

McKenna v 1400 on Fifth LLC

2007 NY Slip Op 30992(U)

April 30, 2007

Supreme Court, New County

Docket Number: 0107597/2003

Judge: Walter B. Tolub

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

PRESENT: **WALTER B. TOLUB**
Justice

PART 15

Index Number : 107597/2003

MCKENNA, THOMAS

vs

1400 ON FIFTH

Sequence Number : 004

SUMMARY JUDGMENT

1 original

INDEX NO. _____

MOTION DATE 4/13/07

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

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 is consolidated with motion sequence 005, 006, and 007 and

IS DECIDED

IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

FILED

MAY - 1 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/30/07

WBT
WALTER B. TOLUB 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 15

-----x

THOMAS MCKENNA and MICHELLE MCKENNA

Plaintiffs,

-against-

1400 ON FIFTH LLC and HRH CONSTRUCTION
COMPANY,

Defendants.

-----x

1400 ON FIFTH LLC and HRH CONSTRUCTION
COMPANY,

Third-Party Plaintiffs.

-against-

CENTRIFUGAL/MECHANICAL ASSOCIATES, INC.,

Third-Party Defendants.

-----x

CENTRIFUGAL/MECHANICAL ASSOCIATES, INC.,

Second Third-Party Plaintiffs.

-against-

JCI

Second Third-Party Defendants.

-----x

1400 ON FIFTH LLC and HRH CONSTRUCTION
COMPANY,

Third Third-Party Plaintiffs.

-against-

AURASH CONSTRUCTION CORP.,

Third Third-Party Defendant.

-----x

WALTER B. TOLUB, J.:

Index No. 107597/03
Mtn Seq. 004, 005,
006, 007

Motion sequence 004, 005, 006, and 007 are consolidated and resolved in the following memorandum decision.

Background

Defendant 1400 on Fifth LLC ("1400") is the owner of premises located at 1400 Fifth Avenue in New York City ("the property"). In 2003, defendant 1400 hired defendant HRH Construction Company ("HRH") to manage a construction project on the property (the construction "site" or "project").¹ Defendant HRH entered into a contract with third-party defendant Centrifugal Mechanical Associates ("CMA") to provide HVAC work on the construction project. Plaintiff Thomas McKenna (McKenna) was employed as a steamfitter by CMA. CMA, it appears, is no longer in business.

Mr. McKenna claims that while working on the construction site on March 11, 2003, he fell from a ladder, and sustained serious injuries. Plaintiff asserts that his fall was in large part due to the ladder being hit by an unsecured blue tarp ("the tarp"). The impact, according to plaintiff's testimony and that of a sworn eyewitness (see Plaintiff's Deposition; statement of Erik Galloway (Motion Sequence 004, Exhibit F; see also, Accident report, Motion Sequence 004, Exhibit G), caused the ladder to

¹Collectively, these two entities (defendants 1400 and HRH) represent the primary defendants in this action and for simplicity, are referred to as "defendants".

kick out on the icy surface, resulting in plaintiff's fall and subsequent injuries (Id.). The court notes that to date, there remains a question of fact as to which entity involved in this action was responsible for installing and securing or maintaining the tarp.²

Plaintiffs commenced this action against defendants 1400 and HRH in April, 2003.³ Shortly thereafter, defendants commenced a third-party action against plaintiff's employer, CMA. CMA impleaded Joy Contractors, Inc., d/b/a JCI ("JCI"), the concrete superstructure subcontractor for the construction project. Defendants then commenced a third-party action against defendant Aurash Construction Corp. ("Aurash"), the subcontractors responsible for providing the masonry and fireproofing for the project.⁴

² Plaintiffs and defendants 1400 and HRH contend that the tarp was the responsibility of either defendant Aurash or defendant JCI.

³ The complaint, comprised of two causes of action asserts claims of negligence, violations of Labor Law §§ 240(1), 241(6), and 200, and violations of numerous provisions of Rule 23 of the Industrial Code of the State of New York and OSHA Article 1926. Plaintiffs' second cause of action asserts a claim on behalf of Mr. McKenna's wife (Motion Sequence 004, Exhibit A).

⁴ The complaints served against CMA and Aurash each contain three causes of action sounding in common law indemnification, contractual indemnification and breach of contract (Defendants' cross-motion, Ex. B (third-party complaint against CMA); Ex. D (third-third party complaint against Aurash). The second-third-party complaint asserted against JCI mirrors the other third-party complaints, and adds a claim a claim for contributory negligence (Defendants' cross-motion, Ex. C).

By motion sequence 004, plaintiffs move for summary judgment under §240(1) of the New York State Labor Law. Defendants/Third-Party plaintiffs 1400 On Fifth LLC and HRH Construction s/h/a HRH Construction Company (collectively, "defendants") cross-move for summary judgment dismissing plaintiff's Labor Law claims asserted under §§ 240(1), 241(6), and 200, as well as claims predicated on common law negligence. Defendants additionally seek summary judgment on their contractual indemnification claim against third-party defendant CMA.⁵ Third-Party defendant / second third-party plaintiff CMA additionally cross-moves for summary judgment dismissing plaintiffs' Labor Law §§ 240(1) and 241(6) claims. Third party defendant JCI cross-moves for summary judgment dismissing the second-third party complaint.

By motion sequence 005, third-party defendant/second third-party plaintiff CMA moves for (1) summary judgment dismissing all of defendants' claims as against CMA; (2) dismissal of the counter-complaint advanced against CMA by second third party defendant JCI, as well as dismissal of any claims advanced against CMA premised on theories of common law indemnity and contribution. Third Party defendant Aurash moves for summary judgment and dismissal of the third party complaint.

⁵ Because this cross-motion is responsive to CMA's motion advanced in sequence 005, this portion of defendant 1400/HRH's cross-motion is addressed in the discussion for that motion sequence.

By motion sequences 006 and 007, third party defendant JCI and defendants 1400 and HRH move to vacate the Note of Issue and Strike the matter from the trial calendar. Both motions are predicated upon the respective contentions that outstanding and yet unproduced documents and medical authorizations warrants additional discovery and delay of trial.

Discussion

As a preliminary matter, the portions of motion sequence 006 and 007 which seek the turnover of medical records and authorizations was handled by this court in its directives given at oral argument of these motions on April 26. Upon consideration of the papers submitted in conjunction with these two motions, the relief sought within, i.e. an order striking of the Note of Issue and removing the matter from the trial calendar, are denied.

Contrary to the assertions of counsel, since the commencement of this litigation, the parties have had more than ample time to obtain the discovery sought in their respective motions, much of which could have been obtained from more than one source. Under these circumstances, it should not surprise the parties in this action that this court sees no reason to further delay the inevitable trial in this matter.

Summary Judgment

The balance of the motions and cross-motions before this

court all seek, in one form or another, summary judgment. Success on any or all of the motions therefore require the proponent(s) of the motions to successfully tender sufficient evidence eliminating any material issues of fact, thereby demonstrating entitlement to judgment as a matter of law (see, Wolff v New York City Trans. Auth., 21 AD3d 956 [2nd Dept 2005], Winegrad v New York University Med. Ctr., 64 NY2d 851 [1985]. See generally, Barr, Altman, Lipshie and Gerstman; *New York Civil Practice Before Trial*, [James Publishing 2006] §37:91-92).

Motion Sequence 004

To succeed on their §240(1) claims, plaintiffs must demonstrate that the fall causing Mr. McKenna's injuries was from an elevated worksite, and that the absence of or defect in a safety device, which here, was the ladder, was the proximate cause of his injuries (see, Felker v. Corning Incorporated, 90 NY2d 219, 224). There is no dispute in this case that Mr. McKenna, in order to complete the portion of the construction job which he was hired to perform, was standing on an unsecured ladder. It is Mr. McKenna's contention that while standing on the ladder, a tarp adjacent to his location struck the ladder, and caused the ladder to fall. Contrary to all of the assertions of the opposing parties, the fact that the unsecured ladder fell, in and of itself, establishes the Labor Law § 240 violation (see, Curte v. City of New York, 21 AD3d 1050 [2nd Dept 2005]; Montalvo

v. J. Petrocelli Construction, Inc., 8 AD3d 173 [1st Dept. 2004] ("It is well settled that [the] failure to properly secure a ladder, to ensure that it remain steady and erect while being used, constitutes a violation" (Id. at 174, quoting Kijak v. 330 Madison Ave Corp., 251 AD2d 152, 153 [1st Dept. 1998])). As such, summary judgment as to plaintiff's Labor Law § 240 claim is granted, and the portions of the cross-motions seeking to dismiss this claim are denied. The portions of the cross-motions seeking summary judgment against plaintiffs on their Labor Law § 241(6) claims are also denied. Given the existence of a Labor Law § 240 violation, this court is, at this juncture, unconvinced as to whether the claimed violations of the Industrial Code provisions should be dismissed.

However, plaintiffs' Labor Law § 200 claims as advanced against defendants 1400 and HRH, are dismissed. It is well established that although a property owner may be held liable under Labor Law § 200, it is appropriate only where the injuries sustained resulted from a dangerous work site condition, and not from the manner in which the work was performed and then, only where the owner exercised supervision and control over the construction performed or had notice of the dangerous condition (Rizutto v. L.A. Wenger Contracting Co., Inc., 91 NY2d 343 [1998]). Here, plaintiffs have not demonstrated that his injuries resulted from a dangerous work site condition which

defendants knew of and/or controlled. At deposition, plaintiff admitted that all of his instructions and work supplies came not from defendants, but from his employer CMA (McKenna Deposition Transcript p. 19, 78). Moreover, even if it were determined that CMA's instructions and supplies somehow were "unsafe", Labor Law § 200 liability would still not attach to the owner and the general contractor, as neither may be held responsible for a subcontractor's unsafe work practices (see, Palmer v. Center for Nursing and Rehabilitation, 18 AD3d 364 [2nd Dept 2005]; Colon v. Leher, McGovern, & Bovis, 259 AD2d 417 [1st Dept. 1999]), and certainly cannot be held liable under Labor Law § 200 where they did not actually supervise or control the work that was being done (O'Brien v. Triborough Bridge and Tunnel Authority, 17 AD3d 105 [1st Dept 2005]).

The final cross-motion made with respect to Motion Sequence 004 is the motion advanced by JCI seeking summary judgment and dismissal of the complaint served against them by CMA. The cross-motion, predicated on the contention that plaintiffs' accident was not the result of work performed by JCI, fails to eliminate one of the most central questions of fact: whether the tarp which is alleged to have struck Mr. McKenna was the responsibility of JCI or Aurash. Inasmuch as there still exist questions of fact as to this issue, summary judgment is denied.

Motion Sequence 005

As a preliminary matter, the cross-motion made by defendant Aurash seeking summary judgment and dismissal of the third-party complaint is denied. As previously discussed, the issue central to determining Aurash's liability focuses on the tarp which is alleged to have struck Mr. McKenna. As there are numerous questions of fact as to this particular issue which still exist, summary judgment is precluded.

The final motion under consideration at this juncture, is the motion made by CMA seeking summary judgment dismissing all of defendants' claims as against them; dismissal of the counter-complaint advanced against them by JCI; and dismissal of claims advanced against them premised on theories of common law indemnification and contribution.

As plaintiff McKenna's employer, unless it is demonstrated that Mr. McKenna suffered a "grave injury" as defined under defined under §11 of the Worker's Compensation Law, an action for common law contribution and/or indemnity as against CMA cannot lie and warrants dismissal.

Defined by statute, a "grave injury" is one which includes one of the following: "death permanent and total loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ears, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused

by an external physical force resulting in permanent and total disability" (Worker's Compensation Law §11). Although Mr. McKenna clearly suffered serious injuries, none of those injuries fall within the ambit of the statute. As such, JCI, which does not have any contractual agreement as between themselves and CMA with respect to indemnification, cannot maintain any claims against CMA sounding in contribution and common law indemnification.

The remaining question this court must address, is whether a contract entered into as between defendants 1400/HRH and defendant CMA but executed after the date of Mr. McKenna's accident, operates so as to render CMA contractually liable to defendant 1400/HRH.

Defendant HRH entered into a subcontract agreement with CMA for HVAC work which was to be completed at the construction site. In furtherance of this agreement, on February 5, 2003, the parties signed a letter which stated

This letter will constitute a notice of the undersigns intention to award to Centrifugal/Mechanical Associates, Inc., a Contract for the HVAC Piping Work at the above referenced project [...] This intent is subject to the Owners approval and the execution of a more formal contract to follow

(Defendant's cross-motion for summary judgment (Motion Sequence 004) Exhibit G).⁶ On February 10, 2003, defendant HRH delivered

⁶ See footnote 5, *supra*.

insurance requirements to CMA (Id.). A contract, entered into on March 24, 2003, followed (Id.), although was not executed until June of that year.

Contrary to CMA's arguments, notwithstanding the fact that a formal contract as between HRH and CMA was not signed until months after plaintiff McKenna's accident, the papers presented support the contention that CMA was acting in accordance with the terms of the HRH-CMA agreement. CMA was not only working on the project, but had obtained insurance for the project in accordance with the preliminary agreements. Under these circumstances, it may be concluded that the parties' course of conduct demonstrated a meeting of the minds with respect to the agreement despite the fact that it was not executed until months after the accident (see, Nephew v. Klewin Building Company, Inc., 21 AD3d 1419 [4th Dept 2005]; Smith v. 21 West LLC Ltd. Liability Co., 29 AD3d 360 [1st Dept. 2006]). As such, the portion of CMA's motion seeking summary judgment and dismissal of the claims advanced against them by defendants 1400 and HRH is denied. The portion of the cross-motion advanced by defendants 1400 and HRH seeking summary judgment on their contractual indemnification claim as against defendant CMA (Cross-Motion to Motion Sequence 004 is granted.

Accordingly, it is

ORDERED that the motion brought by third party defendant Joy

Contractors, Inc., d/b/a JCI to vacate the Note of Issue and Strike this matter from the trial calendar (Motion Sequence 006) is denied; and it is further

ORDERED that the motion brought by defendants 1400 on Fifth LLC and HRH Construction Company seeking to vacate the Note of Issue and Strike this matter from the trial calendar (Motion Sequence 007) is denied; and it is further

ORDERED that plaintiffs' motion seeking summary judgment on its Labor Law § 240 claim (Motion Sequence 004) is granted; and it is further

ORDERED that the cross-motion advanced by defendant/second third party plaintiff Centrifugal Mechanical Associates seeking summary judgment and dismissal of plaintiffs' Labor Law §§ 240 and 241(6) (Motion Sequence 004) claims is denied; and it is further

ORDERED that the portion of the cross-motion advanced by defendants 1400 on Fifth LLC and HRH Construction Company for summary judgment and dismissal of plaintiffs' Labor Law §§ 240, and 241(6) claims (Motion Sequence 004) is denied; and it is further

ORDERED that the portion of the cross-motion advanced by defendants 1400 on Fifth LLC and HRH Construction Company for summary judgment and dismissal of plaintiffs' Labor Law § 200 claim (Motion Sequence 004) is granted; and it is further

ORDERED that the cross-motion advanced by defendant Joy Contractors, Inc., d/b/a JCI seeking summary judgment and dismissal of the second-third party complaint (Motion Sequence 004) is denied; and it is further

ORDERED that the cross-motion made by third third party defendant, Aurash Construction Corp., seeking summary judgment and dismissal of the third-third party complaint, is denied; and it is further

ORDERED that the portion of the motion made by third party defendant Centrifugal Mechanical Associates, Inc., seeking dismissal of the claims advanced against them by defendant Joy Contractors, Inc., d/b/a JCI sounding in contribution and common law indemnification are dismissed; and it is further

ORDERED that the portion of the motion made by third party defendant Centrifugal Mechanical Associates, Inc., seeking summary judgment and dismissal of the claims advanced against them by defendants 1400 on Fifth LLC and HRH Construction Company (Motion Sequence 005) is denied; and it is further


ORDERED that the cross-motion advanced by defendants 1400 on Fifth LLC and HRH Construction Company seeking summary judgment on their contractual indemnification claim as against defendant CMA (Cross-Motion to Motion Sequence 004) is granted; and it is further

ORDERED that the clerk of court enter judgment accordingly.

Counsel for the parties in this matter are directed to appear for Jury Selection and Trial, as previously scheduled, on Thursday May 3, 2007 at 9:30 a.m. in IA Part 15, Room 335, 60 Centre Street, New York, New York.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 4/23/07



HON. WALTER B. TOLUB, J.S.C.

FILED

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