

Munsch v 205-209 E. 57th St. Assoc. LLC

2009 NY Slip Op 30307(U)

February 6, 2009

Supreme Court, New York County

Docket Number: 104718/2006

Judge: Shirley Werner Kornreich

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

JUDGE SHIRLEY WERNER KORNREICH

PRESENT:

PART 54

Index Number : 104718/2006

MUNSCH, EDWARD

VS.

205-209 EAST 57TH ST.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 10/16/08

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1-3

4-5

8

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes

No

FILED
FEB 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, it is ordered that this motion

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION

Dated: 2/16/09

HON. SHIRLEY WERNER KORNREICH

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 54

-----X
EDWARD MUNSCH,

Plaintiff,

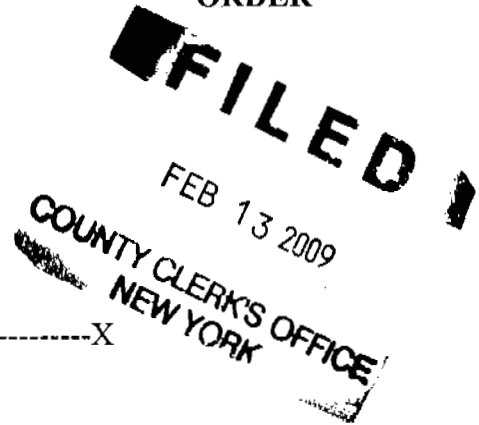
Index No.: 104718/2006

**DECISION and
ORDER**

-against-

205-209 EAST 57TH STREET ASSOCIATES LLC,
PLACE 57, LLC and BOVIS LEND LEASE, LMB,
INC., and FIVE STAR ELECTRIC CORP.,

Defendants.



-----X
SHIRLEY WERNER KORNREICH, J.

In this Labor Law action, defendant Five Star Electric Corp. (Five Star), moves for summary judgment dismissing all claims against it. Defendants 205-209 East 57th St. Associates LLC (Owner) and Bovis Lend Lease, LMB, Inc. (Bovis)(Owner and Bovis will be referred to collectively as cross-movants), cross-move for partial summary judgment dismissing plaintiff's claims under Labor Law §§200 and 240(1), and OSHA¹, as well as the common law, and for summary judgment for conditional contractual indemnification against Five Star. The cross-movants did not move to dismiss plaintiff's claim under Labor Law §241(6).

Background

Plaintiff, Edward Munsch, a metal lather employed by Pinnacle Industries (Pinnacle), brought this action to recover for personal injuries allegedly sustained on September 16, 2005, when he tripped and fell on wood scraps and/or a piece of electrical conduit on the 15th floor of

¹ Occupational Safety and Health Act.

205-209 East 57th Street, New York, NY (Premises). Pinnacle is not a party to the action.

The Premises' Owner hired Bovis as the construction manager to build a new 34-story residential building. Bovis entered into a contract with Five Star to do the permanent and temporary electrical work. Bovis hired Pinnacle to do the superstructure concrete work, which was performed, in part, by metal lathers.

The single cause of action in the second amended complaint alleges that defendants violated Labor Law §§200, 240(1) and 241(6), various regulations contained in the New York City Industrial Code, Article 1926 of OSHA, and the common law. In its answer to the second amended complaint, Bovis cross-claimed against Five Star for common law indemnification and contribution (1st cross-claim), contractual indemnification (2nd cross-claim) and failure to procure insurance (3rd cross-claim). Five Star's answer to the second amended complaint contains a single cross-claim against cross-movants for common law indemnification, contractual indemnification and contribution.

In his opposition to the motion, plaintiff withdrew: 1) all claims against the cross-movants except his claims under Labor Law §§200 and 241(6) and the common law, and 2) all claims against Five Star except for common law negligence. In addition, cross-movants abandoned their claim that Five Star failed to procure insurance by failing to respond to that aspect of Five Star's motion, which annexed the policies it obtained.

Plaintiff testified at his deposition that while he was on the site, he took instructions only from his Pinnacle's foremen. He denied taking instructions from Bovis or Five Star. He said that at 1:45 p.m. on the day of the accident, Pinnacle's foreman instructed him to set up columns in the "column yard."

The column yard, also referred to in the record as the “makeup floor,” was a floor where concrete flooring had already been poured that was used as a staging area by the concrete workers, who were in the process of pouring a concrete floor on a higher floor. The makeup floor would be used by metal lathers, such as plaintiff, to assemble metal forms in which to pour the concrete. After the forms were assembled on the makeup floor, they would be hoisted to the floor above where concrete pouring was taking place. Bovis and Pinnacle determined which floor would be the makeup floor. On the day of the accident, the 15th floor of the premises was the makeup floor, as the concrete flooring was being installed on another floor. Plaintiff testified that the 15th floor had been the column yard two or three days before the accident, but that he never had walked on the concrete 15th floor prior to his injury.

Plaintiff was alone when the accident occurred. He testified that to reach the 15th floor from the higher floor, where he had been working earlier in the day, he climbed down a ladder, walked down some stairs and then took a hoist to the 15th floor. He arrived a little to the left of the center of the U-shaped floor.

Upon arriving at the floor, he picked up the materials he needed to work, which were piled near the hoist. The materials he picked up were roughly 12 bent metal rods in the shape of rectangles that were banded together. He carried them on his right shoulder and began to walk to the middle of the building, the work area where forms were assembled. At that point in time, the 15th floor had a concrete floor and concrete columns, but no curtain walls. He walked 20 to 30 feet before he slid and fell as he took one step behind one of the columns. He said he did not see anything on the ground until after he fell, because the area was dark. He denied that there was any artificial lighting on the 15th floor that day. He fell backwards, landing on his buttocks. The

60 to 80 pound load he was carrying landed on the right side of his chest, causing him to twist. After the fall, he saw a piece of silver conduit pipe about a foot and a half or two feet long and an inch wide. In addition, he saw wood scraps on the floor. He testified that he was not sure whether he slipped on the pipe, the wood or both.

Although plaintiff said that the pipe was the type used by the electricians, he never determined whose pipe it was or where it came from. He testified that he did not know how long the pipe and wood scraps had been there, that he saw no other trades working on the 15th floor on the day of the accident, and that he saw no materials for other trades there at that time. He also did not know if other trades had worked there during the two to three days preceding his accident.

The affidavit of John Hyers, Bovis' Senior Superintendent of the project states that once a floor was designated as the makeup floor, it was off limits to all trades except for the metal lathers and no carpenters were permitted to work there. In addition, Mr. Hyers testified at his deposition that before a floor was designated as the makeup floor, it would be inspected by Bovis, although Mr. Hyers had no specific recollection of inspecting the 15th floor. He testified that when a floor became the makeup floor, Five Star would not be working there. Bovis was responsible for cleaning the makeup floor prior to the time that it was turned over to the metal lathers. Mr. Hyers stated that Five Star had no responsibility for cleaning the 15th floor and that Five Star could not have left the debris upon which plaintiff allegedly slipped. These statements are uncontradicted. Mr Hyers also avers that Pinnacle workers were responsible for removing their own debris, which included wood scraps, that Bovis was not working in the vicinity of the makeup floor at the time of plaintiff's accident, and that Bovis did not have notice of the

allegedly hazardous conditions or inadequate lighting

Mr. Hyers' affidavit states that Five Star was responsible for temporary lighting in all general areas. It was obligated to ensure that the makeup floor had adequate lighting. At his deposition, Mr. Hyers denied that there ever was a temporary lighting problem and produced his weekly inspection reports for September 2005, which did not note any problems with lighting. It is undisputed that Five Star was required to replace light bulbs for the temporary lighting.

Five Star denies that it was obligated to supply temporary lighting in the area where plaintiff fell. It claims that it was required to supply temporary lighting only in the common areas, basement and first floor. Five Star's Senior Vice-President, Barry Halpern, testified that the temporary lighting stringers ran from the hoist and through the corridor areas between where the two apartments were going to be constructed on the 15th floor. However, Five Star's contract with Bovis obligated Five Star to provide temporary lighting at all hours during concrete superstructure work, "for all floors and areas" in accordance with OSHA and regulations of other agencies having jurisdiction, for all "general areas," for all "open areas," and as required "by other trades to properly finish their work." Five Star Contract, Scope of Work, p. 9 of 23. The court need not accept as true allegations that are contradicted by documentary evidence.

Paragraph 12 of Five Star's contract provides that it shall defend and indemnify cross-movants to the fullest extent permitted by law for any claims, costs or expenses, including attorneys' fees attributable to bodily injury in connection with Five Star's work, except for injuries due to the sole negligence of the parties seeking indemnification. Hence, Five Star agreed to indemnify cross-movants in the event that liability is apportioned between the parties to the contract to the extent that Five Star is held to be liable.

Five Star also was required to procure insurance for cross-movants. Five Star annexed copies of the policies it procured to its motion papers, and cross-movants did not raise any issue as to the adequacy of the policies in their response to Five Star's motion.

Discussion

A. General Standard for Summary Judgment Motions

It is well established that summary judgment may be granted only when it is clear that no triable issue of fact exists. *Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 325(1986). The burden is upon the moving party to make a *prima facie* showing that he or she is entitled to summary judgment as a matter of law. *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980); *Friends of Animals, Inc. v Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 1067 (1979). A failure to make such a *prima facie* showing requires a denial of the summary judgment motion, regardless of the sufficiency of the opposing papers. *Ayotte v Gervasio*, 81 N.Y.2d 1062, 1063 (1993). Moreover, the evidence submitted on the motion for summary judgment must be examined in the light most favorable to the parties opposing the motion. *Martin v Briggs*, 235 AD2d 192, 196 (1st Dep't 1997). On a motion for summary judgment, uncontradicted facts are deemed admitted. *Costello Associates, Inc. v. Standard Metals Corp.*, 99 A.D.2d 227, 229 (1st Dep't.), *app. dismissed*, 62 N.Y.2d 942 (1984). Mere conclusions, unsubstantiated allegations, or expressions of hope are insufficient to defeat a summary judgment motion. *Zuckerman, supra*, at 562. Nor can summary judgment be defeated by the "shadowy semblance of an issue." *Jeffcoat v. Andrade*, 205 AD2d 374, 375 (1st Dep't 1994). Upon the completion of the court's examination of all the documents submitted in connection with a summary judgment motion, the motion must be denied if there is any doubt as to the existence of a triable issue. *Rotuba*

Extruders, Inc. v. Ceppos, 46 N.Y.2d 223, 231 (1978).

B. Five Star's Motion to Dismiss Plaintiff's Claims

There is an issue of fact as to whether Five Star provided adequate lighting on the 15th floor. Although Five Star denies responsibility for lighting the area behind the column where plaintiff fell, that claim is contradicted by its written contract, which clearly required it to provide temporary lighting to all open areas and all areas where trades were working. Plaintiff testified that he needed to cross the area where he fell to do his work. In addition, plaintiff testified that there was no artificial lighting on the 15th floor. While Mr. Hyers denied that there ever was a temporary lighting problem, that merely contradicts plaintiff's testimony and cannot be resolved on summary judgment.

Contrary to Five Star's assertions, plaintiff can assert a common law negligence claim against Five Star based upon a breach of its contract to provide temporary lighting. *Morales v. Spring Scaffolding, Inc.*, 24 A.D.3d 42 (1st Dept. 2005)(common law negligence claim upheld against subcontractor who built bridge that collapsed in violation of contract specifications). However, plaintiff does not have a claim against Five Star for debris left on the makeup floor. Five Star denied that it left the debris. Bovis' witness, Mr. Hyers, had no recollection of the condition of the 15th floor, but he testified that the debris could not have been left by Five Star. Plaintiff testified that he did not know who had left the debris there. As a result, plaintiff has failed to create an issue of fact as to whether Five Star left the pipe and wood shavings on the makeup floor. The motion to dismiss the remainder of plaintiff's claims against Five Star is granted on plaintiff's consent. In sum, plaintiff's claims against Five Star based upon violations of Labor Law §§200, 240(1) and 241(6), various regulations contained in the New York City

Industrial Code, and Article 1926 of OSHA are dismissed and the negligence claim based on lack of lighting remains.

C. Cross-Movants' Motion to Dismiss Plaintiff's Claims

Similarly, cross-movants are entitled to dismissal of plaintiff's claims under Labor Law §240(1), and OSHA, as plaintiff does not oppose those branches of the cross-motion. In fact, violations of OSHA regulations cannot support a claim under Labor Law §241(6). *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 351 (1998).

Cross-movants also are entitled to dismissal of plaintiff's claims under Labor Law §200 and the common law. Labor Law §200 codifies the common law duty of a building owner to maintain a safe workplace. *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 505 (1993), citing *Rizzuto v. L.A. Wenger Contr. Co.*, *supra*, at 343. A prerequisite to a finding of liability under §200 is defendant's creation notice of a dangerous condition or its "authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Ross v. Curtis-Palmer Hydro-Elec. Co.*, *supra*. A general duty to supervise the work and ensure compliance with safety regulations is insufficient to constitute the requisite supervision and control under Labor Law § 200. *De La Rosa v. Philip Morris Mgmt. Corp.*, 303 A.D.2d 190, 192 (1st Dep't. 2003).

Here, there is no evidence that cross-movants created or had notice, actual or constructive, of the debris or lack of temporary lighting on the 15th floor, or that they supervised or controlled plaintiff's work. Mr. Hyers evidence was that he or another Bovis representative inspected the building four times a day, that he did not have any specific recollection of inspecting the 15th floor, that he had no notice of any dangerous condition or lack of lighting, and

that there never were any lighting problems. Cross-movants submitted inspection reports that did not note problems with debris or lighting. The record demonstrates that temporary lighting was Five Star's contractual responsibility.

In opposition, plaintiff testified that he did not know who put the debris on the 15th floor. He submitted no proof as to how long the debris had been there or how long the floor had lacked lighting. He testified that he had never walked on the 15th floor until the time of his accident, which occurred after he had walked 20 to 30 feet from the hoist. Hence, he could not establish that the conditions existed for any period of time that would give rise to a claim for constructive notice. Plaintiff admitted that Pinnacle exclusively gave him instructions. Indeed, Pinnacle was responsible for cleaning up its own debris. Finally, there is no evidence that cross-movants created the alleged lack of lighting. Consequently, plaintiff failed to come forward with evidence that would overcome cross-movants' proof that they were not liable under the common law or Labor Law §200.

D. Cross-Movants' Motion for Conditional Contractual Indemnification

Although cross-movants' did not move to dismiss plaintiff's claim under Labor Law §241(6), they could still be liable thereunder. Labor Law §241(6) imposes a nondelegable duty upon an owner or general contractor to respond in damages for injuries sustained due to another party's negligence in failing to conduct its construction operations so as to provide for the reasonable and adequate protection of the persons employed therein. *Rizzuto v. L.A. Wenger Contr. Co.*, *supra* at 350. Once it has been alleged that a specification of the Industrial Code has been violated, it is for the jury to determine whether the negligence of some party to, or participant in, the construction project caused plaintiff's injury. *Id.* If proven, the general

contractor or owner is vicariously liable without regard to its fault. *Id.*

The second amended complaint alleges that defendants violated Industrial Code section 12 NYCRR § 23-1.30, which requires “illumination sufficient for safe working conditions ... wherever persons are required to work or pass in construction of not less than 10 foot candles in any area where persons are required to work.” The second amended complaint also cites 12 NYCRR § 23-1.7, which provides, in subsection (e) (2), that working areas, such as parts of floors where persons work or pass shall be kept free from accumulations of debris and materials.

Cross-movants could be held liable without fault under §241(6) for failing to provide adequate lighting or for failure to keep plaintiff’s work area free from debris. If the jury finds that lack of temporary lighting contributed to the accident, then cross-movants would be vicariously liable without fault, but entitled to indemnification by Five Star to the extent that cross-movants are held liable for lack of temporary lighting. Five Star agreed to indemnify cross-movants to the extent that an injury arose from Five Star’s work and it is permissible for contractual indemnification liability to be apportioned between joint tortfeasors. *Brooks v. Judlau Contr., Inc.*, 11 N.Y.3d 204 (2008).

E. Five Star’s Motion to Dismiss Cross-Movants’ Cross-Claims

Five Star’s motion to dismiss the portion of cross-movants’ cross-claim for common law indemnification is denied. Indemnification requires a showing that the indemnitee was held vicariously liable without fault for the wrong of the indemnitor. *Mangano v. AMEX*, 234 A.D.2d 198 (1st Dep’t 1996). Here, if the cross-movants are held to be liable it will be based upon Labor Law §241(6), which imposes liability without fault on owners and general contractors. There is an issue of fact as to whether Five Star was negligent in failing to provide adequate temporary

lighting. If the jury rejects the notion that cross-movants are liable due to the presence of debris on the 15th floor, but finds that cross-movants are liable for failure to provide adequate lighting, then cross-movants will be held liable with fault and entitled to common law indemnification from Five Star.

Nor is Five Star entitled to dismissal of cross-movants' cross-claim for contribution. Contribution lies where the contributing party had a part in causing or augmenting the injury for which contribution is sought. *Raquet v. Braun*, 90 N.Y.2d 177, 183 (1997). There is evidence that Five Star contributed to the accident by failing to provide lighting. If the jury finds that Five Star and cross-movants both contributed to the plaintiff's injuries, then cross-movants will be entitled to contribution.

Finally, Five Star is not entitled to dismissal of cross-movants' cross-claim for contractual indemnification. As noted above, cross-movants are entitled to conditional contractual indemnification to the extent that the jury finds that lack of temporary lighting caused the accident. However, Five Star is entitled to summary judgment dismissing the cross-claim for failure to procure insurance, as cross-movants have not countered Five Star's evidence that it obtained adequate coverage. Accordingly, it is

ORDERED that Five Star's motion for summary judgment is granted to the extent that: (1) all of plaintiff's claims against Five Star except for plaintiff's claims for common law negligence are dismissed on plaintiff's consent; 2) Five Star's motion to dismiss plaintiff's common law negligence claim is denied; 3) Five Star's motion to dismiss the cross-claims against it by Bovis Lend Lease LMB, Inc., and 205-209 East 57th Street Associates, LLC, are granted solely to the extent that the third-cross claim for failure to procure insurance is dismissed

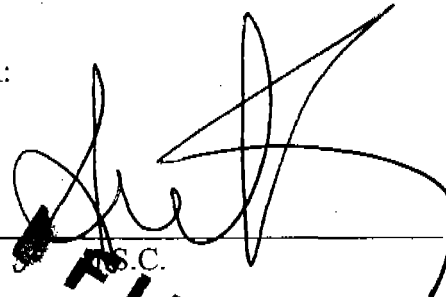
and in all other respects the motion to dismiss said cross-claims is denied; and it is further

ORDERED that the cross-motion by Bovis Lend Lease LMB, Inc., and 205-209 East 57th Street Associates, LLC, for summary judgment dismissing plaintiff's claims under Labor Law §§200 and 240(1) and OSHA, as well as the common law, and for summary judgment for conditional contractual indemnification against Five Star, is granted to the following extent: 1) plaintiff's claims under Labor Law §240(1) and OSHA are dismissed upon consent; 2) plaintiff's claims based upon Labor Law §200 and the common law are dismissed; and 3) Bovis Lend Lease LMB, Inc., and 205-209 East 57th Street Associates, LLC, are granted conditional contractual indemnification to the extent that they are held vicariously liable under Labor Law §241(6) for failure to provide temporary lighting; and it is further

ORDERED that the parties are directed to appear for a pretrial conference in Part 54, Room 1227, of the courthouse located at 111 Centre Street, New York, N.Y. at 9:30 a.m. on February 26, 2009, at which time a trial date will be set if the action is not settled.

Dated: February 6, 2009

ENTER:


S.C.
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