

Sehn v Tishman Constr. Corp.

2007 NY Slip Op 34046(U)

December 7, 2007

Supreme Court, New York County

Docket Number: 0108563/2005

Judge: Barbara Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 12

Index Number : 108563/2005

SEHN, FRANK

INDEX NO. 108563/05

vs
TISHMAN CONSTRUCTION

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. 001

PARTIAL SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ were read on 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

*and cross-motion are decided
in accordance with the
accompanying memorandum decision*

FILED
DEC 13 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/7/07

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

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

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

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

-----X

FRANK SEHN and JEANNETTE SEHN,

Plaintiffs,

-against-

TISHMAN CONSTRUCTION CORPORATION,
TISHMAN CONSTRUCTION CORPORATION OF
MANHATTAN, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, TISHMAN
INTERIORS CORPORATION, SYNSCORT
INCORPORATED and ASSADOUR TAVITIAN,

Defendants.

-----X

TISHMAN CONSTRUCTION CORPORATION,
TISHMAN CONSTRUCTION CORPORATION OF
MANHATTAN, TISHMAN CONSTRUCTION
CORPORATION OF NEW YORK, TISHMAN
INTERIORS CORPORATION and ASSADOUR
TAVITIAN,

Third-party plaintiffs,

-against-

MICHAEL MAZZEO ELECTRIC CORP.,

Third-party defendant.

-----X

BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 108563/05

Motion Seq. Nos. 001
and 002

Third-Party

Index No. 590159/06

FILED

DEC 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

In this action, plaintiffs seeks to recover damages for personal injuries sustained by plaintiff Frank Sehn on June 25, 2002 when the ladder on which he was standing to perform electrical alteration and construction work fell, causing him to fall to the ground. The ladder allegedly "kicked out" as plaintiff was descending.

The project involved the gut renovation of an historically designated townhouse with offices located at 4 East 79th Street in Manhattan.

Defendant Syncsort Incorporated and defendant/third-party plaintiff Assadour Tavitian were allegedly the owners of the construction site.

Defendants/third-party plaintiffs Tishman Construction Corporation, Tishman Construction Corporation of Manhattan, Tishman Construction Corporation of New York and Tishman Interior Corporation (collectively, "the Tishman defendants") allegedly served as the general contractor of the project.

Third-party defendant Michael Mazzeo Electric Corp., an electrical subcontractor, was plaintiff's employer.

Plaintiffs now move (under motion sequence number 001) for partial summary judgment on the issue of liability on their claim pursuant to Labor Law § 240(1).

Defendant Syncsort Incorporated opposes the motion and cross-moves for summary judgment dismissing plaintiffs' action against it

on the ground that it had no connection to the property in question.

Defendants/third-party plaintiffs oppose plaintiffs' motion and move (under motion sequence number 002) for an order:

(1) granting them summary judgment against the third-party defendant based upon common law and contractual indemnity for all or any part of any liability that the plaintiffs may prove in this matter;

(2) dismissing plaintiffs' claims against them pursuant to Labor Law § 200 and for common law negligence on the ground that they did not supervise and/or control plaintiff's work;

(3) dismissing plaintiffs' claims against defendant Tavitian on the ground that Labor Law § 240(1) specifically exempts "owners of one and two-family dwellings who contract for but do not direct or control the work";

(4) dismissing all causes of action against the Tishman defendants (other than Tishman Construction Corporation of New York, which admits that it was the 'construction manager') on the ground that they were not the general contractor of the project; and

(5) dismissing plaintiffs' claim pursuant to Labor Law § 240(1) on the ground that plaintiff's actions were the sole proximate cause of his injuries.

Plaintiffs argue that they are entitled to partial summary judgment on their Labor Law § 240(1) claim on the grounds that the ladder failed its core purpose by falling and that plaintiff was not provided with any other safety devices such as a safety belt or brace.

Defendants/third-party plaintiffs, on the other hand, argue that plaintiffs' claim pursuant to Labor Law § 240(1) must be dismissed on the ground that plaintiff's actions were the sole proximate cause of his accident. Specifically, defendants/third-party plaintiffs contend that although plaintiff was aware that the ladder he was using was too short, plaintiff chose to continue to work on that ladder.¹

In Robinson v. East Medical Center, L.P., 6 N.Y. 3d 550 (2006), the Court of Appeals held that plaintiff's own actions were the sole proximate cause of his accident, because the plaintiff therein knew he needed a taller ladder but failed to wait for one to be provided and failed to take any steps to secure a taller ladder other than allegedly to ask for one shortly before the accident. See also, Miro v. Plaza Construction Corp., 38 A.D.3d 454 (1st Dep't 2007).

¹ Plaintiff testified that the ladder was a couple of inches below the scaffolding floor. He asked the foreman, Miles Blackberg, if a taller ladder was available, and was told to look around. Plaintiff was unable to locate a taller ladder but admits that he never notified Blackberg of that fact.

Plaintiff argues that those cases, in which the ladders being used never fell, are distinguishable from the facts presented in this case. Plaintiff also denies that the height of the ladder on which he was working caused his accident (in contrast to Robinson, where the plaintiff, who was working while standing on the top cap of the ladder, slipped, lost his balance and fell).

Based on the papers submitted and the oral argument held on the record on October 10, 2007, this Court finds that there are triable issues of fact in this case as to whether or not the height of the ladder was a substantial factor in causing plaintiff's accident and as to whether or not plaintiff's actions were the sole proximate cause of his accident.

Accordingly, plaintiffs' motion for partial summary judgment on their Labor Law § 240(1) claim and that portion of defendants/third-party plaintiffs' motion seeking to dismiss said claim are denied.

Third-party defendant argues that the portion of defendants/third-party plaintiffs' motion seeking summary judgment on their third-party claim for contractual indemnification is premature, because there is an issue of fact as to whether the Tishman defendants were actively negligent with respect to the happening of plaintiff's accident. However, this Court finds that

there is no evidence that the Tishman defendants supervised or controlled plaintiff's work or were otherwise negligent with respect to the happening of plaintiff's accident. Accordingly, that portion of their motion is granted.

That portion of the motion seeking to dismiss plaintiffs' claims against the Tishman defendants pursuant to Labor Law § 200 and for common law negligence is granted without opposition.

That portion of the motion seeking summary judgment on the third-party claim for common law indemnification is denied, as there is no evidence that plaintiff sustained a "grave injury" as required by Workers' Compensation Law § 11.

That portion of the motion seeking to dismiss plaintiffs' claims against various Tishman entities is denied with leave to renew, if deemed appropriate, at the time of trial, since there is testimony from the Tishman defendants' witness, Thomas Marchisotto, that Tishman Interiors was also a construction manager on the project and that all the Tishman entities are the "same company".

That portion of the motion seeking to dismiss plaintiffs' claims against defendant Tavitian and the cross-motion by defendant Synscort Incorporated for summary judgment are granted without opposition. The Clerk may enter judgment dismissing plaintiffs'


claims against defendants Tavitian and Synscort Incorporated with prejudice and without costs or disbursements.

The remainder of the case is severed and continued.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on January 3, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: December 4, 2007


Barbara R. Kapnick
J.S.C.

BARBARA R. KAPNICK
J.S.C.

FILED
DEC 13 2007
NEW YORK
COUNTY CLERK'S OFFICE