

Repko v Tishman Constr. Corp. of N.Y.

2007 NY Slip Op 32093(U)

July 2, 2007

Supreme Court, New York County

Docket Number: 0115316/2003

Judge: Louis B. York

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

PRESENT: _____

PART _____

Justice

Reple

INDEX NO.

115316/23

MOTION DATE

Shuman Construction

MOTION SEQ. NO.

002

MOTION CAL. NO.

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

FILED

JUL 12 2007

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Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

Dated: *7/2/07*

Luy

LOUIS B. YORK

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2**

-----X
EDGAR H. REPKO,

Plaintiff,

Index No. 115316/2003

-against-

**TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK and THE CITY OF NEW YORK,**

Defendants.

-----X
**TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK and THE CITY OF NEW YORK,**

Third-party Plaintiffs,

-against-

**REGIONAL SCAFFOLDING & HOISTING CO.,
INC.,**

Third-party Defendant.

-----X
York, J.S.C.:

At the time of the accident on which plaintiff Edgar Repko bases his claims, plaintiff worked for third-party defendant Regional Scaffolding, on a project at the Governor's Island Ferry Terminal ("the property"). On November 19, 2002, plaintiff, who'd been working on a scaffold, jumped from the scaffold onto a platform. He stated that he did this because his employer had not provided him with a ladder for this part of the job, and it was the only way to get back into the building.

Accordingly, he then tried to jump into a window of the building, jumping from the platform toward the building (presumably the ferry terminal, the site of the project), grabbing "a piece of angle" of the building, and then pulling himself up and into the building. Dep.

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at 55. When he did so, however, plaintiff allegedly grabbed the building but slipped – and, to avoid falling into the nearby water, he grabbed onto the edge of the building and began to hoist himself up. At this point, he alleges, his back went out. He pulled himself all the way up and into the window while in pain, resulting in the alleged injuries upon which he bases his current lawsuit.

Plaintiff sued The City of New York (“City”), as owner of the property, which allegedly operated, controlled and/or managed it as well; and, Tishman Construction Corporation of New York, which also allegedly operated, controlled and/or managed the property in question, and which also allegedly contracted with City to perform the renovation, construction or demolition work at the property. Plaintiff alleged violations of Labor Law §§ 200, 240 and 241 and of various OSHA regulations, and also alleged that defendants are guilty of common law negligence.

Defendants answered and also commenced a third-party action against Regional Scaffolding & Hoisting, Inc. (“Regional”), plaintiff’s employer. Now, defendants move for summary judgment dismissing all claims against them. They argue that there is no basis for alleging the Labor Law, OSHA, or negligence claims against them. Alternatively, they seek indemnification from Regional. In addition, based on the indemnification agreement, they seek reimbursement of the attorney’s fees and other costs they have already incurred in this litigation. Regional cross-moves for summary judgment, arguing that plaintiff was the sole proximate cause of his injury. Plaintiff opposes the motions to the extent that they seek dismissal of his claims, cross-moves for summary judgment on the issue of defendants’ liability, and takes no position on the portion of the underlying motion that relates to indemnification.

First, the Court addresses the portions of the motion and of plaintiff's cross-motion relating to the Labor Law § 200 claims against Tishman and the City. These claims must be dismissed in their entirety, as neither defendant exercised control over the workplace sufficient to impose liability upon them here. As Tishman and the City note, third-party defendant Regional was the party with control over the work site.

Plaintiff does not challenge the basic contention that Regional managed the work site. However, he notes that Tishman had a field superintendent with the right to inspect the premises to ensure there were no safety violations. According to plaintiff, this at least creates an issue of fact as to whether defendants retained sufficient supervisory control to impose liability, precluding summary judgment on the Labor Law 200 claims.

Plaintiff is wrong. In O'Sullivan v. IDI Construction Co., Inc., 28 A.D.3d 225, 226-27, 813 N.Y.S.2d 373, 375-76 (1st Dept. 2006), which the Court of Appeals affirmed, 7 N.Y.3d 805, 822 N.Y.S.2d 745 (2006), the First Department held that there was no cause of action against a general contractor under Labor Law § 200 even though, in that case, the general contractor had an on-site safety manager responsible for the safety of the subcontractors' work and the power to stop work. The earlier cases on which plaintiff relies, therefore, is no longer good law.

Next, the court turns to – and reaches a different conclusion regarding – the portions of the motion and of plaintiff's cross-motion Labor Law §§ 240(1) and 241(6) claims. In support of their motion, defendants state that because ladders and alternate means for getting off the scaffold were available to plaintiff, plaintiff was the sole proximate cause of the accident. Thus, according to the motion, no claim is viable under Labor Law § 240(1). Moreover, defendants allege that for the same reason, plaintiff's allegation that defendants

violated NYCRR 23-1.7(f) – which requires that ladders be provided where, as here, stairways, ramps or runways are not practicable alternatives – has no merit.

Among other things, the motion papers suggest that plaintiff concedes that he was provided with a ladder on the work site. However, in so asserting, defendants rely on selective portions of plaintiff's deposition transcript and thus misconstrue his actual testimony and his argument. Plaintiff does not deny that some ladders were on the site of the Ferry Terminal. What he contends is that, for whatever reason, ladders were not available in the area and during the period in question, despite his requests.

Plaintiff has raised an issue of fact as to this crucial part of his argument. In his deposition, plaintiff repeatedly alleged that ladders were not provided to him on the day of the accident and in the area where he fell. See, e.g., Repko Dep. at pp. 64, 65, 166. Joseph O'Connor, plaintiff's supervisor, also stated at deposition that they were not provided with a ladder at the accident site although he asked for one a number of times. O'Connor Dep. at p. 7. The fact that plaintiff admits he was provided with ladders on other days and in other parts of the building does not dispose of the issue. Moreover, plaintiff alleged that he climbed to the elevated area using a ladder, but clarifies that it was a permanent interior ladder. This ladder, too, did not help him once he was outside. To the extent that movants have asserted a contrary position and provided evidence in support of their position, they simply have raised issues for the factfinder.

Similarly, plaintiff cannot rely exclusively on his own statements and claim that he has established his entitlement to summary judgment on the issue of liability. As movants point out, there is also evidence, including the deposition testimony of James Kane, suggesting that Regional always provided its laborers with ladders. Kane testified that he

was a carpenter foreman at the project and that ladders were available to the employees at all times. According to Kane, six to eight ladders were at the site, in a central location; and, workers could go to that location and obtain a ladder whenever they needed one. He also stated that he had never received complaints about the paucity of ladders. For a number of reasons, Kane's testimony does not resolve the issue in defendants' favor. Among others, Kane's statement that there was no problem obtaining ladders in the area where plaintiff worked conflicts not only with plaintiff's testimony but with the testimony of his supervisor, O'Connor; and there are issues of fact regarding, inter alia, whether or not there were enough ladders available – in particular, whether or not they were available to plaintiff in the area where and when he needed one.

As all of plaintiff's allegations under Labor Law §§ 240 and 241 hinge on the issue of whether ladders were provided, then, summary judgment is denied to plaintiff and defendants as to these claims. For similar reasons, the court finds there is an issue of fact precluding summary judgment on the ground that plaintiff was the sole proximate cause of his accident. Because Regional's cross-motion for summary judgment also is based on the argument that plaintiff was the sole proximate cause of his accident, the Court denies this cross-motion as well. Moreover, because defendants have also presented credible evidence supporting their position, plaintiff's cross-motion is denied as well.

Finally, on this issue, the Court notes that, according to defendants, plaintiff's arguments relate only to the City's liability; defendants believe that plaintiff does not oppose the motion as it relates to Tishman. After careful consideration, the Court concludes that this is incorrect. Plaintiff's legal memorandum is not especially clear, but it appears that plaintiff sought partial summary judgment only against the City, but opposes the motion as

against both defendants.

As alternative relief, Tishman and the City move for contractual indemnification by Regional. Regional does not appear to oppose this portion of the underlying motion.¹ There is no affidavit or affirmation in opposition to defendants' motion among the Court papers and, of course, Regional submitted no evidence submitted on this issue, as it would have been annexed to any opposition papers. Regional's cross-motion only seeks summary judgment against plaintiff on the ground that plaintiff is the sole proximate cause of his alleged injuries; the Court can find no mention of indemnification in the cross-motion papers. Therefore, the Court grants that portion of the motion, but with leave to renew upon resubmission of any missing papers.

Accordingly, it is

ORDERED that the motion is granted to the extent that it seeks summary judgment on the Labor Law § 200 claims, and these claims are severed and dismissed; and it is further

ORDERED that the motion is denied to the extent that it seeks summary judgment on the remainder of the complaint; and it is further

ORDERED that Regional's cross-motion is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment on the issue of liability is denied; and it is further

ORDERED that the portion of the motion seeking indemnification by Regional is

¹ The court also notes that movants should have directed the Court to the pertinent parts of the contract, rather than submit it with no more than a conclusory discussion of its terms.

granted without opposition.

The Court notes that the papers before it are not in good condition. Among other things, movants' papers were not bound properly and became detached during Court review, making it more difficult to sift through the moving papers and all other papers as well. If the parties wish to appeal this decision, movant should submit a courtesy copy of its original papers to the appellate court – this time using better binding and/or binding the papers as two separate volumes.

Dated: 7/2/07

ENTER:

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LOUIS B. YORK, C.
J.S.C.

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