

Metcalf v Commerce Bank

2007 NY Slip Op 33489(U)

October 23, 2007

Supreme Court, New York County

Docket Number: 0103290/2005

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PART 12

PRESENT: _____

Index Number : 103290/2005 *Justice*

METCALF, ROBERT SR.

vs

COMMERCE BANK

Sequence Number : 001

SUMMARY JUDGMENT

X NO. 103290/05

ION DATE _____

ION SEQ. NO. 001

ION CAL. NO. _____

on to/for _____

The following papers, numbered _____

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 _____

and
cross-motions are decided in accordance with the accompanying memorandum decision.

FILED

OCT 26 2007

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/23/07

BARBARA R. KAPNICK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

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

-----X

ROBERT METCALF, SR., and CHRISTINE
METCALF,

Plaintiffs,

- against -

COMMERCE BANK and PFIZER, INC.,

Defendants.

-----X

PFIZER INC.,

Third-Party Plaintiff,

- against -

CUSHMAN & WAKEFIELD, INC.,

Third-Party Defendant.

-----X

COMMERCE BANK,

Second Third-Party Plaintiff,

- against -

CUSHMAN & WAKEFIELD, INC.,

Second Third-Party Defendant.

-----X

CUSHMAN & WAKEFIELD,

Fourth-Party Plaintiff,

- against -

METAL BRITE SERVICES COMPANY,

Fourth-Party Defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 103290/05
Motion Seq. No. 001

Third-Party
Index No. 590168/06

FILED
OCT 26 2007
NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiffs seek to recover damages for personal injuries sustained by plaintiff Robert Metcalf, Sr., a metal worker/cleaner, on October 15, 2004 when he fell from an A-frame ladder while polishing the metal window frames of an office building located at 685 Third Avenue, New York, New York. Plaintiff claims that the ladder, which was not tied or otherwise secured, buckled and/or collapsed.

Defendant/third-party plaintiff Pfizer, Inc. is the owner of the building.

At the time of his accident, plaintiff was polishing the windows of the first floor premises leased by defendant/second third-party plaintiff Commerce Bank.

Third-party and second third-party defendant/fourth-party plaintiff Cushman & Wakefield, Inc. was the managing agent of the property.

Fourth-party defendant Metal Brite Services Company was plaintiff's employer and allegedly supplied the ladder on which he was working at the time of his accident.

Defendant/second third-party plaintiff Commerce Bank now moves for an order:

(1) granting summary judgment dismissing plaintiffs' Complaint against it on the ground that Commerce Bank was not responsible for maintaining the exterior of the building, and was not responsible in any way for plaintiff's accident which occurred at approximately 1:30 a.m. when its retail branch was closed; and

(2) granting it summary judgment on its cross-claims against defendant Pfizer, Inc. for contractual indemnification and reimbursement of all defense costs and attorneys' fees.

Plaintiffs cross-move for summary judgment on their claim pursuant to Labor Law § 240(1).

Pfizer and Cushman & Wakefield cross-move for summary judgment against Commerce Bank, claiming that Commerce Bank breached its contractual obligations under the Lease to:

(a) procure a general liability policy naming Pfizer and Cushman & Wakefield as additional insureds, pursuant to Sec. 7.02 of the Lease; and

(b) indemnify and hold them harmless "from and against any and all claims arising from or in connection with (i) the conduct or management of the Premises or of any business therein, or any work or thing done, or any condition created, in or about the Premises,

... [or] (iii) any accident, injury or damage occurring in, at or upon the Premises,..." pursuant to Sec. 6.12 of the Lease.

Pfizer and Cushman & Wakefield also separately cross-move for summary judgment dismissing plaintiffs' claims pursuant to Labor Law §§ 241(6) and 200 and for common law negligence.

That portion of Commerce Bank's motion seeking to dismiss plaintiffs' claims against it is granted on consent, plaintiffs having withdrawn said claims on the record on August 1, 2007.

That portion of Commerce Bank's motion seeking summary judgment on its cross-claims against defendant Pfizer, Inc. for contractual indemnification and reimbursement is denied since the subject Lease does not contain a provision mandating the owner to hold the tenant harmless.

The cross-motion by Pfizer and Cushman & Wakefield for summary judgment against Commerce Bank is denied, as there is no indication that Pfizer and Cushman & Wakefield were not named as additional insureds on a general liability policy procured by Commerce Bank, in accordance with Commerce Bank's lease obligations. However, this Court finds that Commerce Bank had no duty to hold Pfizer or Cushman & Wakefield harmless with respect to the subject accident

which occurred on the exterior of the building, outside of Commerce Bank's demised premises.

The Clerk may, therefore, enter judgment dismissing plaintiffs' claims and all cross-claims against defendant Commerce Bank with prejudice and without costs or disbursements.

Pfizer and Cushman & Wakefield oppose that portion of plaintiffs' cross-motion seeking summary judgment on their claim under Labor Law § 240(1) on the ground that one of plaintiff's co-workers, Mustapha Zayre, testified that he examined the ladder after the accident and found no evidence of buckling and that another worker who arrived at the work site after the accident took place was able to use the same ladder to finish the work that plaintiff had started.

However, plaintiff satisfied his prima facie burden on the motion based on his testimony that the ladder on which he was working fell since "there is no dispute that the ladder was unsecured and no other safety devices were provided" (Vega v. Rotner Management Corp., 40 A.D.3d 473 [1st Dep't 2007]). Therefore, plaintiffs' cross-motion for summary judgment on their Labor Law § 240(1) claim is granted.

The cross-motion by Pfizer and Cushman & Wakefield for summary judgment dismissing plaintiffs' claim against it pursuant to Labor Law § 241(6) is granted, as this Court finds that plaintiff was involved in routine annual maintenance work and was not engaged in "construction, excavation or demolition work" within the meaning of the statute. See, Cordero v. SL Green Realty Corp., 38 A.D.3d 202 (1st Dep't 2007); Wolfe v. KLR Mechanical, Inc., 35 A.D.3d 916 (3rd Dep't 2006); Maes v. 408 W. 39 LLC, 24 A.D.3d 298 (1st Dep't 2005), lv. denied, 7 N.Y.3d 716 (2006).

That portion of the cross-motion seeking to dismiss plaintiffs' claim pursuant to Labor Law § 200 and for common law negligence is granted on consent.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on November 14, 2007 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: October 23, 2007

FILED



Barbara R. Kapnick
J.S.C.

OCT 26 2007

NEW YORK
COUNTY CLERK'S OFFICE

BARBARA R. KAPNICK
J.S.C.