

Carnemolla v HHCM, Inc.

2007 NY Slip Op 31009(U)

April 24, 2007

Supreme Court, Kings County

Docket Number: 0022789/2002

Judge: Mark I. Partnow

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At an IAS Term, Part 43 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 24th day of April, 2007

P R E S E N T:

HON. MARK I. PARTNOW,

Justice.

-----X

SANTINO CARNEMOLLA,

Plaintiff,

- against -

Index No. 22789/02

HHCM INC., PACE WILDENSTEIN, et ano.,

Defendants.

-----X

PACE WILDENSTEIN,

Third-Party Plaintiff,

-against-

Index No. 75076/03

ROCKFORD PLUMBING, et ano.,

Third-Party Defendant.

-----X

HHCM INC.

Third-Party Plaintiff,

-against-

Index No. 75815/02

ROCKFORD PLUMBING, et ano.,

Third-Party Defendant.

-----X

The following papers numbered 1 to 12 read on this motion:

Papers Numbered

Notice of Motion/Order to Show Cause/

Petition/Cross Motion and

Affidavits (Affirmations) Annexed _____

1-2, 3-4, 5-6

Opposing Affidavits (Affirmations) _____

7, 8, 9, 10

Reply Affidavits (Affirmations) _____

11, 12

_____ Affidavit (Affirmation) _____

Other Papers _____

Upon the foregoing papers, defendant Wenat Realty Associates (Wenat) moves, pursuant to CPLR 2221 (d), for leave to reargue that portion of the court's March 25, 2006 decision and order (the prior order) that denied its motion for contractual indemnification against defendant/second third-party plaintiffs HHCM, Inc. (HHCM). Upon the granting of such leave, Wenat seeks an order awarding it contractual indemnification against HHCM. Defendant/third-party plaintiff Pace Wildenstein (Pace) cross-moves for leave to reargue that portion of the prior order that denied its motion contractual indemnification against HHCM. Upon the granting of such leave, Pace seeks an order awarding it contractual indemnification against HHCM. HHCM moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Santino Carnemolla's Labor Law § 200 claim and common-law negligence claims.¹

Background Facts and Procedural History

The instant action arises out of a September 8, 2001 construction site accident at 534-548 West 25th Street in Manhattan (the building) in which plaintiff sustained various injuries after falling from a ladder during the course of his employment with Rockford. Following the accident, plaintiff brought the instant action against Wenat (the owner of the building), Pace (the lessee of the building), and HHCM (the general contractor on the project), alleging violations of Labor Law §§ 240 (1), 241 (6), 200, as well as common-law negligence. In its

¹As part of the same motion, HHCM moved for summary judgment under its contractual indemnification and breach of contract claims against third-party defendant Rockford Plumbing and Heating Corp. (Rockford). By order dated January 9, 2007, these branches of HHCM's motion were granted upon default without opposition. The court reserved decision with respect to plaintiff's Labor Law § 200/common-law negligence claim against HHCM and the instant decision addresses this claim.

answer to the complaint, Wenat asserted cross claims against Pace and HHCM sounding in contractual indemnification, common-law indemnification, and breach of contract to procure liability insurance. In its answer, Pace asserted a contractual indemnification cross claim against HHCM. In addition, Pace brought a third-party action against Rockford seeking, among other things, contractual indemnification. Finally, HHCM brought a third-party action against Rockford seeking contractual indemnification and damages for breach of contract to procure liability insurance. On July 7, 2005, plaintiff filed a note of issue.

After the note of issue was filed, Wenat moved for summary judgment dismissing plaintiff's action and all cross claims asserted against it. Wenat also moved for summary judgment against HHCM, and Pace Wildenstein (Pace) under its contractual indemnification, common-law indemnification, and breach of contract cross claims. Pace moved for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it, and for contractual indemnification against HHCM and Rockford. HHCM, in turn, cross-moved for summary judgment dismissing plaintiff's complaint and all cross claims asserted against it, and for summary judgment under its third-party contractual indemnification and breach of contract claims against Rockford. Finally, plaintiff cross-moved for summary judgment against HHCM, Pace, and Wenat under his Labor Law §§ 240 (1) and 241 (6) claims.

On March 25, 2006, the court issued the prior order and decided these motions as follows: those branches of Wenat, Pace, and HHCM's motions seeking summary judgment dismissing plaintiff's Labor Law §§ 240 (1) and 241 (6) claims were denied, and plaintiff's

motion for summary judgment under these statutes was also denied. Wenat and Pace's motions for summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claims against them were granted. That branch of Wenat's motion which sought summary judgment against Pace and HHCM under its common-law indemnification cross claims was denied while that branch of Wenat's motion which sought contractual indemnification against Pace and HHCM was denied with respect to HHCM and granted as against Pace. In addition, Wenat was awarded summary judgment under its breach of contract claims against Pace and HHCM. Pace's motion for contractual indemnification against HHCM and Rockford was denied with respect to HHCM and granted with respect to Rockford. Finally, HHCM's cross motion for summary judgment dismissing plaintiff's Labor Law § 200/common-law claims against it and awarding it summary judgment under its contractual indemnification and breach of contract claims against Rockford were denied as untimely since the cross motion was filed more than 60 days after the filing of the note of issue. However, while the motions were pending before the court, plaintiff's July 7, 2005 note of issue was vacated. On September 5, 2006, plaintiff filed a second note of issue which was served upon the parties on or about October 3, 2006. The instant motions are now before the court.

HHCM's Motion

HHCM again moves for summary judgment dismissing plaintiff's Labor Law § 200/common-law indemnification claim against it. In so moving, HHCM initially notes

that the court did not address the merits of this motion in the prior order inasmuch as the motion was deemed to be untimely. However, in light of the fact that the original note of issue was vacated and that plaintiff filed a second note of issue after the court issued the prior motion, HHCM points out that the motion is clearly timely.

Turning to the merits of the motion, HHCM argues that there is no basis for plaintiff's Labor Law § 200/common-law indemnification claim against it since it did not exercise control over plaintiff's work and it did not have notice of any dangerous condition that may have caused the accident. In support of this argument, HHCM points to the deposition testimony of its secretary, Hamilton Hoge, as well as HHCM's contract with Rockford, both of which indicate that Rockford alone was responsible for supervising its employees. In addition, HHCM notes that Rockford's foreman, William Cutillo, testified that he was responsible for the safety of Rockford employees. Finally, HHCM notes that, at the time of the accident, HHCM did not have any personnel present at the accident site, and therefore, it did not have notice of any dangerous condition associated with the accident.

In opposition to this branch of HHCM's motion, plaintiff notes that, under its contract with Pace, HHCM was responsible for coordinating the work of the subcontractors at the worksite, cleaning up during and after construction, and "providing a secure space during non-business hours for the work and any materials, tools or equipment stored at the project site in connection with the work." Plaintiff also notes that Mr. Hoge testified at his deposition that HHCM personnel, including a "site attendant" and "site supervisor" were

present at the job site on a daily basis and that the site attendant, Fitzroy Daniels, was present at the worksite at the time of the accident. In addition, plaintiff points out that his foreman, William Cutillo, testified that the garage area where the accident took place was filled with construction debris and tool boxes and that, prior to the accident, he told plaintiff that “[w]e’re going to get [HHCM] to clear the area and give us a scissor lift.” Based upon this evidence, plaintiff contends that there are issues of fact as to whether HHCM violated Labor Law § 200 and was otherwise negligent. In particular, plaintiff notes that the debris condition in the garage area was a contributing factor in the accident and that HHCM was responsible for remedying this condition. Plaintiff further maintains that, given the fact that its personnel were present on the job site on a daily basis, HHCM may be charged with constructive notice of the debris condition.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the methods that plaintiff employs in his work, or who have actual or constructive notice of, or are otherwise responsible for an unsafe condition that causes an accident (*Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]).

Initially, while the court denied HHCM's motion for summary judgment as untimely in the original order, given the fact that the note of issue was vacated, and a new note of issue was filed, it is clear that HHCM's present motion is timely and should be considered on the merits.

The evidence before the court demonstrates that the garage area where the accident took place was full of scattered tools, tool boxes, and debris. Both plaintiff and Mr. Cutillo's deposition testimony indicate that this condition played a role in the accident. In particular, Mr. Cutillo testified that he considered the area to be unsafe and that, immediately before the accident, he attempted to locate HHCM personnel to clear the area. For his part, plaintiff testified that the scattered tools and tool boxes prevented him from setting-up the ladder at the proper angle. In addition, there is evidence in the form of Mr. Cutillo's testimony, as well as the contract between HHCM and Pace, that HHCM was responsible for remedying the condition in the garage area. Finally, the deposition testimony before the court indicates that HHCM maintained a daily presence at the job site. Under the circumstances, there is a question of fact as to whether HHCM violated Labor Law § 200 and was otherwise negligent in failing to remedy a dangerous condition of which it should have been aware. Consequently, HHCM's motion for summary judgment dismissing these claims is denied.

Wenat and Pace's Reargument Motions

Wenat and Pace separately move for leave to reargue that portion of the prior order that denied their respective motions for contractual indemnification against HHCM.² In so

²In its notice of motion, Wenat also seeks leave to reargue that portion of the prior order which denied its motion for common-law indemnification against HHCM. However, the body of Wenat's motion does not discuss the issue of common-law indemnification.

moving, these parties argue that the court overlooked applicable law and facts in making this ruling.

The indemnification clause underlying Wenat and Pace's claims against HHCM provides, in pertinent part:

“[HHCM] shall indemnify, defend and hold harmless [Pace] . . . and [Wenat] . . . from and against all claims, damages, losses and expenses . . . arising out of or in connection with (i) any breach of the Contract Documents by [HHCM] or (ii) any negligence or wrongful act of [HHCM] . . . or its . . . agents or anyone for whose acts [HHCM] is liable as it relates to the scope of this Contract.”

In denying Wenat's and Pace's motions for summary judgment under their contractual indemnifications claims against HHCM, the court previously held that the movants failed to establish, as a matter of law, that either of the contingencies that triggered HHCM's obligation to indemnify had come to pass. Specifically, the court held that, since there was an issue of fact as to whether plaintiff's own conduct was the sole proximate cause of the accident, it would be premature to simultaneously rule that HHCM's negligence and/or breach of the contract caused the accident.³ In addition, the court noted that, while it was clear that Rockford did not comply with all applicable laws, this did not necessarily mean that HHCM breached its contractual obligations toward Pace and Wenat since the contract merely required that HHCM use its “best efforts” to ensure that its subcontractors complied with applicable laws.

³Notably, the subject indemnification clause does not require HHCM to indemnify Pace and Wenat for the negligence of HHCM's subcontractors and its subcontractors' employees.

Wenat and Pace have failed to demonstrate that the court overlooked or misapprehended applicable law or facts in denying their motions for contractual indemnification. Nor have they demonstrated that the court's rational - as set forth in the prior order and summarized above - in rendering this determination was erroneous. Consequently, Wenat and Pace's motions for leave to reargue are denied.

Summary

In summary, the court rules as follows: (1) HHCM's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against it is denied; and (2) Wenat and Pace's motions for leave to reargue the prior order are denied.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

HON. MARK I. PARTNOW