending motion for summary judgment. See, e.g., *Bressingham v. Jamaica Hospital Medical Center*, 17 A.D.3d 496 (2d Dept. 2005). Here, however, Ruttura's cross-motion was not made in response to any of the timely motions for summary judgment and focused on entirely different issues. Indeed, none of the summary judgment movants-in-chief even sought any relief from Ruttura. See *Gonzalez v. Zam Apartment Corp.*, 11 A.D.3d 657 (2d Dept. 2004) (late cross-motion denied as untimely since original motion did not seek any relief from cross-movant). FN 2

Finally, Ruttura argues that the Court should find the delay of one business day to be *de minimus*. However, Ruttura has not submitted any post-*Brill* authority providing for such an exception. Indeed, courts have found otherwise. See, e.g., *Milano v. George*, 17 A.D.3d 644 (2d Dept. 2005) (motion for summary judgment untimely when made one day past Court ordered deadline). Accordingly, Ruttura's cross-motion for summary judgment is denied.

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The cases cited by Ruttura are inapposite because they are either pre-*Brill* or involve cross-motions addressing identical issues in main motions.

In Motion Sequence No. 11, HD and 23rd move, pursuant to C.P.L.R. § 3212, for summary judgment on their cross-claims against IBEX and Sage sounding in common-law indemnification and contribution. The motion is denied in its entirety as to Sage. Since Sage was plaintiff's employer, and plaintiff has not suffered a "grave injury," HD and 23rd's claims against Sage for common-law indemnification and contribution are prohibited by Workers' Compensation Law § 11. See, e.g., *Rodrigues v. N & S Building Contractors*, 5 N.Y.3d 427, 429-430 (2005)]. Therefore, the part of the motion which seeks summary judgment on HD and 23rd's tort claims as against Sage is denied. Although Sage has not sought summary judgment in its favor dismissing these claims, the Court searches the record and since these claims are barred as a matter of law, they are dismissed.

Next, 23rd and HD seek contribution against IBEX. There is no evidence that 23rd was in any way negligent in the causation of plaintiff's accident. The director of operations and engineering for the building, who is responsible for the daily operations of the building except for the area occupied by the Home Depot store, attests that "[a]t no time after the Store area was leased by Home Depot did 23rd Street have any involvement with the Home Depot Store, including its construction and/or

daily operations." This statement is uncontradicted. However, 23rd has failed in its motion to offer proof that IBEX was negligent and thus, they are not entitled to summary judgment against IBEX on this claim.

HD contracted directly with Ruttura and IBEX has presented an affidavit indicating that it did not supervise Ruttura work. There are factual questions as to whether this accident was caused, even in part, by Ruttura's work and whether if it was, HD failed to properly supervise Ruttura's work. These questions preclude granting HD summary judgment on the contribution claim.

HD and 23rd also seek common-law indemnification from IBEX. Common-law indemnification requires not just that the one seeking indemnification be free from negligence, but that the one from whom indemnification is being sought be shown to have been negligent. Here, since HD and 23rd have failed to show, as a matter of law, that IBEX was negligent, summary judgment on their claims for common-law indemnification against IBEX is also denied.

Next, HD and 23rd seek contractual indemnification from IBEX. FN 3 "A party is entitled to full contractual

³ It is not entirely clear that HD's and 23rd's cross-claims specifically plead contractual indemnification. However, since all of the parties have briefed the issue of contractual indemnification, the Court will rule on those claims.

indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement, and the surrounding facts and circumstances". *Torres v. Morse Diesel International*, 14 A.D.3d 401, 403 (1st Dept. 2005) (interior quotation marks and citations omitted); *Masciotta v. Morse-Diesel International*, 303 A.D.2d 309, 310 (1st Dept. 2003). The indemnification clause in the HD-IBEX contract covers any claims "occurring wholly or in part, as a result of the Work done or omitted to be done by, or contracted to be done but not done by, the Contractor, or his Subcontractors, Sub-subcontractors, or the employees, agents, or anyone for whose acts any of them may be liable."

Here, no question exists that plaintiff's claim arises out of his work for Sage, a subcontractor on this job who was hired by Ibex. There is no evidence, however, of any negligence on the part of 23rd and thus, they have met their *prima facie* burden on this claim as against IBEX. IBEX has not alleged any negligence on the part of 23rd, but rather focuses solely on HD's role. Thus, the Court grants 23rd's motion seeking contractual indemnification against IBEX.

However, there are questions of fact as to whether HD was in any way negligent in causing plaintiff's injuries. One of the

critical issues in this action is whether sub-subcontractor Ruttura improperly placed plastic on the floor. There is evidence in the record showing that HD contracted with Ruttura directly and not through IBEX. Moreover, IBEX has put forth evidence showing that it did not direct or control Ruttura's work and that HD scheduled and oversaw Ruttura's work. Thus, HD's motion for summary judgment on the contractual indemnification claim must be denied. See *Correia v. Professional Data Mgmt., Inc.*, 259 A.D.2d 60 (1st Dept. 1999).

Finally, HD and 23rd seek contractual indemnification from Sage. Neither 23rd nor HD is a signatory to the IBEX-Sage subcontract. However, paragraph A of the "Other Terms and Conditions" of the IBEX-Sage subcontract provides that the subcontract "is subject to the terms and provisions of the Prime Contract", i.e., the contract between HD, as Owner, and IBEX, as Contractor (see p. 6 of 10 of subcontract). Paragraph M provides, in pertinent part:

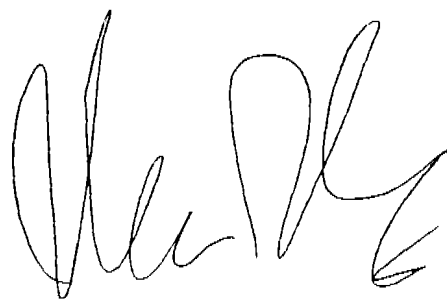
To the fullest extent permitted by law, Subcontractor [Sage] will defend, indemnify, and hold harmless IBEX Construction and Owner ... from and against any and all claims, liens, judgments, liabilities, damages, losses and expenses including reasonable attorneys' fees and legal costs, arising in whole or in part and in any manner from the act, failure to act, omission ... by Subcontractor [Sage] ... in connection with

the performance of this Agreement or any Work.

This clause does not cover all claims arising from the work, but rather only those claims arising from Sage's act or failure to act. As Sage correctly notes, there has been no showing that the accident was caused by Sage or by its failure to act. Indeed, although 23rd and HD, in their reply papers, focus on the fact that Sage supplied the ladder, from which they suggest plaintiff fell, as noted earlier in this decision, there is a question as to whether plaintiff fell from a ladder at all. It also is unclear who provided the plastic that was on the floor. Thus, the contractual indemnifications claims against Sage are denied.

This constitutes the decision and order of the Court.

May 31, 2006



Justice Rosalyn Richter

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