

Talavera v Brookfield Fin. Props.

2007 NY Slip Op 30827(U)

April 12, 2007

Supreme Court, New York County

Docket Number: 0107612/2003

Judge: Barbara R. Kapnick

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

DECEMENT. **BARBARA R. KAPNICK**

PART 12

Index Number: 107612/2003

TALAVERA, RALPH

vs

BROOKFIELD FINANCIAL

Sequence Number: 002

SUMMARY JUDGMENT

INDEX NO.

107612/03

MOTION DATE

MOTION SEQ. NO.

002

MOTION CAL. NO.

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

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

and cross-motion are decided in accordance with the accompanying memorandum decision

FILED

APR 20 2007

NEW YORK COUNTY CLERK'S OFFICE

Dated: 4/12/07

BARBARA R. KAPNICK S.C. JAC

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: PART 12

-----X
RALPH TALAVERA and JOYCE TALAVERA,

Plaintiffs,

DECISION/ORDER
Index No. 107612/03
Motion Seq. Nos.
002 and 003

-against-

BROOKFIELD FINANCIAL PROPERTIES,
LEHR CONSTRUCTION CORPORATION and
P.E. STONE, INC.,

Defendants.

-----X
LEHR CONSTRUCTION CORPORATION,

Third-Party
Index No. 590955/03

Third-Party Plaintiff,

-against-

SUPERIOR ACOUSTICS, INC.,

Third- Party Defendant.

-----X
BARBARA R. KAPNICK, J.:

FILED

APR 20 2007

NEW YORK
COUNTY

Motions sequence numbers 002 and 003 are consolidated for disposition.

This is an action pursuant to Labor Law §§ 240(1), 241(6) and 200 and for common law negligence.

Plaintiffs seek to recover damages for personal injuries sustained by plaintiff Ralph Talavera, a carpenter, on November 18, 2002 at One Liberty Plaza in Manhattan.

At the time of his accident, plaintiff was installing acoustical ceiling tiles in the office space on the 32nd floor of the building which was under renovation, while working on a six foot high Baker scaffold. There is no dispute that the scaffold, which was on wheels, was not equipped with guardrails.

Plaintiff claims that he was thrown to the ground when he attempted to move the scaffold by rocking his body back and forth (referred to in plaintiffs' papers as the "shimmy" method). According to plaintiff, one of the wheels of the scaffold struck debris, causing the scaffold to tip or tilt.

Defendant Brookfield Financial Properties ("Brookfield") was the owner of the site. Defendant/third-party plaintiff Lehr Construction Corporation ("Lehr") was the general contractor of the project. Defendant P.E. Stone, Inc. ("P.E. Stone") was the electrical sub-contractor. Third-party defendant Superior Acoustics, Inc. ("Superior"), plaintiff's employer, was the sub-subcontractor responsible for ceiling work.

Plaintiffs now move (under motion sequence number 002) for an order: (i) granting summary judgment against defendants Brookfield and Lehr on the issue of liability on their claims pursuant to Labor Law §§ 240(1) and 241(6); and (ii) establishing a date for

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the commencement of pre-judgment interest in the event a verdict is awarded in plaintiffs' favor on the issue of damages and ordering a trial solely on the issue of damages with reference to these defendants.

Third-party defendant Superior opposes plaintiffs' motion and cross-moves for summary judgment dismissing plaintiffs' complaint.

Defendants Brookfield and Lehr also oppose plaintiffs' motion and cross-move for an order: (i) granting summary judgment dismissing plaintiffs' claims against them; and (ii) granting summary judgment in favor of Lehr on its third-party claim against third-party defendant Superior for contractual indemnification.

Defendant P.E. Stone moves (under motion sequence number 003) for summary judgment dismissing plaintiffs' complaint and all cross-claims against it.

* * * * *

Plaintiffs argue that they are entitled to summary judgment against defendants Brookfield and Lehr on the issue of liability on their claim pursuant to Labor Law § 240(1) because this action involves an elevation-related injury, and because, according to Jay

Shankman, Ph.D., a forensic safety engineer who has submitted an affidavit in support of plaintiffs' motion, plaintiff was not provided with the proper equipment since the scaffold on which he was working lacked guardrails.

Defendants Brookfield and Lehr, as well as the third-party defendant Superior, argue that plaintiffs' claim pursuant to Labor Law § 240(1) should be dismissed because (i) plaintiff cannot establish that the scaffold he was using was defective or malfunctioned in any way, and (ii) plaintiff's actions were the sole proximate cause of his accident.

Specifically, these parties argue that plaintiff's accident would not have occurred if plaintiff had chosen to get off the scaffold, unlock the wheels which were equipped with friction locks, move the scaffold and re-lock the wheels before getting back on the scaffold to work, rather than rocking the scaffold.

However, the Appellate Division, First Department, has held that defendants' liability pursuant to Labor Law § 240(1) is established as a matter of law where, as here, there is "clear evidence that the injured worker had been provided a scaffold without guardrails or other protective devices that might have prevented his fall." Lezcano v. Metropolitan Life Insurance

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Company, 11 A.D.3d 303 (1st Dep't 2004). See also, Torres v. Monroe College, 12 A.D.3d 261, 262 (1st Dep't 2004) in which the Court found that plaintiff was entitled to partial summary judgment on his claim pursuant to Labor Law § 240(1) because "[d]efendant's failure to ensure that the scaffold plaintiff needed to use to perform his assigned task provided proper protection, and was properly secured and braced, constituted a proximate cause of the accident"; and Morrison v. City of New York, 306 A.D.2d 86 (1st Dep't 2003) in which the Court held that defendants' liability pursuant to Labor Law § 240(1) "was established as a matter of law by the fact that the scaffold they provided plaintiff, which admittedly had no guard rails, safety nets or lifelines, did not prevent plaintiff from falling."

Accordingly, based on the papers submitted and the oral argument held on the record on December 6, 2006, this Court finds that plaintiffs have established the liability of defendants Brookfield and Lehr pursuant to Labor Law § 240(1) as a matter of law. That portion of plaintiffs' motion seeking partial summary judgment on the issue of liability on said claim is, therefore, granted.

Those portions of the cross-motions by third-party defendant Superior and by defendants Brookfield and Lehr to dismiss

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plaintiff's claims pursuant to Labor Law § 240(1) are, therefore, denied.

Plaintiffs also move for summary judgment on their claim pursuant to Labor Law § 241(6) on the ground that defendants violated sections 23-1.5, 23-2.1(b) and 23-5.18(f), (g) and (h) of the Industrial Code.

Defendants argue that plaintiffs' claim pursuant to Labor Law § 241(6) should be dismissed because the sections cited by plaintiffs are too general or not applicable to the facts of this case.

The Appellate Division, First Department, has previously held that section 23-1.5 of the Industrial Code is a "general safety directive, insufficient as a predicate" for liability under Labor Law § 241(6). See, Sajid v. Tribeca North Associates L.P., 20 A.D.3d 301, 302 (1st Dep't 2005). See also, Carty v. Port Authority of New York and New Jersey, 32 A.D.3d 732 (1st Dep't 2006).

However, defendants do not dispute that liability may be predicated under section 23-2.1(b) ['Disposal of debris'] which provides that "[d]ebris shall be handled and disposed of by methods

that will not endanger any person employed in the area of such disposal or any person lawfully frequenting such area."

Nor do defendants dispute that liability may in appropriate cases be predicated on section 23-1.7(e) ['Tripping and other hazards'] of the Industrial Code, a section admittedly referenced by plaintiffs for the first time in their reply papers, which provides, in relevant part, as follows:

(2) *Working areas.* The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

Although defendants argue that this Court should reject plaintiffs' explanation that debris caused the scaffold to tip as speculative, this Court finds that the issue of whether or not the presence of debris was a substantial factor in causing plaintiff's accident is an issue of fact to be determined by the jury.

In addition, it is not clear from the papers submitted whether section 23-5.18 of the Industrial Code, which applies to "manually-propelled mobile scaffolds" and is referenced by plaintiffs' expert, governs the instant case which involves a Baker scaffold.

Accordingly, those portions of the cross-motions by third-party defendant Superior and by defendants Brookfield and Lehr seeking to dismiss plaintiffs' claim pursuant to Labor Law § 241(6) are denied. Plaintiffs' motion for summary judgment on said claim is also denied.

That portion of the cross-motion by defendants Brookfield and Lehr seeking to dismiss plaintiffs' claims pursuant to Labor Law § 200 and for common law negligence is granted with respect to defendant Brookfield only since there is no evidence that said defendant either controlled or supervised the work site.

However, that portion of the cross-motion seeking to dismiss plaintiffs' claims against defendant Lehr pursuant to Labor Law § 200 and for common law negligence is denied, as this Court finds that there are outstanding issues of fact as to whether Lehr, which was responsible for the removal of debris from the worksite, was negligent in failing to remove the debris which allegedly caused the scaffold to tip. See, Taylor v. Lehr Construction Corp., 15 A.D.3d 242 (1st Dep't 2005) in which the Court found that there were issues of fact as to whether Lehr breached its duty to maintain the work area free of scattered materials.

Likewise, that portion of the cross-motion seeking summary judgment in favor of Lehr on its third-party complaint against third-party defendant Superior for contractual indemnification is

denied as premature. See, Diaz v. Martinez, 31 A.D.3d 296 (1st Dep't 2006).

Those portions of the motion by defendant P.E. Stone seeking to dismiss plaintiffs' complaint and all cross-claims against it for contribution and common law indemnification are also denied as premature, as this Court finds that there is an issue of fact as to whether P.E. Stone, which was also responsible for removing its own debris, created the alleged debris condition.¹ See, Barraco v. First Lenox Terrace Associates, 25 A.D.3d 427 (1st Dep't 2006).

That portion of P.E. Stone's motion seeking to dismiss Lehr's cross-claim against it for contractual indemnification is also denied as this Court finds that there is an issue of fact as to whether or not plaintiff's accident "arose out of" P.E. Stone's work, thus giving rise to a contractual duty to indemnify Lehr.

However, that portion of P.E. Stone's motion seeking to dismiss Brookfield's cross-claim against it for contractual indemnification is granted, as it appears that there was no contract between P.E. Stone and Brookfield.

¹ Although P.E. Stone claims to have followed instructions to pile its debris in the corner of the room, there is at least an allegation that the debris in the center of the room which plaintiffs claim was a substantial factor in causing the accident, included conduit and electrical wires which could have been produced by P.E. Stone, the electrical sub-contractor.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on May 2, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: April 12, 2007


Barbara R. Kapnick
J.S.C.

**BARBARA R. KAPNICK
J.S.C.**

FILED
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