

Khan v New York Life Ins. Co.
2008 NY Slip Op 31109(U)
April 4, 2008
Supreme Court, New York County
Docket Number: 0110636/2005
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 110636/2005

KHAN, HATIM K.

< NO.

110636/05

vs

NEW YORK LIFE INSURANCE

ON DATE

Sequence Number : 002

ON SEQ. NO.

002

SUMMARY JUDGMENT

ON CAL. NO.

The following papers, numbered 1 to _____ were read on this motion ~~to~~ for summary judgment

Notice of Motion/ and cross-motion ~~Order to Show Cause~~ ~~Affidavits~~ ~~Exhibits~~

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Memorandum

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion and cross-motion
are

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

APR 17 2008

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 4/4/08

M. Friedman
MARCY S. FRIEDMAN 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 57

PRESENT: Hon. Marcy S. Friedman, JSC

HATIM K. KHAN, et al.,

- against -

NEW YORK LIFE INSURANCE COMPANY, et
al.,

FILED
Plaintiff(s),
APR 17 2008
COUNTY CLERK'S OFFICE
NEW YORK
Defendant(s)

Index No.: 110636/2005

DECISION/ORDER

x

In this Labor Law action, plaintiff sues for injuries that occurred when he fell off a ladder while he was working at a construction site in Manhattan on February 21, 2004. Plaintiff moves for partial summary judgment as to liability on his Labor Law § 240(1) claim against defendant New York Life Insurance Company (“NY Life”). Third-party defendant Penava Mechanical Corp. (“Penava”) cross-moves for summary judgment dismissing the third-party complaint of defendant Jones Lang Lasalle Americas, Inc. (“Jones Lang”) against it. By separate motion, NY Life moves for summary judgment dismissing the complaint and all cross-claims against it, and for summary judgment on its indemnification claims against Jones Lang. Jones Lang cross-moves for partial summary judgment “on the issue of liability.” Defendant PJ Mechanical Service & Maintenance Corp. (“PJ”) cross-moves for summary judgment dismissing all cross- and counter-claims against it and, in the alternative, for summary judgment on its cross-claims against Penava.

It is undisputed that NY Life owned the premises and hired third-party defendant McCann, Inc. (“McCann”) as general contractor for a renovation project.¹ McCann hired PJ to

¹ McCann was in default at the time these motions were submitted.

install and relocate piping. PJ hired Penava, plaintiff's employer, to do that work. NY Life hired Jones Lang to manage the premises and the renovation project. It is also undisputed that on the date of the accident, plaintiff was in the basement, assembling and welding pipes that were part of the premises' steam system. Plaintiff was standing on an A-frame ladder, welding or preparing to weld a pipe onto another pipe in the ceiling, when both plaintiff and the ladder fell to the floor, causing plaintiff injuries. The parties sharply dispute what caused plaintiff and the ladder to fall.

Plaintiff's Labor Law § 240 (1) Claim

The standards for summary judgment are well settled. The movant must tender evidence, by proof in admissible form, to establish the cause of action "sufficiently to warrant the court as a matter of law in directing judgment." (CPLR 3212[b]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980].) "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers." (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985].) Once such proof has been offered, to defeat summary judgment "the opposing party must 'show facts sufficient to require a trial of any issue of fact' (CPLR 3212, subd. [b])."

(Zuckerman, 49 NY2d at 562.)

Labor Law § 240 (1) provides:

All contractors and 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.

"The purpose of the section is to protect workers by placing the 'ultimate responsibility' for worksite safety on the owner and general contractor, instead of the workers themselves."

(Gordon v Eastern Ry. Supply, Inc., 82 NY2d 555, 559 [1993]; Rocovich v Consolidated Edison

Co., 78 NY2d 509 [1991].) “Thus, section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury.” (Gordon, 82 NY2d at 559.)

Plaintiff moves for summary judgment as to liability on his Labor Law § 240(1) claim, on the ground that he was blasted off the ladder by steam and water that emanated from a pipe opened by Jones Lang. More particularly, plaintiff testified that his accident occurred in the following manner:

Probably I was up there on the ladder about 30 seconds and just as I was about * * * to put the welding rod into the stinger, suddenly I was, I was hit by a tremendous force of steam and hot water, blasting me and the ladder to the concrete floor. It felt as [if] I was being electrocuted.

(P.’s Dep. at 39.) Plaintiff further testified that the steam and water came from a pipe approximately five feet from where he was working and that he had not worked on that pipe. (Id. at 41-42.)

In opposition, defendants contend that the record contains differing versions as to how the accident occurred. Defendants note that plaintiff’s co-worker and supervisor, Sime Pavlovic, who was working nearby and heard plaintiff’s fall, testified that he saw water dripping from the pipe on which plaintiff was working, and that the water “wasn’t pressurized, but it was coming. Not like high pressure, but it was coming down.” (Pavlovic Dep. at 20-21.)

While plaintiff’s own version of the events indicates that an electric shock occurred at the time of the accident, defendants also contend that plaintiff made admissions in his hospital emergency room records (Ex. D to NY Life Motion) that he fell because he electrocuted himself and not because he was blasted from the ladder by the force of steam. One hospital record

describes the accident, under “Patient Statement,” as “electric shock/fall.” Another record states: “As patient was exchanging welding rods he electrocuted himself. Pt of contact was [symbol for right] hand * * *. Pt. reports that he couldn’t let go for a few seconds and was then throw [sic] backwards off the ladder.”

Under the weight of recent authority, a statement of a plaintiff in a hospital record as to the cause of an accident, even if not germane to diagnosis and treatment, is admissible as an admission if the record clearly identifies the plaintiff as the source of the statement. (Sec Martinez v New York City Tr. Auth., 41 AD3d 174 [1st Dept 2007]; Amann v Edmonds, 306 AD2d 362 [2d Dept 2003]; Quispe v Lemle & Wolff, Inc., 266 AD2d 95 [1st Dept 1999]. See also Eitner v 119 W. 71st St. Owners Corp., 253 AD2d 641 [1st Dept 1998]. But see Schroder v Consolidated Edison Co., 249 AD2d 69 [1st Dept 1998].) While it is not clear from the face of the hospital records at issue that plaintiff made all of the recorded statements regarding the cause of the accident, the records directly attribute to plaintiff at least some of the statements that the cause of his fall was electrocution.

On this record, plaintiff fails to demonstrate as a matter of law that he is entitled to judgment against NY Life as to liability on his claim under Labor Law § 240(1). NY Life and Jones Lang fail to demonstrate as a matter of law that this claim should be dismissed. It is well settled that “the failure to secure a ladder to insure that it remains stable and erect while the plaintiff [is] working on it constitutes a violation of Labor Law § 240(1) as a matter of law.” (Kapovic v 450 Lexington Venture, 280 AD2d 321, 322 [1st Dept 2001] [internal quotation marks and citation omitted].) “When the circumstances of a worker’s task create a risk related to an elevation differential, a basis for the imposition of liability under Labor Law § 240(1) is

established. Where the furnished protective devices fail to prevent a foreseeable external force from causing a worker to fall from an elevation, that worker is entitled to judgment as a matter of law under the statute.” (Cruz v Turner Constr. Co., 279 AD2d 322, 322-323 [1st Dept 2001] [internal quotation marks, brackets and citation omitted]; Dunn v Consolidated Edison Co., 272 AD2d 129 [1st Dept 2000].) However, where there is conflicting evidence as to how the plaintiff fell from the ladder, a triable issue may exist “as to whether plaintiff’s injury was attributable to a failure on defendants’ part to provide adequate protective devices or was solely attributable to plaintiff’s own conduct.” (See Petrocelli v Tishman Constr. Co., 19 AD3d 145 [1st Dept 2005]. In order to raise a triable issue, the conflict in the evidence must be material. (See Ernish v City of New York, 2 AD3d 256 [1st Dept 2003]; John v Baharestani, 281 AD2d 114 [1st Dept 2001].)

Here, both plaintiff and his co-worker acknowledge that the ladder on which plaintiff was working was in good condition. (See P.s’ Dep. at 38; Pavlovic Dep. at 15.)² Moreover, the court finds that there is a material conflict in the evidence as to the cause of plaintiff’s fall. On the above authority, therefore, summary judgment is not proper. In so holding, the court notes that proof that plaintiff was electrocuted will not necessarily bar recovery in plaintiff’s favor. As this Department has held:

[T]he fact that the plaintiff fell off the ladder only after he sustained an electric shock does not preclude recovery under Labor Law § 240(1) for injuries sustained as a result of the fall from the ladder. However, the plaintiff is not entitled to summary judgment under Labor Law § 240(1) as there are questions of fact as to whether, inter alia, the ladder, which was not shown to be defective

²Plaintiff’s contention that the ladder was defective because it lacked rubber feet was raised for the first time on the reply and is therefore not properly considered by the court. (See Ritt v Lenox Hill Hosp., 182 AD2d 560, 562 [1st Dept 1992].) In any event, plaintiff’s claim is not that he fell because the ladder slipped, but that he was thrown from the ladder by the force of water coming from a pipe.

in any way, failed to provide proper protection, and whether the plaintiff should have been provided with additional safety devices.

(Weber v 1111 Park Ave. Realty Corp., 253 AD2d 376, 378 [1st Dept 1998] [internal quotation marks and citation omitted], quoting Gange v Tilles Inv. Co., 220 AD2d 556, 558 [2d Dept 1995].)

Plaintiff's Labor Law § 241(6) Claim

The branch of NY Life's motion and Jones Lang's cross-motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim will be granted without opposition.

Plaintiff's Labor Law § 200 and Common Law Negligence Claims

The branch of NY Life's motion to dismiss plaintiff's Labor Law § 200 and common law negligence claims will be granted without opposition and for good cause shown based on NY Life's prima facie showing that it did not supervise or control plaintiff's work and that its liability, if any, is solely vicarious. The branch of Jones Lang's motion to dismiss these claims, although unopposed, will be denied, based on Jones Lang's failure to make a prima facie showing that it was not negligent. It is undisputed that Robert Fugowski, a mechanic employed by Jones Lang, opened a steam service valve prior to plaintiff's accident, in the belief that Penava's employees were not working on pipes that were connected to the valve. (See Fugowski Dep. at 160-162.) Mr. Fugowski also acknowledged that a valve leading to pipes on which trades are working should not be opened. (See id. at 158-159.) Triable issues of fact therefore exist as to whether Jones Lang was negligent.

Defendants' Cross-Claims

NY Life

NY Life moves for summary judgment against Jones Lang on its contractual indemnification claim pursuant to section 7.02 of the parties' management agreement (Ex. A to NY Life Motion), which provides in pertinent part: "Property Manager [Jones Lang] agrees to defend and hold and save Owner [NY Life] * * * free and harmless from all expenses, claims, liabilities, losses, judgments or damages, including reasonable attorneys' fees, which Owner may suffer or incur as a result of any negligence or misconduct of Property Manager * * *." It is undisputed that this agreement requires Jones Lang to indemnify NY Life if Jones Lang was negligent. As held above, NY Life has demonstrated that its liability, if any, is vicarious, whereas triable issues of fact exist as to how plaintiff fell and as to whether Jones Lang was negligent in causing the accident. The branch of NY Life's motion for summary judgment on its contractual indemnification claim will therefore be granted conditionally. (See e.g. Quichimbo v Vornado 640 Fifth Ave., L.L.C., 30 AD3d 194 [1st Dept 2006]; Crimi v Neves Assocs., 306 AD2d 152 [1st Dept 2003].)

The branch of NY Life's motion for dismissal of cross-claims against it is unopposed and should be granted. The court notes that while NY Life opposes the branch of Penava's motion for dismissal of the third-party complaint against it, and further argues that it is entitled to indemnification from Penava, NY Life does not move, and the court therefore will not entertain a request, for that relief.

PJ

PJ cross-moves for summary judgment dismissing all counter-claims and cross-claims against it, and in the event any claims against it survive, for summary judgment on its cross-claims against Penava for contractual indemnification and failure to procure insurance. Plaintiff

discontinued his claims against PJ by stipulation dated May 10, 2007. Penava discontinued its cross-claims against PJ by stipulation dated July 17, 2007. The remaining claims are therefore asserted only by NY Life and Jones Lang.

As to NY Life's and Jones Lang's claims against PJ for contractual indemnification, section 4.1 of the purchase order between McCann and PJ (Ex. G to PJ's Cross-Motion) provides for PJ to indemnify the owner (NY Life) and its employees and agents against "all claims * * * arising out of or resulting from the performance of the Work, * * * provided such claim * * * is caused in whole or in part by any omission of Subcontractor [PJ], any subcontractor, anyone directly or indirectly employed by any of them or anyone for whose acts any of them may be liable." On this record, PJ fails to eliminate triable issues of fact relevant to the determination of its obligation to indemnify under this provision, including issues as to whether PJ's subcontractor, Penava, failed to provide plaintiff with adequate safety devices. In so holding, the court notes that the undisputed evidence is that on the day of the accident, plaintiff was working under the supervision of Penava employee Pavlovic. (See Pavlovic Dep. at 8-9.) The branch of PJ's motion to dismiss NY Life's and Jones Lang's contractual indemnification claims against it should therefore be denied. The branch of PJ's motion to dismiss NY Life's and Jones Lang's contribution and/or common law indemnity claims against it should, however, be granted, as these defendants fail to raise a triable issue of fact as to PJ's negligence.

While PJ seeks dismissal of all cross-claims against it, its moving papers do not specifically address NY Life's and Jones Lang's failure to procure insurance claims, and PJ does not submit evidence regarding these claims until its reply. The court accordingly declines to entertain a claim by PJ for dismissal of such claims.

The branch of PJ's motion for summary judgment on its cross-claims against Penava for contractual indemnification and failure to procure insurance should also be denied. As a threshold matter, Penava argues that PJ's motion is untimely. By so ordered stipulation dated February 1, 2007, the court extended the parties' time to move for summary judgment until 120 days from the filing of the note of issue. The computer record of this case shows that the note of issue was filed on February 14, 2007. Plaintiff made a timely motion for summary judgment and Penava served a timely cross-motion to plaintiff's motion on June 6, 2007. PJ's cross-motion (to a separate motion by New York Life) was not served until July 24, 2007, after the 120 day deadline. However, a cross-motion for summary judgment made after the 120 day period "may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made seeking relief 'nearly identical' to that sought by the cross-motion." (Filannino v Triborough Bridge & Tunnel Auth., 34 AD3d 280, 281 [1st Dept 2006] [internal citation omitted].) PJ's motion raises certain key issues that are identical to those raised in Penava's motion, including whether Penava failed to provide plaintiff with adequate safety devices. The motion will therefore be considered.

As to the contractual indemnification claim, the parties dispute whether the purchase order between PJ and Penava contains a hold harmless clause. The purchase order offered by PJ (Ex. H to PJ's Cross-Motion) contains a hold harmless clause requiring Penava to indemnify PJ against all claims "arising out of or resulting from the performance of the work, * * * provided such claim * * * is caused in whole or in part by any negligent or willfull [sic] act or omission of contractor [Penava] * * *." Penava submits the affidavit of its vice-president, Daniel DeVita, attesting that Penava has a long history of working on jobs with PJ, and that this hold harmless

clause was contained in a purchase order for a different job that PJ hired Penava to perform. The court finds that this affidavit is sufficient to raise a triable issue of fact as to whether there is a contractual indemnification agreement between these parties. Even assuming arguendo that the hold harmless clause is part of the parties' purchase order, PJ fails to eliminate triable issues of fact as to whether Penava failed to provide plaintiff with adequate safety devices and thus was negligent. Summary judgment on the contractual indemnification claim is therefore premature.

PJ's claim for failure to procure insurance is governed by the purchase order annexed to PJ's motion (Exhibit H), as Penava does not contest the authenticity of this purchase order, except as to whether it included a separate page containing a hold harmless clause. Paragraph 10 of the purchase order provides: "If, in carrying out the provisions of this Purchase Order, Seller performs any work at project site, the Seller agrees to furnish Certificate of Insurance for General Liability, Automobile Liability, and Worker's Compensation prior to commencing work."

While PJ asserts that Penava was required to procure insurance for PJ, it does not discuss the specific language of paragraph 10 and, in particular, whether this provision required Penava to purchase insurance only for Penava or for both Penava and PJ. As this issue has not been adequately addressed, the branch of PJ's motion for summary judgment on its failure to procure insurance claim will be denied.

Penava

Penava cross-moves for summary judgment dismissing Jones Lang's third-party claims against it. The branch of the motion to dismiss the common law indemnification or contribution claim should be granted in the absence of any opposition and of any showing that plaintiff sustained a grave injury. (See Workers Compensation Law §11.) The branch of the motion to

dismiss the contractual indemnification claim should also be granted. Jones Lang fails to raise a triable issue of fact as to whether the AIA document referred to in paragraph 14 of the purchase order between PJ and Penava was executed, and therefore as to whether there is a contractual indemnification provision pursuant to which Penava might be obligated to indemnify Jones Lang.

The court has considered the parties' remaining contentions and finds them without merit.

It is accordingly hereby ORDERED that plaintiff's motion for summary judgment is denied; and it is further

ORDERED that NY Life's motion for summary judgment motion is granted to the following extent: Plaintiff's claims against NY Life under Labor Law §§ 241(6) and 200, and for common law negligence are dismissed; and all cross-claims against NY Life are dismissed; and NY Life is granted judgment as to liability on its contractual indemnification claim against Jones Lang conditioned on a finding at trial that Jones Lang was negligent; and it is further

ORDERED that Jones Lang's cross-motion for summary judgment is granted to the extent of dismissing plaintiff's claim against Jones Lang under Labor Law § 241(6); and it is further

ORDERED that PJ's cross-motion for summary judgment is granted to the extent of dismissing NY Life's and Jones Lang's cross-claims against it for contribution and common law indemnification; and it is further

ORDERED that Penava's cross-motion for summary judgment is granted to the extent of dismissing the third-party complaint against it.

This constitutes the decision and order of the court.

Dated: New York, New York
April 4, 2008



MARCY FRIEDMAN, J.S.C.

FILED
APR 17 2008
COUNTY CLERK'S OFFICE
NEW YORK