

Pipia v Empire Devs. Corp.

2007 NY Slip Op 32823(U)

July 13, 2007

Supreme Court, Queens County

Docket Number: 0009856/2005

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IA Part 24
Justice

	x	
JOSEPH PIPIA, et al.		Index Number <u>9856</u> 2005
- against -		Motion Date <u>May 8,</u> 2007
EMPIRE DEVELOPERS CORP.		Motion Cal. Number <u>31</u>
	x	Motion Seq. No. <u>3</u>

The following papers numbered 1 to 23 read on this motion by defendant/third-party plaintiff NYC Partnership Housing Development Fund Company, Inc. s/h/a The Partnership For New York City, Inc. (NYC Partnership) pursuant to CPLR 3212 for summary judgment on its cross claims and third-party claims for contractual and common-law indemnification; on the cross motion by third-party defendant Bass Plumbing & Heating Corp. (Bass Plumbing) pursuant to CPLR 3212 for summary judgment dismissing the third-party complaint; and on the cross motion by the plaintiffs pursuant to CPLR 3212 for summary judgment on the issue of liability under Labor Law § 240(1).

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits...	5-11
Answering Affidavits - Exhibits.....	12-19
Reply Affidavits.....	20-23

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

This is an action to recover money damages for personal injuries allegedly suffered by plaintiff Joseph Pipia at a work site accident. The accident occurred on June 14, 2003, at the premises known as 366 Milford Street, Brooklyn, New York. Defendant NYC Partnership was the owner of the premises. Defendant Blake Housing, LLC (Blake Housing) was the builder for the on-going development project. Blake Housing hired Empire Developers, Corp. (Empire Developers) as the general contractor for the job. The

plaintiff brought claims for violations of Labor Law §§ 200, 240(1) and 241(6), and common law negligence.

The plaintiff Mr. Pipia was a plumber working for third-party defendant Bass Plumbing. Bass Plumbing was hired by the general contractor Empire Developers. On the day of the accident the plaintiff, Mr. Pipia was working doing gas roughing. At the time of the accident Mr. Pipia climbed a ladder that was approximately ten to twelve feet in height to the second floor window in order to reach a gang box located on the second floor of the building. As Mr. Pipia was climbing the ladder it slipped and tilted causing Mr. Pipia to jump off the ladder and fall to the ground.

On a motion for summary judgment, the initial burden is on the movant to establish, prima facie, entitlement to judgment as a matter of law (Alvarez v Prospect Hosp., 68 NY2d 320 [1986]). Owners and contractors are subject to strict liability under Labor Law § 240. To prevail under such a claim, a plaintiff must provide evidence that the statute was violated and that the violation was the proximate cause of the injury (Blake v Neighborhood Hous. Servs. of New York City, 1 NY3d 280 [2003]). Moreover, the plaintiff's own contributory negligence is not a defense to the imposition of liability (Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35 [2004]).

Here, the plaintiffs established, through the deposition testimony of Mr. Pipia, that the unsecured ladder he was using tilted and slid down the side of the building, causing him to jump off the ladder and fall. Since the plaintiff demonstrated that the fall from the unsecured ladder was the proximate cause of his injuries, he established his prima facie entitlement to summary judgment (see Lesisz v Salvation Army, 40 AD3d 1050 [2007]; Hanna v Gellman, 29 AD3d 953 [2006]; Boe v Gammarati, 26 AD3d 351 [2006]; Chlap v 43rd Street-Second Ave. Corp., 18 AD3d 598 [2005]). The defendants, in opposition, failed to raise a triable issue of fact as to whether plaintiff's own conduct was the sole proximate cause of the accident (see Boe, 26 AD3d at 352; Chlap, 18 AD3d at 598).

Turning to the branch of the motion by defendant NYC Partnership for summary judgment on the contractual indemnification claim against Blake Housing, the plain language of the site development agreement between NYC Partnership and Blake Housing requires Blae Housing to indemnify NYC Partnership for the accident that occurred (see Great N, Ins. Co. v Interior Constr. Corp., 7 NY3d 412 [2006]; Arqueta v Pomona Panorama Estates, Ltd., 39 AD3d 785 [2007]). Therefore, this branch of the motion is granted without opposition.

However, the branches of the motion by defendant NYC Partnership on the contractual indemnification claims against Empire Developers and Bass Plumbing, are denied. While there is an indemnity provision in the standard form contract requiring Empire Developers to indemnify the owner, the contract listed Blake Housing as owner of the premises. Similarly the subcontract between Empire Developers and Bass Plumbing requires Bass Plumbing to indemnify the owner, but it also lists Blake Housing as the owner. Therefore, the term owner is ambiguous and subject to different interpretations. The intent of the parties will, thus, depend on extrinsic evidence, and, therefore, a triable issue of fact exists whether Empire Developers and Bass Plumbing had contractual obligations to indemnify NYC Partnership (see Tonking v Port Auth. of New York & New Jersey, 3 NY3d 486 [2004]; Amusement Bus. Underwriters v Am. Intl. Group, 66 NY2d 878 [1985]; Lerer v City of New York, 301 AD2d 577 [2003]). As to the branches of NYC Partnership's motion for summary judgment on its common-law indemnification claims against Blake Housing and Empire Developers, 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]).

Finally, the branch of the cross motion by third-party defendant Bass Plumbing to dismiss the claim for common-law indemnification must be granted. Workers' Compensation Law § 11 bars third-party claims for common-law indemnification against an employer except those based on a written contract, unless the employee suffered a grave injury (see Tonking v Port Authority of New York & New Jersey, 3 NY3d 486, 490 [2004]; Konior v Zucker, 299 AD2d 320, 321 [2002]). Here, the third-party defendant has established, prima facie, his entitlement to judgment as a matter of law, by showing that the plaintiff did not suffer a grave injury (see Keating v Nanuet Bd. of Educ., 40 AD3d 706 [2007]; Spiegler v Gerken Bldg. Corp., 35 AD3d 715 [2006]). In response, third-party plaintiff has failed to raise a triable issue of fact.

Accordingly, the branch of the motion by defendant/third-party plaintiff NYC Partnership for summary judgment on its contractual indemnification claim against defendant Blake Housing is granted. The branch of the motion by defendant/third-party plaintiff NYC Partnership for summary judgment on its common-law indemnification against Blake Housing is denied. The branches of the motion by defendant/third-party plaintiff NYC Partnership for summary judgment for contractual and common-law indemnification against Empire Developers and Bass Plumbing are denied. The branch of the cross motion by third-party defendant Bass Plumbing for summary judgment dismissing the third-party claim for contractual

indemnification is denied. The branch of the cross motion by third-party defendant Bass Plumbing for summary judgment dismissing the third-party claim for common-law indemnification is granted. The cross motion by the plaintiff for partial summary judgment on the issue of liability under Labor Law § 240 is granted.

Dated: July 31, 2007

AUGUSTUS C. AGATE, J.S.C.