Sobieraj v Warburg-Storagemart Partners, L.P.

2007 NY Slip Op 31308(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0105741/2004

Judge: Barbara R. Kapnick

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SCANNED ON 5/23/2007

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

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

PART 12

Index Number : 105741/2004

SOBIERAJ, KRZYSTOF

vs

WARBURG-STORAGE PARTNERS LP

Sequence Number : 004

DISMISS

INDEX NO. 105741/04

MOTION DATE

MOTION SEQ. NO. 004

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

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

FILED
MAY 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/21/07

BARBARA R. KAPNICK 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 : IAS PART 12

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KRZYSZTOF SOBIERAJ,

Plaintiff,

-against-

WARBURG-STORAGEMART PARTNERS, L.P.,

Defendant.

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WARBURG-STORAGEMART PARTNERS, L.P.,

Third-Party Plaintiff,

-against-

CCI CONSTRUCTION CO., INC.,

Third-Party Defendant.

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DECISION/ORDER
Index No. 105741/04
Motion Sequence No. 004

Third-Party
Index No. 591050/04

FILED
MAY 23 2007
NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK, J.:

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

Plaintiff Krzystof Sobieraj seeks to recover damages for personal injuries he sustained on January 20, 2004 when he fell off an extension ladder in the first floor loading dock/garage bay of a self-storage facility owned by defendant/third-party plaintiff Warburg-StorageMart Partners, L.P. ("Warburg") at 50 Wallabout Street in Brooklyn.

Plaintiff was employed by third-party defendant CCI Construction Co., Inc. ("CCI"), which was hired by defendant/third-

party plaintiff to perform and manage the construction of this self-storage facility.

There is no dispute that a sprinkler pipe in the facility approximately 20 feet above the floor of the garage had frozen and burst the prior evening requiring the pipe to be repaired and/or replaced and re-insulated. At the time of his accident, plaintiff was descending the ladder which he had been using to re-insulate the sprinkler pipes. The ladder, which was allegedly resting on debris, slid, causing the plaintiff to fall.

Defendant/third-party plaintiff now moves for an order pursuant to CPLR §§ 3001 and 3212(b):

(1) declaring that plaintiff's causes of action in negligence and under Labor Law §§ 200, 241 and 241-a are dismissed,[1] and

(2) directing that CCI indemnify it and hold it harmless for all claims, damages, losses and expenses, including attorneys' fees, resulting from this accident for any causes of action not dismissed.[2]

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[1] Defendant/third-party plaintiff has not moved to dismiss plaintiff's claim pursuant to Labor Law § 240(1).

[2] Pursuant to its written contract with Warburg, CCI agreed to indemnify and hold defendant harmless "from and against claims, damages, losses and expenses, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work,..."

[* 4]

Plaintiff cross-moves for summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1).

Third-party defendant cross-moves for summary judgment dismissing plaintiff's Labor Law claims against the defendant/third-party plaintiff with prejudice.

Those portions of defendant/third-party plaintiff's motion and third-party defendant's cross-motion seeking to dismiss plaintiff's claims for common law negligence and pursuant to Labor Law §§ 200 and 241-a are granted without opposition.

Third-party defendant argues that plaintiff's remaining Labor Law claims must also be dismissed because plaintiff's accident occurred while plaintiff was in the course of performing general "routine maintenance" excluded from the ambit of Labor Law §§ 240(1) and 241(6).

As third-party defendant correctly points out,

> to be entitled to the protection of Labor Law § 240(1), plaintiff had to be engaged in a protected activity, i.e., "the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Similarly, Labor Law § 241(6) only affords protection to the class of workers engaged in "constructing or demolishing buildings ... in areas in which construction, excavation or demolition work is being performed."

Acosta v. Banco Popular, 308 A.D.2d 48, 50 (1st Dep't 2003).

[* 5]

The third-party defendant argues that plaintiff was merely performing "routine maintenance" work on the pipe.

Plaintiff, however, argues that this work constituted a "repair", since the pipe in question was installed by a plumber during the construction of the loading dock and was insulated by CCI, and that plaintiff was directed back to the loading dock to 'repair' the burst pipe and to re-install the entire area.

"[I]n order for work to constitute a 'repair' under Labor Law § 240(1), there must be proof that the machine or object being worked upon was inoperable or not functioning properly (citations omitted)." Goad v. Southern Electric International, Inc., 263 A.D.2d 654, 655 (3rd Dep't 1999).

Based on the papers submitted and the oral argument held on the record on May 31, 2006, this Court finds that plaintiff was engaged in the "repair" of a structure that "had gone awry" (Caraciolo v. 800 Second Avenue Condominium, 294 A.D.2d 200, 201 [1st Dep't 2002] within the meaning of Labor Law § 240(1) and not in the "routine maintenance" of the pipe in question.

The defendant and third-party defendant further argue that the work being performed by the plaintiff was not being done in an area "in which construction, excavation or demolition work [was] being performed" as required under Labor Law §§ 241(6) because CCI had

already completed all of its work, and the garage bay was open for business and accessible to customers at the time of plaintiff's accident.

Plaintiff, however, claims that at the time of his accident, CCI was still conducting construction work throughout the building, and that the repair of the pipes was an integral part of the construction work, thus constituting an activity protected under Labor Law § 241(6). See, O'Hare v. City of New York, 280 A.D.2d 458 (2nd Dep't 2001).

As the Court of Appeals has held, "[l]iability under Labor Law § 241(6) is not limited to accidents on a building construction site..." Joblon v. Solow, 91 N.Y.2d 457, 466 (1998). Since it appears that there was still construction going on in the building at the time of plaintiff's accident, this Court concludes that plaintiff has stated a claim under Labor Law § 241(6).

Accordingly, that portion of third-party defendant's cross-motion seeking to dismiss plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) on the ground that plaintiff was not engaged in work covered by the statutes, is denied.

Those portions of defendant/third-party plaintiff's motion and third-party defendant's cross-motion seeking to dismiss plaintiff's claim pursuant to Labor Law § 241(6) on the ground that plaintiff

has failed to cite to an applicable provision of the Industrial Code are also denied, as this Court finds that there is an issue of fact as to whether defendant violated section 23-1.21(b)(4)(iv) of the Industrial Code, which provides that

> When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against side slip by its position or by mechanical means. When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used.[3]

Third-party defendant further argues that plaintiff's claim pursuant to Labor Law § 240(1) must be dismissed because there is no evidence that the ladder, which was acquired new by CCI within one year of plaintiff's accident and had rubber footings on its base, was defective.

In addition, defendant/third-party plaintiff and the third-party defendant argue that, at the very least, there is an issue of fact as to whether or not plaintiff's own negligence was the sole proximate cause of his accident, because plaintiff instructed

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[3] The rule set forth in CPLR § 3025(b) that leave to amend pleadings shall be freely given, has been applied to the amendment of bills of particulars, in the absence of prejudice or surprise. See, Sahdala v. New York City Health & Hospitals Corp., 251 A.D.2d 70 (1st Dep't 1998). Thus, although defendant correctly notes that plaintiff's Bill of Particulars fails to allege a violation of section 23-1.21(b)(4)(iv) of the Industrial Code, plaintiff is granted leave to amend his Bill of Particulars accordingly.

another employee of CCI, Lukasz Szypulski, to leave the bottom of the ladder which he had been holding and to retrieve more insulation.

However, "[p]laintiff's use of the ladder without his co-worker present amounted, at most, to comparative negligence, which is not a defense to a section 240(1) claim." Velasco v. Green-Wood Cemetery, 8 A.D.3d 88, 89 (1st Dep't 2004). "Unrefuted evidence that the unsecured ladder moved, combined with evidence that no other safety devices were provided to plaintiff, warrant[s] a finding that [defendant/third-party plaintiff is] absolutely liable under Labor Law § 240(1), notwithstanding claims of comparative negligence (*see Velasco* [supra])," Peralta v. American Telephone and Telegraph Co., 29 A.D.3d 493 [1st Dep't 2006].

Accordingly, that portion of third-party defendant's cross-motion seeking to dismiss said claim is denied, and plaintiff's cross-motion for summary judgment on the issue of liability on his claim pursuant to Labor Law § 240(1) is granted.

Finally, defendant/third-party plaintiff seeks contractual indemnification against the third-party defendant.

Third-party defendant argues that this branch of defendant/third-party plaintiff's motion is premature, because there is an issue of fact as to whether Warburg was negligent with

respect to the happening of plaintiff's accident. Specifically, third-party defendant annexes an affidavit from Mr. Szypulski, who was working under plaintiff's supervision at the time of his accident. Mr. Szypulski states, in relevant part, that

> 7. On the day of the accident, the cement floor in the garage bay was unpainted and full of debris (including sand, dirt and rocks). The debris was located all over the floor of the garage bay including the area where the accident occurred. The debris accumulated because the garage bay was heavily utilized by vehicles transporting storage into and out of the facility in furtherance of the business of Storage Mart. The debris came into the garage bay from the tires of these vehicles.
>
> 8. In my opinion, the aforementioned condition of the floor (unpainted and full of debris) caused the floor to be slippery and was a cause of the ladder slippage which caused Mr. Sobieraj to fall and sustain injuries.

Warburg denies that there was debris on the floor and further denies that the floor of the garage was uneven. Defendant/third-party plaintiff further argues that Mr. Szypulski's affidavit should not be considered because it never had an opportunity to depose him and because Mr. Szypulski is not an expert and thus may not speculate on the source of the alleged debris. This Court, however, does not agree that deponent had to be an expert in order to state that he saw debris coming into the garage bay and accumulating there.

Third-party plaintiff Warburg also argues that CCI, as the construction manager, and not Warburg, as the passive owner, was

responsible for ensuring safe working conditions, including cleaning up any debris prior to placing the ladder in position.[4]

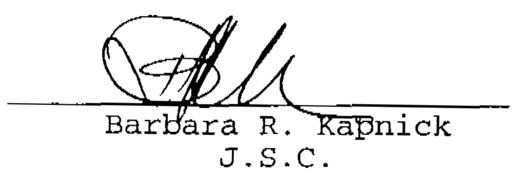
The Court finds that the papers submitted raise issues of fact which preclude the granting of defendant/third-party plaintiff's motion for indemnification at this time.

A pre-trial settlement conference shall be held in IA Part 12, 60 Centre Street, Room 341 on June 6, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: May 21, 2007

Barbara R. Kapnick
J.S.C.



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J.S.C.

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[4] Third-party defendant alternatively argues that there is an issue of fact as to whether plaintiff was performing work pursuant to the contract annexed to the moving papers, or pursuant to a second contract dealing with CCI's work to be performed as "a construction manager", which Warburg's witness, D. Joseph Cook, testified existed, but which was not exchanged during discovery and which may contain a different indemnification provision. However, since this alleged "second contract" was between Warburg and CCI, CCI should have had its own copy and should not have needed to rely on Warburg to provide a copy during discovery. Given the speculative nature of this argument, it has not been considered by this Court in determining this motion.