

Escurra v Liberty Contr. Corp.

2009 NY Slip Op 32986(U)

December 11, 2009

Supreme Court, New York County

Docket Number: 106301/07

Judge: Marilyn Shafer

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

MARILYN SHAFER

PRESENT: _____
Justice

PART 8

Escura, J

INDEX NO. 106301/07

MOTION DATE _____

- v -

MOTION SEQ. NO. 03

Liberty Contracting

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion be denied
inasmuch as attached

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

FILED
DEC 21 2009
NEW YORK
COUNTY CLERK'S OFFICE

MARILYN SHAFER

Dated: 12/11/09

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: IAS PART 8

-----x
JOHN ESCURRA,

Plaintiff,

Index No.
106301/07

-against-

Motion Sequence Nos.
003-005

LIBERTY CONTRACTING CORP. and TIME
EQUITIES, INC.,

Defendants.

-----x
LIBERTY CONTRACTING CORP.,

Third-Party Plaintiff,

Third-Party
Index No.
590003/08

-against-

GIALAS CONSTRUCTION INC., NEW YORK STATE
INSURANCE FUND, and SCOTTSDALE INSURANCE
COMPANY,

Third-Party Defendants.

-----x
TIME EQUITIES, INC.,

Second Third-Party Plaintiff,

Second Third-Party
Index No.
590335/08

-against-

GIALIAS CONSTRUCTION INC.,

Second Third-Party Defendant.

-----x

MARILYN SHAFER, J.:

Motion sequence numbers 003, 004, and 005 are consolidated for disposition.

In motion sequence 003, defendant/third-party plaintiff Liberty Contracting Corp. (Liberty) moves for an order dismissing all of plaintiff's claims (CPLR 3211), as well as for summary judgment (CPLR 3212) dismissing the complaint and all cross claims.

In motion sequence 004, third-party defendant and second third-party defendant Gialas Construction Inc. (Gialas) moves to dismiss (CPLR 3211) or, alternatively, for summary judgment (CPLR 3212) dismissing the third-party complaint.

In motion sequence 005, defendant and second third-party plaintiff Time Equities, Inc. (Time) moves for: (1) summary judgment dismissing plaintiff's complaint and all cross claims as against it;¹ (2) summary judgment on its cross claims against Liberty; and (3) a default judgment under CPLR 3015 against Gialas. Alternatively, Time seeks summary judgment on its second third-party claims for contractual indemnification and legal expenses against Gialas.

For the reasons stated below, Liberty's motion for summary judgment is granted only to the extent of dismissing plaintiff's Labor Law § 241 (6) claims and Time's cross claims, and is

¹Time seeks dismissal of Liberty's cross claims, however, no such cross claims were asserted.

otherwise denied. Additionally, Gialas' motion is granted. Finally, Time's motion is granted only to the extent of dismissing plaintiff's complaint against it, and ordering contractual indemnification against Gialas, conditioned upon a finding that Gialas and/or plaintiff was negligent in plaintiff's alleged accident, and is otherwise denied.

Background

In this action to recover monetary damages for a December 28, 2006 workplace accident, plaintiff, an employee of third-party Gialas, alleges that he was injured while attempting to guide a container filled with debris down a metal plate being used as a ramp in front of a building at 132 W. 22nd Street, New York, New York (the building). It is uncontested that Gialas had been hired by Time, the management company of the building, as the general contractor to convert the 10th and 11th floors of the building into residential apartments, and that plaintiff was the foreman of the Gialas workers. Gialas had orally engaged Liberty, a carting company, to rent containers to hold the concrete debris that was created as the result of the conversion, and to bring a garbage truck to the building to empty those containers when called by Gialas.

According to plaintiff, in the minutes prior to his accident, Giuseppe Biundo (Biundo), the driver of Liberty's garbage truck, had taken the metal plate off the truck, and

placed it on an angle from the sidewalk to the street. Biundo then helped plaintiff and another Gialas worker take the containers down the ramp to the garbage truck. Plaintiff alleges that, immediately prior to his accident, he was guiding the full container down the ramp from a position on the street, while Biundo pushed the full container from behind. According to the plaintiff, while Biundo was pushing the container down the ramp, the metal plate fell into the street, causing the container to tip over and, with its concrete debris, fall onto him.

Biundo maintains, however, that although he put down the ramp and was a witness to plaintiff's accident, he was not pushing the container, and was, instead, standing with the truck in the street at the time of the accident. According to Biundo, one of plaintiff's fellow Gialas employees was pushing the container down the ramp, and the reason that the container tipped over was because the Gialas employees had overfilled it.

Plaintiff seeks the recovery of monetary damages as against Liberty, and Time (the managing agent of the building at 132 W. 22nd Street), on the theory of common-law negligence, as well as for violations of the Labor Law § 241 (6).

In its answer, Time asserts cross-claims against Liberty for common-law indemnification and contribution, contractual indemnification, and breach of contract for the failure to procure insurance.

In its third-party complaint, Liberty seeks defense and indemnification from Gialas, the New York State Insurance Fund (SIF) and Scottsdale Insurance Company (Scottsdale).² Liberty seeks defense and indemnification in the main action.

In the second third-party complaint, Time seeks common-law indemnification and contribution, as well as contractual indemnification from Gialas. It also seeks to recover monetary damages from Gialas for breach of contract based upon in its failure to procure the required liability insurance.

Discussion

Dismissal Under 3211 and Default

Liberty first moves to dismiss plaintiff's complaint in its entirety. However, this motion was not made pre-answer, and because Liberty does not address this prayer for relief in its papers, it is unclear whether or not such grounds are waived under CPLR 3211 (e). Therefore, that portion of Liberty's motion that seeks dismissal of plaintiff's complaint, pursuant to CPLR 3211, is denied.

In its motion, Gialas moves to dismiss the third-party complaint. However, it has also answered the third-party complaint and only addresses its arguments to summary judgment. For the reasons stated above, therefore, that portion of Gialas'

²The SIF and Scottsdale have not answered nor made a special appearance in this action.

motion that seeks dismissal of the third-party complaint, pursuant to CPLR 3211, is denied.

As respects the second third-party complaint, Time seeks a default judgment (CPLR 3215) for Gialas' failure to answer its complaint in a timely fashion. Pursuant to CPLR 3215 (a), "[w]hen a defendant has failed to appear, plead or proceed to trial of an action reached and called for trial, or when the court orders a dismissal for any other neglect to proceed, the plaintiff may seek a default judgment against him." Time contends that, after it served its April 25, 2008 second third-party complaint, no answer was served until March 2009. By March 11, 2009 letter, Time rejected that answer as untimely.

In opposition to Time's prayer for a default judgment, Gialas offers both an excuse and a potentially meritorious defense to the second third-party action. See CPLR 5015 (a) (1); see also *Stillman v City of New York*, 39 AD3d 301 (1st Dept 2007). Gialas asserts that its failure to serve an answer to the complaint was a law office failure, and it never intended to default in this action. To support this, it proffers several letters, dated May 20, 2008, December 4, 2008 and January 5, 2009, that indicate an intention to contest at least a portion of Time's complaint. See Gialas Notice of Motion, Exh. L; see also Gialas Affirmation in Opposition, Exh. A. Additionally, Gialas properly maintains in all the aforementioned letters, as well as

in the instant motion papers, that Workers' Compensation Law § 11 precludes recovery against it, because plaintiff did not sustain a "grave injury," as defined in the statute.³ See *Picchione v Sweet Constr. Corp.*, 60 AD3d 510 (1st Dept 2009).

This court holds that Gialas has provided both a reasonable excuse and a potentially meritorious defense, and that, therefore, that portion of Time's motion that seeks a default judgment in the second third-party action is denied. Additionally, Gialas' proposed verified answer to the second third-party complaint, dated March 4, 2009, and served upon Time on March 7, 2009 (see Affirmation in Partial Opposition to Gialas Motion, Exh. A) is deemed served in the second third-party action.

Summary Judgment

To obtain summary judgment, a movant must establish entitlement to a court's directing judgment in its favor as a matter of law. See *Alvarez v Prospect Hosp.*, 68 NY2d 320 (1986). "[I]t must clearly appear that no material and triable issue of

³ Pursuant to Workers Compensation Law § 11, "grave injury" is defined as:

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.

fact is presented" (*Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 [1968]; see also *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]), because summary judgment is a drastic remedy that should not be invoked where there is any doubt as to the existence of a triable issue or when the issue is even arguable. See *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

Common-Law Negligence and Labor Law § 200 Claims

Liberty and Time seek summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims.

An owner and a general contractor/construction manager's duty to maintain a safe workplace under the common law is codified in Labor Law § 200. See *Gasper v Ford Motor Co.*, 13 NY2d 104 (1963). In the context of a Labor Law case, if a defective condition is alleged to be the cause of a worker's injuries, that worker must proffer evidence that the owner or general contractor/construction manager either caused the dangerous condition or had actual or constructive notice of it. See *Higgins v 1790 Broadway Assoc.*, 261 AD2d 223 (1st Dept 1999); see also *Balaj v Equitable Life Assur. Socy. of U.S.*, 211 AD2d 487 (1st Dept), lv denied 85 NY2d 811 (1995).⁴

Plaintiff contends that the plate that Biundo used for a

⁴ Supervision and control of the injured worker are not required to show that a defective condition existed. See *Murphy v Columbia Univ.*, 4 AD3d 200 (1st Dept 2004).

ramp was defective and that he complained to the driver numerous times about it, but that Biundo ignored him. See Plaintiff's Examination Before Trial (EBT), at 57; see also Affidavit of Kathleen Hopkins, R.N., CSSM. Another Gialas worker, Victor Ayala (Ayala), that was also engaged in bringing containers down to the street contended that he had complained to Biundo after a similar incident the week before. See Ayala EBT, at 42.

Biundo, however, asserts that the metal plate that was being used as a ramp never moved as the workers were pushing the container down it, and that there was nothing wrong with it. See Liberty Notice of Motion, Exh. A., Biundo Affidavit; see also Biundo EBT, at 26-27, 34. Liberty additionally has proffered the affidavit of an expert, Carl J. Abraham, P.E., who opines that, in his professional opinion, the ramp was not defective in any way and did not contribute to plaintiff's accident.

There are material questions of fact for trial as to whether or not Liberty's metal plate that Biundo placed from the sidewalk to the street was defective, which require denial of that portion of Liberty's motion that seeks dismissal of plaintiff's common-law negligence and Labor Law § 200 claims against it.

Further, that portion of Liberty's motion that seeks dismissal of plaintiffs claims against Liberty under common-law negligence and Labor Law § 200 must also be denied because there are material questions of fact about plaintiff's methods.

To be held liable for negligence as respects workers' methods, an owner or general contractor must have "the authority to control the activity bringing about the injury to enable it to avoid or correct an unsafe condition." *Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 (1981); see also *Comes v New York State Elec. and Gas Corp.*, 82 NY2d 876, 877 (1993); *Mitchell v New York Univ.*, 12 AD3d 200 (1st Dept 2004); *Candela v City of New York*, 8 AD3d 45 (1st Dept 2004).

Such control exercised over the worker must be more than a "general duty to supervise the work and ensure compliance with safety regulations" (*De La Rosa v Philip Morris Mgt. Corp.*, 303 AD2d 190, 192 [1st Dept 2003]; see also *Vasiliades v Lehrer McGovern & Bovis, Inc.*, 3 AD3d 400 [1st Dept 2004]; *Reilly v Newireen Assoc.*, 303 AD2d 214 [1st Dept], lv denied 100 NY2d 508 [2003]), because "monitoring and oversight of the timing and quality of the work [are] not enough to impose liability under section 200[, n]or is a general duty to ensure compliance with safety regulations or the authority to stop work for safety reasons." *Dalanna v City of New York*, 308 AD2d 400, 400 (1st Dept 2003) (internal citations omitted); see also *Geonie v OD & P NY Ltd.*, 50 AD3d 444 (1st Dept 2008); *Gonzalez v United Parcel Serv.*, 249 AD2d 210 (1st Dept 1998).⁵

⁵ *Cf. Brady v City of New York*, 52 AD3d 331, 332 (1st Dept 2008), where the First Department held that "plaintiff's Labor

Here, there are issues of fact as to whether Biundo, Liberty's driver, was assisting in pushing the container down the ramp. Plaintiff and Ayala attest to the fact that he was, but Biundo has testified that he was standing aside his truck and was not so involved. See Plaintiff EBT, at 54, 62-64; see also Ayala EBT, at 37-38; Biundo EBT, at 34, 37; Biundo Affidavit.

That portion of Time's motion that seeks dismissal of plaintiff's common-law negligence and Labor Law § 200 claims is granted. There is no evidence that Time had anything to do with the garbage pick-up or the ramp that the Liberty driver placed from the sidewalk to the street. Additionally, Time contends, and plaintiff admits in his testimony, that the only person to supervise him was his boss Alex Gialas. See Plaintiff EBT, at 77-79; Jacob Bucksbaum EBT, at 50, 60.

Labor Law § 241 (6) Claim

Defendants seek summary judgment dismissing plaintiff's Labor Law § 241 (6) cause of action.

Labor Law § 241 (6) provides that "[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate

Law § 200 claim should not have been dismissed as against the site owner given the testimony of the latter's resident engineer that he not only inspected the site several times a day but also had authority to stop the work if he observed an unsafe condition."

protection and safety to the persons employed therein or lawfully frequenting such places."

The section requires owners and contractors at a construction site to "'provide reasonable and adequate protection and safety' for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor." *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 (1993).

Because there is no evidence that Liberty was either an owner or a general contractor at the 132 W. 22nd Street site, plaintiff's Labor Law § 241 (6) claims against it are dismissed. *See Scuderi v Independence Community Bank Corp.*, 65 AD3d 928 (1st Dept 2009).

As respects Time, in his bill of particulars, plaintiff alleges violations of 12 NYCRR 23-1.2, 1.3, 1.4, 1.5, 1.7, 1.15, and 1.22.

"To state a claim under Labor § Law 241 (6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications." *Walker v Metro-North Commuter R.R.*, 11 AD3d 339, 340 (1st Dept 2004).

Industrial Code sections 23-1.2, 23-1.3, 23-1.4, and 23-1.5 are not sufficiently specific to support plaintiff's Labor Law § 241 (6) claim. *See Schiulaz v Arnell Constr. Corp.*, 261 AD2d 247 (1st Dept 1999); *see also Weinberg v Alpine Improvements, LLC*, 48

AD3d 915 (3d Dept 2008).

As respects Industrial Code section 23-1.7, entitled Protection from General Hazards, that section has been held to be sufficiently specific on which to predicate a Labor Law § 241 (6) claim (see *Amato v State of New York*, 241 AD2d 400 [1st Dept 1997], lv denied 91 NY2d 805 [1998]), but is inapplicable to the facts in the instant action.

Similarly, 12 NYCRR 23-1.15 is inapplicable, as that section refers to Safety Railings, of which there were none involved in this accident. See *Dzieran v 1800 Boston Rd., LLC*, 25 AD3d 336 (1st Dept 2006).

Plaintiff finally seeks to support his Labor Law § 241 (6) claim against Time under 12 NYCRR 23-1.22. Although plaintiff first seeks to support his claim with subsection (b) (1), that section is inapplicable, as it consists of regulations concerning motor trucks and heavier vehicles only. See *Dzieran v 1800 Boston Road, LLC*, 25 AD3d 336, *supra*.

Subsection (b) (3) of that section provides,

Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks shall be at least 48 inches in width. Such runways and ramps shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced to prevent excessive spring or deflection....Bracing for such runways and ramps shall be installed at a maximum of four foot intervals.

Although it is unclear whether the container that plaintiff

was guiding would be included within the categories of "wheelbarrows, power buggies, hand carts or hand trucks," there is no evidence that there would be any violation of this subsection in any case.

As subsection (c) of 12 NYCRR 23-1.22 applies to platforms and not the metal plate/ramp that was used here, it is inapplicable to the facts at issue in this action.

Absent any specific Industrial Code section to support plaintiff's Labor Law § 241 (6) claim, that claim is dismissed as against Time.

Common-Law Indemnification

Liberty seeks to dismiss Time's cross claim for common-law indemnification and Time seeks summary judgment on it. Additionally, Gialas moves to dismiss that portion of the third-part action that seeks common-law indemnification. Common-law indemnification requires a finding that a party was negligent for personal injuries sustained in a workplace accident. See *Matthews v Trump 767 Fifth Ave., LLC*, 50 AD3d 486 (1st Dept 2008); see also *Arteaga v 231/249 W 39 St. Corp.*, 45 AD3d 320 (1st Dept 2007); *Reilly v DiGiacomo & Son*, 261 AD2d 318 (1st Dept 1999). Although there are material issues of fact as to whether or not Liberty was negligent with respect to plaintiff's accident, all of plaintiff's claims against Time are dismissed. Because Time will not be held vicariously liable in this action,

that portion of Liberty's motion that seeks to dismiss Time's cross claim is granted, and that portion of Time's motion that seeks summary judgment for common-law indemnification is denied as moot.

Gialas also moves for dismissal of Liberty's common-law indemnification claims. Workers' Compensation Law § 11 clearly states that an action can be maintained against an employer by "any person otherwise entitled to recover damages, contribution or indemnity, at common law or otherwise, on account of such injury" only if its employee suffered a "grave injury." Here, it is uncontroverted that plaintiff did not suffer any such injuries as defined by the statute. Therefore, that portion of Liberty's second third-party complaint that seeks common-law indemnification is dismissed.

Contribution

As respects the claims for contribution, recovery "is available [only] where 'two or more tortfeasors combine to cause an injury[,] and is determined 'in accordance with the relative culpability of each such person.'" *Godoy v Abamaster of Miami, Inc.*, 302 AD2d 57, 61-62 (2d Dept), *lv dismissed* 100 NY2d 614 (2003), quoting 23 NY Jur 2d, Contribution, Indemnity, and Subrogation § 24; *see also* CPLR 1402.

For the reasons stated immediately above, that portion of Liberty's motion that seeks to dismiss Time's cross claim is

granted, and that portion of Time's motion seeking summary judgment on its cross claim for contribution is denied as moot. Additionally, that portion of Liberty's third-party complaint that seeks contribution from Gialas is dismissed.

Contractual Indemnification

In its second third-party action, Time seeks contractual indemnification from Gialas based upon the November 24, 2006 contract between the parties. See Time Notice of Motion, Exh. C. Pursuant to that contract, the

GC shall indemnify and hold harmless the OWNER ... from and against all claims, damages, losses and expenses (including attorney's fees) arising out of or resulting from the performance of the work, provided that any such claim, damage, loss or expenses (a) is attributable to bodily injury ... resulting therefrom and (b) is caused in whole or in part by any act or omission of the GC, any subcontractor, anyone directly or indirectly employed by any of them, or anyone for whose acts any of them may be liable.... Owner and Architect to be named on face of insurance policy. Insurance company to give owner and architect prior notice of any policy cancellation.

Because there are material questions of fact as to whether Gialas/plaintiff were negligent in plaintiff's accident, any order of entitlement to indemnification of its attorney's fees is conditioned upon a finding that either Gialas or plaintiff was negligent.

As respects Liberty's claim of entitlement to contractual indemnification against Gialas, any written documentation of the transactions between Liberty and Gialas were limited to receipts, of which no receipt was proffered for the date of plaintiff's

accident. See Gialas Reply Affirmation, Exh. A. Further, although Liberty seeks to support its claim of entitlement to such relief upon such a receipt, as a matter of law, the statement, "Customer is responsible for for spillage if container overfilled, and for any fines due to overfilled or overweight containers," is not a sufficient basis for contractual indemnification in a personal injury case.

Therefore, that portion of Liberty's motion seeking summary judgment on its contractual indemnification claim is denied.

Order

Accordingly, it is hereby

ORDERED that Liberty Contracting Corp.'s motion is granted only to the extent of severing and dismissing plaintiff's Labor Law § 241 (6) claims and severing and dismissing as against Time Equities, Inc.'s cross-claims, and is otherwise denied; and it is further

ORDERED that Gialas Construction Inc.'s motion is granted, and the third-party complaint is severed and dismissed in its entirety; and it is further

ORDERED that Time Equities, Inc.'s motion is granted only to the extent of severing and dismissing plaintiff's complaint against it, and ordering contractual indemnification against Gialas Construction Inc. In the second third-party action, conditioned upon a finding that Gialas Construction Inc. and/or

negligent in plaintiff's alleged accident, and is otherwise denied; and it is further

ORDERED that the Gialas Construction Corp.'s March 4, 2009 proposed answer in the second third-party action (Index No. 590335/08) is deemed served nunc pro tunc; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment for Time Equities Inc. in the first action (Index No. 106301/07), with costs and disbursements to that party as taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: 12/11/09

ENTER:

MARILYN SHAFER
J.S.C.

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