

Uzynski v 47 Wooster St. Realty Corp.

2007 NY Slip Op 33360(U)

October 15, 2007

Supreme Court, New York County

Docket Number: 0100695/2005

Judge: Barbara Kapnick

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

PRESENT: BARBARA R. KAPNICK

Justice

PART 12

Index Number : 100695/2005

USZYNSKI, ROMAN

vs

47 WOOSTER ST REALTY

Sequence Number : 005

SUMMARY JUDGMENT

INDEX NO. 100695/05

MOTION DATE _____

MOTION SEQ. NO. 005

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered that this motion

FILED
OCT 17 2007
NEW YORK
COUNTY CLERKS OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

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

Dated: 10/15/07


BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
ROMAN USZYNSKI and ARLETTA USZYNSKI,

Plaintiffs,

-against-

47 WOOSTER ST. REALTY CORP., TAOCON,
INC., LA BOUTIQUE NY, INC., MARITHE
& FRANCOIS GIRBAUD, and JKLM, INC.,

Defendants.

-----X
LA BOUTIQUE NY, INC.,

Third-Party Plaintiff,

-against-

A.B.S. ATLANTIC, INC.,

Third-Party Defendant.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 100695/05
Motions Seq. Nos.
005 and 006

Motions sequence numbers 005 and 006 are consolidated for disposition.

This is an action commenced by plaintiffs Roman Uszynski and Arletta Uszynski pursuant to Labor Law §§ 240(1), 241(6) and 200 and for common law negligence seeking to recover damages for personal injuries Roman Uszynski sustained on February 5, 2003 at approximately 10:00 p.m. when he fell from an A-frame ladder while performing work in connection with the renovation of a store on

Wooster Street in Manhattan which was scheduled to open the next day or within a few days thereafter.

The property was owned by defendant 47 Wooster Street Realty Corp. Plaintiff was employed by defendant A.B.S. Atlantic, Inc. ("ABS"), a company apparently owned by him and his wife, which was retained by La Boutique NY, Inc. ("La Boutique") to install a Barrisol ceiling.¹

At the time of his accident, plaintiff was cleaning a stain off the newly installed ceiling. The ladder was allegedly resting on top of brown paper which had not been taped to the floor and which was covered in dust. The floor had allegedly been 'papered' by a floor contractor hired by defendant Taocon, Inc., the general contractor at the site, or by Taocon itself to protect the freshly epoxy painted floor.

The ladder allegedly shifted, causing plaintiff to lose his balance and to fall approximately 10 feet to the ground.

¹ La Boutique's third-party action against ABS seeks contribution and indemnity. By Order dated June 14, 2006, the Hon. Rosalyn Richter granted La Boutique a default judgment against ABS as to liability only, and directed that damages be assessed at the time of trial of the main action.

Defendants/third-party plaintiffs La Boutique NY, Inc. and La Boutique NY, Inc. s/h/a Marithe & Francois Girbaud now move, under motion sequence number 005, for an order: (i) granting summary judgment dismissing the complaint and cross-claims against them; and (ii) granting summary judgment awarding them defense costs and contractual indemnity against defendant Taocon, Inc.

Defendant Taocon, Inc. opposes that portion of the motion seeking defense and indemnification against it, and moves, under motion sequence number 006, for an order: (i) granting summary judgment dismissing the complaint and all cross-claims against it; and (ii) granting summary judgment awarding it defense costs and contractual indemnity against La Boutique on the ground that La Boutique agreed to indemnify and hold harmless Taocon "from and against claims, damages, losses and expense, including but not limited to attorneys' fees, arising out of or resulting from performance of the Work,...".

In relations to plaintiffs' Complaint, defendants argue that plaintiffs' claims pursuant to Labor Law §§ 240(1) and 241(6) must be dismissed on the ground that plaintiff's 'routine act' of cleaning a stain off the ceiling was not a necessary or an integral part of the work involved in the renovation of the premises.

Labor Law § 240(1) affords protection only to individuals engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." Thus, "routine maintenance activities in a nonconstruction, nonrenovation context are not protected by Labor Law § 240 (citations omitted)." Paciente v. MBG Development, Inc., 276 A.D.2d 761 (2nd Dep't 2000). See also, Brown v. Christopher Street Owners Corp., 87 N.Y.2d 938 (1996); Garcia v. Piazza, 16 A.D.3d 547 (2nd Dep't 2005).

However, the papers submitted reflect that the activity plaintiff was engaged in at the time of his accident was incidental and related to the alteration work he was performing as part of the ongoing renovation of the premises for which he and ABS were hired. See, Velasco v. Green-Wood Cemetery, 8 A.D.3d 88 (1st Dep't 2004).

Moreover, plaintiff was exposed to an elevation-related risk while engaged in "cleaning", a separate category of activity protected under section 240(1). See, Broggy v. Rockefeller Group, Inc., 8 N.Y.3d 675 (2007); Fischetto v. LB 745 LLC, York, A.D.3d, 2007 WL 2791706 (1st Dep't).

Similarly, Labor Law § 241(6) requires that safeguards be taken with regard to "[a]ll areas in which construction, excavation or demolition work is being performed."

While the act of cleaning is not by itself an activity protected under Labor Law § 241(6), in this case, plaintiff's activities were "necessary and incidental" to the renovation work being performed by plaintiff. See, Pino v. Martin Co., 22 A.D.3d 549 (2nd Dep't 2005); Sponholz v. Benderson Property Development, Inc., 273 A.D.2d 791 (4th Dep't 2000). Therefore, this Court finds that plaintiff was engaged in an activity protected under both Labor Law §§ 240(1) and 241(6).

Defendants alternatively argue that plaintiff's claim pursuant to Labor Law § 240(1) must be dismissed on the grounds that (a) plaintiff has failed to provide any proof that the ladder was defective, and (b) plaintiff's actions were the sole proximate cause of his accident because he allegedly placed the ladder in a dusty area.

However, there is no dispute that the ladder (which was allegedly worn) was unsecured and that plaintiff was provided with no other safety devices. See, Peralta v. American Tel. and Tel. Co., 29 A.D.3d 493 (1st Dep't 2006). Accordingly, those portions of defendants' motions seeking to dismiss plaintiffs' Labor Law § 240(1) claim are denied.²

² The Court notes that plaintiff has not affirmatively moved for summary judgment pursuant to Labor Law § 240(1).

Defendants also argue in a conclusory fashion, citing Biafora v. City of New York, 27 A.D.3d 506, 508 (2nd Dep't 2006), that the Labor Law §§ 241(6) claims must be dismissed because plaintiff has failed to show that his injuries were proximately caused by a violation of an Industrial Code regulation that is applicable to the circumstances of his accident. See, Ross v. Curtis-Palmer Hydro-Elec. Co., 81 N.Y.2d 494 (1993).

Plaintiffs, however, have set forth various sections of the Industrial Code in their Bill of Particulars which they claim were violated and apply to the facts of this case, and thus have set forth a prima facie showing of liability under section 241(6). Neither defendant discussed the scope or applicability of any of these regulations, relying primarily on their argument that plaintiff is not a protected worker under the Labor Law.

Accordingly, defendants' motions to discuss plaintiffs' Labor Law claims under section 241(6) on this ground are also denied.

Defendants next move to dismiss plaintiffs' claims against it pursuant to Labor Law § 200 and for common law negligence on the ground that they did not supervise or control plaintiff's work and/or have notice of the alleged condition.

Plaintiffs consent to withdraw their Labor Law § 200 claim but argue that those portions of the motion seeking to dismiss their claim for common law negligence should be denied because a question of fact exists as to who was responsible for the condition of the floor.

La Boutique contends that Taocon was responsible for removing the floor covering and cleaning the construction dust arising out of the work. Taocon, on the other hand, contends that La Boutique, which had hired a cleaning company, was ultimately responsible for the debris and dust condition under the ladder. Although La Boutique contends that the kind of cleaning necessary to rectify the condition was not the fine cleaning performed by its own crew, which allegedly came in after Taocon or its cleaners cleaned the premises, this Court finds that there are triable issues of fact which preclude the dismissal of plaintiffs' negligence claims against both defendants at this time.

Since there is a triable issue of fact as to La Boutique's own negligence, that portion of La Boutique's motion for summary judgment on its cross-claims against Taocon is denied as premature.

Defendant Taocon also moves for summary judgment awarding it defense costs and indemnity against La Boutique based on the

testimony of Taocon's project manager, Mark Grady, that La Boutique was required pursuant to paragraph 10 of Taocon's Addendum to the parties' contract to "indemnify and hold harmless Taocon, Inc., for any insurance claims resulting from or related to any Owner Subcontractors".

This branch of the motion must also be denied as premature since this Court has already determined that there is an issue of fact as to whether or not defendant Taocon was negligent.³

All parties are directed to appear for a settlement conference in IA Part 12, 60 Centre Street, Room 341 on November 7, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court

Date: October 15, 2007


Barbara R. Kapnick
J.S.C.

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³ In addition, the alleged provision would not appear to apply to the facts of this case since (i) plaintiffs' claims against the defendants in this action do not constitute "insurance claims", and (ii) ABS was hired directly by La Boutique and thus would constitute an "owner contractor", and not an "owner subcontractor".