

Rau v Bagles N Brunch, Inc.

2007 NY Slip Op 32986(U)

September 4, 2007

Supreme Court, Suffolk County

Docket Number: 0009719/2004

Judge: Robert W. Doyle

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INDEX No. 04-9719
CAL. No. 07-00539-OT

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

P R E S E N T :

Hon. ROBERT W. DOYLE
Justice of the Supreme Court

MOTION DATE 5-17-07
ADJ. DATE 7-20-07
Mot. Seq. # 002 - MG
003 - XMotD
004 - XMD

-----X
ROBERT RAU. :
 :
 :
 Plaintiff, :
 :
 :
 - against - :
 :
 BAGELS N BRUNCH, INC., THE SOMMER :
 ROLLING MEADOWS FAMILY LIMITED :
 PARTNERSHIP, ROLLING MEADOWS, INC., :
 HOMEFRONT ORGANIZATION, INC., ROY :
 VON KAMPEN, HERMANN G. VON KAMPEN :
 and WERNER SOMMER, :
 :
 :
 Defendants. :
-----X

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Upon the following papers numbered 1 to 44 read on these motions for summary judgment; Notice of Motion/
Order to Show Cause and supporting papers 1 - 22 ; Notice of Cross Motion and supporting papers 23 - 35; 35 - 38 ;
Answering Affidavits and supporting papers 39 - 40 ; Replying Affidavits and supporting papers 41 - 42; 43 - 44 ; Other
_____ : (and after hearing counsel in support and opposed to the motion) it is,

ORDERED that the motion (#002) by defendant Homefront Organization, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against it, is granted; and it is further

ORDERED that the cross motion (#003) by defendants The Sommer Rolling Meadows Family Limited Partnership, Rolling Meadows, Inc., and Werner Sommer for an order pursuant to CPLR 3212

granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against them, or, alternatively, summary judgment over and against co-defendants Roy Von Kampen and Bagels N Brunch, 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 defendants Bagels N Brunch, Roy Von Kampen and Hermann G. Von Kampen, for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiff's complaint and any cross claims asserted against them is denied as untimely.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1), and 241(6), and common law negligence for injuries he allegedly sustained in a slip and fall accident. Plaintiff was employed by nonparty Mercury Security Protection to install and service alarm systems. Mercury had been hired by Bagels N Brunch (together with the Von Kampen defendants, hereafter collectively Bagels) to install a security system in commercial space leased from the owner (the Sommer and Rolling Meadows defendants, hereafter collectively Sommer). Defendant Homefront Organization, Inc. (hereafter Homefront) acted as the construction manager for Sommer in construction of the building shell.¹ In turn, each tenant of the new building was then required to build out its space to its own specifications and needs.

Plaintiff testified at his deposition that he and a coworker were installing the security system for Bagels and that he directed and controlled his own work. When he arrived at Bagels, a drop ceiling had already been installed, although several ceiling tiles were not in place, permitting access to the attic. He used a ladder already standing beneath the opening to go into the attic above the drop ceiling. Plaintiff stated that there was adequate lighting in the attic, that he saw that a compressor had been installed on a wooden platform, and that some of the metal studs around it had been bent over.² To run the wires, plaintiff decided to go into the attic and walk along the metal studs, rather than working from below the drop ceiling, which would have necessitated going up a ladder, removing the ceiling tiles, and then coming down the ladder and moving it to the next area. He walked along the studs and laid the wires without incident but as he walked back along the studs, one of them twisted and he lost his balance, falling to his left and landing on the compressor. He did not fall to, or through, the ceiling. Plaintiff testified that the stud twisted because it was already bent. He also testified that Bagels' owner (apparently Mr. Hermann Von Kampen, who testified that he was present at the premises whenever work was being performed) told him that the studs were bent and that it was a mess in the attic.³

¹ Construction of the shell included hiring subcontractors for installation of the drop ceilings and drywall.

² It would appear from plaintiff's testimony that the metal studs were installed with the open side up and that he alleges that the sides on some of the studs had been bent over. It is not clear whether they were bent inward or outward. It would also appear that these metal studs were also referred to as trusses.

³ Hermann Von Kampen's testimony contradicts plaintiff's version of this alleged conversation. He testified that there were plywood walks in the attic, that other trades had done work in the attic without incident, and that the metal beams were not bent.

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]). However, the special protection afforded by § 240(1) does not encompass any and all perils that may be connected in some tangential way with the effects of gravity (*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]).

Here, the facts do not support the absolute liability imposed by Labor Law § 240(1). Plaintiff lost his balance and fell onto the compressor, which is not a hazard contemplated by the statute (*see, Bond v York Hunter Constr.*, 95 NY2d 883, 884-885, 715 NYS2d 209 [2000]; *Milligan v Allied Bldrs.*, 34 AD3d 1268, 824 NYS2d 524 [2006]; *Turner v Garten Foods*, 33 AD3d 691, 823 NYS2d 182 [2006]). Accordingly, plaintiff’s Labor Law § 240(1) claim is dismissed. Further, even if § 240(1) were applicable, the construction manager, Homefront, having completed its work of erecting the main building months before the accident, was without the ability to direct or control the subcontractors hired by the tenant and therefore cannot be vicariously liable to plaintiff under § 240(1).⁴

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 Curtis-Palmer Hydro-Elec. Co.*, *supra*; *Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]).

Plaintiff alleges that defendants breached the regulations found at 12 NYCRR §§ 23-1.5, 1.7, 1.16 and 1.21. As to section 23-1.5, entitled “General responsibility of employers,” this directive is too general to support § 241(6) liability (*Carty v Port Auth. of N.Y. & N.J.*, 32 AD3d 732, 821 NYS2d 178

⁴ Plaintiff does not oppose dismissal of the action as against Homefront.

[2006]; *Sajid v Tribeca North Assocs.*, 20 AD3d 301, 799 NYS2d 33 [2005]). As to section 23-1.7, entitled "Protection from general hazards," plaintiff has not offered which subsection of 1.7 defendants breached nor does it appear that plaintiff lost his balance due to the hazards contemplated therein. Also inapplicable is the alleged violation of section 23-1.16, which addresses the approval, attachment and instruction for safety belts, harnesses, tail lines and lifelines. Section 23-1.16 does not direct when these safety devices should be used; rather, it sets forth standards for their construction, inspection and maintenance, and it is undisputed that these safety devices were not being used by the plaintiff (*see, Partridge v Waterloo Cent. School Dist.*, 12 AD3d 1054, 1056, 784 NYS2d 767 [2004]; *D'Acunti v New York City School Constr. Auth.*, 300 AD2d 107, 751 NYS2d 459 [2002]). Finally, section 23-1.16 entitled "Ladder and ladder ways," cannot form a predicate for plaintiff's Labor Law § 241(6) claim because there is no allegation that a ladder was involved in plaintiff's accident. Accordingly, plaintiff's Labor Law § 241(6) cause of action is also dismissed. As with plaintiff's Labor Law § 241(6) claim, the construction manager, Homefront, cannot be vicariously liable even if § 241(6) were applicable to plaintiff's accident.

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*see, Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son, supra*) who exercise control or supervision over the work or either created the allegedly dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). Here, plaintiff alleges that his accident was caused by a premises defect. Therefore, plaintiff must establish defendants' actual or constructive notice. Further, on their motions for summary judgment it was defendants' burden to establish, prima facie, that they did not have notice of defect that plaintiff alleges caused his accident (*see, Sang Hyun Ban v Sunjin Shipping USA, Inc.*, 23 AD3d 452, 805 NYS2d 620 [2005]). Here, the Sommer defendants established that they lacked notice of the alleged defect and plaintiff did not refute this with evidence to the contrary. Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are dismissed as to the Sommer defendants. Homefront also established that it lacked knowledge of the alleged defect and that its work was complete before Bagels contracted for the refrigeration work, and plaintiff does not oppose dismissal of any negligence claim as against Homefront. Accordingly, plaintiff's Labor Law § 200 and common-law negligence claims are also dismissed as to Homefront.

As to the cross motion by the Bagels defendants, this cross motion is procedurally defective because it was not interposed within the time limitation prescribed by CPLR 3212(a) (*Miceli v State Farm Mutual Automobile Ins. Co.*, 3 NY3d 725, 786 NYS2d 379 [2004]; *Brill v City of New York*, 2 NY3d 64, 781 NYS2d 261 [2004]). Nevertheless, the Court, in searching the record as to issues which are identical to the main motion and cross motion, has dismissed plaintiff's Labor Law § 240(1) and § 241(6) causes of action as to all defendants, including the Bagels defendants (*Altschuler v Gramatan Management, Inc.*, 27 AD3d 304, 811 NYS2d 379 [2006]; *Bressingham v Jamaica Hosp. Med. Ctr.*, 17 AD3d 496, 793 NYS2d 176 [2005]).

However, as to plaintiff's Labor Law § 200 and common-law negligence claims against the Bagels defendants, it is not the Court's function to resolve issues of credibility on motions for summary

Rau v Bagels N Brunch

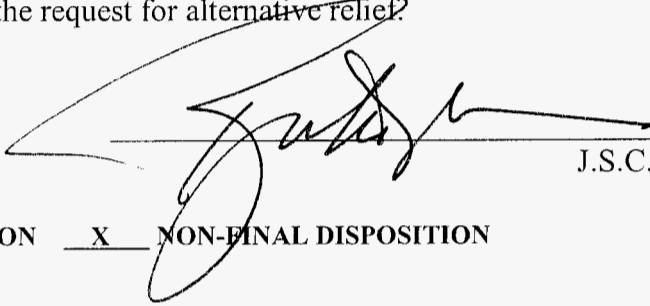
Index No. 04-9719

Page No. 5

judgment (*Ferrante v American Lung Assn.*, 90 NY2d 623, 631, 665 NYS2d 25 [1997]). Here, plaintiff's testimony raised triable issues of fact as to whether the Bagels defendants had actual or constructive notice of the alleged defect which plaintiff asserts caused his accident (*see, Godoy v Baisley Lumber Corp.*, 40 AD3d 920, 924-925, 837 NYS2d 682 [2007]; *Sang Hyun Ban v Sunjin Shipping USA, Inc.*, *supra*; *Bradley v Morgan Stanley & Co.*, 21 AD3d 866, 868-869, 800 NYS2d 620 [2005]). Further, plaintiff's testimony raised triable issues of fact as to his common-law negligence claim (*Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Fabbricatore v Lindenhurst Union Free School Dist.*, 259 AD2d 659, 686 NYS2d 822 [1999]), based upon general principles of negligence and foreseeability (*Dunham v Hilco Constr. Co.*, 89 NY2d 425, 654 NYS2d 335 [1996]; *Severino v Hohl Indus. Serv.*, 300 AD2d 1049, 725 NYS2d 776 [2002]). Accordingly, summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims cannot be granted to the Bagels defendants and these claims are severed and shall continue.

The Sommer defendants' cross motion seeks alternate relief. In the event that summary judgment dismissing plaintiff's complaint is not granted to them, the Sommer defendants argue that they are entitled to enforcement of the indemnification, insurance and hold harmless provisions of the lease agreement. Since the Sommer defendants have been granted summary judgment dismissing plaintiff's complaint herein, the Court will not address the request for alternative relief.

Dated: SEP 04 2007



 J.S.C.

_____ FINAL DISPOSITION NON-FINAL DISPOSITION