

Diaz v 333 E. 66th St. Corp.

2008 NY Slip Op 32222(U)

July 15, 2008

Supreme Court, Queens County

Docket Number:

Judge: Lawrence Vincent Cullen

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE LAWRENCE V. CULLEN IA Part 6
Justice

	x	
JOSELITO DIAZ,		Index Number <u>10864</u> 2006
Plaintiff,		Motion
- against -		Date <u>April 15,</u> 2008
333 EAST 66 TH STREET CORPORATION,		Motion
et al.		Cal. Number <u>8</u>
Defendants.		Motion Seq. No. <u>1</u>
	x	

The following papers numbered 1 to 23 read on this motion by 333 East 66th Street Corporation (333 East) and Lawrence Properties, Inc., (collectively referred to herein as "333 East/Lawrence"), for summary judgment in their favor dismissing the complaint and for summary judgment in their favor on their claims for contractual and common-law indemnification against Helen Hamlin; cross motion by plaintiff for summary judgment in his favor on his claims pursuant to Labor Law § 240(1); and cross motion by Hamlin for summary judgment in her favor as against Serene Construction and to dismiss the third-party action.

	<u>Papers Numbered</u>
Notice of Motion - Affidavits - Exhibits	1-4
Notices of Cross Motions-Affidavits-Exhibits	5-12
Answering Affidavits - Exhibits	13-18
Reply Affidavits	19-23

Upon the foregoing papers it is ordered that the motion and cross motions are decided as follows:

Plaintiff in this negligence/labor law action seeks damages for personal injuries sustained on March 1, 2006, when he fell from an elevated height while painting and plastering a ceiling and closet in connection with a renovation project to adjoin two apartments in a cooperative building at 333 East 66th Street, in New York City (premises). It is alleged that plaintiff was directed to

stand on top of two inverted buckets, stacked one on top of the other, by his employer, Serene Construction Corp (Serene). 333 East/Lawrence move for summary judgment in their favor and to dismiss the complaint pursuant to CPLR 3212. Plaintiff cross-moves for summary judgment in his favor on his claims pursuant to Labor Law § 240(1). Hamlin cross-moves for summary judgment in her favor on her claims against Serene. Plaintiff opposes the motion. 333 East/Lawrence oppose plaintiff's cross motion. Hamlin opposes the branch of the motion which seeks indemnification from Hamlin.

Motion by 333 East/Lawrence

An "implicit precondition" to the duty to provide construction site workers with a safe place to work is that the party charged with such responsibility have the authority to control the activity bringing about the injury (Comes v New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Sabato v New York Life Insurance Company, 259 AD2d 535 [1999]). 333 East/Lawrence established their entitlement to summary judgment dismissing the causes of action pursuant to Labor Law § 200 and common-law negligence by demonstrating that they did not exercise control over the work performed, or have actual or constructive notice of the allegedly dangerous condition (see, Russin v Picciano & Son, 54 NY2d 311 [1981]; O'Donoghue v New York City School Const. Authority, 1 AD3d 333 [2003]; Bright v Orange & Rockland Utils., 284 AD2d 359 [2001]; Braun v Fischbach & Moore, 280 AD2d 506 [2001]; Loiacono v Lehrer McGovern Bovis, 270 AD2d 464 [2000]).

In support of the motion the movants submitted, *inter alia*, a certified transcript of plaintiff's examination before trial testimony. Plaintiff testified to the following: Plaintiff was employed by Serene to perform painting and plastering work at the premises. Plaintiff was putting plaster up on a closet at the premises when he fell from an elevated height. Plaintiff stated that he was directed by his employer to stand on the buckets, one placed on top of the other, to access the closet area where he was plastering, and that he was elevated at least eight feet; when he fell, one of the buckets that he was standing on also fell over. Plaintiff alleges that he was supervised by his boss, "Stanley" of Serene Construction, and that he was told to use the buckets because someone else was using the ladders at the site.

It is undisputed that plaintiff was under the supervision and direct control of his employer and that 333 East/Lawrence were not involved in the supervision or control of the renovation project. Hamlin, the proprietary lessee, testified that she was required to get the approval from the co-op board for the renovations at the premises; that she retained Serene to perform the work and

submitted her architect's plans to the managing agent, Lawrence Properties, along with a letter indicating that she had retained Serene to perform the work. Hamlin further testified that there were no requirements in hiring the contractor placed upon the building except as to insurance; the building required the contractor to be licensed and required Hamlin to obtain insurance and to name the building as an additional insured. Finally, Hamlin testified that no one in the building ever worked in the apartment during the renovation.

Plaintiff's claims pursuant to Labor Law §§ 240(1) and 241(6) are also dismissed as 333 East and Lawrence are not "owners" within the meaning of the Labor Law (see, Bosch v 229 West 97 Realty Associates, 279 AD2d 373 [2001]; Brown v Christopher Street Owners Corp., 211 AD2d 441 [1995], affd on other grounds 87 NY2d 938). To recover under Labor Law §§ 200, 240 and 241 as a member of the special class for whose protection these provisions were adopted, a plaintiff must establish two criteria: (1) that he was permitted or suffered to perform work on a structure and, (2) that he was hired by the owner, the general contractor or an agent of the owner or general contractor (Mordkofsky v V.C.V. Dev. Corp., 76 NY2d 573 [1990], citing Whelen v Warwick Val. Civic & Social Club, 47 NY2d 970 [1979]). As there is no suggestion that Hamlin functioned as the agent of either the cooperative corporation or its managing agent in engaging the services of plaintiff, he has failed to assert any grounds to impose liability upon these two defendants. "That defendant [Hamlin] is an owner of shares in the cooperative corporation and the holder of a proprietary lease in premises operated and maintained by the managing agent does not suffice to hold either the cooperative or the agent answerable for plaintiff's injuries" (see, Brown v Christopher Street Owners Corp., supra).

Finally, plaintiff cannot state a cause of action under Labor Law § 241(6) because he failed to allege the violation of a specific applicable safety regulation (see O'Hare v City of New York, 280 AD2d 458 [2001]). While plaintiff alleges violations of numerous sections of the New York Code of Rules and Regulations, they are either too general or inapplicable to establish liability.

The court notes the following: Sections 12 NYCRR 23-1.2 - 1.4 are inapplicable as these sections consist of introductory findings of fact, a general statement of the application of the rules and a list of definition of terms. 12 NYCRR 23-1.5 is not sufficiently specific to support a claim under Labor Law § 241(6) (see, Carty v Port Authority of New York and New Jersey, 32 AD3d 732 [2006]; Sajid v Tribeca North Assoc., 20 AD3d 301 [2005]). 12 NYCRR 23-1.7 requires that ladderways, stairways, work areas and passages be

kept clear of accumulated debris and is inapplicable because this case doesn't involve accumulated debris or tripping hazards. 12 NYCRR 23-1.16 and 1.17 involve the construction and inspection of safety belts and life net, respectively. Since there are no allegations of a failure to properly construct or inspect safety belts or life nets, these sections do not apply. 12 NYCRR 23-1.21 is inapplicable because it outlines the construction requirements of ladders and how the same are to be secured. 12 NYCRR 23-1.22 involves ramps and runways, which are not relevant under the instant facts. 12 NYCRR 23-5.3, 5.10 and 5.18 all deal with scaffolds which was not used herein. Finally, 12 NYCRR 23-9.6 involves aerial baskets, which are not relevant herein.

The branch of the motion which seeks contractual indemnification by 333 East/Lawrence from Hamlin is granted based upon the provisions of the contract (see, generally Baron v Grant, 28 AD3d 608 [2008]; Tiffany at Westbury Condominium By Its Board of Managers v Marielli Development Corp., 40 AD3d 1073 [2007]). 333 East/Lawrence are not entitled to common-law indemnification from Hamlin as Hamlin was not an active tort-feasor and did not exercise any actual control or supervision of the work (see, Walker v Trustees of Univ. of Pennsylvania, 275 AD2d 266 [2000]).

Cross Motion by Plaintiff

The cross motion by plaintiff for summary judgment on his claims pursuant to Labor Law § 240(1), is denied. Hamlin, the proprietary lessee, hired plaintiff's employer to renovate/combine the two apartments. The cross motion by plaintiff for summary judgment on its claims under 240(1) is denied based upon it being established that plaintiff's employer was hired by Hamlin, not 333 East or its managing agent, Lawrence, and that Hamlin was not acting as the owner's agent (see, Brown v Christopher St. Owners Corp., supra). Aside from the agreement allowing Hamlin to renovate, the deposition testimony of the parties shows that neither defendant exercised supervision or control over the renovation work. Absent any controverting proof, defendants cannot be held liable, in these circumstances, as an "owner" under Labor Law § 240(1) (see, Marchese v Grossarth, 232 AD2d 924 [1996], lv denied 89 NY2d 809).

Cross Motion by Hamlin

The cross motion by Hamlin for summary judgment on her cross claims against Serene is granted (see, generally Great Northern Ins. Co. v Interior Constr. Corp., 7 NY3d 412 [2006]). Hamlin entered into a contract with Serene to perform construction work at the premises. Pursuant to the provisions of the contract, Serene

would indemnify Hamlin for the subject claim as Hamlin was listed as an additional insured.

The branch of the cross motion which seeks to dismiss the third-party complaint is denied (see, Landgraff v 1579 Bronx River Avenue, LLC, 18 AD3d 385 [2005]).

Conclusion

The branches of the motion by 333 East/Lawrence which seek to dismiss plaintiff's claims pursuant to Labor Law §§ 200, 240(1) and 241(6), and for summary judgment on its claims for contractual indemnification, are granted. The branch of the motion which seeks common-law indemnification from Hamlin is denied. The cross motion by plaintiff is denied. The cross motion by Hamlin is granted, except the branch thereof which seeks to dismiss the third-party complaint is denied.

Dated: July 15, 2008

LAWRENCE V. CULLEN, J.S.C.