

Block v Pulte Homes of N.Y., Inc.

2007 NY Slip Op 32244(U)

July 18, 2007

Supreme Court, Suffolk County

Docket Number: 0020891/2005

Judge: Robert W. Doyle

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

PRESENT:

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 1/17/07 (#002)
2/13/07 (#003)
4/12/07 (#004)
ADJ. DATE 6/06/07
Mot. Seq. # 002 - MotD
003 - MotD
004 - XMD

-----X
MICHAEL J. BLOCK, :
 :
 :
 Plaintiff, :
 :
 - against - :
 :
 PULTE HOMES OF NEW YORK, INC., :
 PULTE REALTY OF NEW YORK, INC. :
 and WOLTMANN ASSOCIATES, INC., :
 :
 Defendants. :

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-----X
PULTE HOMES OF NEW YORK, INC. and :
 PULTE REALTY OF NEW YORK, INC., :
 :
 Third-Party Plaintiffs, :
 :
 - against - :
 :
 R & R BROTHERS ELECTRICAL :
 CONTRACTORS, INC., :
 :
 Third-Party Defendant. :
-----X

Upon the following papers numbered 1 to 45 read on these motions and cross motion for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-10; 11-22; Notice of Cross Motion and supporting papers 23 - 37; Answering Affidavits and supporting papers 38 - 39; Replying Affidavits and supporting papers 40-43; 44-45; Other _____; (~~after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion (#002) by defendant Woltmann Associates, Inc. for an order pursuant to CPLR 3212 granting it summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), 241(6), and 200 common-law negligence causes of action, is granted to the extent that plaintiff's Labor Law §§ 240(1) and

241(6) causes are dismissed, and is otherwise denied; and it is further

ORDERED that the motion (#003) by defendants/third-party plaintiffs, Pulte Homes of New York, Inc. and Pulte Realty of New York, Inc., for an order pursuant to CPLR 3212 granting them summary judgment dismissing plaintiff's Labor Law §§ 200, 240(1), 241(6), and 200 common-law negligence causes of action, and summary judgment on their cross claim for contractual and/or common-law indemnification against Woltmann Associates, Inc., is granted to the extent that plaintiff's complaint is dismissed as against movants, 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 §§ 200, 240(1) 241(6), and common-law negligence is denied, as untimely.

ORDERED that these motions are consolidated for the purpose of this determination.

Plaintiff commenced this action to recover damages, pursuant to Labor Law §§ 200, 240(1), 241(6) and common-law negligence for injuries he allegedly sustained in an accident at a construction site. Defendant Pulte Homes of New York acted as the general contractor for the single-family home and condominium subdivision, and defendant Woltmann Associates, Inc. was the framing subcontractor. Plaintiff, a helper electrician, was employed by third-party defendant, R & R Brothers Electrical Contractors.

Plaintiff testified at his deposition that he had been working at the back gatehouse for the complex for a couple of days. He and a coworker were installing a meter panel outside the gatehouse and running wires inside the gatehouse. As he was working inside the gatehouse, workers for Woltmann had set up a ladder outside and in front of the gatehouse. Although he did not see the workers go up or down the ladder, he knew they were doing so because he heard their nail gun. At one point during his work, plaintiff's boss pulled up in the company van, on the road along side the gatehouse, and called to plaintiff to come to the van. As plaintiff was standing in the road and talking to his boss, it would appear that the ladder slid along the side of the building and then fell off the building, striking plaintiff. Plaintiff testified that after the ladder hit him and knocked him over, his boss told him that the wind blew the ladder off the building, although plaintiff had noticed only a slight breeze. It would also appear that the ladder was placed on dirt which was not level, much like any construction site.

The construction supervisor for Woltmann, Mr. Kohn, testified at his deposition that he and his worker were tacking and nailing soffits to the gatehouse and using an aluminum extension ladder. At the time of plaintiff's accident, his worker had gone to refill the nail gun and, therefore, no one was on the ladder. He also testified that the ladder was secured in the usual manner, by driving a 10-penny, 3-inch nail on either side, and then bending over the tops of the nails. Mr. Kohn stated that the ladder was blown over by the wind.

Labor Law § 240(1), commonly known as the "scaffold law," creates a duty that is nondelegable and an owner or general contractor who breaches that duty may be held liable in damages regardless of whether either actually exercised supervision or control over the work (*see, 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]). [1991]). However, 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 ladder 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]; *Mikcova v Alps Mech., Inc.*, 34 AD3d 769, 82 NYS2d 130 [2006]). Further, the ladder 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) (*compare, Outar v City of New York*, 5 NY3d 731, 799 NYS2d 770 [2005], where the object, although not being hoisted, was at a higher level than plaintiff’s work; *see also, Desharnais v Jefferson Concrete Co.*, 35 AD3d 1059, 827 NYS2d 312 [2006]; *Peay v New York City School Constr. Auth.*, 35 AD3d 566, 568, 827 NYS2d 189 [2006]; *lv denied* 8 NY2d 807, 833 NYS2d 426 [2007]; *Mikcova v Alps Mech., Inc.*, *supra*; *Zirkel v Frontier Communications of Am.*, 29 AD3d 1188, 815 NYS2d 324 [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]).

Here, plaintiff has confined his argument to defendants’ alleged violation of the Industrial Code found at 12 NYCRR §§ 23-1.7(e)(2), and 23-21.3(b), subsections (ii),(iv), and (v). Plaintiff does not

oppose dismissal of the other alleged violations, and they do not appear to be applicable.

As to section 12 NYCRR §23-1.7(e), entitled “Tripping and other hazards,” it provides, in relevant part:

(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.

Here, however, there is no allegation that plaintiff tripped or fell due to any accumulations in his work area. He fell after being struck by the ladder. Therefore, this section is inapplicable to plaintiff’s accident.

As to section 23-1.21(b) entitled “General requirements for ladders,” it provides at subsection (4) “Installation and use,” in relevant part:

(ii) All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used a ladder footings.

(iv) When work is being performed from ladder rungs between six and 10 feet above the ladder footing, a leaning ladder shall be held in place by a person stationed at the foot of such ladder unless the upper end of such ladder is secured against a side slip by its position or by mechanical means.

(v) The upper end of any ladder which is leaning against a slippery surface shall be mechanically secured against side slip while work is being performed from such ladder.

These sections are also inapplicable. There is no allegation that the ladder footings were not appropriate (i), or that plaintiff was injured while performing work on the ladder (iv and v). Therefore, none of these subsections can form a sufficient predicate for defendants’ Labor Law § 241(6) liability, and plaintiff’s Labor Law § 241(6) cause of action is also dismissed.

Accordingly, defendants are granted summary judgment dismissing plaintiff’s Labor Law §§ 240(1) and 241(6) causes of action, and so much of plaintiff’s cross motion which seeks summary judgment on his Labor Law §§ 240(1) and 241(6) claims is correspondingly denied.¹ Further, plaintiff’s cross 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,

¹ Plaintiff’s reliance on case law which holds that a fall from an unsecured later represents a violation of Labor Law § 240(1) is misplaced in that here plaintiff was not working on the ladder and did not fall from an unsecured ladder.

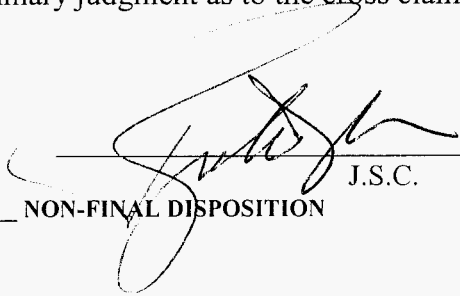
781 NYS2d 261 [2004]).² Moreover, Woltmann is neither an owner nor a general contractor and, as the framing subcontractor, has no liability under Labor Law §§ 240(1) or 241(6) (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]; *Morales v Federated Dept. Stores, Inc.* 5 AD3d 744, 774 NYS2d 180 [2004]).

The protection provided by Labor Law § 200 codifies the common-law duty of an owner or general contractor to provide employees a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son, supra*) who exercise control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, the Court finds that Woltmann has not established, prima facie, that it had no notice of the hazardous condition that plaintiff alleges caused his accident (*Sang Hyun Ban v Sunjin Shipping USA, Inc.*, 23 AD3d 452, 805 NYS2d 620 [2005]). However, where, as here, the alleged dangerous condition arises from the method or material controlled by the subcontractor and the general contractor exercised no supervision or control over the subcontractor's work, no liability attaches under the common law or Labor Law § 200 (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877, 609 NYS2d 168 [1993]). Accordingly, Pulte has established its entitlement to summary judgment as to these causes of action, and plaintiff has not offered sufficient evidence to the contrary. Plaintiff's remaining causes of action, common-law negligence and Labor Law § 200 as against Woltmann, are severed and shall continue.

Lastly, summary judgment is unavailable to the Pulte defendants on their cross claims for indemnification against Woltmann. The cross claim for contractual indemnification contains a demand for an answer (CPLR 3011), and it appears that Woltmann did not serve an answer. Therefore, issue has not been joined and summary judgment is unavailable as to this cross claim (CPLR 3212[a]; *AEC Bldg. Assoc. v Crystal*, 246 AD2d 496, 667 NYS2d 399 [1998]). 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 Woltmann remains unresolved, the claim for common-law indemnification cannot be resolved herein (*Coque v Wildflower Estates Dev.*, 31 AD3d 484, 818 NYS2d 546 [2006]; *Farduchi v United Artists Theatre Circuit*, 23 AD3d 613, 804 NYS2d 786 [2005]). Accordingly, summary judgment as to the cross claims is denied.

Date: JUL 17 2007

 FINAL DISPOSITION X NON-FINAL DISPOSITION



J.S.C.

² Plaintiff's note of issue was filed on October 17, 2006 and his motion for summary judgment was served or "made" on April 12, 2007, well beyond the 120-day limitation set forth in CPLR 3212, and plaintiff offered no good cause for the motion's untimeliness.