

Rivas v Persaud

2010 NY Slip Op 30572(U)

January 28, 2010

Supreme Court, Queens County

Docket Number: 11262/2007

Judge: Augustus C. Agate

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE
Justice

IA Part 24

ALEJANDRO RIVAS x

- against

SEERIENAUTH PERSAUD, et al. x

Index

Number 11262 2007

Motion October 13 & 27, 2009
Dates November 4, 2009

Motion

Cal. Numbers 20, 21, & 13

Motion Seq. Nos. 3, 4, & 5

The following papers numbered 1 to 46 read on this motion by defendants Home Depot USA, Inc. and The Home Depot At Home Services, Inc. (Home Depot) for partial summary judgment dismissing plaintiff's claims under Labor Law §§ 241(6) and 200 and common-law negligence insofar as asserted against it and for partial summary judgment on its third-party causes of action for contractual indemnification and breach of contract to procure insurance against third-party defendant Responsible Remodeling, Inc. (Responsible Remodeling); and on this cross motion by plaintiff for partial summary judgment against Home Depot on the issue of liability under Labor Law § 240(1); and on this cross motion by Responsible Remodeling for partial summary judgment dismissing plaintiff's cause of action under Labor Law § 241(6) and for partial summary judgment dismissing Home Depot's third-party claims for contractual indemnification and breach of contract to procure insurance insofar as asserted against it; and, by separate notice of motion, Responsible Remodeling moves for partial summary judgment dismissing the third-party causes of action for common-law indemnification and contribution asserted against it; and on this motion by Home Depot to compel Responsible Remodeling to produce certain tax records and to vacate the note of issue due to new injuries alleged in plaintiff's supplemental bill of particulars or, alternatively, to preclude plaintiff from offering at trial testimony or evidence pertaining to the newly alleged injuries; and on this cross motion by Responsible Remodeling for a protective order pursuant to CPLR 3122 barring disclosure of its corporate tax records and to preclude plaintiff from introducing at trial evidence regarding the new injuries alleged in plaintiff's supplemental bill of particulars; and on this cross motion by plaintiff for leave to supplement his bill of particulars to allege a claim for psychological injuries pursuant to CPLR 3025(b) and (c) and 3043(b).

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

Plaintiff was employed as a roofing assistant by Responsible Remodeling, which had a subcontract with Home Depot to perform roof installation work on the premises owned by defendants Seerienauth Persaud and Julia Persaud. The property owners had a contract with Home Depot to perform the roof installation. On June 12, 2006, while working on the roof at the Persauds' residence, plaintiff was allegedly injured when the rope onto which he was holding broke loose from the nails used to secure it to the beams in the house, causing him to slide down the roof and fall to the ground below. Plaintiff subsequently commenced this action against defendants under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence. On July 6, 2007, Home Depot commenced a third-party action against Responsible Remodeling alleging claims for contractual and common-law indemnification and contribution. Pursuant to an order of this court dated January 31, 2008, plaintiff's complaint and all cross claims against defendants Seerienauth Persaud and Julia Persaud have been dismissed.

Irrespective of Home Depot's objection, Responsible Remodeling's cross motion will be considered herein. A cross motion for summary judgment made after the expiration of the statutory period or court-ordered deadline may be considered by the court, even in the absence of good cause, where a timely motion for summary judgment was made on grounds nearly identical to that of the cross motion (*see Grande v Peteroy*, 39 AD3d 590 [2007]). Here, Responsible Remodeling's cross motion was served more than two months after the court-ordered deadline of May 14, 2009. Responsible Remodeling's cross motion seeks partial summary judgment dismissing plaintiff's claim under Labor Law § 241(6) and the third-party causes of action for contractual indemnification and breach of contract to procure insurance, which are the same causes of action addressed in Home Depot's timely motion for partial summary judgment. Therefore, the court, in its discretion, will entertain Responsible Remodeling's otherwise untimely cross motion.

Home Depot established its prima facie entitlement to judgment as a matter of law on plaintiff's Labor Law § 200 and common-law negligence causes of action insofar as asserted

against it. Plaintiff did not oppose Home Depot's motion on these grounds and, thus, failed to raise a triable issue of fact. Where, as here, a claim arises out of alleged defects or dangers in the methods or manner of the work rather than the condition of the premises, recovery against the owner or contractor cannot be had under the common law or Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]; *Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]). Plaintiff's own deposition testimony makes clear that Home Depot did not exercise any supervision or control over the method or manner of the injured plaintiff's roofing work (*see Lombardi v Stout*, 80 NY2d 290 [1992]; *Loiacono v Lehrer McGovern Bovis, Inc.*, 270 AD2d 464 [2000]; *Lofaso v J.P. Murphy Assoc.*, 37 AD3d 769 [2007]). At his deposition, plaintiff testified that Responsible Remodeling, plaintiff's employer, owned the tools and equipment used by him. Plaintiff further stated that his immediate supervisor, Byron, was an employee of Responsible Remodeling and was the only person who gave him instructions at the work site.

The court next turns to the branch of Home Depot's motion and Responsible Remodeling's cross motion for partial summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action. To recover under Labor Law § 241(6), a plaintiff must demonstrate a violation of an Industrial Code provision that is applicable given the circumstances of the accident and sets forth specific safety standards (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 502-505 [1993]). In the bill of particulars, plaintiff alleged violations of 12 NYCRR 23-1.2, 23-1.3, 23-1.4, 23-1.5, 23-1.15, 23-1.16, 23-1.17, and 23-5.

Home Depot and Responsible Remodeling established prima facie, that the Industrial Code sections cited by plaintiff in his bill of particulars are either inapplicable or are not sufficiently specific to support a Labor Law § 241(6) claim. In opposition, plaintiff failed to raise a triable issue of fact. Industrial Code provisions 12 NYCRR 23-1.2 (*see Gordineer v County of Orange*, 205 AD2d 584 [1994]), 23-1.3 (*see Weinberg v Alpine Improvements, LLC*, 48 AD3d 915 [2008]), 23-1.4 (*see Fisher v WNY Bus Parts, Inc.*, 12 AD3d 1138 [2004]), and 23-1.5 (*see Cun-En Lin v Holy Family Monuments*, 18 AD3d 800 [2005]) merely recite general safety standards and, therefore, do not afford a basis for liability under Labor Law § 241(6). In addition, the other regulations cited by plaintiff do not apply to this case. Industrial Code provisions 12 NYCRR 23-1.15, 23-1.16, and 23-1.17, which establish standards for safety railings, safety belts, and life nets, respectively, are inapplicable here because plaintiff was not provided with any such devices (*see Forschner v Jucca Co.*, 63 AD3d 996 [2009]; *Kwang Ho Kim v D & W Shin Realty Corp.*, 47 AD3d 616 [2008]). Industrial Code provision 12 NYCRR 23-5, which sets forth safety standards for scaffolding, also does not apply to the facts of this case because plaintiff's accident did not involve a scaffold. Based on the foregoing, plaintiff's Labor Law § 241(6) claim asserted against Home Depot is dismissed.

Turning to plaintiff's cross motion for partial summary judgment against Home Depot on the issue of liability under Labor Law § 240(1), plaintiff failed to establish, prima facie, that Home Depot was liable under the statute as the general contractor on the subject roof installation project (*see Reaber v Connequot Cent. School Dist. No. 7*, 57 AD3d 640 [2008]; *Fajardo v Clark*, 57 AD3d 605 [2008]). A party is deemed an "owner," "contractor," or "agent" of an owner or contractor under the Labor Law if it has the authority to control the activity bringing about the injury so as to enable it to avoid or correct the unsafe condition (*see Chimborazo v WCL Assoc., Inc.*, 37 AD3d 394 [2007]; *Natoli v City of New York*, 32 AD3d 507 [2006]). The relevant inquiry on the issue of control is not who furnished equipment and safety devices but who had control over the work being done and the authority to insist that proper safety practices be followed (*see Everitt v Nozkowski*, 285 AD2d 442 [2001]). Here, in support of his cross motion, plaintiff submitted the contract between the property owners and Home Depot, which merely states that Home Depot was responsible for furnishing, delivering, and arranging for the installation of all materials as described in the specification sheet. Moreover, according to the deposition testimony of Richard Hull, Home Depot's project manager, he did not give any instructions to the workers, he visited the site only to check on the progress of the work and to make sure that the necessary materials had been delivered, and Home Depot was not responsible for ensuring that proper safety procedures at the site were followed. Mr. Hull further stated that Responsible Remodeling provided all the tools and equipment to perform the roofing work. Likewise, the deposition testimony of John Rothe, the president of Responsible Remodeling, indicates that only the "crew leader" from Responsible Remodeling gave directions regarding the method or manner of the roof installation work to be performed by Responsible Remodeling's employees, including plaintiff. Since plaintiff failed to meet his prima facie burden, the sufficiency of Home Depot and Responsible Remodeling's opposition papers need not be considered (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

The court will now address the branches of Home Depot's motion for partial summary judgment and Responsible Remodeling's cross motion for partial summary judgment dismissing the third-party causes of action for contractual indemnification and breach of contract to procure insurance asserted against Responsible Remodeling. In this case, the evidence in the record demonstrates that there is an issue of fact, at least, as to whether Home Depot was a party to the contract or an intended beneficiary of the contract annexed to Home Depot and Responsible Remodeling's respective moving papers (*see e.g. Williams v 461 Eighth Ave. Assoc.*, 277 AD2d 181 [2000]). That contract was entered into between Installed Products U.S.A., LLC (IPUSA), the contractor, and by Responsible Remodeling, the subcontractor. In opposition to Responsible Remodeling's cross motion, Home Depot submitted another contract, which was executed on the same dates, between Home Depot, the contractor, and Responsible Remodeling, the subcontractor. Moreover, there is no evidence indicating whether either of these two contracts was applicable to the subject roof installation project. These issues are not resolved by the affidavit of Stuart Gray, Home

Depot's corporate counsel, because the conclusory statement that, in September 2003, Home Depot acquired IPUSA and all of its contracts, including the contract between IPUSA and Responsible Remodeling in question, is not substantiated by any documentary evidence demonstrating the legal connection between Home Depot and IPUSA. In addition, Mr. Hall testified at his deposition that Home Depot purchased IPUSA but he did not know whether Home Depot assumed IPUSA's contracts. Similarly, Mr. Rothe's deposition testimony illustrates that he did not know whether Responsible Remodeling entered into a contract with Home Depot or IPUSA. Consequently, the branches of Home Depot's motion and Responsible Remodeling's cross motion for partial summary judgment on the third-party claims for contractual indemnification and breach of contract to procure insurance are denied.

With respect to Responsible Remodeling's motion for partial summary judgment dismissing the third-party causes of action for common-law indemnification and contribution, Responsible Remodeling established its prima facie entitlement to judgment as a matter of law by demonstrating that plaintiff did not sustain a "grave injury" as defined in Workers' Compensation Law § 11 (*see Dechnik v Fortunato Sons, Inc.*, 58 AD3d 793 [2009]; *Martelle v City of New York*, 31 AD3d 400 [2006]; *Soto v Alert No. 1 Alarm Sys.*, 272 AD2d 466 [2000]). Home Depot concedes that plaintiff did not meet the requirements of "grave injury" under the Workers' Compensation Law and does not oppose dismissal of the third-party claims for common-law indemnification and contribution. Therefore, Responsible Remodeling's motion for partial summary judgment is granted to the extent that the third-party causes of action seeking common-law indemnification and contribution against Responsible Remodeling are hereby dismissed.

Next, the court turns to the branches of Home Depot's motion to compel disclosure of Responsible Remodeling's tax records for the period of 2005 until the present and Responsible Remodeling's cross motion for a protective order barring disclosure of those records. The court, in its discretion, will review the propriety of the disclosure request notwithstanding Responsible Remodeling's admitted failure to make a timely motion for a protective order (CPLR 3122[a]; *see Bowes v Magna Concepts*, 245 AD2d 33 [1997]; *Spancrete Northeast, Inc. v Elite Assoc., Inc.*, 148 AD2d 694 [1989]; *Handy v Geften Realty, Inc.*, 129 AD2d 556 [1987]). Although CPLR 3101(a) provides that "[t]here shall be full disclosure of all evidence material and necessary in the prosecution or defense of an action," a party does not have the right to uncontrolled and unfettered disclosure. Thus, the party seeking an order to compel the production of tax records must make a strong showing of overriding necessity (*see Gilman & Ciocia, Inc. v Walsh*, 45 AD3d 531 [2007]). Here, Home Depot has not made a sufficient showing that the information contained in Responsible Remodeling's tax records is indispensable to the instant litigation and unavailable from other sources (*see Banigan v Hill*, 57 AD3d 463 [2008]; *Latture v Smith*, 304 AD2d 534 [2003]; *Slate v State*, 267 AD2d 839 [1999]). Home Depot's contention that the tax records are

necessary to discover whether Responsible Remodeling has the financial ability to indemnify Home Depot if a judgment is obtained against Responsible Remodeling is purely speculative as Home Depot failed to present any evidence to substantiate such a claim. Moreover, the essential issue in this case is whether Home Depot has a *right* to indemnification from Responsible Remodeling (emphasis added). Home Depot's disclosure request is palpably improper because it seeks information of a confidential and private nature which does not appear necessary, material, and relevant to the issues in the case (*see e.g. Zimmer v Cathedral School of St. Mary & St. Paul*, 204 AD2d 538 [1994]; *Gordon v Grossman*, 183 AD2d 669 [1992]; *Matthews Industrial Piping Co. v Mobil Oil Corp.*, 114 AD2d 772 [1985]).

The court will now address the branch of Home Depot's motion to vacate the note of issue or, in the alternative, to preclude plaintiff from offering at trial evidence or testimony regarding the new injuries alleged in his supplemental bill of particulars, the branch of Responsible Remodeling's cross motion seeking an order of preclusion on similar grounds, and plaintiff's cross motion for leave to supplement the bill of particulars to assert a claim for psychological injuries. Plaintiff's self-labeled "supplemental bill of particulars" was, in reality, an amended bill of particulars since it sought to add new injuries, that is, major depressive disorder and adjustment disorder with anxious mood (*see Fuentes v City of New York*, 3 AD3d 549 [2004]; *Kyong Hi Wohn v County of Suffolk*, 237 AD2d 412 [1997]). Once the note of issue has been filed, the plaintiff may not serve an amended bill of particulars without obtaining leave of the court (CPLR 3042[b]; *see Romanello v Jason*, 303 AD2d 670 [2003]). While leave to amend a bill of particulars is ordinarily to be freely given in the absence of prejudice or surprise resulting directly from the delay, it is well-settled that when leave to amend is sought on the eve of trial, judicial discretion should be exercised in a "discreet, circumspect, prudent and cautious manner" (*Fuentes*, 3 AD3d at 550; *Kyong*, 237 AD2d at 412). Moreover, where there has been an inordinate delay in seeking to amend, the plaintiff must establish a reasonable excuse for the delay and submit an affidavit to establish the merits of the proposed amendment (*id.*).

In this case, plaintiff served the original bill of particulars on April 2, 2008, and the note of issue was filed on November 6, 2008. Pursuant to a so ordered stipulation dated March 12, 2009, the discovery deadline was extended to April 10, 2009. On June 2, 2009, plaintiff served, without leave of the court, the improperly designated "supplemental bill of particulars," alleging, inter alia, psychological injuries, which were not mentioned in the original bill of particulars. Jury selection was scheduled to begin on November 10, 2009. On September 24, 2009, less than three weeks before jury selection and approximately one year after the filing of the note of issue, plaintiff made the instant cross motion for leave to amend the bill of particulars to add new injuries. The court also notes that plaintiff did not make his cross motion for leave to amend until several months after Home Depot and Responsible Remodeling made their respective motion and cross motion to preclude.

Plaintiff's counsel claims that the delay in seeking leave to amend the bill of particulars was due to plaintiff not being evaluated by Dr. Benjamin Hirsch, PhD and diagnosed with psychological injuries until May 19, 2009, almost three years after the date of plaintiff's accident. The court finds that this is not a reasonable excuse for the inordinate delay in seeking leave to amend the bill of particulars to add new injuries since plaintiff had sufficient time and opportunity to be evaluated by a psychologist before the court-ordered discovery deadline. Moreover, the affirmed medical report of Dr. Hirsch, upon which plaintiff relied to demonstrate the causal connection between his alleged psychological injuries and the accident, is insufficient to establish the merit of the proposed amendment. Dr. Hirsch's affirmation presented no objective data to indicate the basis for his conclusion and was, therefore, speculative, conclusory, and lacked probative value (*see e.g. Itzkowitz v King Kullen Grocery Co., Inc.*, 22 AD3d 636 [2005]; *Gruberger v Ford Motor Co.*, 12 Misc 3d 1191A [Sup Ct, Richmond County 2006]). As such, plaintiff is not permitted to amend his bill of particulars to add new psychological injuries and is precluded from introducing at trial any evidence or testimony concerning those injuries.

Accordingly, the branch of the motion by Home Depot for partial summary judgment dismissing the Labor Law §§ 241(6) and 200 and common-law negligence claims insofar as asserted against it is granted. In addition, the branch of the cross motion by Responsible Remodeling for partial summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action is granted. The branches of Home Depot and Responsible Remodeling's respective motion and cross motion for partial summary judgment on the third-party causes of action for contractual indemnification and breach of contract to procure insurance against Responsible Remodeling are denied. The cross motion by plaintiff for partial summary judgment on the Labor Law § 240(1) cause of action asserted against Home Depot is denied. Responsible Remodeling's cross motion for partial summary judgment dismissing the third-party causes of action for common-law indemnification and contribution asserted against it is granted. The branch of Home Depot's motion to compel production of Responsible Remodeling's corporate tax records is denied, and the branch of Responsible Remodeling's motion for a protective order barring disclosure of its corporate tax records is granted. The branches of Responsible Remodeling and Home Depot's separate motions to preclude plaintiff from offering at trial testimony or evidence pertaining to the new injuries alleged in plaintiff's supplemental bill of particulars are granted. Additionally, the branch of Home Depot's motion to vacate the note of issue is denied. The cross motion by plaintiff for leave to supplement his bill of particulars to allege a claim for psychological injuries is denied in its entirety.

Dated: January 28, 2010

AUGUSTUS C. AGATE, J.S.C.