

Horne v 94th & Park Corp.

2007 NY Slip Op 34259(U)

December 31, 2007

Supreme Court, New York County

Docket Number: 0116692/2003

Judge: Leland G. DeGrasse

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

HON. LELAND DEGRASSE

PRESENT.

PART 25

Index Number : 116692/2003

HORNE, WILLIAM

vs
94TH & PARK

Sequence Number : 009

DISMISS

EX NO. _____

TION DATE _____

TION SEQ. NO. _____

TION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

JAN 03 2008

NEW YORK
COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION.

DEC 31 2007

Dated: _____

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

-----X
WILLIAM HORNE,

Plaintiff,

-against-

Index No. 116692/03

94TH & PARK CORPORATION and "ABC CORP."
said name being fictitious and unknown

Defendants.

-----X
(and third-party actions)

FILED
JAN 03 2008
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DeGrasse, J.:

Motion sequences eight, nine and ten are consolidated. Defendant / third-party plaintiff, 94th & Park Corporation, third-party plaintiff / third-party defendant Glenridge Fabricators, Inc., and third-party defendant Lago Steel Products Incorporated move for summary judgment. Third-party plaintiff / third-party defendant Silver Rail Associates, Inc. cross-moves for the same relief. Plaintiff, a laborer employed by Silver Rail, was injured in a construction accident on September 17, 2001 during the renovation of two cooperative apartments leased to former third-party defendants Jeffrey Flug and Sheryl Flug by 94th & Park, the proprietary lessor. Silver Rail is the contractor pursuant to an August 2001 written agreement between itself and the Flugs. According to his deposition and answering affirmation, plaintiff and another worker were carrying a steel beam which plaintiff was holding at ear level. The steel beam slipped, striking plaintiff on his shoulder. Plaintiff has asserted direct claims against 94th & Park only and invokes Labor Law §§ 200, 240, 241 (6) as well as a theory of common-law negligence. Plaintiff makes no substantive argument with respect to the merits of his Labor Law § 240 cause of action. Industrial Code of

the State of New York (12 NYCRR) § 23-2.3 (c) is the only regulation plaintiff cites in his answering affirmation with regard to his Labor Law § 241 (6) claim. The section provides: “Tag Lines. While steel panels or structural steel members are being hoisted, tag lines shall be provided and used to prevent uncontrolled movement of such panels or members.” Plaintiff argues that “[t]he absence of these statutorily required ‘tag lines’ resulted in the precise scenario that the statute is designed to preclude - *to wit*, an uncontrolled movement, during the hoist of a [steel structural] member.”

Plaintiff bases his argument on the erroneous premise that the carrying of material, such as structural steel members, constitutes hoisting. A tag line, sometimes called a restraint line, can be defined as a line that is hooked to each end of an object and acts as a guide (*see Cammon v City of New York*, 21 AD3d 196 [2005]). Specific requirements for hoisting materials are set forth under Industrial Code § 23-6.1 which also includes a provision for the use of tag lines for loads which have a tendency to swing or turn freely during hoisting. Section 23-6.1 speaks of the maintenance of hoisting equipment, its operation by trained personnel and the use and the required use of visual and audible signals. “Hoisting” within the contemplation of § 23-6.1 clearly refers to the use of mechanical devices. The same interpretation should be applied to the term as used in § 23-2.3 (c). Also, the “uncontrolled movement” referred to in § 23-2.3 (c) cannot occur where an object is manually carried and necessarily controlled by persons. As stated above, under plaintiff’s construction, the carrying of structural steel by hand would constitute hoisting § 23-2.3 (c). It would necessarily follow that the hand carrying of anything else constitutes hoisting under § 23-6.1. Plaintiff’s Labor Law § 241 (6) cause of action is, therefore, not viable. George Skinjejj, an employee of the building’s property manager, states in his unrefuted affidavit that 94th

& Park did not direct, control or supervise the renovation work. Accordingly, 94th & Park has established that it is not liable under Labor Law § 200 or the theory of common-law negligence (see *Balladares v Southgate Owners Corp.*, 40 AD3d 667, 670 [2007]).

Silver Rail seeks a determination of liability on its contractual indemnification claims against Glenridge and Lago. Silver Rail has annexed what it describes as a copy of its complete contract with Glenridge to the October 4, 2007 affirmation of its counsel. The contract provides for indemnification in the event of an injury “caused in whole or in part by any act or omission of [Glenridge].” Indemnification based on the contract is unavailable at this time because there is a triable factual issue as to whether the accident was caused by Glenridge’s act or omission. In any event, enforcement of the contract would not have been precluded by the fact that it was signed after the date of plaintiff’s accident. Al Putre, Glenridge’s president, testified that the contract was in force on the date of the accident. Such an acknowledgment takes the contract outside of the scope of the statute of frauds (General Obligations Law § 5-701) (see *Concordia Gen. Contr. v Peltz*, 11 AD3d 502, 503 [2004]). Silver Rail also makes reference to a covenant by which Glenridge was required to obtain coverage for Silver Rail as an additional insured. Yet, Silver Rail’s papers contain no assertion that Glenridge has failed to do so. In fact, the October 4, 2007 affirmation acknowledges the existence of the appropriate certificate of insurance. The subcontract between Lago and Glenridge obligates Lago to indemnify Glenridge “and Owner, their officers, directors, partners, representatives, agents and employees” from claims arising out of Lago’s “acts, omissions, breach or default.” Silver Rail asserts that subcontract entitles it to indemnification by Lago despite the fact that Silver Rail is not referred to in the indemnification clause. The same agreement requires Lago to obtain additional insured coverage for the general

contractor among others. A promise to answer for the debt of another must be in writing (General Obligations Law § 5-701 [a][2]). Silver Rail's exclusion from the indemnification provision in an agreement which includes it under the insurance provision makes it clear that the parties to the agreement did not intend to provide contractual indemnification for Silver Rail. Moreover, the clause which permits the general contractor to assert claims against the subcontractor for indemnity, contribution and common-law negligence does not create contractual indemnification. Lago's subcontract also provides for indemnification in the event of injury arising out of its "acts, omissions, breach or default." Accordingly, Silver Rail would not, in any event, be entitled to a finding of liability because it has not been determined that Lago was negligent or in breach or default.

For the foregoing reasons, the motions and cross motion are granted to the extent that the complaint is dismissed. In addition, Lago's motion is granted to the further extent that Silver Rail's claim against it for contractual indemnification is dismissed. The Clerk shall enter judgment accordingly. The remaining claims are severed and continued. Lago's motion is denied to the extent that it seeks a dismissal of Glenridge's claim. Silver Rail's motion is denied to the extent that it seeks summary judgment on its claims against Glenridge and Lago. Glenridge's motion is denied to the extent that it seeks summary judgment on its claim against Lago.

Dated: December 31, 2007

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MS
 J. S. C.