

Kacperski v D.H.I. Constr. Servs., Inc.

2008 NY Slip Op 30545(U)

February 15, 2008

Supreme Court, Nassau County

Docket Number: 3717-05/

Judge: Michele M. Woodard

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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

-----X

KRYSZTOF KACPERSKI,
Plaintiff,

-against-

D.H.I. CONSTRUCTION SERVICES, INC. and
BEACH POINT CLUB, INC.
Defendants.

**MICHELE M. WOODARD,
J.S.C.**

TRIAL/IAS Part 16
**Index No.: 013717/05
Motion Seq. Nos.:03,04&05**

DECISION AND ORDER

-----X

D.H.I. CONSTRUCTION SERVICES, INC.,
Plaintiff,

-against-

NACIREMA ENVIRONMENTAL SERVICES
COMPANY, INC.
Defendant.

-----X

Papers Read on this Motion:

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|--|----|
| Defendant's Notice of Motion | 03 |
| Defendant Beach Point Club Notice of Motion | 04 |
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| Plaintiff's Reply Affirmation | xx |
| Defendant D.H.I. Construction Reply Affirmation | xx |

In Motion Sequence number three, Defendant DHI Construction Services, Inc. hereinafter referred to as "DHI" moves for an order pursuant to CPLR §3212 granting Summary Judgement and dismissing the Plaintiff's complaint against them.

In Motion Sequence number four, Defendant Beach Point Club, Inc., hereinafter referred to as "Beach Point" moves for an order pursuant to CPLR §3212 granting it Summary Judgement dismissing the complaint and any and all cross claims against them.

In Motion Sequence number five, the Plaintiff moves for an order pursuant to CPLR §3025(b) granting him leave to supplement his Bill of Particulars.

This is an action to recover damages for personal injuries allegedly sustained by Plaintiff on November 13, 2003 while he was performing demolition work at Beach Point located at 900 Rushmore Avenue, Mamaroneck, New York. Specifically, Plaintiff alleges that he was in the process of removing concrete steps when a mechanical hammer affixed to a Bobcat vehicle operated by one of his co-workers came down on his right hand. At the time of the accident, Plaintiff was employed by Nacirema Environmental Services Company, Inc. (hereinafter referred to as “Nacirema”). Nacirema was hired by the general contractor D.H.I. to perform the demolition aspect of the project. Beach Point was the owner of the subject premises.

DHI seeks summary judgment dismissing Plaintiff’s claims based upon violations of Labor Law §§ 200, 240 and 241(6). Beach Point seeks summary judgment on the cross-claims against DHI based upon contractual indemnification and common law indemnification. Plaintiff cross-moves for leave to supplement his bill of particulars to include a violation of 12 NYCRR §23-9.2(b)(1), which prohibits the operating of power-operated equipment used in construction, demolition or excavation operations by untrained persons.

The Court will first address Plaintiff’s cross-motion.

CPLR §3025(b) states that “[l]eave to amend shall be freely given upon such terms as may be just including the granting of costs and continuances.” Leave to amend the bill of particulars to specify an Industrial Code violation may properly be granted where the Plaintiff makes a showing of merit and the amendment “[involves] no new factual allegations, raise[s] no new theories of liability and cause[s] no prejudice to the Defendants.” *Dowd v City of New York*, 40 AD3d 908 (2d

Dept 2007); *Kelleir v Supreme Indus. Park, LLC.*, 293 AD2d 513 (2d Dept 2002). In the instant case, Plaintiff's supplemental bill of particulars raises no new factual allegations since Plaintiff previously pled in his bill of particulars that "the demolition equipment was operated by an untrained person and in an improper and unsafe manner." (¶ 3[a]).

Contrary to Defendants' contention, they have failed to establish that the proposed amendment lacks any merit or that the amendment would result in unfair prejudice. *Dowd v City of New York, supra*. Accordingly, Plaintiff is **granted** leave to amend his bill of particulars in the manner proposed.

Beach Point

The contract between DHI and Beach Point contains a specific provision whereby DHI promises to hold harmless and defend and indemnify Beach Point in the event of litigation. Article 12-3 states, in pertinent part, that:

Contractor shall indemnify and hold harmless the Owner and its consultants, agents . . . and employees from and against all claims, damages, losses, liabilities, obligations and expenses, direct, indirect or consequential . . . arising out of or resulting from the performance or lack of performance of the Work, providing that any such claim, damage, loss or expense is caused in whole or in part by intention or negligent act or commission by Contractor, any person or organization directly or indirectly employed by the Contractor . . . or anyone for whose acts Contractor may be liable, regardless of whether or not it is caused in part by a party indemnified hereunder.

A promise contained in a construction contract to indemnify an owner of a premises is valid and enforceable where, as here, the intention to indemnify is clearly implied from the language and purposes of the entire contract and the surrounding facts and circumstances. *See Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 (2007); *see also Drzewinski v Atlantic Scaffolding & Ladder Co.*,

Inc., 70 NY2d 774 (1987).

Inasmuch as this provision is sufficiently clear and unambiguous, the indemnity provision is enforceable. However, an issue of fact exists as to whether DHI can be found negligent. Hence, the branch of Beach Point's motion for summary judgment is **granted** only to the extent of conditional contractual indemnity (*see Ruddock v Boland Rentals, Inc.*, 5 AD3d 368[2d Dept 2004]).

The contract between DHI and Beach Point also contains a provision whereby DHI agrees to name Beach Point as an additional insured under its general liability insurance policy. According to Beach Point, DHI breached this provision since it failed to name Beach Point as an additional insured. *Watters v R.D. Branch Associates, L.P.*, 30 AD3d 408 (2d Dept 2006); *Kinney v G. W. Lisk Co., Inc.*, 76 NY2d 215 (1990).

Turning to common-law indemnification, it is well settled that the party "seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law, such as the non-delegable duty imposed by Labor Law § 240(1)." *Correia v Professional Data Management, Inc.*, 259 AD2d 60, 65 (1st Dept 1999); *see also McDermott v City of New York*, 50 NY2d 211, *rearg den.* 50 NY2d 1059 (1980).

Further, "common-law indemnification is warranted where, as here, a Defendant's role in causing the Plaintiff's injury is solely passive, and thus, its liability is purely vicarious." *Taeschner v M & M Restoration, Ltd.*, 295 AD2d 598, 599 (2d Dept 2002); *Charles v Eisenberg*, 250 AD2d 801. "A subcontractor can be held liable for common-law indemnity where it had the authority to

direct, supervise, and control the work giving rise to the injury.” *Id.*; *Hernandez v Two East End Ave. Apt. Corp.*, 271 AD2d 570 (2d Dept 2000). Since there is an outstanding issue as to whether DHI and/or Nacirema were free from any negligence, conditional summary judgment on the basis of common-law indemnity is premature. *Benedetto v Carrera Realty Corp.*, 32 AD3d 874 (2d Dept 2006). As such, Beach Point’s application for Summary Judgment is **denied**.

DHI

In order to impose liability based upon Labor Law §200 and common-law negligence, the Plaintiff must demonstrate that the Defendants exercised supervision and control over the work performed, or had actual and constructive notice of the allegedly dangerous condition. *Pilch v Board of Education of City of New York*, 27 AD3d 711 (2d Dept 2006), *lv to app dism.* 8 NY3d 828 (2007), *on reargument* 8 NY3d 958 (2007); *see Lombardi v Stout*, 80 NY2d 290 (1992).

Generally, the owner and general contractor are not vicariously liable, either at common-law or under Labor Law § 200 for a subcontractor’s failure to follow safe procedures. *Palmer v Center for Nursing & Rehabilitation*, 18 AD3d 634 (2d Dept 2005).

Section 240(1) of the Labor Law states, in pertinent part:

“All contractors, owners and their agents . . . in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

This “statute is to be interpreted liberally to accomplish its purpose.” *Striegel v Hillcrest Heights Development Corp.*, 100 NY2d 974, 977 (2003) citing *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-514 (1991).

Not every worker who falls at a construction site, and not every object that falls on a worker, gives rise to the extraordinary protections of Labor Law §240(1). Rather, liability is contingent upon the existence of a hazard contemplated in §240(1) and the failure to use, or the inadequacy of, a safety device of the kind enumerated therein. *Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263, 268 [1st Dept 2007] [citations and internal quotation marks omitted]. In order to trigger the protections of Labor Law §240(1), a worker must be performing a task that inherently entails a significant risk because of the relative elevation at which the task must be performed or at which materials or loads must be positioned or secured. *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514 [1991]; *Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 867 [2d Dept 2005]. For purposes of the scaffold law, the special hazards that arise where materials or load are being hoisted or secured do not encompass any and all perils that may be connected in some tangential way with the effects of gravity. Rather, they are limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured. *Natale v City of New York*, 33 AD3d 772, 774 [2d Dept 2006]. The scaffold law which imposes absolute liability is addressed to situations in which a worker is exposed to the risk of falling from an elevated work site or being hit by an object falling from an elevated work site. *Tsatsakos v Citicorp.*, 295 AD2d 500, 501 [2d Dept 2002]. In order to establish liability under § 240(1), however, a violation of statute must be demonstrated and shown to have been a proximate cause of the injuries sustained. *Blake v Neighborhood Hous. Serv. of N.Y. City.*, 1 NY3d 280, 287 [2003].

A *prima facie* violation of Labor Law §240(1) is established when Plaintiff presents evidence that no safety devices were provided at the time of the accident. *Taeschner v M & M*

Restorations, Ltd., *supra*; see also *Smith v Xaverian High School*, 270 AD2d 246, 247 (2d Dept 2000). When applying Labor Law §240(1), liability is contingent on a statutory violation and proximate cause . . . when these elements are established, contributory negligence cannot defeat the Plaintiff's claim." *Blake v Neighborhood Housing Services of New York*, 1 NY3d 280, 287 (2003); see also *Melber v 6333 Main St.*, 91 NY2d 759, 762 (1998). To defeat a claim pursuant to Labor Law §240(1) based upon the Plaintiff's contributory negligence, Defendant must proffer evidence which establishes "that the accident was 'caused exclusively by [Plaintiff's] own willful or intentional acts.'" *Kyle v City of New York*, 268 AD2d 192, 196 (1st Dept 2000), *lv den.* 97 NY2d 608 (2002), quoting *Clark v Fox Meadow Builders, Inc.*, 214 AD2d 882, 884 (3d Dept 1995).

At his examination before trial, Plaintiff testified that no one other than his supervisor from his employer Nacirema supervised or instructed the demolition work that he was performing on the date of the accident. As Plaintiff's testimony indicates that no one from DHI directed, controlled or supervised the demolition work at issue, Plaintiff's claim under Labor Law §200 and common law negligence should be dismissed. See *Dupkanikova v Vasiloff*, 35 AD3d 650 (2d Dept 2006).

The accident herein resulted from an elevation-related risk and hence, is within the contemplation of Labor Law §240(1). As for Plaintiff's claim pursuant to Labor Law §241(6), that statute 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 . . ."

Section 241(6) "by its very terms, imposes a *nondelegable* duty of reasonable care upon owners and contractors 'to provide reasonable and adequate protection and safety' to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being

performed.’ ” *Rizzuto v L.A. Wenger Contracting Co., Inc.*, 91 NY2d 343, 348 (1998), citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 (1993); *Long v Forest Fehlhaber*, 55 NY2d 154, 160, *rearg den.* 56 NY2d 805 (1982); *Allen v Cloutier Constr. Corp.*, 44 NY2d 290-299-300, *rearg den.* 45 NY2d 776 (1978). This duty, too, is absolute and liability is imposed upon owners and general contractors even in the absence of supervision or control of the work. *Allen v Cloutier Constr. Corp.*, *supra*; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*.

Further, once it has been alleged a concrete specification of the Industrial Code have been violated, “it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused Plaintiff’s injury.” *Rizzuto v L.A. Wenger Contracting Co., Inc.*, *supra* at 350.

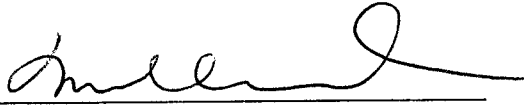
Plaintiff has alleged a sufficiently specific Industrial Code provision and a question of fact has been raised as to whether a violation of these provisions was a proximate cause of his injury. *Hart v Turner Const. Co.*, 30 AD3d 213 (1st Dept 2006). Hence, DHI’s application is **denied**. The Court finds that DHI is not entitled to summary judgment on this claim. It is hereby

ORDERED, that the parties are directed to appear for trial in DCM on February 21, 2008 at 9:30 a.m.

This constitutes the **DECISION** and **ORDER** of the Court.

DATED: February 15, 2008
Mineola, N.Y.

ENTER:


HON. MICHELE M. WOODARD
J.S.C.

ENTERED