

Dean v The R.C. House LLC

2008 NY Slip Op 32592(U)

September 24, 2008

Supreme Court, New York County

Docket Number: 0100066/2006

Judge: Doris Ling-Cohan

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

PRESENT: **JUSTICE DORIS LING-COHAN**

PART 36

Justice

Charles Dean + Donna Dean

INDEX NO. 100066/2006

MOTION DATE _____

The R.C. House LLC
et al.

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for summary judgment

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

PAPERS NUMBERED

1, 2

Answering Affidavits — Exhibits _____

3

Replying Affidavits _____

4

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion by Third-party defendant Labor Lathing Corp for summary judgment of dismissal, is granted in accordance with the attached memorandum decision.

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/24/08



JUSTICE DORIS LING-COHAN 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 IAS PART 36

-----X
CHARLES DEAN and DONNA DEAN,
Plaintiffs,

DECISION AND
JUDGMENT

v.

Index. No. 100066/06

THE R.C. HOUSE LLC, MD CARLISLE
CONSTRUCTION CORP, and CENTURY MAX,
Defendants.

Motion Seq. No.: 003

-----X
CENTURY MAXIM CONSTRUCTION CORP,
Third-Party Plaintiff,

v.

REBAR LATHING CORP,
Third-Party Defendant.

-----X
THE R.C. HOUSE LLC and M.D CARLISLE
CONSTRUCTION CORP,
Second Third-Party Plaintiffs,

v.

NEW TOWN CORP,
Second Third-Party Defendant

-----X
LING-COHAN, DORIS, J.S.C.

FILED
SEP 26 2008
COUNTY CLERK'S OFFICE
NEW YORK

In this personal injury action, third party defendant, Rebar Lathing Corp. ("RLC") moves pursuant to CPLR 3212 for summary judgment dismissing the third party complaint and all cross claims against it.

Plaintiff Charles Dean ("Dean"), a construction worker employed by RLC, alleges that he was injured in the course of his employment when he tripped on a piece of concrete debris that was lying on the stairway of a building under construction at 18 West 48th Street in New York

City (“the premises”). Dean commenced this action against the owner of the premises, R.C. House LLC (“House”) and MD Carlisle (“Carlisle”) the general contractor. Dean subsequently amended the complaint to add Century-Maxim Construction Corp. (“Century”), the company that performed concrete superstructure construction, as a defendant.

Thereafter, Century commenced a third party action against RLC, the subcontractor it hired to install the reinforcing steel that is included in the concrete. The third party complaint alleges, *inter alia*, that, if plaintiff sustained the injuries as he alleges, and if Century is found liable, then Century is entitled to contractual indemnification from RLC.¹

The subcontract between RLC and Century contains an indemnification clause, which states in pertinent part that RLC:

shall indemnify and hold harmless [Century] and/or their agents and employees . . . from and against all claims, damages, losses and expenses, including attorneys fees arising out of or resulting from the performance of work, provided any such claim, damage, loss or expense is (A) attributable to bodily injury . . . and is (B) caused in whole or in part by any neglect act or omission by [RLC] . . . or anyone directly or indirectly employed by [RLC] or anyone for whose acts [RLC] may be liable

[Affirmation in Opposition, Exh. A].

RLC now contends that it is entitled to summary judgment dismissing the third party complaint because the deposition testimony establishes that Dean’s injury was not caused in whole or in part by any negligent act or omission by RLC or any of its sub-tier contractors or

¹ Century agrees to dismissal, without prejudice, of its common law indemnification claims as it concedes that Dean’s injury, a broken ankle, does not rise to the level of “grave injury” as that term is defined in Section 11 of the Workers’ Compensation Law. [¶14, Aff. In Opposition].

anyone directly or indirectly employed by it. RLC claims that the deposition testimony demonstrates that the accident occurred when Dean stepped on a piece of concrete debris on the stairs; that Dean attributes the accident to the concrete debris and the poor lighting on the stairwell, and that the deposition testimony of both defendant MD Carlisle and Century also establishes that RLC did not create the condition that caused the accident and it is not responsible for removing debris from the stairwell or for the inspecting or replacing the lighting on the stairs.

In opposition to the motion for summary judgment, Century argues that the motion should be denied because the deposition testimony of Thomas Steinhart ("Steinhart"), an RLC foreman, creates a question of fact as to whether another RLC employee, Jody Goldsberry ("Goldsberry"), was a contributing cause of the accident. (Christofides Aff, , Exh. J, p. 39, ll 2-12).

DISCUSSION

In order to prevail on a motion for summary judgment, the movant must present a *prima facie* case demonstrating that there are no triable issues of fact and he or she is entitled to judgment as a matter of law. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]; *Prince v. DiBenedetto*, 189 A.D.2d 757, 759 [2nd Dept 1993]). Once the movant has established a *prima facie* case, the party opposing the motion for summary judgment bears the burden of "produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact . . . mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient. (*Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980])

In this case, RLC has established its *prima facie* case that it is entitled to judgment

dismissing the third party complaint and all cross claims against it. Dean testified that the accident happened when he stepped on a piece of concrete debris and that the accident was caused by the debris and poor lighting. (Christofides Aff., Ex. G, p. 31, ll 17-25; p. 32 ll 2-6) The deposition testimony of Century demonstrates that RLC did not create the concrete mortar debris on the stairwell (Christofides Aff, Ex. I, p. 51, ll 20-25; p. 52, ll 2-16), that it was not responsible for cleaning debris from the stairwell (Christofides Aff, Ex. I, p. 15, ll 8-20; p. 21, ll 10-18; p. 35, ll 25; p. 36, ll 2-5) and that it was the General Contractor's responsibility to clean the debris at the site. (Christofides Aff, Ex. I, p. 20, ll 9-23, p. 21, ll 2-3). In addition, RLC's deposition testimony demonstrates that it was not responsible for the lighting on the stairwell. (Christofides Aff, Ex. J, p. 98, ll 5-19)

Century does not dispute that RLC was not responsible for creating the concrete debris or for removing it. However, in opposition, Century points to the testimony of Steinhart, RLC's foreman, who stated that Jody Goldsberry, Dean's coworker, said that, at the time of the accident, Goldsberry was behind Dean on the stairs and encouraging Dean to "hustl[e]" down the stairs. (Christofides aff., Ex. J, p. 39, ll.2-12) Century contends that this testimony creates a question of fact as to whether Goldsberry, RLC's employee, was a contributing cause of the accident.

However, Steinhart's hearsay statement fails to create a question of fact regarding the cause of the accident as there is not a scintilla of evidence that Goldberry touched Dean as Dean was descending the stairs or that Dean was, indeed, "hustling" down the stairs. In fact, Steinhart also testified that neither Dean, nor Goldsberry said that they were running down the stairs. (Christofides Aff., Ex. J, p. 91, ll 24-25, p. 92, ll 2-8) Accordingly, Steinhart's statement that Goldsberry was "hustling" Dean by saying, "let's go" is insufficient to overcome RLC's *prima*

facie case establishing that the accident was caused by a piece of concrete debris on the stairs and poor lighting and that it did not arise from any neglect, act or omission by RLC or any of its sub-tier contractors or anyone directly or indirectly employed by RLC. Century's mere speculation and surmise that Goldsberry may have been a contributing factor cannot defeat RLC's motion for summary judgment. (See, *Benton v. 673 Realty Co.*, 33 A.D.3d 533, 535 [1st Dept 2006])

Accordingly, it is

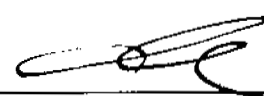
ORDERED that third party defendant, Rebar Lathing Corp.'s motion for summary judgment dismissing the complaint and all cross claims against it is granted.

The clerk is directed to enter judgment accordingly; it is further

ORDERED that within 30 days of entry of this order, Rebar Lathing Corp shall serve a copy of this order upon all parties with notice of entry.

The remainder of the action is severed and shall continue.

DATE 9/24/08



Hon. Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\dean.rchouse.wpd

FILED
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