

Echegaray v Queen of the Most Holy Rosary

2008 NY Slip Op 33067(U)

October 29, 2008

Supreme Court, Queens County

Docket Number: 8009/2006

Judge: Patricia P. Satterfield

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

| | | |
|---|---|-------------------------------------|
| | x | Index Number <u>8009</u> 2006 |
| JULIO ECHEGARAY, et al., | | |
| Plaintiffs, | | Motion Date <u>July 16,</u> 2008 |
| - against - | | |
| QUEEN OF THE MOST HOLY ROSARY ROMAN CATHOLIC CHURCH, et al., | | Motion Cal. Number <u>13</u> |
| Defendants. | | Motion Seq. No. <u>1</u> |

x

JOSEPH T. REILLY AND COMPANY, INC.,

Third-Party-Plaintiff,

- against -

JADE EXTERIOR CLEANING, INC.,

Third-Party Defendant.

x

The following papers numbered 1 to 36 read on this motion by plaintiffs, pursuant to CPLR 3212, for partial summary judgment on the cause of action brought under Labor Law § 240 (1) against defendants Queen of the Most Holy Rosary Roman Catholic Church (Church), Roman Catholic Diocese of Rockville Centre (Diocese) and Joseph T. Reilly, Inc. (Reilly, Inc.); on the cross motion by defendants Church and Diocese, pursuant to CPLR 3212, for summary judgment dismissing the complaint and cross claims against them, and on their cross claims against defendant Reilly, Inc.; on the cross motion by defendant Reilly, Inc., pursuant to CPLR 3212, for summary judgment dismissing the complaint and all cross claims against it; and on the cross motion by third-party defendant Jade Exterior Cleaning, Inc. (Jade), pursuant to CPLR 3212, for summary judgment dismissing the third-party complaint and all cross claims against it, and for sanctions against defendant Reilly, Inc.

| | Papers <u>Numbered</u> |
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Upon the foregoing papers it is ordered that the motion and cross motions are determined as follows:

Defendant Reilly, Inc. agreed to paint the inside of a church on premises owned by defendant Church. Jade had an agreement with defendant Reilly, Inc. to complete the required painting. On the day of the accident, plaintiff Julio Echegaray was employed as a painter by third-party defendant Jade and was assigned to paint a portion of the wall near the ceiling of the church. In order to reach that portion of the wall, plaintiff climbed an extension ladder that was set on top of a Bakers scaffold. The Bakers scaffold was not secured by any other devices, but all four wheels were locked at the time plaintiff climbed onto it. From atop the Bakers scaffold, which was positioned a few feet away from the wall, the ladder was leaned against the wall and was not secured by any other devices. After plaintiff climbed the Bakers scaffold and the ladder and commenced painting, the scaffold allegedly tipped to one side, moving the ladder, which slid down the wall and resulted in plaintiff falling approximately 20 feet to the ground.

Subsequently, plaintiffs commenced this action against defendants to recover damages, alleging violations of Labor Law §§ 200; 240 (1); and 241 (6), and common-law negligence. Thereafter, defendants Church and Diocese asserted cross claims against defendant Reilly, Inc. Defendant Reilly, Inc. asserted cross claims against defendants Church and Diocese and commenced a third-party action against third-party defendant Jade. Thereafter, third-party defendant Jade asserted cross claims against defendants Church and Diocese and defendants Church and Diocese asserted cross claims against third-party defendant Jade.

In view of the fact that defendant Diocese established that it has no ownership interest in the subject premises and it has not been shown to have had any control or supervision over the premises, or that it would benefit from the work which led to the subject accident (see Grindley v Town of Eastchester, 213 AD2d 448, 449 [1995]), the branch of defendants Church and Diocese's cross motion for summary judgment is granted to the extent that all claims and cross claims against defendant Diocese are dismissed.

Labor Law § 240 (1) provides that contractors, owners and their agents "shall furnish or erect, or cause to be furnished or erected . . . scaffolding, hoists, stays, ladders . . . and other devices which shall be so constructed, placed and operated as to give proper protection" to workers employed on the premises. A prima facie case under Labor Law § 240 (1) requires a showing that a defendant's statutory violation was a proximate cause of the plaintiff's injury (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d 280, 289 [2003]; Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 [1993]).

Plaintiff has established a prima facie violation of Labor Law § 240 (1) (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 289; Guaman v New Sprout Presbyt. Church of N.Y., 33 AD3d 758, 759 [2006]). Uncontroverted evidence has established that plaintiff was injured as a result of using an extension ladder erected on top of a Bakers scaffold in order to perform his work. He was not provided with any other safety devices. The ladder was not secured from slippage and the scaffold was not secured from slippage or from tipping to one side. Plaintiff was injured when the scaffold tipped to one side, thereby causing the ladder he was on to slide down the wall. Defendants have failed to demonstrate that plaintiff was the sole proximate cause of the accident because plaintiff's supervisor, Giuseppe Raicovi, admitted that he assisted the workers in assembling the Bakers scaffold involved in the accident and admitted that he did not tell the workers to wait for a larger, safer scaffold to arrive at the work site (see Blake v Neighborhood Hous. Servs. of N.Y. City, 1 NY3d at 290; Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d 616, 618-619 [2008]). Thus, plaintiff has established that he was not provided with "proper protection" within the meaning of Labor Law § 240 (1). Therefore, his motion for partial summary judgment with respect to that cause of action is granted and the branches of defendants Reilly, Inc. and Church's cross motions for summary judgment dismissing plaintiff's Labor Law § 240 (1) claim are denied.

Under Labor Law § 241 (6), all contractors and owners must provide workers engaged in "construction, excavation or demolition work" with "reasonable and adequate protection and safety" in areas where such work is being performed. The duty to comply with this section is nondelegable and contractors and owners who contract for but who do not supervise or control said work may still be held liable for injuries on the premises (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 502 [1993]). "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation [promulgated by the Commissioner of the Department of Labor], was a proximate cause of the accident." (Mercado v TPT Brooklyn Assoc., LLC, 38 AD3d 732, 733 [2007]; see Ross v Curtis-Palmer

Hydro-Elec. Co., 81 NY2d at 501-502.) Contrary to defendant Reilly, Inc.'s contention, because painting is included in the Industrial Code's definition of construction work (see 12 NYCRR 23-1.4 [b] [13]), plaintiff may state a claim under Labor Law § 241 (6) in the instant case (see Joblon v Solow, 91 NY2d 457, 466 [1998]).

Plaintiff predicates his cause of action under Labor Law § 241 (6) upon alleged violations of various sections of the Industrial Code, including 12 NYCRR 23-5.1 which provides specifications for scaffolds, scaffold planking and safety railings on scaffolds, and 12 NYCRR 23-5.18 which deals with "manually-propelled mobile scaffolds" and the bracing and cross-bracing of scaffolds. With regard to 12 NYCRR 23-5.1, plaintiff does not allege that the scaffold failed because it could not bear his weight, or that the scaffold planking was defective or not in good repair. Additionally, plaintiff does not allege that the lumber used on the scaffold was inadequate or that the scaffold used in the instant case was more than seven feet from the ground. Plaintiff further relies on O'Connor v Spencer (1997) Inv. Ltd. Partnership (2 AD3d 513 [2003]), which held 12 NYCRR 23-5.1 sufficiently specific to support the plaintiff's Labor Law § 241 (6) claim in that case. While plaintiff attempts to characterize O'Connor v Spencer (1997) Inv. Ltd. Partnership as requiring that scaffolds be braced against tipping to one side, it sets forth no such requirement. Thus, the sections of 12 NYCRR 23-5.1 that plaintiff relies upon are inapplicable to the facts of the instant case.

As to 12 NYCRR 23-5.18, plaintiff relies upon a Third Department case (Robertson v Little Rapids Corp., 277 AD2d 560 [2000]) which found that section sufficient to support the Labor Law § 241 (6) claim of the plaintiff in that case. Although the scaffold used by plaintiff in the instant action was a mobile scaffold with wheels, plaintiff does not allege that the planking of the scaffold was inadequate or defective or that the absence of, or the failure of, railings on the Bakers scaffold proximately caused his injury (see Ferrero v Best Modular Homes, Inc., 33 AD3d 847, 851 [2006], lv dismissed 8 NY3d 841 [2007]; Plass v Solotoff, 5 AD3d 365, 366 [2004], lv denied 2 NY3d 705 [2004]). Nor does he allege that the scaffold "tipped" over because it was not "plumb, square and rigid" as a result of not being properly cross-braced or diagonally-braced within the meaning of 12 NYCRR 23-5.18 (f). Thus, the sections of 12 NYCRR 23-5.18 that plaintiff relies upon are inapplicable to the facts of the instant case.

Additionally, plaintiff predicates his cause of action under Labor Law § 241 (6) upon alleged violations of 12 NYCRR 23-1.16 which deals with safety belts and other safety devices and upon

12 NYCRR 23-1.21, which provides specifications for stepladders. As to 12 NYCRR 23-1.16, plaintiff relies upon two cases, Farmer v Central Hudson Gas & Elec. Corp., 299 AD2d 856 [4th Dept 2002] and Mills v Niagara Mohawk Power Corp., 262 AD2d 901 [3rd Dept 1999], both holding the aforementioned section sufficiently specific to support a Labor Law § 241 (6) claim. Plaintiff does not allege that he was provided with safety belts, harnesses or other safety devices. Such safety devices must first be provided to an employee in order for this section to apply (see Kwang Ho Kim v D & W Shin Realty Corp., 47 AD3d at 619; Avendano v Sazerac, Inc., 248 AD2d 340, 341 [1998]). Plaintiff does not allege that unapproved safety devices were provided to him, that he was not instructed in the use of a device provided to him, or that any tail lines failed to meet the specifications provided in 12 NYCRR 23-1.16 (d). Therefore, the sections of 12 NYCRR 23-1.16 that plaintiff relies upon are inapplicable to the facts of the instant case.

With regard to 12 NYCRR 23 1.21, plaintiff relies on two cases in which stepladders were used, Losurdo v Skyline Assoc., L.P., 24 AD3d 1235 [4th Dept 2005] and Enderlin v Hebert Indus. Insulation, 224 AD2d 1020 [4th Dept 1996]. Although this section was applicable to the facts of those two cases, it is inapplicable to the facts of the instant case because plaintiff used an extension ladder. Despite plaintiff's attempt to characterize the ladder he used as an "extension step ladder," the record reflects that he used an extension ladder, and not a stepladder, within the definitions of 12 NYCRR 23 1.4 (b) (22) and (53). In any event, 12 NYCRR 23-1.21 (d), which precedes the section plaintiff relies upon and which pertains to the use of extension ladders, is also inapplicable to the facts of the instant case. Thus, defendants Reilly, Inc. and Church have satisfied their burden of establishing prima facie entitlement to judgment as a matter of law on their cross motions as to plaintiff's 241 (6) claim (see Alvarez v Prospect Hosp., 68 NY2d 320, 324-325 [1986]; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v City of New York, 49 NY2d 557, 562 [1980]). In opposition, plaintiff has failed to raise a triable issue of fact and, thus, his Labor Law § 241 (6) claim must be dismissed (see e.g. Godoy v Baisley Lbr. Corp., 40 AD3d 920, 924 [2007]).

Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work or had actual or constructive notice of the alleged condition which caused the injury (see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d at 505; Lombardi v Stout, 80 NY2d 290, 295 [1992]). Common law negligence requires a plaintiff to show what duty a defendant owed to him or her, a breach of that duty, and how that breach proximately caused his or her injury (see Quick v

G.G.'s Pizza & Pasta, Inc., 53 AD3d 535, 536 [2008]; Nappi v Incorporated Vil. of Lynbrook, 19 AD3d 565, 565 [2005], lv denied 5 NY3d 714 [2005]). As to plaintiff's causes of action for common law negligence and violation of Labor Law § 200, the undisputed testimony is that no one from defendant Church was present at the work site at the time of plaintiff's accident. The only employee of defendant Church present at the premises on the day of the accident was a janitor who opened the doors to allow third-party defendant Jade's employees to enter the premises and then left said employees to perform their work. Defendant Church has satisfied its burden, on its cross motion, of showing that it did not control or supervise plaintiff's work or that it did not have "actual or constructive notice" of the condition which caused plaintiff's injuries (see Wynne v State of New York, 53 AD3d 656, 657 [2008]). Therefore, the branch of defendant Church's cross motion for summary judgment is granted dismissing plaintiff's causes of action against it for common law negligence and violation of Labor Law § 200. In light of this dismissal, the branch of defendant Reilly, Inc.'s cross motion seeking dismissal of defendant Church's cross claim against it for common law indemnification is denied as moot.

Defendant Reilly, Inc. has also cross-moved for dismissal of plaintiff's causes of action against it for common law negligence and violation of Labor Law § 200. John Reilly, an employee of defendant Reilly, Inc., alleged in his deposition testimony that although he was present at the work site on the day of the accident, he did not remain at the site and was not present at the time of plaintiff's accident. He testified that he went to the premises to observe third-party defendant Jade's workers and that it was up to third-party defendant Jade to determine what equipment they used to complete the painting. Reilly denied supervising or controlling third-party defendant Jade's work but admitted that he had the authority to fire third-party defendant Jade for not completing the work in compliance with his agreement with defendant Church. Third-party defendant Jade's owner, John Guerrera, alleged in his deposition testimony that defendant Reilly, Inc. did not control third-party defendant Jade's work or the work of its employees. Therefore, defendant Reilly, Inc. has satisfied its burden on this branch of its cross motion by demonstrating that it did not exercise control over third-party defendant Jade's work or the work of third-party defendant Jade's employees, and that it did not owe a duty to plaintiff. In opposition, plaintiff has not submitted any evidence to the contrary. Therefore, the branch of defendant Reilly, Inc.'s cross motion seeking dismissal of plaintiff's causes of action against it for common law negligence and violation of Labor Law § 200 is granted.

Third-party defendant Jade has also cross-moved for dismissal of all claims and cross claims against it by defendants Church and Reilly, Inc. Workers' Compensation Law § 11 provides that an employer's liability is limited to workers' compensation benefits when an employee is injured, unless a written contract for indemnification existed prior to the injury or the employee suffered a "grave injury" as defined in Workers' Compensation Law § 11 (see Fleming v Graham, 10 NY3d 296, 299 [2008]; Tonking v Port Auth. of N.Y. & N.J., 3 NY3d 486, 490 [2004]). Plaintiff admits that Workers' Compensation covered his claim as a result of the subject accident. It is undisputed that no written contract for indemnification existed between third-party defendant Jade and any other party prior to the subject accident. The injuries alleged by plaintiff in his bill of particulars are not "grave injur[ies]" within the definition of Workers' Compensation Law § 11. Plaintiff and defendants Reilly, Inc. and Church have not submitted any proof to the contrary. Thus, third-party defendant Jade has satisfied its burden on the branch of its cross motion for summary judgment dismissing all claims and cross claims against it for common law indemnification, contribution, apportionment and contractual indemnification, and its cross motion as to these causes of action is granted (see Fleming v Graham, 10 NY3d at 299; Castilla v. K.A.B. Realty, Inc., 37 AD3d 510, 512 [2007]; see also Ferluckaj v. Goldman Sachs & Co., 53 AD3d 422, 426 [1st Dept 2008]).

The branch of third party defendant Jade's cross motion for summary judgment dismissing the cross claims of defendants Reilly, Inc. and Church against it for breach of contract for failure to procure insurance and dismissing defendant Church's cross claim against it for breach of fiduciary duty is granted, as is the branch of defendant Reilly, Inc.'s cross motion for summary judgment dismissing defendant Church's cross claim against it for breach of contract for failure to procure insurance. John Reilly testified that defendant Reilly, Inc. had an oral hold harmless agreement with third-party defendant Jade which provided that defendant Reilly, Inc. and its customers, including defendant Church, would be held harmless because third-party defendant Jade had sufficient insurance coverage. Reilly testified that, before the instant project began, during a conversation with Guerrero, third-party defendant Jade's owner, Guerrero said "don't worry about it. I hold you harmless. I have great insurance." However, Guerrero denied the existence of any oral or written agreement to hold defendant Reilly, Inc. or its customers harmless. Even accepting Reilly's claim with regard to Guerrero's statements, there is no indication that third-party defendant Jade agreed to procure insurance for either defendants Church or Reilly, Inc., and defendant Church has not demonstrated that it had such an agreement with defendant Reilly, Inc. Additionally, no agreement between

third-party defendant Jade and defendant Church gave rise to a fiduciary relationship between them (see Marmelstein v Kehillat New Hempstead, 11 NY3d 15, 21 [2008]). Third-party defendant Jade's cross motion for sanctions to be awarded against defendant Reilly, Inc. is denied because it cannot be said that defendant Reilly, Inc.'s maintaining a third-party action against third-party defendant Jade is frivolous conduct (see NY Ct Rules, § 130-1.1 [a], [c]).

Since plaintiff's Labor Law § 241 (6) cause of action has been dismissed, there has been no code violation upon which defendant Church can predicate its claim for contractual indemnification against defendant Reilly, Inc. Therefore, the branch of defendant Church's cross motion seeking summary judgment on its cross claim against defendant Reilly, Inc. for breach of contract for failure to perform the work in accordance with code is denied.

Accordingly, plaintiff's motion for partial summary judgment against defendants Church and Reilly, Inc. on his cause of action under Labor Law § 240 (1) is granted. The action shall be severed from the remaining causes of action and set down for an inquest on the issue of damages. The branches of defendants Church and Reilly, Inc.'s cross motions for summary judgment dismissing plaintiff's cause of action under Labor Law § 240 (1) are denied. The branch of defendants Church and Diocese's cross motion dismissing all claims and cross claims against defendant Diocese is granted. Those branches of defendants Church and Reilly, Inc.'s cross motions for summary judgment dismissing plaintiff's causes of action under Labor Law §§ 200 and 241 (6) and for common law negligence are granted. The branch of defendant Reilly, Inc.'s cross motion seeking dismissal of defendant Church's cross claims against it for breach of contract for failure to procure insurance is granted. The branch of Reilly, Inc.'s cross motion seeking dismissal of defendant Church's cross claim against it for common law indemnification is denied as moot. The branch of defendant Church's cross motion for summary judgment on its cross claim against defendant Reilly, Inc. for breach of contract for failure to perform the work in accordance with code is denied. The branches of third-party defendant Jade's cross motion for summary judgment dismissing defendants Reilly, Inc. and Church's claims and cross claims against it are granted. The branch of third-party defendant Jade's cross motion seeking costs and sanctions to be awarded against defendant Reilly, Inc. is denied.

Dated: October 29, 2008

J.S.C.