Lettieri v Prince
2007 NY Slip Op 31632(U)
June 7, 2007
Supreme Court, Suffolk County
Docket Number: 0007874/2005
Judge: Robert W. Doyle
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SHORT FORM ORDER

INDEX No. 05-7874
CAL. No. 06-02390-OT

SUPREME COURT - STATE OF NEW YORK
POST-NOTE MOTION PART - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1-18-07 (002, 003)
2-27-07 (004)
ADJ. DATE 4-23-07
Mot. Seq. # 002 - MotD
003 - XMotD
004 - XMD

---X

FRANK LETTIERI,
Plaintiff,

- against -

STEVEN B. PRINCE, PRINCE VENTURES, LLC., NORTH SHORE INTERIOR DESIGNS, NORTH SHORE DESIGN GROUP, LLC and COUNTRY-TIQUE, INC.,
Defendants.

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STEVEN B. PRINCE, PRINCE VENTURES, LLC.,
Third-Party Plaintiffs,

- against -

8G's COMMERCIAL CORP., A CUT ABOVE FINISHERS, INC., FRANK GALLO d/b/a A CUT ABOVE FINISHERS, INC.,
Third-Party Defendants.

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Upon the following papers numbered 1 to 71 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1-12 ; Notice of Cross Motion and supporting papers 13-34; 35-44 ; Answering Affidavits and supporting papers 45-54; 55-59; 60-62; 63-64 ; Replying Affidavits and supporting papers 65-66; 67-68; 69-71; Other__; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant Country-Tique, Inc., for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's complaint and all cross-claims against it, is granted to the extent that plaintiff's Labor Law §§ 240(1) and 241(6) causes of actions are dismissed, and is otherwise denied: and it is further

ORDERED that the cross motion (#003) by defendants/third-party plaintiffs, Steven B. Prince and Prince Ventures, LLC, for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's complaint; an order dismissing all claims against Steven B. Prince in his individual capacity; an order granting conditional common-law indemnification as against defendants Country-Tique, Inc. and

8G's Commercial Group; and an order granting contractual indemnification as against Country-Tique, is granted to the extent that plaintiff's complaint is dismissed as against movants and movants are entitled to contractual indemnification as against County-Tique, and is otherwise denied; and it is further

ORDERED that the cross motion (#004) by plaintiff for an Order pursuant to CPLR 3212 granting him summary judgment as to defendants' liability pursuant to Labor Law §§ 240(1) and 241(6), and for leave to serve an amended bill of particulars, is denied.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and for common-law negligence, for injuries he suffered when a movable wall fell on him. Plaintiff's employer, 8G's Commercial Corp. (8G's), had been hired by Country-Tique, Inc. to perform certain renovations at a building it had leased from Prince Ventures, LLC, the owner. Country-Tique had leased the premises with the intention of combining its two home furniture stores into one store, and it undertook the responsibility and cost of removing most of the existing interior and then replacing the ceiling, electrical fixtures, floors, and walls with its own design. 8G's, by its acting principal Frank Gallo, recommended other trades to Country-Tique's acting principal, Adam Ross. Mr. Ross designed the new space and engaged the other contractors, including an electrician, painter, and the tile and flooring contractors. The various contractors, as well as invoices for materials used by 8G's, were paid from a Country-Tique account.

Mr. Gallo or his foreman was present daily and directed 8G's employees in removing the old materials and implementing the renovations. Mr. Ross was also at the site daily, stopping on the way to his other stores, and he would often direct which room he wanted cleaned-up so that the work could progress as quickly as possible. He asked 8G's to construct three movable walls to use as backdrops to display furniture. The walls needed to accommodate sideboards, headboards and other large pieces of furniture, resulting in wall dimensions of about 10 feet long by 10 feet high, and 1 foot deep, for each of the three walls. They were constructed on a wooden frame lying on the floor and sheet-rocked on both sides, which required the customary taping and spackling. Two rows of five wheels were affixed to the bottom of each wall.

Plaintiff testified at his deposition that he was performing general clean-up at the site and other tasks as directed by his employer. On the day of his accident, he was directed to install new ceiling tiles in a drop ceiling in a room where one of the movable walls was located. He was utilizing a scaffold which the electricians had brought to the site. At some point the wall became an obstruction to the tile area he needed to reach and he decided to move the wall out of his way. He testified that, although prior to this job he had never seen or moved a movable wall before, he did not think it would be hard to move, considering that it had wheels on the bottom. He received no instructions to the contrary. He pushed up against the end of the wall and it did move a little. However, it started to tip and he thought he could stop it from falling all the way. He went from the end of the wall to the long part of the wall and attempted to stop the fall. Unfortunately, he misjudged the weight of the wall, he couldn't prevent its decent and it fell on top of him, causing the profound injuries complained of herein and leaving him a paraplegic.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable, and an owner or general contractor or their agent who breaches that duty may be held liable in damages regardless of whether they had actually exercised supervision or control over the work (***Ross v Curtis-***

Palmer Hydro-Elec. Co., 81 NY2d 494, 601 NYS2d 49 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents 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.***, *supra* at 501; ***Rocovich v Consolidated Edison Co.***, 78 NY2d 509, 514, 577 NYS2d 219 [1991]; ***Zimmer v Chemung County Performing Arts***, 65 NY2d 513, 493 NYS2d 102 [1985]). The legislative purpose behind § 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and general contractor or their agent instead of on workers, who are "scarcely in a position to protect themselves from accidents" (***Rocovich v Consolidated Edison Co.,*** 78 NY2d 509, 577 NYS2d 219 [1991]). Nevertheless, the "special hazards" afforded by § 240(1) "do not encompass *any and all* perils that may be connected in some tangential way with the effects of gravity" (*see,* ***Ross v Curtis-Palmer Hydro-Electric Co.***, *supra;* ***Rodriguez v Margaret Tietz Ctr. for Nursing Care,*** 84 NY2d 841, 616 NYS2d 900 [1994]). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (***Bland v Manocherian,*** 66 NY2d 452, 497 NYS2d 880 [1985]; ***Sprague v Peckham Materials Corp.,*** 240 AD2d 392, 658 NYS2d 97 [1997]).

It is well-settled that "not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240 (1)" (***Narducci v Manhasset Bay Assoc.***, 96 NY2d 259, 267, 727 NYS 2d 37 [2001]). In actions premised on falling objects, an essential component of an injured worker's ability to recover is that he or she "must show that the object fell, while being hoisted or secured, because of the absence or inadequacy of a safety device of the kind enumerated in the statute" (*id.* at 267; ***Roberts v General Elec. Co.***, 97 NY2d 737, 742 NYS2d 188 [2002]). Here, the movable wall which fell was neither in the process of being hoisted nor a load that required securing by an enumerated device (***Narducci v Manhasset Bay Assoc.***, *supra* at 268; ***Misseritti v Mark IV Constr. Co.***, 86 NY2d 487, 490-491, 634 NYS2d 35 [1995]). Further, the wall that fell was at the same level as plaintiff and therefore was not a falling object for the purposes of the absolute liability imposed by Labor Law § 240(1) (*see,* ***Peay v New York City School Constr. Auth.,*** 35 AD3d 566, 568, 827 NYS2d 189 [2006]; ***Mikcova v Alps Mech., Inc.,*** 34 AD3d 769, 770, 825 NYS2d 130 [2006]; ***Zirkel v Frontier Communications of Am***, 29 AD3d 1188, 815 NYS2d [2006]; ***Atkinson v State of N.Y.,*** 20 AD3d 739, 740, 789 NYS2d 230 [2005]). Accordingly, the Court finds that Labor Law § 240(1) is inapplicable to plaintiff's accident and, therefore, his Labor Law § 240(1) cause of action is dismissed.

Labor Law § 241(6) requires owners and general contractors to "provide reasonable and adequate protection and safety" for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. As is the duty imposed by Labor Law § 240(1), the duty to comply with the Commissioner's regulations imposed by § 241(6) is nondelegable (***Ross v Curtis-Palmer Hydro-Elec. Co.,*** *supra;* ***Long v Forest-Fehlhaber***, 55 NY2d 154, 448 NYS2d 132 [1982]; ***Allen v Cloutier Constr. Corp.,*** 44 NY2d 290, 405 NYS2d 630 [1978]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a "specific positive command" and not merely "general safety standards" need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*see*, ***Ross v Curtiss-Palmer Hydro-Elec. Co.,*** *supra*; ***Rizzuto v L.A. Wenger Contr. Co.***, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff's cross motion is confined to defendants' alleged violations of 12 NYCRR §§ 23-2.1(a)(1) and (2), 23-1.(e)(2), and 23-5.18(h). Since plaintiff's bill of particulars does not include section 25-5.18(h), plaintiff also seeks leave to serve an amended bill of particulars adding this alleged violation. Plaintiff did not address the remaining Code violations as stated in the bill of particulars, and, in any event, they are either too general or not applicable to plaintiff's accident and, are dismissed.

As to section 23-2.1, "Maintenance and housekeeping," it provides:

(a) Storage of material or equipment.

> (1) All building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.
>
> (2) Material shall not be stored upon any floor, platform or scaffold in such quantity or of such weight as to exceed the safe carrying capacity of such floor, platform or scaffold. Material and equipment shall not be placed or stored so close to any edge of a floor, platform or scaffold as to endanger any person beneath such edge.

Here, the movable wall cannot be categorized as material or equipment which was being stored in a passageway or thoroughfare (***Castillo v Starrett City, Inc.,*** 4 AD3d 320, 772 NYS2d 74 [2004]). Although it is apparent that the wall was unstable, it was not material being stored. It was fully constructed and needed to be secured to the permanent wall and decorated. Therefore, this section is not applicable to plaintiff's accident.

As to section 23-1.7 (e) "Tripping and other hazards," it provides:

> (2) Working areas. The parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials and from sharp projections insofar as may be consistent with the work being performed.

However, plaintiff does not allege that he tripped or slipped and fell. He fell when the wall fell over on top of him. Therefore, the section is also inapplicable to his accident.

As to section 25-5.18, "Manually-propelled scaffolds," it provides at subsection (h);

> Moving the scaffold. Provisions shall be made to prevent such scaffolds from tipping or falling during their movement from one location to another. Scaffolds shall be moved only on level floors or equivalent surfaces free from obstructions and openings. No person shall be suffered or permitted to ride on any manually-propelled mobile scaffold while it is being moved.

Clearly, the scaffold did not tip or fall. Moreover, it was not moving the scaffold which caused

plaintiff's accident, rather it was moving the wall (*see*, ***McKenna v Lehrer McGovern Bovis, Inc.,*** 302 AD2d 329, 756 NYS2d 181 [2003]). Therefore, this section cannot be applicable to plaintiff's accident and leave to so amend the bill of particulars to add the alleged violation of 12 NYCRR § 25-5.18(h), is denied. Since none of the sections relied upon by plaintiff can form a sufficient predicate for his Labor Law § 241(6) claim, his Labor Law § 241(6) claim is also dismissed. Plaintiff's cross motion for summary judgment on his Labor Law §§ 240(1) and 241(6) claims is correspondingly denied. Moreover, his motion could not be considered, even if it were meritorious, in that it was untimely (***Miceli v State Farm Mut. Auto. Ins. Co.,*** 3 NY3d 725, 786 NYS2d 379 [2004]; ***Brill v City of New York,*** 2 NY3d 648, 781 NYS2d 261 [2004]).

Frank Gallo, plaintiff's employer at 8G's, testified at his deposition that he had never seen a movable wall before, that he constructed the walls to Adam Bass's specifications, and that Mr. Bass decided how many wheels to put on the walls and supplied the wheels, based upon how much weight they were expected to carry. He also recalled that during the course of the renovations he and Mr. Bass had moved the walls together. Mr. Bass would direct where to leave the walls at the end of the day, in that he knew which contractors were scheduled for the next day. He could not recall whether plaintiff had been on the site when the walls had been moved or righted, but he did recall telling plaintiff to have someone help him if he was going to move the wall. Upon completion of the renovation, the walls were to be anchored to the permanent walls. Mr. Bass testified at his deposition that the it was apparent to him that the walls were not stable. They were fine when left alone but when manipulated they could topple. That was why he wanted them to eventually be anchored.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*see*, ***Jock v Fien***, 80 NY2d 965, 590 NYS2d 878 [1992]; ***Mordkofsky v V.C.V. Dev. Corp.,*** 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (*see*, ***Russin v Louis N. Picciano & Son***, *supra*) who exercise control or supervision over the work or either created the allegedly dangerous condition or had actual or constructive notice of it (*see*, ***Lombardi v Stout***, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; ***Yong Ju Kim v Herbert Constr. Co.,*** 275 AD2d 709, 713 NYS2d 190 [2000]). Here, while Country-Tique had no direct control over plaintiff's work, it did contract for the work and did design the wall and supply the wheels for it, and Mr. Bass testified that he knew that it was unstable (***Cruz v New York City Housing Auth.,*** 291 AD2d 223, 737 NYS2d 81 [2002]). Further, defendant's assertion that the wall's instability was readily observable is not dispositive. While such circumstance might have "negated any duty that defendant[] . . . owed plaintiff to warn of potentially dangerous conditions" (***England v Vacri Constr. Corp.,*** 24 AD3d 1122, 807 NYS2d 669 [2005] quoting ***MacDonald v City of Schenectady***, 308 AD2d 125, 126, 761 NYS2d 752 [2003]); it did not, without more, obviate the duty to provide a reasonably safe workplace (***Bilinski v Bank of Richmondville***, 12 AD3d 911, 784 NYS2d 708 [2004]; ***MacDonald v City of Schenectady***, *supra* at 127), subject to any issue of plaintiff's alleged comparative negligence (***Cowan v ADF Constr. Corp.,*** 26 AD3d 802, 809 NYS2d 735 [2006]). Further, Country-Tique did not meet its initial burden as to plaintiff's common-law negligence claim (***Zuckerman v City of New York,*** 49 NY2d 557, 427 NYS2d 595 [1980]; ***Fabbricatore v Lindenhurst Union Free School Dist.,*** 259 AD2d 659, 686 NYS2d 822 [1999]), based upon general principals of negligence and foreseeability (***Dunham v Hilco Constr. Co.,*** 89 NY2d 425, 654 NYS2d 335 [1996]; ***Severino v Hohl Indus. Serv.,*** 300 AD2d 1049, 725 NYS2d 776 [2002]). Accordingly, so much of Country-Tique's motion which seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims, is denied.

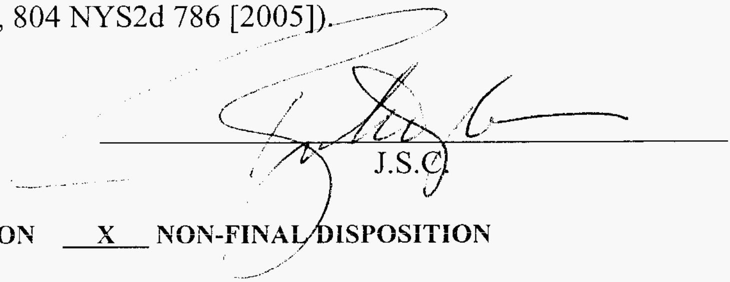
Defendants Prince Ventures, LLC, and its principal, Steven B. Prince (Prince), established that they exercised no control or supervision over plaintiff's work and had no notice of the hazardous wall. Therefore, they established their entitlement to summary judgment as a matter of law as to plaintiff's Labor Law § 200 and common-law negligence causes of action and plaintiff did not refute this with any admissible evidence to the contrary. Accordingly, plaintiff's complaint is dismissed as to these defendants.

Prince also seeks summary judgment on its cross claims for contractual and common-law indemnification against Country-Tique and third-party complaint for common-law indemnification against 8G's. The lease between Prince and Country-Tique, provides at paragraph 12(b) that the tenant shall provide liability insurance naming landlord as an additional insured and, moreover, at paragraph 15:

> Tenant shall indemnify, defend, save and hold Landlord harmless from and against any and all liability and damages and any injury, loss, claim, damage or suit of every kind and nature, including Landlord's reasonable counsel fees, to any person, firm, association or corporation or to any property *arising out of or based upon related to or in any way connected with* the use of occupancy of the Premises or the conduct or operation of Tenant's business or in violation of any environmental law, unless such injury, loss, claim or damage is attributable solely to the negligence of Landlord or its agents, servants or employees. (emphasis added)

Therefore, the agreement is not dependant upon a finding that Country-Tique was negligent and Prince is entitled to summary judgment on its claim for contractual indemnification, including reasonable counsel fees in defending against plaintiff's action (***Correia v Professional Data Mgt.***, 259 AD2d 60, 65, 693 NYS2d 596 [1999]; ***Robinson v City of New York,*** 8 Misc 3d 1012A, 801 NYS2d 781, *affd* 22 AD3d 293, 802 NYS2d 48 [2005]). However, to establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence . . . but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (***Perri v Gilbert Johnson Enter.,*** 14 AD3d 681, 685, 790 NYS2d 25 [2005]; ***Correia v Professional Data Mgt.***, *supra*; ***Priestly v Montefiore Med. Ctr., Einstein Med. Ctr***., 10 AD3d 493, 495, 781 NYS2d 506 [2004]). Since the issue of any negligence on the part of Counrty-Tique and 8G's[1] remains unresolved, the claims for common-law indemnification, which include the costs of defending against plaintiff's action (***Chapel v Mitchell,*** 84 NY2d 345, 347-348, 618 NYS2d 626 [1994]) cannot be resolved herein (***Coque v Wildflower Estates Dev.,*** 31 AD3d 484, 818 MYS2d 546 [2006]; ***Farduchi v United Artists Theatre Circuit,*** 23 AD3d 613, 804 NYS2d 786 [2005]).

Dated: JUN 0 7 2007



J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**

[1] In light of plaintiff's grave injury, his employer, 8G's, is not exempt from a claim for common-law indemnification as provided by Worker's Compensation Law §11 (*see also*, ***Majewski v Broadalbin-Perth Cent. School Dist.***, 91 NY2d 577, 673 NYS2d 966 [1998]).