Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IA Part 19
Justice

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WILLIE SMITH and RACHEL SMITH,	Number 4513 2004
Plaintiffs,	Motion Date February 11, 2009
- against -	
THE NEW YORK CITY HOUSING AUTHORITY, BOVIS LEND LEASE, INC., and BOVIS LEND LEASE LMB, INC.,	Motion Cal. Number 26
	Motion Seq. No. 6
Defendants.	
x	

The following papers numbered 1 to 21 read on this motion by defendants Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc. for summary judgment dismissing the complaint and all other claims; and on this cross motion by defendant The New York City Housing Authority for summary judgment dismissing the complaint and all other claims, or in the alternative, granting it contractual indemnity against defendants Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc.

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiff Willie Smith (plaintiff)seeks to recover damages for personal injuries allegedly sustained on April 4, 2003 stemming from a construction site accident. Plaintiff contends that he was standing on a scaffold outside a building owned by defendant The New York City Housing Authority (NYCHA), and was in the process of using a jackhammer to demolish a four-foot terrace wall made of

brick and cinder block, when, while chipping away at the mortar between the bricks, several cinder blocks which had not yet been separated began to fall. Plaintiff attempted to avoid the falling blocks, but was unable to do so because of the pile of already-removed bricks that had accumulated behind him. As a result, the cinder blocks fell onto his foot causing injury.

As a preliminary matter, the branches of defendants' respective motion and cross motion for summary judgment dismissing plaintiff's Labor Law § 240(1) claim are hereby granted, as well as that portion of NYCHA's cross motion for summary judgment dismissing plaintiff's Labor Law § 200 claim and claim for common-law negligence, as plaintiff concedes that these causes of action are inapplicable to the facts of this case (see e.g. Meng Sing Chang v Homewell Owner's Corp., 38 AD3d 625 [2007]; Morales v 569 Myrtle Ave., LLC, 17 AD3d 418 [2005]).

Turning to that portion of the motion seeking dismissal of plaintiff's Labor Law §§ 241(6) and 200, as well as common-law negligence claims by defendants Bovis Lend Lease, Inc. and Bovis Lend Lease LMB, Inc. (collectively Bovis), Bovis invokes its role as a construction manager for this project. "Although a construction manager is generally not considered a 'contractor' or 'owner' within the meaning of Labor Law § 240(1) or § 241, it may nonetheless become responsible for the safety of the workers at a construction site if it has been delegated the authority and duties of a general contractor, or if it functions as an agent of the owner of the premises" (Pino v Irvington Union Free School Dist., 43 AD3d 1130 [2007]; see Walls v Turner Constr. Co., 4 NY3d 861, 863-864 [2005]; Domino v Professional Consulting, Inc., 57 AD3d 713 [2008]). Furthermore, a construction manager can be held liable under Labor Law § 200 or common-law negligence only if it had the authority to supervise or control work performance (see Domino, 57 AD3d at 715).

In the case at bar, Bovis has demonstrated its entitlement to judgment as a matter of law. First, the agreement between Bovis and NYCHA indicates that Bovis was retained to provide construction management services. The express terms of the agreement state that Bovis was "without the power to act as agent for or otherwise bind NYCHA without NYCHA's prior written consent." No such consent is evident in the record presented to the court (see Hutchinson v City of New York, 18 AD3d 370 [2005] [where there were no contractual terms present creating statutory agency]; cf. Pino, 43 AD3d at 1131 [where, pursuant to the parties' contract, the construction manager assumed the owner's authority]).

Second, it is clear from both the separate contract between NYCHA and Zaffuto Construction Company, Inc., plaintiff's employer, as well as the affidavit of Edgar Vera (Vera), project manager for Bovis, that Bovis was not given the authority to hire its own subcontractors for the project. This further evidences that Bovis was not considered a "contractor" for purposes of liability pursuant to the applicable section of the Labor Law (see Uzar v Louis P. Ciminelli Constr. Co., Inc., 53 AD3d 1078 [2008]).

Third, Bovis' role with respect to the project was one of general supervision over the construction site, in that Bovis did not have any actual control or supervisory role over the manner and method of plaintiff's work; such a general supervisory authority is insufficient to impose liability (see Delahaye v Saint Anns School, 40 AD3d 679 [2007]; Damiani v Federated Dept. Stores, Inc., 23 AD3d 329 [2005]). Vera's affidavit stated that Bovis' duty was overall project management, that Bovis did not direct, supervise, or control plaintiff's work, and that each contractor was responsible for establishing and executing its own safety program. Finally, plaintiff, by virtue of his own admission, testified that all of the necessary tools and safety equipment were provided by his employer, and he received instructions directly and solely from his employer regarding work to be done.

Contrary to the contentions made by plaintiff and NYCHA, the requirements as per the construction management agreement with regard to safety did not give Bovis direct supervision and control over plaintiff's work. On the contrary, the agreement provided that Bovis' role was that of general supervision, which included compliance with contract specifications regarding safety. Even if Bovis were to observe safety violations occurring on site, Bovis was required to notify NYCHA and the violating contractor before any action could be taken, except in cases of emergency. Even the authority to stop work in the event a safety violation existed does not thereby give Bovis a duty to protect plaintiff (see Peay v New York City School Constr. Auth., 35 AD3d 566 [2006]; Linkowski v City of New York, 33 AD3d 971 [2006]). Furthermore, simply because Bovis regularly attended safety meetings, was present on-site on a daily basis, or even created work schedules and prepared progress reports, does not demonstrate that plaintiff's accident was a direct result of Bovis' direction, supervision, or control (see generally Linkowski, 33 AD3d at 975; Armentano v Broadway Mall Props., Inc., 30 AD3d 450 [2006]). In light of the foregoing, any other claims against Bovis cannot be established as a matter of law, and are similarly dismissed (see Linkowski, 33 AD3d at 975).

Turning now to plaintiff's Labor Law § 241(6) claim against NYCHA, this section requires owners, contractors, and their agents to provide reasonable and adequate protection and safety for

workers, and to comply with the specific rules and regulations promulgated by the Commissioner of the Department of Labor as set forth in the New York Industrial Code (see Ross v Curits-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993]; Galarraga v City of New York, 54 AD3d 308 [2008]; Lodato v Greyhawk N. Am., 39 AD3d 491 [2007]). In order for plaintiff to maintain a cause of action under § 241(6), he must plead and prove a specific, positive violation of one or more of the above regulations (see Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343, 349 [1998]; Ferrero v Best Modular Homes, Inc., 33 AD3d 847 [2006]).

Plaintiff seeks to include the following violations pursuant to the Industrial Code under § 23: subsections 1.5, 1.7(e)(2), 3.3(b)(3), 3.3(c), 3.3(k)(1)(ii), 2.1, and 11.7(e)(2) (presumably referring to 1.7[e][2], as there is no such subsection 11.7[e][2] in the Industrial Code). Plaintiff cannot plead a violation of § 23-1.5 and 2.1(b), as these sections lack the specificity which is required under Labor Law § 241(6) (see Cun-En Lin v Holy Family Monuments, 18 AD3d 800 [2005] [regarding § 23-1.5]; Madir v 21-23 Maiden Lane Realty, LLC, 9 AD3d 450 [2004] [regarding § 23-2.1(b)]).

12 NYCRR 23-3.3(k)(1)(ii) is also inapplicable to this case (see generally Randazzo v Consolidated Edison Co. of N.Y., 271 AD2d 667 [2000]), as the bricks with which plaintiff was working were not located in a storage area but instead were accumulating upon a scaffold; nor did the bricks "interfere with access to any stairway or passageway used . . . as a means of ingress or egress." Subsection 2.1(a) is inapplicable for the same reason, to wit: the subject material upon which plaintiff allegedly tripped was not being stored (see e.g. Castillo v Starrett City, 4 AD3d 320 [2004]). Notwithstanding the above, this court finds the following sections of the Industrial Code to be applicable to the case at bar: 12 NYCRR 23-1.7(e)(2), 3.3(b)(3), and 3.3(c).

12 NYCRR 23-1.7(e)(2) requires working areas, such as a floor, to be kept clear of debris and "scattered tools and materials . . . insofar as may be consistent with the work being performed." In this case, NYCHA has not established, as a matter of law, that this section of the Industrial Code is inapplicable. Plaintiff's testimony reveals that the process by which the terrace wall was to be demolished was that plaintiff was to loosen the mortar between the bricks and cinder blocks with a jackhammer, and then place each piece onto the scaffold floor on which he was standing. Then, plaintiff would clear the area temporarily to allow laborers to dispose of the removed brick and blocks. However, on the day of plaintiff's accident, the laborers were not present at the site. As a result, plaintiff's employer instructed plaintiff to continue

the demolition process despite the absent clean-up laborers, and directed plaintiff to place the removed brick on the terrace while plaintiff's supervisor searched for the laborers. Plaintiff neglected to move the bricks from the scaffold floor to the terrace floor, and tripped on the accumulated pile of brick just before his injury.

NYCHA contends that plaintiff has not alleged a violation of subsection 1.7(e)(2) in that the debris, the accumulated brick in this case, was created by plaintiff, which was an integral part of the work being performed, the demolition process in this case (see e.g. Hageman v Home Depot U.S.A., Inc., 45 AD3d 730 [2007]; Marinaccio v Arlington Cent. School Dist., 40 AD3d 714 [2007]; Salinas v Barney Skanska Constr. Co., 2 AD3d 619 [2003]).

Given the unique facts presented, it cannot be said, as a matter of law, that the accumulated brick was an "integral part" of plaintiff's work. The case of Riley v J.A. Jones Contr., Inc. (54 AD3d 744 [2008]) is most instructive here. In Riley, plaintiff was instructed to demolish a wall that he had just constructed, and rebuild it to meet certain specifications. Plaintiff's supervisor directed plaintiff to begin construction of the wall without allowing the scaffold to be cleared of the bricks. The Second Department held that triable issues of fact existed as to whether the brick over which the plaintiff allegedly tripped was integral to the work being performed or if it was "debris."

Here, there is an issue of fact as to whether the bricks on the scaffold were an integral part of the work being performed – in that it was clearly part of the demolition process to place bricks there – or, on the other hand, if the bricks were considered debris, in that enough of them had accumulated, where it was necessary for plaintiff's supervisor to locate laborers whose job it was to dispose of said bricks.

12 NYCRR 3.3(b)(3), which applies to demolition by hand operations, provides that: "Walls, chimneys and other parts of any building or other structure shall not be left unguarded in such condition that such parts may fall, collapse or be weakened by wind pressure or vibration." NYCHA's reliance on Balladares v Southgate Owners Corp. (40 AD3d 667 [2007]) is entirely irrelevant, as Balladares did not mention this particular subsection of the Industrial Code at all. Neither is the case of German v City of New York (14 Misc 3d 1204[A], [Sup Ct, New York County 2006]) applicable, since, in that case, it was neither wind nor pressure nor vibration which caused the duct to fall on plaintiff, but rather, it was the fact that plaintiff was engaged in "cutting" pipes. In the case at bar, it is undisputed that plaintiff was

using a jackhammer to loosen the mortar between the bricks and cinder block, which undoubtedly created a vibration when being used. Therefore, NYCHA has not demonstrated, as a matter of law, that this section of the Industrial Code is inapplicable.

NYCHA has neither established, prima facie, that subsection 3.3(c) (Inspection) is inapplicable to the work being performed by plaintiff, as "[t]he thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections,' against hazards which are created by the progress of the demolition work itself" (Monroe v City of New York, 67 AD2d 89 [1979]; see Balladares, 40 AD3d at 670; Salinas, 2 AD3d at 621). Other than summarily stating that "plaintiff himself loosened and dislodged the debris that allegedly injured him," NYCHA did not show that the required inspections were performed (see Balladares, 40 AD3d at 671) or that the loosened material did not require stabilization (see Perron v Hendrickson/Scalamandre/Posillico (TV), 22 AD3d 731 [2005]).

Therefore, in light of the above discussion, that branch of NYCHA's cross motion dismissing plaintiff's Labor Law § 241(6) claim is denied.

Turning now to NYCHA's portion of its motion seeking contractual indemnification from Bovis, the indemnification provision contained within the construction management agreement states, in relevant part:

> "The CM [Bovis] agrees to defend, indemnify and hold harmless NYCHA, its Members, officers, employees, agents and representatives, and any other party or entity acting on behalf of NYCHA, from and against any and all liabilities, claims, losses, damages, costs, fees and expenses, including, without limitation, reasonable attorneys' fees and expenses (including, without limitation, those incurred by NYCHA in enforcing this indemnification), and all reasonable sums charged to associated litigation, relating to (a) any alleged or actual personal injury, bodily injury (including death), or property damage . . . arising out of or resulting from any work or services provided by the CM or its employees, agents, subconsultants or subcontractors . . . unless resulting from the intentional act of NYCHA . . ."

First, since it has already been established by the aforementioned discussion that Bovis had only general supervisory authority, and did not have a duty to protect plaintiff, this indemnification provision was not triggered and is, therefore, inapplicable (see Murray v City of New York, 43 AD3d 429 [2007];

Linkowski, 33 AD3d at 975). In any event, since the above provision is so broadly constructed in that it purports to indemnify NYCHA for its own negligence, it is void and unenforceable pursuant to General Obligations Law § 5-322.1 (see e.g. Harvey v Mazal Am. Partners, 79 NY2d 218, 225 [1992]).

Accordingly, Bovis' motion for summary judgment dismissing plaintiff's complaint and all other claims is granted. The branches of NYCHA's cross motion for summary judgment dismissing plaintiff's Labor Law §§ 240(1), 200, and common-law negligence claims are also granted. The branch of NYCHA's cross motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim is denied. The branch of NYCHA's cross motion for summary judgment seeking contractual indemnification is also denied.

Dated: April 27, 2009

J.S.C.