

Leonard v Davis Homes, Inc.

2008 NY Slip Op 32368(U)

August 18, 2008

Supreme Court, Suffolk County

Docket Number: 0023348/2005

Judge: Arthur G. Pitts

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ORDERED that these motions are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (#003) by defendant Sidaras Concrete, Ltd. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and any cross claims asserted against it, is granted; and it is further

ORDERED that the cross motion (#004) by defendant Davis Homes, Inc. for an order pursuant to CPLR 3212 granting summary judgment dismissing the plaintiff's complaint and any cross claims asserted against it, is granted to the extent of dismissing the plaintiff's Labor Law § 240(1) claim, as well as the plaintiff's Labor Law § 241(6) claim based upon the alleged violation of 12 NYCRR § 23-2.7, and is otherwise denied; and it is further

ORDERED that the motion (#005) by third-party defendant Klein Electrical Incorporated for an order pursuant to CPLR 3212 granting summary judgment dismissing the third-party complaint and any cross claims asserted against it, as well as costs and sanctions over and against defendant Sidaras Concrete, Ltd. is denied; and it is further

ORDERED that the cross motion (#006) by plaintiff for an order pursuant to CPLR 3212 granting summary judgment in his favor as to the liability of Davis Homes, Inc., based upon its violation of Labor Law § 240(1), is denied, and it is further

ORDERED that the cross motion (#007) by third-party defendant Davis Homes, Inc. for an order vacating the stipulation of discontinuance it executed in favor of Klein Electrical Incorporated, and for an order granting it indemnification over and against Klein Electrical Incorporated, including costs, is denied.

Plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240(1) and 241(6), and common-law negligence, for injuries he suffered in a fall at the construction site for a new home owned by defendant Davis Homes, Inc. (Davis), for which Davis also acted as the general contractor. Davis employed various subcontractors, including defendant Quality Assured Construction, Inc. (Quality), which was hired to perform the framing and rough carpentry; defendant Sidaras Concrete, Ltd. (Sidaras), which poured the foundation walls and floors; and third-party defendant Klein Electrical Incorporated (Klein), which performed the electrical work.

Plaintiff testified at his deposition that he was an electrician employed as a lead mechanic for Klein. Plaintiff's task for the day of his accident was to run electrical lines for switches, boxes, and fixtures to the main panel in the basement. To get to the basement, plaintiff utilized wooden stairs leading from the first floor. He testified that these were permanent stairs, although they were unfinished and had no railings or walls around them. The staircase was nailed to the first floor but was suspended six-to-eight inches above the concrete basement floor. The bottom portion of the stairs was supported by a two-by-four on each side, with each two-by-four nailed to the steps and to the ceiling joist above. Plaintiff stated that as he descended and approached the bottom part of the steps, they would wobble

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slightly but that, based on his experience, he considered the wobble normal and did not complain about it. On a work day prior to his accident, plaintiff and Davis' principal, Robert Davis, had gone to the basement together and had proceeded down and up the stairs a few steps apart, without incident. On the day of his accident the plaintiff had gone down and up the stairs approximately 10 times but on the last trip, as he took his first step to go down the stairs, they detached from the first floor and plaintiff fell to the basement, sustaining the injuries complained of herein.

It is well settled that “a stairway which is, or is intended to be, permanent – even one that has not yet been anchored or secured in its designated location, or completely constructed – cannot be considered the functional equivalent of a ladder or other ‘device’ as contemplated by [Labor Law] section 240 (1)” (*Milanes v Killerman*, 41 AD3d 1058, 1060-1061, 838 NYS2d 256 [2007], quoting *Williams v City of Albany*, 245 AD2d 916, 917, 666 NYS2d 800 [1997], *lv dismissed* 91 NY2d 957, 671 NYS2d 717 [1998]; *see also*, *Caruana v Lexington Vil. Condominiums at Bay Shore*, 23 AD3d 509, 806 NYS2d 634 [2005]; *Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 801 NYS2d 373 [2005]). “Such a structure functions as a permanent passageway between two parts of the building, not as a ‘tool’ or ‘device’ that is employed for the express purpose of gaining access to an elevated worksite” (*Milanes v Killerman*, *supra* at 1061, *Williams v City of Albany*, *supra* at 917). Here, the staircase, even though it had yet to be permanently supported or affixed to the basement floor, was a “normal appurtenance to the building” and was not designed as a safety device to protect plaintiff from an elevation-related risk (*Gallagher v Andron Constr. Corp.*, 21 AD3d 988, 989, 801 NYS2d 373 [2005]; *Parsuram v I.T.C. Bargain Stores*, 16 AD3d 471, 791 NYS2d 616 [2005]; *Norton v Park Plaza Owners Corp.*, 263 AD2d 531, 532, 694 NYS2d 411 [1999]). Accordingly, the plaintiff’s Labor Law § 240(1) claim is dismissed against all defendants (CPLR 3212[b]; *Rogers v C/S Assoc. Ltd. Partnership*, 273 AD2d 523, 708 NYS2d 524, *lv denied* 95 NY2d 769, 722 NYS2d 473 [2000]) and his motion for summary judgment on this claim is correspondingly denied.

Labor Law § 241(6) requires owners and general contractors to “provide reasonable and adequate protection and safety” for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. It creates a duty that is nondelegable, and an owner, general contractor, or agent who breaches that duty may be held liable in damages regardless of whether it had actually exercised supervision or control over the work (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Long v Forest-Fehlhaber*, 55 NY2d 154, 448 NYS2d 132 [1982]). Therefore, a plaintiff who asserts a viable claim under § 241(6) wherein the rule or regulation alleged to have been breached is a “specific positive command” and not merely “general safety standards” need not show that defendants exercised supervision or control over the work site or had actual or constructive notice in order to establish a right of recovery (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 670 NYS2d 816 [1998]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, *supra*).

Plaintiff has confined his opposition to the defendants’ alleged violations of the Industrial Code at 12 NYCRR §§ 23-1.7 (f), 23-1.11 (c), and 23-2.7(e). Section 23-1.7 (f), entitled “Vertical passage,” provides:

Stairways, ramps or runways shall be provided as the means of access to working levels above or below ground except where the nature or the progress of the work prevents their

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installation in which case ladders or other safe means of access shall be provided.

The defendants have not established that this section is insufficient, as a matter of law, to support the plaintiff's § 241(6) claim (*see, Miano v Skyline New Homes Corp.*, 37 AD3d 563, 656, 830 NYS2d 257 [2007]; *Gonzalez v Pon Lin Realty Corp.*, 34 AD3d 638, 639, 826 NYS2d 94 [2006]). Accordingly, summary judgment dismissing this claim is denied.

Section 23-1.11, entitled "Lumber and nail fastenings," provides, in pertinent part:

(c) All nails shall be driven full length and shall be of the proper size, type, length and number to provide the required strength at all joints. Only double-headed or screw-type nails shall be used in the construction of scaffolds.

Mr. Davis testified that, when he examined the stairs after the accident, he saw that the nails had remained attached to the first floor, while the stairs had pulled out and fallen to the basement, and he speculated that the nails used were insufficient for the task. Therefore, there is a question as to whether the nails was adequate, and the defendants have not established that this section is inapplicable, as a matter of law. Further, section 23-1.11 has been held to be specific enough to form a predicate for a § 241(6) claim (*Skudlarek v Bethlehem Steel Corp.*, 251 AD2d 973, 974, 673 NYS2d 344 [1998]). Accordingly, summary judgment dismissing this claim is denied.

Section 23-2.7, entitled "Stairway requirements during the construction of buildings," provides:

(c) Protective railings. The stairwells of temporary wooden stairways and of permanent stairways where enclosures or guard rails have not been erected shall be provided with a safety railing constructed and installed in compliance with this Part (rule) on every open side. Every stairway and landing shall be provided with handrails not less than 30 inches nor more than 40 inches in height, measured vertically from the nose of the tread to the top of the rail.

Here, the plaintiff's testimony is devoid of any statement that the lack of a railing was a proximate cause of his fall (*compare, Kanarvogel v Tops Appliance City*, 271 AD2d 409, 705 NYS2d 644, *lv dismissed* 95 NY2d 902 [2000]), rather, he testified that the stairs detached from the floor above and that he and the stairs fell to the basement. Accordingly, summary judgment dismissing this claim is granted.

While the plaintiff's Labor Law § 241(6) claims based upon the alleged violation of sections 23-1.7 (f) and 23-1.11 (c) remain unresolved, a violation of the Industrial Code is considered only some evidence of negligence. The jury will resolve the issue of whether the operation or conduct at the work site was reasonable and adequate under the particular circumstances and whether plaintiff's contributory negligence, if any, was a factor (*Rizzuto v L. A. Wenger Contr. Co.*, *supra*; *Herman v St. John's*

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Episcopal Hosp., 242 AD2d 316, 678 NYS2d 635 [1997]).¹ Nevertheless, as a subcontractor without the authority to control the worksite Sidaras is not subject to the vicarious liability imposed by Labor Law § 241(6), and summary judgement dismissing this claim is granted to it (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]).

Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work (*Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]; *Mordkofsky v V.C.V. Dev. Corp.*, 76 NY2d 573, 561 NYS2d 892 [1990]). It applies to owners, contractors, or their agents (*Russin v Louis N. Picciano & Son*, *supra*) who exercise control or supervision over the work, or either created the dangerous condition or had actual or constructive notice of it (*Lombardi v Stout*, 80 NY2d 290, 294-295, 590 NYS2d 55 [1992]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2000]). “Where, as here, a worker’s injuries result from an unsafe or dangerous condition existing at a work site, rather than from the manner in which the work is being performed, the liability of a general contractor, and of an allegedly negligent subcontractor, depends upon whether they had notice of the dangerous condition and control of the place where the injury occurred” (*Wolfe v KLR Mech.*, 35 AD3d 916, 918, 826 NYS2d 458 [2006]; *Jurgens v Whiteface Resort on Lake Placid*, 293 AD2d 924, 926-927, 742 NYS2d 142 [2002]; *Johnson v Packaging Corp. of Am.*, 274 AD2d 627, 629, 710 NYS2d 699 [2000]). Further, a defendant moving for summary judgment dismissing a Labor Law § 200 claim based upon a defect or dangerous condition on the property has the initial burden to establish, *prima facie*, that it did not create nor have actual or constructive notice of the dangerous condition alleged (*Gadani v Dormitory Auth. of State of N.Y.*, 43 AD3d 1218, 841 NYS2d 709, 712 [2007]; *Wolfe v KLR Mech.*, *supra* at 919; *Bonse v Katrine Apt. Assoc.*, 28 AD3d 990, 991, 813 NYS2d 578 [2006]). Davis, the general contractor which controlled the worksite, has not established its entitlement to summary judgment as to plaintiff’s Labor Law § 200 and common-law negligence claims. By contrast, Sidaras established that it did not create or have notice of the defective stairs (*Kelarakos v Massapequa Water Dist.*, 38 AD3d 717, 832 NYS2d 625 [2007]), and summary judgment dismissing the plaintiff’s Labor Law § 200 and common-law negligence claims, as well as any cross claims asserted against it, is granted to Sidaras.

In summary, the plaintiff’s Labor Law § 240(1) claim is dismissed (CPLR 3212[b]); his Labor Law § 241(6) claim, based upon the alleged violation of 12 NYCRR §§ 23-1.7 (f) and 23-1.11 (c), survives as against Davis and Quality, and is otherwise dismissed; and his Labor Law § 200 and common-law claims survive as against Davis and Quality, and are otherwise dismissed. The claims dismissed herein are severed and the plaintiff’s remaining claims shall continue.

The motion by Klein seeks to dismiss the third-party complaint and any cross claims asserted

¹ There were two stairways to the basement: the wooden steps from the first floor and cement steps leading from the garage. The plaintiff’s coworker, Victor Lagattolla, testified at his deposition that the plaintiff told him that the wooden steps “don’t feel right.” Mr. Lagattolla testified that he understood that to mean to be cautious and he took it upon himself to avoid the wooden steps and to only use the cement steps. Therefore, the defendants argue that, contrary to the plaintiff’s testimony, he was aware that the steps were unsafe but continued to use them. However, Mr. Lagattolla also testified that he originally used the wooden steps but did not notice a sway or unsteadiness, and used the cement steps because they were closer to his work. Therefore, the weight to be afforded Lagattolla’s testimony is also to be resolved by the jury.

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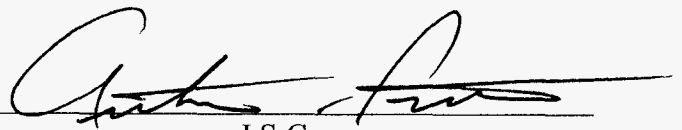
against it, and seeks to have the Court impose costs and sanctions over and against Sidaras for Sidaras' refusal to voluntarily discontinue its cross claim against Klein. Klein relies upon Sidaras' refusal to join a stipulation of discontinuance previously executed by the plaintiff, Klein and Davis. The plaintiff's action against Sidaras is dismissed herein, and Klein's request for sanctions against Sidaras is denied because the Court does not find evidence of frivolous or bad faith action as contemplated by 22 NYCRR § 130-1.1 (*Broich v Nabisco*, 2 AD3d 474, 768 NYS2d 489 [2002]; *Karnes v City of White Plains*, 237 AD2d 574, 655 NYS2d 615 [1997]). Moreover, because the stipulation of discontinuance was not signed by all the parties, and therefore could not be filed with the Court, it is a nullity pursuant to CPLR 3217(a)(2). Accordingly, Klein's request to vacate it is denied as moot.

Davis' second cross motion also seeks what appears to be summary judgment on its claim for contractual indemnification over and against Klein. The agreement between Davis and Klein provides, in relevant part:

The subcontractor agrees to indemnify and hold the general contractor, including his agents and employees, harmless from and against any and all losses, claims, damages, penalties, or expenses, including reasonable attorneys fees, arising from bodily injury or death to any person and/or property damage including loss of use arising out of or in any way relating to the work performed or omission caused by the subcontractor, agents, or employees of the subcontractor under this contract.

The gravamen of the indemnification portion of Davis' motion is its reading of the holding in *Brown v Two Exchange Plaza Partners* (76 NY2d 172, 556 NYS2d 991 [1990]), where the Court of Appeals found that the subject agreement provided for indemnification even where the subcontractor was in no way negligent.² While that portion of the holding is relevant, *Brown* also stated that a general contractor who is guilty of negligence will be barred from recovering contractual indemnity by virtue of General Obligations Law § 5-322.1 (*id.* at 180; *see also, Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 823 NYS2d 765 [2006]; *Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 658 NYS2d 903 [1997]). Here, the issue of any negligence on the part of Davis is unresolved; therefore, the claim for contractual indemnification cannot be decided. Accordingly, Davis is denied summary judgment on its claim for contractual indemnification over and against Klein, and Klein's request for summary judgment dismissing the third-party complaint is correspondingly denied.

Dated: August 18, 2008


J.S.C.

FINAL DISPOSITION NON-FINAL DISPOSITION

² Davis thereby impliedly concedes that Klein was not negligent.