Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

RAYMOND T. TUCKER, et al.
2004

- against -

ABSOLUTE ELECTRICAL CONTRACTING CO., et al.

D and M KINGS REALTY, LLC,

Third-Party Plaintiff,

- against -

TOWNSPORTS INTERNATIONAL, INC., et al.,

Third-Party Defendants.

Index Number 7169

Motion Date February 28, 2006

Motion Cal. Number 63 & 64

Motion Seq. No. 6

The following papers numbered 1 to 35 read on this motion by third-party defendants, Townsports International, Inc. and TSI Brooklyn Belt, Inc. (collectively TSI), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and any and all cross claims; on motion by defendant, Absolute Electrical Contracting Co. (Absolute), pursuant to CPLR 2221(e), for leave to renew its prior motion for summary judgment and, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and any and all cross claims; on cross motion by defendant, D and M Kings Realty, LLC (D&M), pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and for contractual indemnification from TSI; on separate cross motion by defendant, Cropsey & Mitchell Company, Inc. a/k/a C&M Holding Corp. (C&M), pursuant to CPLR 3212, for summary judgment on its contractual indemnification claims against D&M and TSI; and on separate cross motion by C&M, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint and any and all cross claims.

	Papers Numbered
Notices of Motions - Affidavits - Exhibits.....	1-8
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Upon the foregoing papers it is ordered that the motions and cross motions are determined as follows:

Plaintiffs commenced this action to recover damages for injuries plaintiff, Raymond T. Tucker (Tucker), claims to have sustained as a result of an accident that occurred on his job on November 19, 2002. Tucker alleges that, while employed by TSI, he stood on a chair to inspect a light fixture, when he received an electrical shock, which caused him to fall off the chair and sustain various injuries. The record indicates that TSI owned and operated the New York Sports Club, the exercise facility where Tucker was employed. The building which housed the exercise facility was owned by D&M and leased to TSI. D&M leased the land from landowner, C&M. Plaintiffs' allege causes of action under Labor Law §§ 240(1), 241(a), 241(6) and 200.

Initially, this court notes that plaintiffs have withdrawn their Labor Law § 200 as against C&M and D&M. Accordingly, this cause action as against C&M and D&M is dismissed.

Additionally, Absolute's motion for leave to renew its prior motion for summary judgment is granted. "A motion for leave to renew must be supported by new or additional facts not offered on the prior motion that would change the prior determination, and shall also contain reasonable justification for the failure to present such facts on the prior motion." (Vincente v Roy Kay, 35 AD3d 448, 451 [2006].) Absolute has demonstrated that, at the time of this court's determination on Absolute's prior motion for summary judgment, discovery had not yet commenced. The recently completed depositions present new facts and evidence that was not offered on the previous motion, and that were in the sole possession of plaintiffs.

It is the movants' burden to establish their prima facie entitlement to summary judgment as a matter of law. (Alvarez v Prospect Hosp., 68 NY2d 320 [1986].) Upon making a showing of their entitlement to summary judgment, the burden then shifts to plaintiffs to produce evidence, in admissible form, to demonstrate the existence of material issues of fact which require a trial of the action. (Alvarez v Prospect Hosp., supra

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Plaintiffs' Labor Law § 241(6) claim must be dismissed, because the protections of Labor Law § 241(6) do not apply to claims arising out of maintenance of a building or structure outside of the context of construction, demolition or excavation. (Nagel v D & R Realty Corp., 99 NY2d 98 [2002].) Tucker gave deposition testimony that his responsibilities involved tending to maintenance issues throughout various exercise facilities owned by TSI. Tucker testified that on the day of his accident, he noticed that a high hat was not properly positioned, therefore he stood on a chair, and stuck his hand through a space in the ceiling to inspect the problem. This activity of inspecting the high hat is not covered work under Labor Law § 241(6), and as plaintiffs have failed to raise a triable issue of fact in this regard, this claim must be dismissed as against all defendants.

Plaintiffs' Labor Law § 240(1) must also be dismissed, because this statute serves as a basis of recovery for certain workers injured only during the "erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." (Labor Law § 240[1].) Tucker's deposition testimony establishes that, at the time of his accident, he was not involved in any of these protected activities, rather, he was conducting routine maintenance. "To that end, it has been repeatedly held that routine maintenance is not a protected activity within the meaning of Labor Law § 240(1)." (Kirk v Outokumpu American Brass, 33 AD3d 1136, 1136 [2006].)

This court rejects plaintiffs' argument that Tucker was involved in a project to repair the lighting system, and that these repairs are covered under Labor Law § 240(1). According to Tucker, he had arranged for various lighting repairs to be conducted by Absolute, and these repairs were done approximately three weeks prior to his accident. Upon receiving complaints that the work had either not been done, or were improperly done, Tucker claims that he arranged what he described as a " walk-through" of the facility to "inspect" the painting and electrical work that had been done. It is apparent that Tucker's work, post-repair inspection, was merely investigatory, and does not fall within the purview of Labor Law § 240(1). (Beehner v Eckerd Corp., 3 NY3d 751 [2004].) Accordingly, this cause of action must be dismissed as against all defendants.

Plaintiffs' Labor Law § 200 must be dismissed as against TSI. Labor Law § 200 codifies the common-law duty of owners and general contractors to provide workers with a safe place to work. (Haider v Davis, 35 AD3d 363 [2006].) Implicit to this duty is the precondition that "the party charged with that responsibility have the authority to control the activity bringing about the

injury." (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981].) The record is bare of any evidence tending to establish that TSI exercised any supervisory control over any alleged electrical work Tucker claims had been performed by Absolute some three weeks prior to his accident. Further, the record is also bare of any evidence establishing that TSI either created or had actual or constructive notice of the alleged hazardous condition. (See Gonzalez v Pon Lin Realty Corp., 34 AD3d 638 [2006].) No evidence has been submitted to raise a triable issue of fact with respect to this issue. (See Hatfield v Bridgedale, LLC, 28 AD3d 608 [2006].)

With respect to plaintiffs' Labor Law § 200 and common-law negligence claims as against Absolute, the same must be dismissed. There appears to be some dispute as to whether Absolute did or did not perform repairs to the lighting system in the locker room prior to Tucker's accident. According to Tucker, some work had been done by Absolute, albeit improperly and incompletely. TSI and Absolute maintain that no work had been done at all. This dispute, however, is immaterial, as Tucker's testimony that he must have been electrocuted by wires which Absolute left exposed is based on nothing more than mere speculation. (See John v Tishman Const. Corp. of New York, 32 AD3d 458 [2006]; see Ziajka v Pace Plumbing Corp., 254 AD2d 480 [1998].) Even if, according to Tucker, Absolute had repaired the lighting system prior to the accident, a post-accident inspection performed by Absolute on November 20, 2002, revealed no exposed wires. Further, Tucker submits no evidence, such as medical records, to support his contention that he was electrocuted.

Plaintiffs' remaining claim, Labor Law § 241(a), must also be dismissed as this statute, mandating that workers in or at elevator shaftways of buildings in course of construction or demolition shall be protected by sound planking at least two inches thick laid across the opening at levels not more than two stories above and not more than one story below such worker, is inapplicable to the facts of this case.

D&M's cross motion for contractual indemnification from TSI is denied. The indemnification provision contained in Paragraph 24.1 of the subject sublease between D&M and TSI provides for indemnification by TSI in the event of, inter alia, TSI's negligence. As there is no basis to support a finding of TSI's negligence, D&M is not entitled to contractual indemnification. (Moss v McDonald's Corp., 34 AD3d 656 [2006]; Mohammed v Islip Food Corp., 24 AD3d 634 [2005].)

C&M's cross motion for contractual indemnification from D&M and TSI is denied. C&M identifies Paragraph 9.3, under the headings,"Alterations, etc." and "Indemnification," as a basis of D&M's duty to indemnify C&M in this action. A party is only

entitled to full contractual indemnification when the "intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances." (Kennelty v Darlind Const., 260 AD2d 443, 446 [1999].) Initially, it would appear that Paragraph 9.3 and 15 of the subject contract conflict, in that Paragraph 9.3 provides for full indemnity, regardless of D&M's negligence, while Paragraph 15 conditions indemnification on D&M's negligence. Upon closer review, however, it would appear that the parties only intended Paragraph 9.3 to apply when, as a result of improvements having been made to the property, D&M, D&M's contractors, subcontractors, their agents, servants, employees, materialmen or third-parties make claims based on the labor and material relating to the improvement. Therefore, Paragraph 9.3 is inapplicable to the facts of this case. The only portion of Paragraph 15 which appears to be applicable, as it concerns accidents, injuries or death sustained on the property, provides for indemnification by D&M only in the event of D&M's negligence. As this court has already determined that there is no evidence upon which to base a finding of D&M's negligence, C&M is not entitled to contractual indemnification. Further, as there is no contractual provision requiring TSI to indemnify C&M, C&M is not entitled to contractual indemnification from TSI. Finally, as this court has determined that TSI was not negligent in the happening of Tucker's accident, C&M is not entitled to common-law indemnification from TSI.

Accordingly, the motions for summary judgment are granted, and plaintiffs' complaint is dismissed in its entirety as against all parties. Further, the cross motions for indemnification are denied.

Dated: June 15, 2007

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J.S.C.