McQuade v 340 W., LLC

2007 NY Slip Op 30995(U)

April 26, 2007

Supreme Court, New York County

Docket Number: 0114810/2003

Judge: Leland G. DeGrasse

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SCANNED ON 5/1/2007

[* 1]

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

PRESENT: LELAND DeGRASSE PART 25

Justice

Mc Quade, Gerard

- v -

340 West LLC

INDEX NO. 114810/03

MOTION DATE MAR 0 1 2007

MOTION SEQ. NO. 005

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 ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
MAY 01 2007
COUNTY CLERK'S OFFICE
NEW YORK

In accordance with Decision

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

Dated: APR 26 2007

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

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GERARD McQUADE and LISA McQUADE,

Plaintiffs,

-against- Index No. 114810/03

340 WEST, LLC, EUGENE M. GRANT & COMPANY, LLC, THE BAUMAN FAMILY FOUNDATION, INC., and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Defendants.

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340 WEST, LLC, EUGENE M. GRANT & COMPANY, LLC, EUGENE M. GRANT & COMPANY, LLC and THE BAUMAN FAMILY FOUNDATION, INC.,

Third-Party Plaintiffs,

-against- TP Index No. 591371/03

KLEINKNECHT ELECTRIC COMPANY, INC., and MERRILL, LYNCH, PIERCE, FENNER & SMITH, INCORPORATED,

Third-Party Defendants.

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FILED
MAY 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

DeGrasse, J.:

Motion sequences five and six are consolidated. Defendants / third-party plaintiffs 340 West LLC, Eugene M. Grant & Company, LLC and The Bauman Family Foundation, Inc. (collectively "340 West") and defendant Merrill, Lynch, Pierce, Fenner & Smith, Incorporated move for summary judgment. Plaintiffs and Merrill Lynch cross-move for the same relief. Plaintiff Gerard McQuade, an electrician, was injured in fall from an A-frame ladder which he had placed

on a basement floor. At the time of the accident, McQuade was engaged in the upgrading of the fire protection system of a building owned by 340 West. The site of the accident is a portion of the basement which had been leased to Merrill Lynch. McQuade testified that the ladder "kicked out" due to oil on the floor. Negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6) are alleged in the complaint. 340 West's third-party claims against Merrill Lynch are for contribution, common-law indemnification and contractual indemnification.

340 West asserts that the Labor Law § 240 (1) claim should be dismissed because the accident was caused by plaintiff's use of a heavy tool while he was standing too high on the ladder in an improper crouched position. On the contrary, liability under the statute is established by the fact that the unsecured ladder slipped while being used (*see e. g. Evans v Anheuser Busch, Inc.*, 277 AD2d 874 [2000]). 340 West's argument regarding McQuade's alleged improper use of the ladder speaks of comparative negligence which is not a defense to a Labor Law § 240 (1) cause of action (*Gilbert v Albany Med. Ctr.*, 9 AD3d 643, 644 [2004]). The same is true of any assertion that McQuade had improperly placed the ladder on a slippery surface (*see Kazmierczak v Town of Clarence*, 286 AD2d 955 [2001]). Plaintiffs invoke Industrial Code of the State of New York (12 NYCRR) §§ 23-1.5, 23-1.7 (d) and 23-1.21 (b)(4)(ii) in support of their Labor Law 241 (6) cause of action. Section 23-1.5, a general safety standard, is insufficient to support the claim (*Murray v Lancaster Motorsports*, 27 AD3d 1193 [2006]). Section 23-1.7 (d) provides that employers shall not suffer or permit any employee to use a floor which is in a slippery condition. No controlling authority supports 340 West's argument that the provision does not apply where a ladder is caused to slip. Section 23-1.21 (b)(4)(ii) provides in pertinent part that slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder

footings. This plain language refutes 340 West's argument that the provision can be applied only in cases involving defective ladders. Plaintiffs, however, do not challenge 340 West's argument that it is not liable under Labor Law § 200 or a common-law negligence theory.

340 West's third-party complaint prays for indemnification and contribution by Merrill Lynch on the ground that Merrill Lynch, the lessee of the site of the accident, was actively negligent in its maintenance. The claim is based upon the common-law duty of a lessee to keep its premises in a reasonably safe condition. Merrill Lynch asserts that it was not negligent because it lacked actual or constructive notice of the floor's slippery condition. In this regard, Cornelius P. Hogan, Merrill Lynch's Assistant Building Manager, testified that he did not recall observing any relevant leakage during the three-year period preceding plaintiff's accident. Plaintiffs submit the affidavit of Kevin Lavoun, McQuade's co-worker, who swears that he saw a drum of coconut oil hand cream in the basement. Lavoun further states that the drum "*may* have been leaking" at its pump [emphasis added]. This speculation is insufficient to raise a triable factual issue as to whether Merrill Lynch was negligent. Also, Merrill Lynch cannot be held liable as an owner under Labor Law §§ 240 (1) and 241 (6). The term "owners" as used in the statute "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 [emphasis added]" (*Reisch v Amadori Const. Co.*, 273 AD2d 855 [2000]). It is not claimed that Merrill Lynch was a party to any contract involving McQuade's work.

Merrill Lynch's lease requires it to indemnify 340 West from all liability arising from "any acts, omissions or negligence of Tenant or [any person claiming through or under Tenant], or the contractors, agents, servants or employees, visitors or licensees of Tenant or any such person, in

or about the Demised Premises or the Building during the Demised Term." Hogan testified that liquid hand soap had been stored in the basement by American Building Maintenance ("ABM"), Merrill Lynch's janitorial contractor. 340 West argues that the lease's indemnification clause was triggered because Merrill Lynch "has both performed an act and committed an omission that directly lead to plaintiff's accident." 340 West further asserts that:

> "The act was ABM's storage of a leaking drum of liquid hand soap in the basement area where plaintiff was working at the time of his accident. The omission was MERRILL LYNCH's own failure to inspect or failure to properly inspect the area where ABM was storing this drum of leaking liquid hand soap."

The argument is flawed by the absence of evidence that hand soap, coconut oil or any other substance had been leaking.

For the foregoing reasons, 340 West's motion is granted to the extent that plaintiffs' Labor Law § 200 cause of action, their Labor Law § 241 (6) cause or action insofar as it is predicated on Industrial Code § 23-1.5 and their common-law negligence cause of action are dismissed. The cross claims and third-party counterclaims asserted by Merrill Lynch are also dismissed. Merrill Lynch's cross motion is granted to the extent that the cross claims and third-party causes of action asserted against Merrill Lynch are dismissed. Merrill Lynch's motion is granted to the extent that plaintiffs' complaint is dismissed as against Merrill Lynch. The Clerk shall enter judgment dismissing the complaint and all cross claims and third-party claims asserted against Merrill Lynch. The action is severed and continued with respect to the remaining parties. Plaintiffs' cross motion is granted only to the extent that the issue of liability is resolved in favor of plaintiffs and against 340 West, LLC, Eugene M. Grant & Company, LLC and The Bauman Family Foundation, Inc. with respect to plaintiffs' Labor Law § 240 (1) cause of action. An

assessment of damages shall be conducted at the time of trial.

Dated: April 26, 2007

J. S. C.

HON. LELAND DeGRASSE

FILED
MAY 01 2007
NEW YORK
COUNTY CLERK'S OFFICE