

Moran v RFD 55th St. Corp.

2007 NY Slip Op 32633(U)

August 16, 2007

Supreme Court, New York County

Docket Number: 0100467/2004

Judge: Marylin G. Diamond

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

PRESENT: HON. MARYLIN G. DIAMOND

PART 48

Justice

THOMAS MORAN,

Plaintiff,

-against-

RFD 55TH STREET CORP. et al.,

Defendants.

INDEX NO. 100467/04

MOTION SEQ. NO. 002

And Third-Party Action.

FILED
AUG 21 2007
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that: This is a personal injury action arising out of an accident which occurred on December 9, 2003 while the plaintiff Thomas Moran was engaged in construction work at a building located on East 55th Street in Manhattan. The plaintiff, an employee of third-party defendant Jansons Associates, Inc., alleges that he injured his arm when he stepped on a piece of wood and lost his balance as he and a co-worker were carrying a tub filled with mortar to the location on the floor where it was to be placed for disposal. The complaint asserts causes of action under Labor Law §§ 200, 240(1) and 241(6). The complaint alleges that the defendants RFD 55th Street Corp., RFD 55th Street I holding LLC and RFD 55th Street ("RFD defendants") are the owners of the site and that defendant Turner Construction Company was retained by them to perform construction work. In turn, the defendants have brought a third-party action against Jansons for contractual indemnification, common law indemnification, attorney's fees and breach of a contractual obligation to procure insurance.

It appears that the actual owner of the site is an RFD entity which was not named as a defendant, RFD 55th Street LLC ("LLC Owner"). Initially, the LLC Owner retained the Tishman Construction Corporation as its construction manager. In March, 2003, Tishman retained Jansons, pursuant to a written contract and purchase order, to provide and install a refuse chute and compactor. The written contract between Tishman and Jansons consisted of 49 pages, plus 17 exhibits. It included an indemnification clause which provided that Jansons would indemnify and hold Tishman, the owner and a number of other parties harmless from any claims made against them arising out of Jansons' performance of its work. The contract also required that Jansons obtain a commercial general liability insurance policy having a \$5 million limit on an occurrence basis and that various parties listed in an attachment, including the LLC Owner and Tishman, be named as additional insureds. Finally, the contract provided that in the event a successor manager was retained by the owner to replace Tishman, Jansons would be obligated to afford the successor manager all of the rights and remedies owed to Tishman under the contract. Approximately 8 months after this contract was executed, Tishman was replaced by Turner as the construction manager.

In the meantime, in June, 2003, pursuant to a new and separate purchase order, Jansons' responsibilities were expanded so as to include masonry work throughout the building. The purchase order consisted of essentially one paragraph. It was not accompanied by a written contract, did not refer to the 49-page contract which the parties had entered into three months earlier and did not contain any of the terms set forth in the other contract such as an indemnification clause and an insurance requirement.

Subsequent to the commencement of this action, the defendants brought a declaratory judgment

action in this court seeking an order declaring that Jansons' liability insurance carrier, QBE Insurance Corp., has a duty to defend and indemnify them in this personal injury action. They also sought an order declaring that Jansons breached its contractual obligation to procure an insurance policy on their behalf in which they are named as additional insureds. By decision and order dated June 25, 2007, this court found that (1) the Tishman/Jansons contract for the installation of a refuse chute and compactor did not obligate Jansons to obtain an insurance policy naming the RFD defendants as additional insureds since they are not listed as an additional insured in the attachment to the contract, (2) Jansons was contractually obligated under its agreement with Tishman to obtain insurance naming Tishman's successor, Turner, as an additional insured and (3) Jansons had breached its obligation to procure insurance on Turner's behalf since the policy which Jansons obtained had only a \$1 million limit per occurrence whereas it was contractually obligated to obtain a \$5 million policy.

The defendants have now moved for summary judgment dismissing the complaint and for summary judgment on their third-party claim against Jansons for contractual indemnification. Jansons has cross-moved for summary judgment dismissing the third-party complaint.

Discussion

A. The Plaintiff's Claims - As a threshold matter, the court notes that it has already found, in the related declaratory judgment brought by the defendants, that the evidence in the record established that the RFD defendants are not the owner of the premises where the plaintiff's accident occurred. Although the plaintiff continues to contend in this action that the RFD defendants are, in fact, the owner, he has failed to submit any evidence in support of this assertion. Nevertheless, in moving for summary judgment dismissing the complaint, the RFD defendants have not argued that it is the LLC Owner who owns the premises in question and that they therefore cannot be liable for the plaintiff's injuries. If, in fact, they had made such an argument, the court would have seriously entertained an application by the plaintiff, pursuant to CPLR 305(c) and 2001, to amend the caption to correct a misnomer and reflect the true name of the intended subject of the lawsuit. *See Fink v. Regent Hotel, Ltd.*, 234 AD2d 39, 41 (1st Dept 1996). *See also Bracken v. Niagara Frontier Transp. Auth.*, 251 AD2d 1068 (4th Dept 1998); *Ober v. Rye Town Hilton*, 159 AD2d 16, 19-20 (2nd Dept 1990). However, since the issue was not raised, the court will proceed to address the arguments which the RFD defendants and Turner have asserted in support of their motion.

As to plaintiff's Labor Law § 240(1) claim, the plaintiff has apparently conceded that the claim is without merit since he has notably failed to respond or even address the defendants' argument that his accident does not involve the sort of elevation-risk contemplated by the statute. This claim is therefore dismissed.

Similarly, with respect to his Labor Law § 200 claim, the plaintiff has not disputed the defendants' argument that they did not have the authority to control the activity bringing about the injury and did not have actual or constructive notice of the presence on the floor of the piece of wood on which plaintiff tripped. *See Russin v. Picciano & Son*, 54 NY2d 311, 317 (1981); *Mitchell v. New York Univ.*, 12 AD3d 200, 201 (1st Dept 2004). Rather, plaintiff argues that Turner was contractually responsible for removing debris from the area where petitioner was injured and that it created the dangerous condition by failing to adequately do so. This argument is without merit. Turner's alleged failure to remove the debris merely constitutes nonfeasance. It is not the affirmative negligence required to constitute the creation of a dangerous condition. *See DiGrazia v. Lemmon*, 28 AD3d 926, 928 (3rd Dept 2006). *See also Mazzola v. City of New York*, 32 AD3d 906 (2nd Dept 2006). The plaintiff's Labor Law § 200 claim must therefore be dismissed.

As to the merits of plaintiff's Labor Law § 241(6) claim, to prevail under this statute, the plaintiff is required to establish a violation of an Industrial Code provision which sets forth a specific standard of conduct. *See Ross v. Curtis-Palmer Hydro-Electric Co.*, 81 NY2d 494, 504-05 (1993). Here, the plaintiff has relied on only one provision, 12 NYCRR § 23-1.7(e)(2), which has allegedly been violated. This

provision is entitled "Tripping and Other Hazards: Working Areas" and provides, in relevant part, that "areas where people work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materialsas may be consistent with the work being performed." This provision has been found to be sufficiently specific so as to support a section 241(6) claim. *See Scannel v. Mt. Sinai Med. Center*, 256 AD2d 214 (1st Dept 1998). Moreover, it is clearly applicable to the plaintiff's accident since he tripped on debris located where people work. Although the courts have held that this provision is inapplicable where the item causing the injury was an "integral part" of the work being performed, *see Lenard v. 1251 Americas Assoc.*, 241 AD2d 391, 393 (1st Dept 1997), the defendants have not even suggested that the piece of wood on which plaintiff tripped was an integral part of his work. The defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim must therefore be denied.

B. The Third-Party Complaint Against Jansons - As already noted, the defendants' third-party complaint against Jansons asserts four causes of action: contractual indemnification, common law indemnification, attorney's fees and breach of a contractual obligation to procure insurance. The claim for common law indemnification is clearly barred under section 11 of the Workers Compensation Law since it has been brought against the plaintiff's employer and no one has even suggested that plaintiff has suffered a "grave injury" within the meaning of that statute.

As to contractual indemnification, the Tishman/Jansons contract for the installation of a refuse chute and compactor contained a provision obligating Jansons to indemnify and hold harmless, to the fullest extent permitted by law, the owner, construction manager and the additional insureds listed in an attachment thereto from all claims arising out of any act, error or omission of Jansons in connection with the performance of its work. In moving for summary judgment dismissing the defendants' claim for indemnification, Jansons argues that this provision is inapplicable because the plaintiff was injured in the course of performing work pursuant to the June, 2003 purchase order for masonry labor, and not the Tishman/Jansons contract for the installation of a refuse chute and compactor. They argue that the masonry purchase order, a one-paragraph document which did not contain an indemnification provision, was separate and distinct from the agreements relating to the refuse chute and compactor so that it did not incorporate the terms of those agreements, such as the indemnification clause.

Initially, the court notes that the argument that the Tishman/Jansons contract is inapplicable because the plaintiff was performing masonry work under a separate agreement was never raised in the declaratory judgment action and the court therefore did not address the issue. In any event, Jansons would have this court believe that although Tishman and the LLC Owner insisted on a comprehensive, 49-page contract covering Jansons' installation of a refuse chute and compactor, there was somehow no understanding between the parties that the terms of this contract, including an indemnification obligation and a requirement to procure insurance, were applicable to Jansons' extensive masonry work and that, indeed, the one-paragraph purchase order contained all of the terms and conditions applicable to this work. In view of the "attendant circumstances, the situation of the parties, and the objectives they were striving to attain," *see Brown Bros. Electrical Contractors, Inc. v. Beam Constr. Corp.*, 41 NY2d 397, 400 (1997), there is, at the very least, a triable issue of fact as to whether the extensive terms of the contract between Tishman and Jansons for the installation of a refuse chute and compactor were intended by the parties to apply to the subsequent purchase order for masonry work at the same construction site, especially given the fact that some of this masonry work apparently was to be performed as part of the installation of the refuse chute.

Jansons argues that even if the terms of its contract with Tishman were applicable to the masonry work which it performed pursuant to the purchase order, the indemnification clause is not applicable to the RFD defendants since none of these defendants can be considered the owner and none are listed as an additional insured in the attachment to the contract. The court agrees. Indeed, it was for this reason that the court, in the declaratory judgment action, found that Jansons' insurance carrier, QBE, was not obligated

to defend and indemnify any of the RFD defendants in this action. The defendants nevertheless point out that the indemnification requirement in the Tishman/Jansons contract also applied to the “agents and employees” of the owner and additional insureds, and argue that they are covered pursuant to this portion of the provision. The RFD defendants, however, have failed to explain how or why they should be considered agents or employees of the LLC Owner or of the various parties listed as additional insureds in the attachment. The RFD defendants’ third-party claims against Jansons for contractual indemnification must therefore be dismissed. In the event the caption to the underlying complaint is ultimately amended so as to correctly name the LLC Owner as the defendant/owner of the construction site, the LLC Owner may, upon leave of the court, reinstate this third-party claim.

As to Turner, as already noted, the Tishman/Jansons contract provided that in the event a successor manager was retained by the owner to replace Tishman, Jansons would be obligated to afford the successor manager all of the rights and remedies owed to Tishman under the contract. Since Jansons was contractually obligated to indemnify Tishman, it is clear that the contractual indemnification provision applies to Tishman’s successor, Turner. Since the provision is triggered irrespective of whether the underlying claim is attributable to Jansons’ negligence, the issue of whether Jansons was negligent is irrelevant. Moreover, since there is no evidence that plaintiff’s accident was caused by Turner’s negligence, GOL 5-322.1 is inapplicable and Turner is entitled to be indemnified. See *Itri Brick & Concrete Corp. v. Aetna Casualty & Surety Co.*, 89 NY2d 786, 795 n. 5 (1997); *Brown v. Two Exchange Plaza Partners*, 76 NY2d 172, 179 (1990). In this respect, there is no merit to Jansons’ argument that the plaintiff’s claim did not arise out of its work because Jansons had nothing to do with the presence on the ground of the piece of wood on which plaintiff tripped. Since plaintiff was injured while performing work as a Jansons employee, the event is covered under the indemnification provision. See *Lim v. Atlas-Gem Erectors Co., Inc.*, 225 AD2d 304, 305-06 (1st Dept. 1996). Turner is therefore entitled to conditional summary judgment against Jansons on its third-party claim for contractual indemnification. See *Dickstein v. Sarwill Assocs.*, 221 AD2d 496, 497 (2nd Dept 1995).

As to the third cause of action in the third-party complaint for attorney’s fees and costs, the court agrees with Jansons that this claim should be dismissed since it is duplicative of the defendants’ claim for contractual indemnification. As to the fourth cause of action for breach of a contractual obligation to procure insurance, the court has already ruled, in the declaratory judgment action, that Jansons was not contractually obligated to procure insurance on the RFD defendants’ behalf since they are not listed in the Tishman/Jansons contract as parties who must be named as additional insureds. Moreover, as previously discussed in this decision, the RFD defendants have failed to show that they were otherwise covered by the application of the contract to agents and employees of the listed additional insureds. As to Turner, the issue is moot since the court found, in the declaratory judgment action, that Jansons was obligated to procure insurance on Turner’s behalf and breached this obligation by procuring a policy from QBE having only a \$1 million limit per occurrence whereas it was contractually obligated to obtain a \$5 million policy. As the court stated, if the QBE policy does not cover the entire cost of defending and indemnifying Turner in the underlying action, Turner will be entitled to monetary relief reflecting the cost of its own insurance policy, any incidental out-of-pocket expenses and any increase in its future insurance premiums resulting from the liability claim. See *Inchaustegui v. 666 5th Avenue Ltd Partnership*, 96 NY2d 111 (2001); *Trokie v. York Preparatory School*, 284 AD2d 129 (1st Dept 2001).

Accordingly, the defendants’ motion is granted to the extent that (1) plaintiff’s Labor Law §§200 and 240(1) claims are hereby dismissed in their entirety and (2) Turner is entitled to conditional summary judgment against Jansons on its third-party claim for contractual indemnification. The motion is otherwise denied. Jansons’ cross-motion for summary judgment is granted to the extent that (1) the RFD defendants’ third-party claim for contractual indemnification is hereby dismissed and (2) the second, third and fourth causes of action for common law indemnification, attorney’s fees and failure to procure are hereby dismissed. The motion is otherwise denied.

The parties shall appear before the court in Room 412, 60 Centre Street, New York, New York on September 18, 2007 at 10:00 a.m. for a status conference.

ENTER ORDER

Dated: 8/16/07



MARYLIN G. DIAMOND, J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

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AUG 21 2007
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