

Moscoso v Lehr Constr. Corp.

2007 NY Slip Op 32114(U)

July 9, 2007

Supreme Court, Queens County

Docket Number: 0025538/2004

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

MIGUEL MOSCOSO, x

Plaintiff,

- against -

LEHR CONSTRUCTION CORP. and
HUDSON GUILD,

Defendants.

LEHR CONSTRUCTION CORP. and X
HUDSON GUILD,

Third-Party Plaintiffs,

- against -

LIBERTY CONTRACTING CORPORATION,

Third-Party Defendant.

The following papers numbered 1 to 22 read on this motion by defendant Hudson Guild pursuant to CPLR 3212 for summary judgment for contractual and common law indemnification against defendant Lehr Construction Corp. (Lehr) and for summary judgment dismissing the plaintiff's Labor Law § 200 and substantially all of plaintiff's claims under Labor Law § 241(6); on the cross motion by the plaintiff to amend the bill of particulars; and on the motion by defendant/third-party plaintiff Hudson Guild pursuant to CPLR 3214 for a default judgment against the third-party defendant Liberty Contracting Corporation (Liberty).

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....	1-11
Notice of Cross Motion - Affidavits - Exhibits...	12-17
Answering Affidavits - Exhibits.....	18-19
Reply Affidavits.....	20-22

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover money damages for personal injuries allegedly suffered as a result of a work site accident that occurred in the basement of a community center. The accident occurred on July 16, 2004. The plaintiff alleges claims for violations of Labor Law §§ 200, 240(1) and 241(6).

Defendant Hudson Guild leased the community center where the accident took place and hired defendant Lehr as the general contractor for the renovation of the center. The project involved the refitting of several floors of the building with new mechanical, plumbing and electrical services and creating an extension of the front of the building with new stairwells at the sides. The plaintiff was an employee of third-party defendant Liberty, which had been hired as a subcontractor by Lehr. The plaintiff alleges on the day of the accident he was performing demolition work in the basement of the community center. The plaintiff alleges the accident occurred when he was working on the second tier of a scaffold while tearing down a ceiling. The plaintiff testified that immediately before the accident he was standing on the top level of the scaffold breaking the ceiling tile and sheetrock with a crowbar. The plaintiff testified that he was caused to fall when the scaffold moved. The plaintiff further testified that the scaffold had moved previously while he was standing on it working.

For an owner or general contractor to be liable under Labor Law § 200 the plaintiff must show that the owner supervised or controlled the work, or had actual or constructive notice of the unsafe condition causing the accident. On this issue, defendant Hudson Guild has established as a matter of law that it had no actual or constructive knowledge of the defective condition at the work site and exercised no control or supervision over plaintiff's work (see Lopez v Port Auth. of New York & New Jersey, 28 AD3d 430 [2006] Parisi v Loewen Dev. of Wappingers Falls, LP, 5 AD3d 648 [2003]). In opposition, the plaintiff failed to raise an issue of fact that would warrant denial of the motion.

As for the claims under Labor Law § 241(6), the defendant seeks to dismiss the portion of the claim predicated on certain provisions of the industrial code. The plaintiff does not oppose the dismissal of claims based on a violation of 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.24, 23-3.2, or 23-3.3, as they are either general safety provisions or inapplicable to the facts of this case. Therefore the portion of the Labor Law § 241(6) claims predicated on those provisions of the

Industrial Code will be dismissed. Contrary to Hudson Guild's argument, however, the provisions under 12 NYCRR § 23-5.1 are specific enough to support a Labor Law § 241(6) cause of action (see O'Connor v Spencer Inv. Ltd., 2 AD3d 513 [1997]). Since there is an issue of fact as to whether there was a violation of the provision that was a proximate cause of the accident dismissal is not warranted. The defendant Hudson Guild did not seek summary dismissal of those claims predicated on violations of 12 NYCRR §§ 23-5.2, 23-5.3, 23-5.9 and that portion of the claim will not be dismissed.

Plaintiff cross-moves to amend his bill of particular by alleging new provisions of the Industrial Code to support his Labor Law § 241(6) claim. Leave to serve an amended bill of particulars should be freely granted in the absence of prejudice (Lipari v Babylon Riding Ctr., 18 AD3d 824 [2005]). Since the identification of this provision does not raise any new factual allegations and does not prejudice the defendants the plaintiff may amend the bill of particulars too add a violation of 12 NYCRR § 5.18 (see Latino v Nolan & Taylor-Howe Funeral Home, 300 AD2d 631 [2002]; Noetzell v Park Ave. Hall Hous. Dev. Fund Corp., 271 AD2d 231 [2000]). The plaintiff also attempts to amend the bill of particulars to add purported violations of OSHA. However, since violations of OSHA are insufficient to support a claim under Labor Law § 241(6) the portion of the plaintiff's cross motion to amend the bill of particulars and add OSHA violations is denied (see Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005]; Greenwood v Shearson, Lehman & Hutton, 238 AD2d 311 [1997]).

Turning next to the branches of the motion for contractual and common law indemnification. The plain language of the contract between Hudson Guild and Lehr requires Lehr to indemnify Hudson Guild for the accident that occurred (see Great N, Ins. Co., v Interior Constr. Corp., 7 NY3d 412 [2006]). In opposition, Lehr failed to submit evidence to raise a triable issue of fact which would preclude the granting of summary judgment on the contractual indemnification claim (see Reborchick v Broadway Mall Props., 10 AD3d 713 [2004]). The argument that indemnity provision is invalid because it does not contain language excluding liability for Hudson Guild's own negligence is not supported by the law (see Davis v All State Assoc., 23 AD3d 607 [2005]). Such an indemnity provision may be enforced where the party to be indemnified is shown to be free from of any negligence (see Rogers v Rockefeller Group Intl., 38 AD3d 747 [2007]). As to the remaining claim for common law indemnification, a resolution of the matter must await determination of liability in the underlying action (see Singh v Congregation Bais Avrohom K'Krula, 300 AD2d 567 [2002]; Barabash v Farmingdale Union Free School Dist., 250 AD2d 794 [1998]).

The motion by defendant/third-party plaintiff Hudson Guild for default has been withdrawn pursuant to a stipulation of the parties dated March 27, 2007.

Accordingly, the branch of the motion by the defendant Hudson Guild for summary judgment dismissing the claims under Labor Law § 200 is granted and the claim is dismissed. The branch of the motion for summary judgment to dismiss some of the Labor Law 241(6) claims is granted to the extent provided herein and the portions of the Labor Law § 241(6) claim predicated on 12 NYCRR §§ 23-1.5, 23-1.7, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.24, 23-3.2, 23-3.3 are dismissed, while the portions of the claim predicated on violations of 12 NYCRR §§ 23-5.1, 23-5.2, 23-5.3, 23-5.9 and 23-5.18 are not dismissed. The branch of the motion by defendant for summary judgment on its contractual indemnification cross claim is granted. The branch of the motion by defendant for summary judgment on its common law indemnification cross claim is denied. The cross motion by plaintiff is granted to the extent that the plaintiff's bill of particulars is deemed amended to add a violation of 12 NYCRR § 5.18.

Dated: July 9, 2007

J.S.C.