

Bucnis v Consolidated Edison Co. of N.Y.

2007 NY Slip Op 33084(U)

September 27, 2007

Supreme Court, New York County

Docket Number: 0114886/2005

Judge: Carol R. Edmead

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

HON. CAROL EDMEAD

PRESENT: _____

PART 35

Justice

Index Number : 114886/2005

BUCNIS, KATHY

INDEX NO. 114886/05

vs

MOTION DATE 5/1/07

CONSOLIDATED EDISON

MOTION SEQ. NO. 001

Sequence Number : 001

MOTION CAL. NO. _____

PARTIAL SUMMARY JUDGMENT

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his motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ...

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

FILED
OCT 01 2007
NEW YORK
COUNTY CLERK'S OFFICE

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion sequence 001 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Consolidated Edison Company of New York, Inc. and Persico Contracting & Trucking, Inc.'s motion is granted, only to the extent of (1) dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims against all defendants, and (2) dismissing the third-party defendant Loftus Contracting Corp.'s counterclaim, and is otherwise denied; and it is further

ORDERED that third-party plaintiffs Consolidated Edison Company of New York, Inc. and Persico Contracting & Trucking, Inc.'s cross motion is granted only to the extent of granting both parties contractual indemnification against Loftus Contracting Corp., conditioned upon a finding of negligence as against Loftus Contracting Corp. in this action, and is otherwise denied; and it is further

ORDERED that counsel for defendant Con Ed shall serve a copy of this Order with notice of entry within twenty days of entry on all counsel.

Dated: 9/27/07

HON. CAROL EDMEAD J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Check if appropriate: FINAL DISPOSITION DO NOT POST NON-FINAL DISPOSITION REFERENCE

M. J. P.

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

-----X
KATHY BUCNIS, as Administratrix of the
Estate of DAVID VON BUCNIS,

Plaintiff,

-against-

CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., and PERSICO CONTRACTING & TRUCKING,
INC.,

Defendants.

-----X
CONSOLIDATED EDISON COMPANY OF NEW YORK,
INC., and PERSICO CONTRACTING & TRUCKING,
INC.,

Third-Party Plaintiffs,

-against-

LOFTUS CONTRACTING CORP.,

Third-Party Defendant.
-----X

CAROL EDMEAD, J.:

MEMORANDUM DECISION

Motion sequence numbers 001 and 002 are consolidated for disposition.

In motion sequence 001, plaintiff moves for summary judgment (CPLR 3212) on her Labor Law § 240 (1) claims against all defendants. Defendants/third-party plaintiffs Consolidated Edison Company of New York, Inc. (Con Ed) and Persico Contracting & Trucking,

Index No.
114886/05
DECISION/ORDER

Motion Sequence Nos.
001 & 002

FILED
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NEW YORK
COUNTY CLERK

Inc. (Persico) cross-move for summary judgment dismissing (1) plaintiff's complaint in its entirety, and (2) all counterclaims alleged by third-party defendant Loftus Contracting Corp. (Loftus).

In motion sequence 002, defendants/third-party plaintiffs Con Ed and Persico seek contractual and common-law indemnification against Loftus.

For the reasons stated below, plaintiff's motion is denied. Defendants/third-party plaintiffs' motion is granted, only to the extent of (1) dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims, and (2) dismissing Loftus' counterclaim, and is otherwise denied. Defendants/third-party plaintiffs' cross motion is granted to the extent of ordering conditional contractual indemnification to the moving parties against Loftus, and is otherwise denied.

Background

Plaintiff seeks to recover monetary damages for a June 13, 2005 workplace accident that caused the death of David Von Bucnis (Bucnis). Bucnis, a dock builder in the employ of third-party defendant Loftus,¹ was working at a Con Ed-owned site in White Plains, New York, when the incident occurred. It is uncontested that Bucnis was involved in the off-loading of steel piles from a flatbed truck and was standing on the truck, on top of some of the steel pilings, just before he was killed. When the two steel piles that were being hoisted by a Loftus employee fell off a Loftus payloader/forklift, one of them struck Bucnis and caused his death.

In her complaint, plaintiff seeks damages against Con Ed, the property owner, and

¹ Defendant Persico, the general contractor on the Con Ed construction project # MCX-04-066, engaged Loftus to drive the piles that would form the foundation of a new Con Ed substation.

Persico, the general contractor, for common-law negligence, as well as for violations of Labor Law §§ 200, 240 (1), and 241 (6).

Defendants contend herein that, although, under Labor Law § 240 (1), owners and general contractors are vicariously liable for injuries to construction workers when an item being hoisted falls from a height, Bucnis's decision to stand on top of the steel pilings when he should not have been there was the sole proximate cause of his injuries, and thus, any resultant injuries are not covered under that section of the Labor Law.

Discussion

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320 (1986). “[I]t must clearly appear that no material and triable issue of fact is presented” (Glick & Dolleck v Tri-Pac Export Corp., 22 NY2d 439, 441 [1968]; see also Giuffrida v Citibank Corp., 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

Defendants/third-party plaintiffs seek dismissal of plaintiff's complaint in its entirety. This court will address each cause of action separately.

Common-Law Negligence and Labor Law § 200 Claims

To establish a *prima facie* case of common-law negligence, a plaintiff is required to establish that: (1) a defendant either created or had notice of the alleged dangerous or defective condition, and (2) that the alleged dangerous condition was the proximate cause of the injury. See Pouso v City of New York,

177 AD2d 560 (2d Dept 1991).

An owner and a general contractor's duty to maintain a safe workplace under the common law is codified in Labor Law § 200. See Gasper v Ford Motor Co., 13 NY2d 104 (1963). In the context of a Labor Law case, if a defective condition is alleged to be the cause of a worker's injuries, the worker must proffer evidence that the owner or contractor either caused the dangerous condition or had actual or constructive notice of it (see Higgins v 1790 Broadway Assocs., 261 AD2d 223 [1st Dept 1999]; see also Balaj v Equitable Life Assur. Soc. of U.S., 211 AD2d 487 [1st Dept), lv denied 85 NY2d 811 [1995]),² however, if the accident is the result of the worker's methods, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition" (Russin v Louis N. Picciano & Son, 54 NY2d 311, 317 [1981]) to be held liable.

Supervision and control of the injured worker's methods by an owner or general contractor are, therefore, prerequisites to such liability. See Candela v City of New York, 8 AD3d 45 (1st Dept 2004); see also Comes v New York State Elec. and Gas Corp., 82 NY2d 876, 877 (1993); Mitchell v New York University, 12 AD3d 200 (1st Dept 2004). To establish liability, the control exercised must be more than a "general duty to supervise the work and ensure compliance with safety regulations." De La Rosa v Philip Morris Management Corp., 303 AD2d 190, 192 (1st Dept 2003); see also Vasiliades v Lehrer McGovern & Bovis, 3 AD3d 400 (1st Dept 2004); Reilly v Newireen Associates, 303 AD2d 214 (1st Dept), lv denied 100 NY2d 508 (2003).

² Supervision and control need not be shown to maintain a negligence claim based upon a defective condition. See Murphy v Columbia University, 4 AD3d 200 (1st Dept 2004).

"[M]onitoring and oversight of the timing and quality of the work [are] not enough to impose liability under section 200[, n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." Dalanna v City of New York, 308 AD2d 400, 400 (1st Dept 2003); see also Gonzalez v United Parcel Service, 249 AD2d 210 (1st Dept 1998).

In this action, it is the Loftus workers' methods that are at issue. Thus, to be held liable, the defendants must have exercised supervision and control over Loftus's work.

Although there is no question that Con Ed workers were on the site at the time of Bucnis's accident and had been involved in both safety meetings and "tailgate talks" with Loftus employees prior to the date in question (see Thomas Celentano [Celentano] Examination Before Trial [EBT], at 31, 34, 35), there is no evidence that Con Ed employees were involved in the manner Loftus intended to employ to off-load the steel pilings. See Daniel Heyburn (Heyburn) EBT, at 36-38; see also Michael Loftus EBT, at 36; Brian William Scott (Scott) EBT, at 18. Loftus foreman James Truncale (Truncale) does maintain that, on the day of the accident, there was some general discussion with Persico and Con Ed employees about the unloading of the piles and where it would be done and that there was a signal from Con Ed that the street was clear and that the unloading of the piles could begin; however, there was no talk about lifting the piles and how that would be accomplished. See Truncale EBT, at 19-21, 52. Because it was the lifting of the piles in the air to clear a fence that caused the steel piling on the forklift to pitch forward and kill Bucnis, and Con Ed had no part in either supervising or controlling Loftus employees' performance of those duties, Con Ed was not negligent either under the common law or Labor Law § 200 for the accident that caused Bucnis's death.

Therefore, those causes of action that allege common-law negligence and violations of Labor Law § 200 as to Con Ed are dismissed.

Persico was also not involved in the supervision or control of the use of the forklift to unload the steel pilings. According to Heyburn, the project manager for Persico on the site, although he was aware that a forklift would be used to unload the steel, he had not discussed how the pilings would be off-loaded with Loftus's employees. See Heyburn EBT, at 30, 36, 41; see also Michael Loftus, at 36. Although there is some dispute regarding this matter (see Scott EBT, at 20), there is no proffered evidence that Persico instructed Loftus employees on how to perform the off-loading.³ See Heyburn EBT, at 64. That, in addition to the fact that it was Loftus employees using Loftus equipment to do the job, requires this court to find, as a matter of law, that Persico was not liable for common-law negligence or under Labor Law § 200 for the accident that caused Bucnis's death.

Therefore, those causes of action that allege common-law negligence and violations of Labor Law § 200 as to Persico are dismissed.

Negligence Counterclaim

In its cross motion, Con Ed and Persico seek to dismiss all counterclaims. In fact, Loftus's answer to the third-party complaint contains only one counterclaim, i.e., the allegation that defendants/third-party plaintiffs Con Ed and Persico were negligent in the incident that caused Bucnis's death. For the reasons stated above, this court has already determined that, as a

³ Heyburn did admit that two Persico employees were watching the off-loading of the piles; however, he contends that the Persico employees were present only to observe as to whether such unloading caused any damage to Con Ed property, not to supervise the off-loading of the steel. See Heyburn EBT, at 71. None of the Loftus employees present asserted otherwise.

matter of law, neither of those parties was negligent in Bucnis's accident. Therefore, Loftus' counterclaim is dismissed.

Labor Law § 240 (1) Claim

Under Labor Law § 240 (1), owners, general contractors, and their agents who fail to provide or erect the safety devices necessary to give proper protection to a worker involved in the erection, demolition, repair, alteration, painting, cleaning or pointing of a building or structure are absolutely liable when that worker sustains injuries proximately caused by that failure. See Rocovich v Consolidated Edison Co., 78 NY2d 509 (1991); see also Rizzo v Hellman Elec. Corp., 281 AD2d 258 (1st Dept 2001).

That section of the Labor Law "applies to tasks that ... involve a significant inherent risk 'because of the relative elevation ... at which materials or loads must be positioned or secured'" (Cammon v City of New York, 21 AD3d 196, 200 (1st Dept 2005) [quoting Rocovich v Consolidated Edison Co., 78 NY2d at 514]), and applies to "falling object" cases as well as to those where the injured party falls from a height, where that load was required to be secured. See Narducci v Manhasset Bay Associates, 96 NY2d 259 (2001).

In such cases, a plaintiff must show that the statute was violated and that such violation was the proximate cause of the victim's injuries. See Cahill v Triborough Bridge and Tunnel Authority, 4 NY3d 35 (2004).

The hoisting of timber, steel beams, and roofing material require secure methods. See Cammon v City of New York, 21 AD3d 196, supra; see also Malloy v Madison Forty-Five Co., 13 AD3d 55 (1st Dept 2004); Orner v Port Authority of New York and New Jersey, 293 AD2d 517 (2d Dept 2002); Pope v Supreme-K.R.W. Constr. Corp., 261 AD2d 523 (2d Dept 1999).

Here, it was steel piling that was being hoisted by an open forklift. Plaintiff seeks recovery based upon the fact that the unsecured steel pilings fell off that forklift from a height above the truck. Because there are differing expert opinions proffered as to whether or not the manner of hoisting and the protection provided were adequate, there are questions of fact as to whether or not Labor Law § 240 (1) was violated by the parties to this action. See Affidavit of Herbert Heller, Jr., PE, Plaintiff's Notice of Motion, Exh. 8; but see Affidavit of Lawrence K. Shapiro, PE (Shapiro), Defendants' Notice of Cross Motion, Exh. K.

Additionally, defendants aver that, even if the trier of fact finds that the steel pile that struck Bucnis was improperly secured, Bucnis was the sole proximate cause of his own injuries, and that, therefore, any claims predicated on Labor Law § 240 (1) should be dismissed.

Where a finding that the injured worker's own actions were the sole cause of his or her accident, Labor Law § 240 (1) does not apply. Recalcitrance on the part of the worker is not required. The issue to be addressed, rather, is whether the worker was solely to blame for his or her injuries. See Blake v Neighborhood Housing Services of New York City, 1 NY3d 280 (2003).

There is no question that Bucnis's positioning on top of the steel on the truck was at least unusual, given the work about to be accomplished. See Shapiro Affidavit, supra; Michael Loftus EBT, at 35-36; Scott EBT, at 14-15; Truncale EBT, at 59. Both Scott and Truncale, two Loftus workers who were both on the site at the time of the accident, were aware of Bucnis's positioning immediately prior to his death. Scott testified that Bucnis had just taken the tarp off the load, which was required prior to the commencement of the removal of the piles. See Scott EBT, at 32. According to Scott, the forklift operator, Bucnis remained up there and served as the

designated signal man for him. Id. at 14-15, 32. Truncale, the foreman, however, testified that both he and Bucnis were acting as signal men for the off-load (see Truncale EBT, at 12), that he did not give Scott the signal to begin hoisting (Id. at 25-26), and that Bucnis, of whom he had a full view, also did not give Scott the signal to lift the pipes. Id. at 61.

Additionally, although Scott testified that Bucnis helped to instruct him on exactly where to place the forklift to get the piles onto the equipment (see Scott EBT, 15), there is some question as to whether Bucnis was attempting to get off the truck just before the pile hoisting began. See Truncale EBT, at 28–29.

However, whether or not Bucnis should have been on the truck on top of the piles during the loading and hoisting, the fact remains that defendants have provided no evidence that Bucnis' exact position on top of the truck is what caused his injury. There is evidence that as he saw the load falling, Bucnis jumped from the truck to the ground (see id. at 63-64), such that when he was hit by the steel pile, he might have already been on the ground (where, according to all persons testifying, he should have been).

When this fact is combined with the paucity of evidence that his being on the truck contributed to the fact that Bucnis was hit by the pile, this court concludes that Bucnis's positioning on the truck immediately prior to his accident was not the sole proximate cause of his injuries.

Because, however, this court finds questions of fact as to whether the pilings were properly secured and, thus, whether a violation of Labor Law § 240 (1) occurred, those portions of the instant motion and cross motion that seek summary judgment on plaintiff's Labor Law § 240 (1) claim are denied.

Labor Law § 241 (6) Claim

Defendants seek summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action.

Labor Law § 241 (6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places."

The section requires owners and contractors at a construction site 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." Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494, 501-502 (1993).

In her complaint, plaintiff seeks to recover monetary damages for violations of Industrial Code sections 23-6.1 (a), (c) (1), (d), (e), and (h); 23-9.2 (b) (1) and (12), (c); 23-9.7 (c); 23-9.8 (a), (b), (e), (j), and (l); as well as 23-91 and 23-910.

Subsection 23-6.1 (a) contains a general description of the application of the "material hoisting" subpart (23-6). In that particular subsection, it states that "[t]he general requirements of this Subpart shall apply to all material hoisting equipment except cranes, derricks, aerial baskets, excavating machines used for material hoisting and fork lift trucks." Because this accident occurred as the result of a payloader/forklift dropping steel piles, none of the subsections of 23-6.1 can serve as predicates for plaintiff's Labor Law § 241 (6) claims.

Plaintiff next seeks to employ Industrial Code section 23-9.2 (b) (1) and (12), and (c) to serve as the basis of her Labor Law § 241 (6) claims. Subpart 23-9.2 contains regulations

relating to power-operated equipment. However, it is not sufficiently specific to serve as a predicate for a Labor Law § 241 (6) claim. See Gonzalez v Glenwood Mason Supply Co., Inc., 41 AD3d 338 (1st Dept 2007).

Industrial Code section 23-9.7 (c), which regulates the operation of motor trucks, is not applicable to the facts of this action (see Modeste v Mega Contracting, Inc., 40 AD3d 255 [1st Dept 2007]), so it too cannot serve as the basis of plaintiff's Labor Law § 241 (6) claims.

It is Industrial Code subpart 23-9.8 that deals with regulations regarding the use of forklifts. Several parts have been held to be sufficiently specific to support a claim under Labor Law 241 (6). See Modeste v Mega Contracting, Inc., 40 AD3d 255, *supra*; see also Scott v American Museum of Natural History, 3 AD3d 442 (1st Dept 2004). Plaintiff herein seeks to predicate her claims on subsections (a), (b), (e), (j), and (l) of that subpart. However, none of those subsections, concerning forklift capacity, overloading, operating surfaces, prohibited uses, or warnings are applicable to the accident at issue in this action. Therefore, none of the subsections of 23-9.8 that plaintiff has identified as being violated can serve as predicates to plaintiff's Labor Law § 241 (6) claims.

Finally, although plaintiff seeks to base her Labor Law § 241 (6) claims on subsections denominated "23-91" and "23-910," such subsections do not exist in the Industrial Code, and cannot, therefore, be relied on to predicate a Labor Law § 241 (6) claim. Because plaintiff has not provided an applicable section of the Industrial Code upon which to predicate her Labor Law § 241 (6) claims, those claims are dismissed.

Common-law and Contractual Indemnification Claim

Defendants/third-party plaintiffs seek both common-law and contractual indemnification

against Loftus, Bucnis's employer.

Common-Law Indemnification

The movants correctly contend that any prohibitions to such recovery found in Workers Compensation Law § 11 are overcome by the fact that Bucnis suffered a "grave injury" within the meaning of the statute. However, to recover under the common law, the movants are required to show not only that they were not negligent, but also that Loftus was responsible for the accident that killed Bucnis. See Priestly v Montefiore Medical Center/Einstein Medical Center, 10 AD3d 493 (1st Dept 2004). Because there has, as yet, been no such finding, an order of entitlement to common-law indemnification from Loftus is premature.

Contractual Indemnification

Defendants/third-party plaintiffs seek an order of entitlement to contractual indemnification based upon the language of the March 10, 2005 contract between the parties.

Under that contract, paragraph 4.61 reads:

To the fullest extent permitted by law [Loftus] shall indemnify and hold harmless the Owner ... and its agents ... from and against claims, damages, losses and expenses ... arising out of or resulting from performance of [Loftus'] work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death ... caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's sub-contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Third-party defendant Loftus asserts that an order granting contractual indemnification is premature based upon the language of the paragraph. Loftus is correct that the provision clearly reads that indemnification is triggered when a loss is "caused by the negligent acts or omissions

of the Subcontractor, the Subcontractor's sub-contractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable," and that no such factual finding has been made as of this date. However, given the language of the above contract, Con Ed and Persico are entitled to an order of indemnification, conditioned upon a future possible finding that Loftus was negligent in the death of Bucnis. See Steakin v Voicestream Wireless Corp., 39 AD3d 424 (1st Dept 2007).

Order

Accordingly, it is hereby

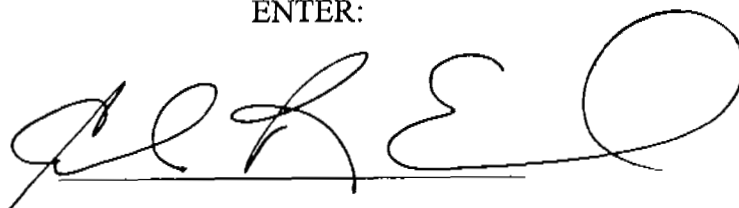
ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that Consolidated Edison Company of New York, Inc. and Persico Contracting & Trucking, Inc.'s motion is granted, only to the extent of (1) dismissing plaintiff's common-law negligence and Labor Law §§ 200 and 241 (6) claims against all defendants, and (2) dismissing the third-party defendant Loftus Contracting Corp.'s counterclaim, and is otherwise denied; and it is further

ORDERED that third-party plaintiffs Consolidated Edison Company of New York, Inc. and Persico Contracting & Trucking, Inc.'s cross motion is granted only to the extent of granting both parties contractual indemnification against Loftus Contracting Corp., conditioned upon a finding of negligence as against Loftus Contracting Corp. in this action, and is otherwise denied.

Dated: September 27, 2007

ENTER:



Carol Robinson Edmead, J.S.C.

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