

Callan v Structure-Tone, Inc.

2007 NY Slip Op 31383(U)

May 21, 2007

Supreme Court, New York County

Docket Number: 0108305/2005

Judge: Michael D. Stallman

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. MICHAEL D. STALLMAN **PART 7**
Justice

FRANK CALLAN and ANNAMARIA CALLAN,
Plaintiffs,

INDEX NO. 108305/05

- v -

MOTION DATE 3/27/07

MOTION SEQ. NO. 001

STRUCTURE TONE, INC.,
Defendant.

MOTION CAL. NO. _____

(And a third-party action)

The following papers, numbered 1 to 16 were read on this motion and cross motions for summary judgment.

	PAPERS NUMBERED
Notice of Motion— Affidavits — Exhibits	1-2
Answering Affidavits — Exhibits	3
Replying Affidavits	4-5
Notice of Cross Motion— Affidavits — Exhibits	6-8
Answering Affidavits — Exhibits	9-10
Replying Affidavits	11
Notice of Cross Motion— Affidavits — Exhibits	12-13
Answering Affidavits — Exhibits	14
Replying Affidavits	15-16

Cross-Motions (2) : X Yes No

Upon the foregoing papers, It is ordered that this motion and cross motions are decided
in accordance with the annexed memorandum decision and order.

J.S.C.

FILED

MAY 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

[Signature]
J.S.C.

Dated: 5/21/07

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check If appropriate: DO NOT POST REFERENCE

HON. MICHAEL D. STALLMAN

MOTION/CASE IS RESPECTFULLY REFERRED TO
JUSTICE
DATED:

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 7**

-----X
FRANK CALLAN and ANNAMARIA CALLAN,

Plaintiffs,

-against-

Index No. 108305/05

STRUCTURE-TONE, INC.,

Decision and Order

Defendant.

-----X

STRUCTURE TONE, INC.,

Third-Party Plaintiff,

-against-

ATLAS-ACON ELECTRIC SERVICES CORP.,

Third-Party Defendant.

-----X

FILED
MAY 30 2007
NEW YORK
COUNTY CLERK'S OFFICE

MICHAEL D. STALLMAN, J.:

In this action arising out of a construction site accident, defendant/third-party plaintiff Structure Tone, Inc. (ST) moves, pursuant to CPLR 3212, (1) for summary judgment dismissing the complaint, and (2) for summary judgment on its third-party complaint against Atlas-Acon Electric Services Corp. (AA). Plaintiffs cross-move for summary judgment on the issue of defendant's liability under Labor Law § 240 (1). Third-party defendant AA cross-moves for summary judgment dismissing both the complaint and the third-party complaint.

BACKGROUND

On June 4, 2005, the second floor of the Grace Building, located at 1114 Avenue of the Americas in Manhattan, was undergoing renovation work. ST, apparently the general contractor for

the project, retained AA to perform the electrical work there. Plaintiff Frank Callan was an electrician employed by AA.

June 4, 2005 was a Saturday, and AA was working on the second floor that day because it was behind schedule in its work. Callan alleges that he was installing lighting fixtures in the ceiling, along with his partner, Gerald Newsum. Both men were standing on 10-foot wooden A-frame ladders that had been supplied to them by their employer, AA. Both Callan and Newsum allege that the second floor was extremely hot, estimating that it was 100 degrees or more, and that no air conditioning, fans, or ventilation of any kind had been provided for them, in spite of the fact that the floor-to-ceiling windows there could not be opened. Callan asserts that, as a result of the extreme heat, he became “woozy and nauseous.” As he was passing out, he attempted to grab the top of the ladder, but it wobbled, and both he and the ladder fell approximately eight feet to the floor, causing Callan to be injured. It is uncontested that, while air conditioning was provided to the floor during the week, it was not provided on weekends because ST would have had to pay an “excessive” fee (\$10,000) for it (Keosayian Dep., at 45).

PLEADINGS

The complaint alleges two causes of action: the first cause of action asserts claims for common-law negligence and violations of Labor Law §§ 200, 240 (1), and 241 (6); the second alleges Annamaria Callan’s claim for loss of consortium.

ST’s third-party complaint alleges four causes of action, sounding in contractual and common-law indemnification and breach of contract by failure to procure insurance.

DISCUSSION

“The proponent of a motion for summary judgment must demonstrate that there are no

material issues of fact in dispute, and that it is entitled to judgment as a matter of law” (*Dallas-Stephenson v Waisman*, ___ AD3d ___, 833 NYS2d 89, 92 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Santiago v Filstein*, 35 AD3d 184, 186 [1st Dept 2006], quoting *Winegrad*, 64 NY2d at 853). However, “[o]nce the movant makes the required showing, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial” (*Dallas-Stephenson*, ___ AD3d ___, 833 NYS2d at 92, citing *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “The court’s role, in passing on a motion for summary judgment, is solely to determine if any triable issues exist, not to determine the merits of any such issues” (*Sheehan v Gong*, 2 AD3d 166, 168 [1st Dept 2003], citing *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]).

Plaintiffs’ Cross Motion

Labor Law § 240 (1) imposes absolute liability upon owners, contractors, and their agents for injuries to workers that were proximately caused by the failure to provide safety devices necessary to protect workers from elevation-related risks and hazards, such as “falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured” (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). “[L]iability is contingent upon the existence of a hazard contemplated in section 240 (1)” (*Narducci v Manhasset Bay Assocs.*, 96 NY2d 259, 267 [2001]). These “contemplated hazards”

are those related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of

the materials or load being hoisted or secured

(*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991], quoted in *Suwareh v State of New York*, 24 AD3d 380, 381 [1st Dept 2005]). Not all injuries caused by a fall from a ladder are within the intended ambit of section 240 (1). “Labor Law § 240 (1) is directed solely at elevation-related hazards, and is not applicable where the injury sustained resulted from other types of hazards ‘even if proximately caused by the absence of an adequate scaffold or other required safety device’ [citing *Ross*, 81 NY2d at 500, and other citations]” (*Georgopoulos v Gertz Plaza*, 13 AD3d 478, 479 [2d Dept 2004]). If an accident was the result of a general hazard of the workplace, it does not fall within Labor Law § 240 (1) (*see e.g. Sahota v Celaj*, 11 AD3d 308, 309 [1st Dept 2004]).

Here, the hazard encountered by Callan, namely the excessive heat, was not an elevation-related hazard. Thus, it does not fall within the intended ambit of section 240 (1), and plaintiffs’ cross motion which seeks summary judgment in their favor is denied.

Defendant’s Motion

For Summary Judgment Dismissing the Complaint

Because Labor Law § 240 (1) does not apply to Callan’s alleged accident, plaintiffs’ claim under Labor Law § 240 (1) is dismissed. Because plaintiffs withdrew the Labor Law § 241 (6) claims in their moving papers, ST’s motion for summary judgment is also granted dismissing these claims.

“It is settled that § 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work” (*Singh v Black Diamonds LLC*, 24 AD3d 138, 139 [1st Dept 2005]). In cases, such as this one, where the injury is the result of an allegedly dangerous condition, rather than the result of the

contractor's method of doing its work, "[t]he statute applies ... to owners and contractors who either created a dangerous condition or had actual or constructive notice of it" (*Linares v United Mgt. Corp.*, 16 AD3d 382, 384 [2d Dept 2005]). Callan contends that defendant both created the extreme heat condition by failing to provide air conditioning or any other form of ventilation for the second floor that Saturday, and that defendant had actual notice of the hazard, trade workers having told ST's project superintendent, Paul Keosayian, on Mondays that the heat and lack of air conditioning made it either uncomfortable or difficult to do their work on weekends (Keosayian Dep., at 44).

With respect to the creation of the hazard issue, it cannot be said that defendant created the heat on the second floor that Saturday. Rather, the sun streaming through floor-to-ceiling windows with a southern exposure created the heat. Defendant's failure to reduce the effect of the sun's rays is not tantamount to creation of the heat produced.

However, the part of defendant's motion which seeks summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims must be denied because there are questions of fact concerning the issue of defendant's notice of the excessive heat condition. "[C]onstructive notice of the allegedly unsafe condition that caused the accident ... must call attention to the specific defect or hazardous condition and its specific location, sufficient for corrective action to be taken" (*Mitchell v New York University*, 12 AD3d 200, 201 [1st Dept 2004]). ST's Keosayian testified that, prior to June 4, 2005, trade workers "used to complain" to him "on Monday mornings" about the heat and lack of air-conditioning on weekends (Keosayian Depo., at 43-44). Thus, ST received these complaints on more than one occasion prior to the date of Callan's accident.

Defendant contends, in essence, that these complaints do not constitute notice of a hazardous

heat condition. Defendant contends that Callan's subjective estimation of the intensity of the heat as "excessive," is belied by the actual reported temperature. To substantiate this position, defendant proffers the NOAA weather report for Central Park for June 4, 2005. For the period encompassing the time of Callan's accident, the reported outdoor temperature ranged from 79 to 81 degrees (*see* Joyce 3/14/07 Reply Affirm., ¶ 37 and Ex I).

Although the Court does not dispute the proffered outdoor temperature statistics, it cannot conclude from them that the indoor temperatures were the same at the subject worksite. It would not appear reasonable to assume that the temperature in the open air and shade of Central Park would be the same as that within a building with floor-to-ceiling windows that cannot be opened, with the sun's rays streaming in through its southern exposure, without the benefit of air-conditioning or other ventilation. Moreover, triable questions of fact remain concerning, for example, whether defendant had notice that the heat created by these conditions could be sufficiently intense as to constitute a fainting hazard. In addition, there are questions concerning what the trade workers meant by their statements that the heat caused it to be "uncomfortable" or "difficult" to work there, and whether these statements constituted notice that the heat was actually intense enough to pose a hazard. Moreover, because the general contractor has overall responsibility for the safety of the workplace, including the duty to inspect it for suitability, a triable question is presented as to whether the general contractor had constructive notice.

Therefore, the part of defendant's motion which seeks summary judgment dismissing plaintiffs' common-law negligence and Labor Law § 200 claims is denied.

For Summary Judgment on Its Third-Party Complaint

The part of defendant's motion which seeks summary judgment in its favor on its common-

law indemnification/contribution cause of action is denied. Because Callan undisputedly did not sustain a “grave injury,” Workers’ Compensation Law § 11 bars a claim for contribution and common-law indemnification against Callan’s employer, AA (*see e.g. Rodrigues v N & S Building Contr.*, 5 NY3d 427, 429-430 [2005]).

As for contractual indemnification, the Terms and Conditions contained in the ST/AA Purchase Order includes paragraph 11.1, which provides: “The insurance and indemnification provisions are set forth in the separate Blanket Insurance/Indemnity Agreement signed by Subcontractor [AA], the terms of which are incorporated herein. In the absence of said Agreement, the following indemnification and insurance provisions shall apply [¶ 11.2].”¹ Paragraph 6 of the Blanket Insurance/Indemnity Agreement provides, in relevant part:

To the fullest extent permitted by law, subcontractor [AA] will indemnify and hold harmless Structure Tone Inc. (“STI”) ... from and against any and all claims, suits, liens, judgements, damages, losses and expenses, including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of Subcontractor ... in connection with the performance of any work by or for Subcontractor pursuant to any Purchase Order and/or related Proceed Order. Subcontractor will defend and bear all costs of defending any actions or proceedings brought against STI ... arising in whole or in part out of any such acts, omission, breach or default.

“A party is entitled to full contractual indemnification provided that the intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances [interior quotation marks omitted]” (*Watral & Sons v OC Riverhead 58, LLC*, 34 AD3d 560, 563 [2d Dept 2006], quoting *Drzewinski v Atlantic Scaffold &*

¹ Paragraph 11.2 of the Terms and Conditions AA does not apply here because AA did sign the separate Blanket Insurance/Indemnity Agreement.

Ladder Co., 70 NY2d 774, 777 [1987]; see also *Torres v Morse Diesel Intl.*, 14 AD3d 401, 403 [1st Dept 2005]). In addition, “[i]n contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant” (*Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999]; see also *De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 193 [1st Dept 2003], quoting *Correia*).

The part of defendant’s motion which seeks summary judgment on its contractual indemnification is denied. First, there are questions of fact as to whether defendant was negligent. Second, defendant has made no showing that Callan’s accident arose out of AA’s “acts, omissions, breach or default” in its performance of AA’s work under the ST/AA Purchase Order, thereby triggering AA’s obligation to indemnify ST.

As to breach of contract, defendant contends that AA failed to procure insurance for ST’s benefit, as required under Paragraph 3.2 of the Blanket Insurance/Indemnity Agreement:

Comprehensive General Liability (“CGL”) with a combined single limit for Bodily Injury, Personal Injury and Property Damage of at least \$4,000,000 per occurrence and aggregate. The limit may be provided through a combination of primary and umbrella/excess liability policies. Coverage shall include the Broad Form Comprehensive General Liability Endorsement. Coverage shall provide and encompass at least the following:

(c) Blanket Written Contractual Liability covering all Indemnity Agreements.

In addition to specific requirements concerning the types and amounts of coverage mandated, paragraph 3.2 (e) of the Blanket Insurance/Indemnity Agreement requires an “[e]ndorsement naming Structure Tone Inc. as an Additional Insured” A certificate of insurance, dated March 1, 2005,

shows that ST is an additional insured under the policy, and is the certificate holder. However, the certificate includes the language: “This certificate is issued as a matter of information only and confers no rights upon the certificate holder. This certificate does not amend, extend or alter the coverage afforded by the policies below.”

“A certificate of insurance is only evidence of a carrier’s intent to provide coverage but is not a contract to insure the designated party nor is it conclusive proof, standing alone, that such a contract exists” (*Tribeca Broadway Associates, LLC v Mount Vernon Fire Insurance Co.*, 5 AD3d 198, 200 [1st Dept 2004], citing *Buccini v 1568 Broadway Associates*, 250 AD2d 466, 469 [1st Dept 1998]). Thus, the court must look to the insurance policy itself to determine whether its terms could provide coverage for defendant as an additional insured.

AA has appended a policy to its papers, policy number CPP 3080611 issued by Utica National Assurance Company for the term November 1, 2004 to November 1, 2005, which shows that AA procured a “Commercial Package Policy” which includes commercial general liability coverage. The Declarations Page of the Commercial General Liability Coverage Part shows that the limits of insurance include a General Aggregate Limit (Other Than Products-Completed Operations) of \$2 million, a Products-Completed Operations Aggregate Limit of \$2 million, and an Each Occurrence Limit of \$1 million.

The policy includes an endorsement concerning Additional Insured - Owners, Lessees or Contractors - Scheduled Person or Organization, which does not name ST as an additional insured in its schedule. However, the policy also includes a General Liability Extension Endorsement. Paragraph 11 of this endorsement covers “Additional Insureds - By Contract, Agreement or Permit”

The following is added to SECTION II - WHO IS AN INSURED:

a. Additional Insureds - By Contract, Agreement or Permit:

(1) Any person or organization with whom you [AA] have entered into a written contract, agreement or permit requiring you to provide insurance such as is afforded by this Commercial General Liability Coverage Form will be an additional insured, but only:

(a) To the extent that such additional insured is held liable for your acts or omissions arising out of and in the course of ongoing operations performed by you or your subcontractors for such additional insured[.]

The language of this provision is sufficient to cover ST as an additional insured because of its contract with AA.

AA's policy with Utica National Assurance Company does not provide enough coverage to meet the \$4 million in coverage required under the Blanket Insurance/Indemnity Agreement. However, ST has commenced a declaratory judgment action against AA and its insurers, *Structure Tone, Inc. v Atlas-Acon Electric Services Corp., et al.*, Index Number 112012/06, in which ST seeks a declaratory judgment that AA and its insurers owe a duty to ST to defend, indemnify, and provide insurance coverage for ST in this action. There, ST alleges that Fireman's Fund Insurance Company issued AA an excess policy, policy number XYZ76116060, with policy limits of \$10 million per occurrence and \$10 million in the aggregate, which was not produced by either ST or AA on this motion. The existence of this policy, which may provide coverage to ST as an additional insured, warrants denial of the part of ST's motion seeking summary judgment in its favor against AA for breach of an agreement to procure adequate insurance.

AA's Cross Motion

For Summary Judgment Dismissing the Complaint

Because AA is not a defendant, the part of AA's motion which seeks summary judgment dismissing the complaint merely duplicates defendant's motion. Like defendant's motion, AA's motion is granted to the extent that the Labor Law §§ 240 (1) and 241 (6) claims are dismissed.

For Summary Judgment Dismissing the Third-Party Complaint

As discussed above, Workers' Compensation Law § 11 bars ST's claim for common-law indemnification/contribution from AA, and so this claim is dismissed.

As to contractual indemnification, paragraph 6 of the Blanket Insurance/Indemnity Agreement requires AA to indemnify and hold harmless ST from all damages arising from AA's "acts, omissions, breach or default ... in connection with the performance of" AA's work. Here, an issue of fact arises whether Callan's accident arose out of AA's failure to provide fans for the performance of its work. Callan testified that he complained to his foreman, Nick Ranieri, on June 4, 2005, "several" times prior to his accident, telling Ranieri, "The heat is brutal" (Callan Dep., at 104). Ranieri told him that he would try to get fans; "Drink water. Stay hydrated" (*id.* at 105). No fans were ever brought (*id.* at 106). As explained above, triable factual questions are presented as to whether AA had notice of an unsafe heat condition, and failed to take appropriate measures. Therefore, the part of AA's cross motion which seeks summary judgment dismissing ST's claim for contractual indemnification is denied.

Finally, as discussed above in the context of ST's motion for summary judgment, an issue of fact arises as to whether AA obtain adequate insurance on ST's behalf. The part of AA's cross motion which seeks summary judgment dismissing ST's breach of contract claim is therefore denied.

CONCLUSION

Accordingly, it is

ORDERED that the motion for summary judgment by defendant Structure Tone, Inc. is granted to the extent that so much of the first cause of action as alleges violations of Labor Law §§ 240 (1) and 241 (6) claims are dismissed, and the motion is otherwise denied; and it is further

ORDERED that plaintiffs' cross motion is denied; and it is further

ORDERED that the cross motion for summary judgment by third-party defendant Atlas Acon Electric Services Corp. is granted to the extent that so much of the first cause of action as alleges violations of Labor Law §§ 240 (1) and 241 (6) claims are dismissed, the second cause of action of the third-party complaint is dismissed, and the cross motion is otherwise denied; and it is further

ORDERED that the remainder of the action shall continue.

Dated: May 21 2007
New York, New York

ENTER:



J.S.C.

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