Velez v Fifth Ave. Jewelers Exch.
2008 NY Slip Op 33137(U)
November 19, 2008
Supreme Court, Queens County
Docket Number: 39/2006
Judge: Allan B. Weiss
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

JUAN VELEZ and MIGUEL TAMAY Plaintiff, - against - FIFTH AVENUE JEWELERS EXCHANGE, THE BALIANT CONTRACTING CORP., PAUL R. HERMAN, HOWARD R. HERMAN and LOVEY BEER, Defendants.	Index Number 39 2006 Motion Date August 13, 2008 Motion Cal. Number 24 Motion Seq. No. 1
FIFTH AVENUE JEWELERS EXCHANGE, Third-Party Plaintiff, - against - LVI SERVICES, INC., d//b/a LVI ENRIRONMENTAL SERVICES, INC., Third-Party Defendant.	

The following papers numbered 1 to 34 read on this motion by defendants for an order (1) dismissing all claims and cross claims against Howard Herman as he predeceased plaintiffs' accident, and jurisdiction cannot be obtained over him; (2) dismissing all causes of action for negligence against Fifth Avenue Jewelers Exchange (Exchange), Paul Herman and Lovey Beer; (3) dismissing all Labor Law §200 causes of action against Exchange; and (4) granting conditional summary judgment in favor of third-party plaintiffs against third-party defendant LVI Environmental Services, Inc. s/h/a LVI Services, Inc. d/b/a LVI Environmental Services, Inc. (LVI) on the cause of action for contractual indemnification. Third-party defendant LVI cross-moves for an order granting summary judgment dismissing the third-party complaint in its entirety. Plaintiffs Juan Velez and Miguel Tamay cross-move for

an order granting partial summary judgment against the Exchange, Paul Herman and Lovey Beer on the Labor Law § 240 cause of action.

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Upon the foregoing papers this motion is determinated as follows:

Plaintiffs Juan Velez and Miguel Tamay allege that they sustained personal injuries during the course of their employment on August 13, 2005 when a light fixture they were removing fell, causing the scaffold they were standing on to fall to the ground. Plaintiffs were employed by LVI and were engaged in an asbestos abatement project at the premises known as 30-32 West 47th Street, New York, New York. The subject premises are owned by the Exchange, a Limited Liability Corporation, and defendants Paul Hermann and his sister Lovey Beer are general partners in the Exchange. Lovey Beer also acted as the managing agent for the Exchange, in that she negotiated leases and renewal leases, and collected delinquent rents.

In June 2005 two fires occurred at the subject premises. Prior to undertaking the renovations to the premises, it was necessary to perform asbestos abatement and the Exchange hired LVI to perform this work. Exchange executed a signed letter proposal dated August 4, 2005,and a signed work change order dated August 18, 2005. The general service contract, dated August 11, 2005, was not executed by Exchange. The work commenced on August 11, 2005, and was performed in a room that is approximately 4,000 square feet, with ceilings 16 to 20 feet high, and required the use of scaffolds. LVI provided all of the labor and equipment necessary to perform the work. The scaffold was assembled by LVI's workers including Mr. Velez, who testified that the scaffold did not contain adequate angle support braces. Plaintiffs assert that such support braces would have prevented the scaffold from

tipping over. Plaintiffs testified that although they were supplied with safety harnesses there was no mechanism or equipment to attach the safety lines to which would have prevented their fall.

Defendants Exchange Paul Herman and Lovey Beer's motion to dismiss the claims and cross claims against Howard Herman; to dismiss the negligence and Labor Law § 200 claim; and for a conditional summary judgment against third-party defendant LVI; and LVI's cross motion to dismiss the third party complaint:

That branch of defendants' Exchange, Paul Herman and Lovey Beer motion which seeks to dismiss all claims and cross claims against Howard Herman is granted. The documentary evidence submitted herein establishes that defendant Howard Herman died on March 29, 2004, more than a year prior to the accident, and more than two years prior to the commencement of this action on March 1, 2006. Plaintiffs' counsel in his affidavit submitted in support of plaintiffs' cross motion concedes that all claims against Howard Herman should be dismissed, as he was deceased at the time the action was commenced, and therefore no jurisdiction was obtained over him.

That branch of defendants Exchange, Paul Herman and Lovey Beer motion which seeks to dismiss plaintiffs' negligence claim and Labor Law § 200 claim is granted, as plaintiffs' counsel has now withdrawn these claims, as there is no evidence that these defendants directed, supervised or controlled the plaintiffs' work or the area where the work was performed, or that these defendants created a dangerous condition.

That branch of defendant and third-party plaintiff Exchange's motion for conditional summary judgment on the third party claim against LVI for contractual indemnification and LVI's cross motion to dismiss the complaint in its entirety is decided as follows:

In view of the court's order of November 13, 2008, the issues raised by LVI concerning the proper caption and parties to the third party action appears to be moot. The third-party complaint asserts claims for common law indemnification and contribution, for contractual indemnification and contribution, and for breach of contract for the failure to procure insurance for the benefit of the third-party plaintiffs.

Workers' Compensation Law § 11 permits an owner to bring a third party claim against an injured worker's employer in only two circumstances: where the injured worker has suffered a "grave injury" or the employer has entered into a written contract to

indemnify the owner. Here, LVI asserts that plaintiffs Juan Velez and Miguel Tamay did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 11. Workers' Compensation Law § 11 expressly states that "grave injury ... shall mean only one or more of the following: death, permanent and total loss of use or amputation of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability." LVI, in support of its request to dismiss the first cause of action, has submitted copies of the medical reports exchanged by the parties which establish that neither of the plaintiffs sustained a grave injury. In opposition to this branch of LVI's motion, counsel for third-party plaintiffs has not submitted any medical evidence and merely asserts that the jury should determine the common law claims. The court therefore finds that dismissal of the first cause of action set forth in the third-party complaint which alleges a claim for common-law contribution and indemnification against LVI, is mandated (O'Berg v MacManus Group, Inc., 33 AD3d 599 [2006]; Lipshultz v K & G Industries, 294 AD2d 338 [2002]; Schuler v Kings Plaza Shopping Center & Marina, 294 AD2d 556, 559 [2002]; Hussein v Pacific Handy Cutter, 272 AD2d 223, 223-224 [2000]).

"In the absence of a 'grave injury,' Workers' Compensation Law § 11 ... bars a third-party action for contribution or indemnification against an employer when its employee is injured in a work-related accident, unless the employer entered into a written contract 'prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered' (Guijarro v V.R.H. Constr. Corp., 290 AD2d 485, 486, [2002] quoting Workers' Compensation Law § 11). The third-party claims for contractual indemnification and breach of a contract to procure insurance are based upon the General Service Contract dated August 11, 2005 which was executed solely by Paul Mast, the vice-president of LVI. This agreement states that the scope of the work is described in the LVI proposal dated August 4, 2004 which was executed by both LVI and Paul Herman on behalf of Exchange, and further provides that the parties may make changes in the work to be performed pursuant to a written change order. A written change order dated August 18, 2005 was executed by the parties.

The "written contract" provision in section 11 does not require that the agreement be signed by the employer to be

enforceable (see Mantovani v Whiting-Turner Contr. Co., ___ AD3d ___, 2008 NY Slip Op 8100, [Oct. 21, 2008]; Falkowski v Krasdale Foods, Inc., 50 AD3d 1091 [2008]; Flores v Lower E. Side Serv. Ctr., 4 NY3d 363, 371-372 [2005]). Here, the General Service Agreement was signed by the plaintiffs' employer, LVI, and therefore is enforceable against LVI, the party to be charged. The court notes that the agreement's failure to include the amount of sales tax to be paid by Exchange does not render it unenforceable, as sales tax in New York City is set by law and is readily ascertainable by the parties.

Section 11 of said agreement provides in as follows:

"Indemnity. Each party agrees to indemnify and hold harmless the other party hereto and the other party's shareholders, directors, officers, employees and agents, from and against any and all claims, demands, causes of action and liabilities of any nature, whether for damages to property, and/or the conditions to which this Contract pertains, to the extent that any such claim, demand, cause of action and/or liability is attributable to the breach of Contract or other fault of the indemnifying party."

It is well established that "[w]hen a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed. The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (Hooper Assoc. v AGS Computers, 74 NY2d 487, 491-492 [1989]). The General Service Contract's indemnity clause does not specifically include the claims of LVI's employees. Since it cannot be said that indemnification for claims by LVI's employees was "the unmistakable intent of the parties" (Solomon v City of New York, 11 AD2d 383, 388 [1985] [internal quotation marks omitted]), LVI cannot be required to indemnify either Exchange or the individual third-party plaintiffs under the circumstances presented herein (Sumba v Clermont Park Assoc., LLC, 45 AD3d 671 [2007], appeal dismissed 10 NY3d 732 [2008]; Vigliarolo v Sea Crest Constr. Corp., 16 AD3d 409, 410 [2005]).

Furthermore, said indemnity clause violates General Obligation Law § 5-322.1, as it requires the parties to indemnify and hold harmless one another for "any and all claims" to the extent attributable to the "fault of the indemnifying party," which encompasses both parties, without regard to who or what caused the injury, without any limitation. (see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co., 89 NY2d 786, 795 [1997]; Kalinsky v Square, 41 AD3d 785 [2007]; Brooks v Judlau Contr.,

Inc., 39 AD3d 447 [2007]; Flores v Jeffrey M. Brown Constr. Assoc., 28 AD3d 711, 712 [2006]; Carriere v Whiting Turner Contr., 299 AD2d 509, 511 [2002]).

Finally, neither the General Service Agreement nor the proposal, nor the change order contain any provision for contribution or for the procurement of insurance naming Exchange, Paul Herman or Lovey Beer as insureds or additional insureds. Therefore, third-party plaintiffs cannot maintain a claim against LVI for contractual contribution or for breach of contract based upon the alleged failure to procure insurance.

Accordingly, that branch of defendants' and third-party plaintiffs' motion for an order granting conditional summary judgment on the second cause of action for contractual indemnification is denied, and third-party defendant LVI's cross motion to dismiss the third-party complaint in its entirety is granted.

Plaintiffs' cross motion for summary judgment on their cause of action for a violation of Labor Law § 240(1):

Labor Law § 240(1) creates a duty that is nondelegable and an owner who breaches that duty may be held liable in damages regardless of whether it actually exercised supervision or control over the work (see Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 [1993]). The "exceptional protection" provided for workers by § 240(1) is aimed at "special hazards" and is limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured (see Ross v Curtis-Palmer Hydro-Electric Co., supra at 501; Rocovich v Consolidated Edison Co., 78 NY2d 509, 514 [1991]; Zimmer v Chemung County Performing Arts, 65 NY2d 513 [1985]). The legislative purpose behind Section 240(1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs on the owner and general contractor instead of on workers who are "scarcely in a position to protect themselves from accident" (see Rocovich v Consolidated Edison, supra at 501). Although the "special hazards" contemplated "do not encompass any and all perils that may be connected in some tangential way with the effects of gravity" (see Ross v Curtis-Palmer Hydro-Electric Co., supra; Rodriguez v Tietz Center for Nursing Care, 84 NY2d 841 [1994]), the statute's purpose of protecting workers "is to be liberally construed" (Ross v Curtis-Palmer Hydro-Electric Co., supra at 500). In order to prevail upon a claim pursuant to Labor Law § 240(1), a plaintiff must establish that the statute was violated and that this violation was a

proximate cause of his injuries (see Bland v Manocherian, 66 NY2d 452 [1985]; Sprague v Peckham Materials Corp., 240 AD2d 392 [1997]).

Mr. Velez testified that the scaffold had three levels and was approximately 14 feet high; that he and Mr. Tamay, along with two other workers had assembled the scaffold but that the angle braces which provided support to the scaffold and would prevent the scaffold from tipping over were missing and that he reported this to his supervisor; that at the time of the accident he and Mr. Tamay were in the process of taking down light fixtures that were some 6-7 feet long, weighed approximately 25 pounds and were attached to the ceiling with metal strips; that he cut the strips with one hand while holding onto the fixture with his other hand and that Mr. Tamay held onto the other end of the fixture with both hands; that they had cut down two fixtures and that when he started to cut down the third fixture, it fell along with a piece of the ceiling and hit the scaffold, causing the scaffold to tip over. He testified that the scaffold did not have wheels and had to be moved manually by all four workers; that the scaffold was not affixed to the floor or wall in any manner; and that although he was wearing a safety harness, the only place to tie off the harness was on the scaffold itself.

It is well settled that a scaffold fall caused by the movement or shifting of the apparatus constitutes prima facie evidence of a Labor Law § 240(1) violation (deSousa v Dayton T. Brown Inc., 280 AD2d 447, 448 [2001]; Haulotte v Prudential Ins. Co. of America, 266 AD2d 38, 38-39 [1999]; Mooney v PCM Development Co., 238 AD2d 487, 488 [1997]; Rivera v Rite Lite Ltd., 13 Misc 3d 1142 [2006]). Defendants' claim that plaintiffs were the "sole proximate cause" of the accident is rejected (see Blake v Neighborhood Hous. Servs. of New York City, Inc., 1 NY3d 280 [2003]). Defendants' claim that the accident was caused by the plaintiffs' own actions in assembling the scaffold is rejected. The cause of this accident was the failure of the safety devices provided, and it was not due solely to any the actions of the plaintiffs. There is no evidence that the scaffold was improperly constructed by the plaintiffs. Rather, Mr. Velez' testimony establishes that the stabilizing angle braces were not provided by his employer at the time the scaffold was constructed or any time thereafter, although his supervisor had been advised that the braces were missing. In addition, Mr. Velez' testimony establishes that the safety harnesses did not provide proper protection, as they could not be attached to anything but the scaffold. Clearly, plaintiffs did not create the absence of the braces or the failure to provide a means of properly tying off the safety harness, and defendants' claim that the plaintiffs

mishandled the scaffold is purely speculative and without merit. Contrary to defendants' assertions the act of constructing the scaffold does not constitute a superceding cause of the accident so as to relieve an owner of liability under the statute (see Madalinski v Structure-Tone, Inc., 47 AD3d 687 [2008]; Norwood v Whiting-Turner Contr. Co., 40 AD3d 718 [2007]; Valensisi v Greens at Half Hollow, LLC, 33 AD3d 693 [2006]; Nimirovski v Vornado Realty Trust Co., 29 AD3d 762 [2006] Moniuszko v Chatham Green, Inc., 24 AD3d 638 [2005]; deSousa, 280 AD2d at 448; Haulotte, 266 AD2d at 38-39).

Finally, the accident report submitted by defendants is not in admissible form and therefore will not be considered by the court in opposition to the plaintiffs' cross motion for summary judgment (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Therefore, that branch of plaintiff's motion which seeks summary judgment on the issue of liability on the Labor Law § 240(1) claim against the property owners defendants is granted.

Conclusion:

That branch of defendants' Exchange, Paul Herman and Lovey Beer's motion to dismiss the complaint and all cross claims against Howard Herman is granted. That branch of defendants' Exchange, Paul Herman and Lovey Beer's motion to dismiss plaintiffs' claims for negligence and for a violation of Labor Law §200 is granted. That branch of defendants' Exchange, Paul Herman and Lovey Beer's motion for conditional summary judgment on the third-party action for indemnification against LVI is denied. LVI's cross motion to dismiss the third-party complaint in its entirety is granted. Plaintiffs' cross motion for summary judgment against Exchange, Paul Herman and Lovey Beer on the issue of liability on its cause of action for a violation of Labor Law § 240(1) is granted.

Dated: November 19, 2008

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J.S.C.