

Curran v Chelsea/Village Assoc., LLC
2010 NY Slip Op 30584(U)
March 11, 2010
Supreme Court, New York County
Docket Number: 102577/2007
Judge: Emily Jane Goodman
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3-22-10

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 102577/2007

Justice

CURRAN, JOHN

INDEX NO. _____

vs

CHELSEAVILLAGE ASSOCIATES

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

PARTIAL SUMMARY JUDGMENT

MOTION CAL. NO. _____

the remaining papers _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

ad cross motion

Upon the foregoing papers, it is ordered that this motion

be denied for

OT fueled

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

Dated: 3/11/10

[Signature]
EMILY JANE GOODMAN

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 17

-----X

John Curran,
Plaintiff,

Index
Number
102577/2007

-against-

Chelsea/Village Associates, LLC,
Defendant.

-----X

Chelsea/Village Associates, LLC,
Third-Party Plaintiff,

-against-

Lucky 13, LLC,
Third-Party Defendant.

-----X

Lucky 13, LLC,
Second Third-Party Plaintiff,

-against-

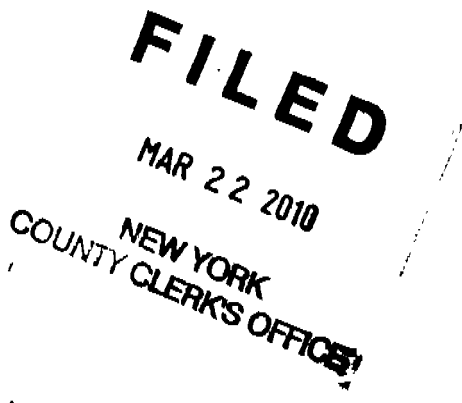
Gweedore Construction, Inc.,
Second Third-Party Defendant.

-----X

Emily Jane Goodman, J.S.C.:

Plaintiff moves for partial summary judgment on liability on his claim under Labor Law § 240 (1). Second third-party defendant Gweedore Construction, Inc.'s (Gweedore) cross motion for summary judgment dismissing the second third-party complaint and any cross claims against it, based upon Workers' Compensation Law § 11 and plaintiff's failure to allege a grave injury, is granted without opposition. Chelsea/Village Associates, LLC (Chelsea) moves for summary judgment on its claim for contractual indemnification against Lucky 13, LLC (Lucky 13).

Plaintiff alleges that, on February 15, 2006, he was



employed by Gweedore as a carpenter working at 355 West 14th Street, New York (the accident site or the premises) (plaintiff's motion, Exhibit I, plaintiff's affidavit, ¶¶ 1, 2). He states that the work involved the gut renovation of a restaurant and that, as part of this renovation, the first floor of the premises was being extended and the basement underneath it was being dug out (*id.*, ¶ 3). He was instructed to install cross-beams on the floor beams to provide support for the first floor extension and, in order to access the basement, there was a straight extension ladder (the ladder) from the basement to the first floor (*id.*, ¶ 5).

Plaintiff asserts that on the morning of the accident, he arrived before his scheduled 8 a.m. commencement time and the ladder was already set up. He further alleges that there were no railings on either side of the ladder at the first floor level and that the ladder was not tied off in any way (*id.*, ¶ 7). He further contends that, as he was climbing down the ladder and placed his second foot on its third rung, the bottom of the ladder slid out from underneath him, causing him to fall to the basement floor (*id.*, ¶ 8; plaintiff EBT, at 29-32). Plaintiff contends that, as a result of his fall, he suffered multiple fractures to both his left and right ankles (plaintiff's motion, Exhibit G, Bill of Particulars, Item 2).

Plaintiff states that he did not set up the ladder, that the

top of the ladder was not tied off to anything, that the bottom of the ladder was not based against a wall or anything else to prevent it from moving, and that the ladder was "plainly not upside down" (plaintiff's affidavit, ¶¶ 8, 9). Therefore, plaintiff contends that the ladder was not properly secured to provide him adequate protection and that he is entitled to judgment on liability against Chelsea, the owner.

Chelsea states that it is the owner of the premises and that, pursuant to a lease (the lease), it rented the ground floor and basement to West 14th Street Partners, LLC (West 14) (Tozer EBT, at 7, 11-12). It further states that West 14 began renovating the restaurant area, and the lease of the ground floor and basement area was assigned to Lucky 13 pursuant to an assignment (the assignment) dated September 30, 2005 (Chelsea motion, Exhibit I). It further contends that it was not involved in the restaurant construction and that it only conducted a few walkthroughs of the premises (Meadow EBT, at 33-34).

Chelsea also alleges that the ladder was provided by Gweedore, that there were two by four railings on either side of the top of the ladder at the first floor level, and that the top of the ladder was tied off (McFadden EBT, at 39-41). It also claims that the ladder was taken up and secured each evening and that it must have been misplaced in an upside down position on the day of the accident (*id.* at 45, 52). It therefore claims

that the ladder was improperly secured by plaintiff, that this conduct was the sole proximate cause of the accident, and that, consequently, plaintiff's motion for partial summary judgment should be denied.

Chelsea argues that, since it had no active fault relating to plaintiff's accident, it should be entitled to contractual indemnity against Lucky 13. Lucky 13 contends that it should not be liable for contractual indemnity since there is no direct contract between it and Chelsea. Chelsea further contends that the assignment included an indemnity clause wherein the assignee, Lucky 13, agreed to hold West 14, the assignor, harmless, but also agreed to "benefit the landlord" as well. Additionally, it further notes that the lease required the tenant to hold the landlord harmless from all claims or liability from any occurrence on the premises (§ 44[e]). Chelsea asserts that, in assuming the lease's obligations, Lucky 13 bound itself to indemnify the landlord, pursuant to the lease's indemnity clause.

Finally, plaintiff responds that Mr. McFadden was not present at the accident site on the day of the accident (McFadden EBT, at 43) and that his co-worker, Mr. McCarry, only arrived at the accident site after plaintiff was on the basement floor. Therefore, he asserts that they lack any personal knowledge as to who placed the ladder at the accident site on the day of the accident and whether it was properly secured. Plaintiff states

that the ladder was there when he arrived for work and that it was not secured in any way. Consequently, he contends that, since the ladder was improperly secured, it slid and caused him to fall.

Labor Law § 240 (1)

Labor Law § 240 (1) (the Scaffold Law) provides, in pertinent part:

"All contractors and owners ... in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

The Scaffold Law is to be liberally construed to accomplish its purpose, which is to protect workers against the special hazards and risks involved in elevation differentials, by placing responsibility for safety practices at building construction sites on owners and contractors (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-514 [1991]).

Plaintiff establishes entitlement to summary judgment on liability on a Labor Law § 240 (1) claim when he demonstrates that an unsecured ladder, on which he is standing, shifts and causes him to fall (*Hart v Turner Constr. Co.*, 30 AD3d 213 [1st Dept 2006]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]). Even if plaintiff himself sets up the ladder,

he is entitled to summary judgment, if the ladder is unsecured and no other safety devices are provided (*Vega v Rotner Mgt. Corp.*, 40 AD3d 473 [1st Dept 2007]; *Velasco v Green-Wood Cemetery*, 8 AD3d 88 [1st Dept 2004]).

Where plaintiff has not shown a violation of the Scaffold Law and he is the sole proximate cause of the accident, he is not entitled to recovery (*Blake v Neighborhood Hous. Serv. of N.Y. City*, 1 NY3d 280, 289-290 [2003]). Also, if there is conflicting testimony as to whether the ladder was properly secured, this raises a triable issue of fact as to whether defendant provided plaintiff with a defective or malfunctioning ladder (*Antenucci v Three Dogs, LLC*, 41 AD3d 205 [1st Dept 2007]).

However, in this action, there is no genuine factual conflict. Plaintiff testified that the ladder was already in place at the accident site when he arrived for work on February 15, 2006. He further testified that the ladder was completely unsecured, that it shifted when he got on it and that this movement of the ladder caused him to fall. Chelsea's evidence, in opposition, does not controvert this. Mr. McFadden was not present at the accident site on February 15, 2006 (McFadden EBT, at 43). Therefore, he has no personal knowledge as to whether or not the ladder was properly secured that day. Similarly, Mr. McCarry arrived at the accident site after plaintiff had fallen and was on the basement floor. He also cannot tell whether the

ladder was properly secured. While he stated that it "seemed to (him) that (plaintiff) placed the ladder upside down" (McCarry affidavit), he has not presented any facts that he observed to support his belief.

Defendant has not shown that plaintiff was the sole proximate cause of the accident (*Rieger v 303 E. 37 Owners Corp.*, 49 AD3d 347 [1st Dept 2008]; *Peralta v American Tel. & Tel. Co.*, 29 AD3d 493 [1st Dept 2006]). Therefore, plaintiff's motion for partial summary judgment on liability on his Labor Law § 240 (1) claim against Chelsea is granted.

Contractual Indemnity

Chelsea has alleged that it had no role in the construction work and only occasionally walked through the premises and this is not contested. This type of participation is inadequate to establish the type of control that would preclude indemnification (*Mangano v American Stock Exch.*, 234 AD2d 198 [1st Dept 1996]). In the assignment, Lucky 13 agreed to assume West 14's position as tenant and, thereby, its obligation to indemnify the landlord. Consequently, there was an agreement by Lucky 13 to indemnify Chelsea.

An owner that is held liable pursuant to the Scaffold Law based upon its status as an owner is entitled to contractual indemnification, where there is such an agreement between the parties (*Velez v Tishman Foley Partners*, 245 AD2d 155 [1st Dept

1997])). Chelsea's motion for summary judgment on its claim for contractual indemnification against Lucky 13 is, therefore, granted.

Order

It is therefore

ORDERED that plaintiff's motion for partial summary judgment on liability against Chelsea/Village Associates, LLC on his claim under Labor Law § 240 (1) is granted; and it is further

ORDERED that Gweedore Construction, Inc.'s cross motion for summary judgment dismissing the second third-party complaint and any cross claims against it is granted and the Clerk of the Court is directed to sever same and enter judgment dismissing said second third-party complaint and any cross claims, together with costs and disbursements as taxed by the Clerk; and it is further

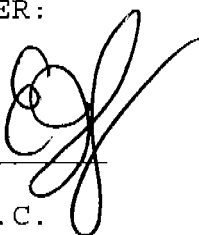
ORDERED that Chelsea/Village Associates, LLC's motion for summary judgment against Lucky 13, LLC on its cause of action for contractual indemnity is granted and said party shall hold it harmless in the event of any recovery by plaintiff, in the full amount of such recovery; and it is further

ORDERED that the parties shall appear to pick a jury on May 20, 2010 at 10am.

This Constitutes the Decision and Order of the Court.

Dated: March 11, 2010

ENTER:



A handwritten signature in black ink, consisting of several loops and a long, sweeping tail, positioned above a horizontal line.

J.S.C.

EMILY JANE GOODMAN

FILED
MAR 22 2010
NEW YORK
COUNTY CLERK'S OFFICE