

Kochanowicz v 410-57 Corp.

2010 NY Slip Op 31197(U)

May 11, 2010

Supreme Court, New York County

Docket Number: 104229/2008

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON
Justice

PART 55

Index Number : 104229/2008
KOCHANOWICZ, KAZIMIERZ
vs.
410-57
SEQUENCE NUMBER : 002
SUMMARY JUDGEMENT

INDEX NO. _____
MOTION DATE 3/22/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
motion to/for _____

The

PAPERS NUMBERED
1-3
4, 5
6-7

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

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided by the*
appexal memorandum decision and order.

NB 6-7-10 @ 2PM
Comp set at end 2
attached

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/11/10

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----x
KAZIMIERZ KOCHANOWICZ,

Plaintiff,

-against-

410-57 CORPORATION and EVEREST
SCAFFOLDING, INC.,

Defendants.
-----x

Index No.: 104229/2008
DECISION and ORDER

FILED
MAY 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

JANE S. SOLOMON, J.:

Plaintiff Kazimierz Kochanowicz (Plaintiff) was injured when he fell from sidewalk bridge scaffolding while working on a construction project at 410 East 57th Street, in Manhattan. Plaintiff sued 410-57 Corporation, the owner of the building (410 Corp.) and Everest Scaffolding, Inc. (Everest), the company that erected the scaffolding. Now before the court are Plaintiff's motion for partial summary judgment as to liability against 410 Corp., and Everest's motion for summary judgment seeking dismissal of the complaint against it and granting its cross claim for common law indemnification. The motions are decided as follows.

FACTS

410 Corp. hired AM&G Waterproofing, LLC. (AM&G) to renovate the facade of the building. Plaintiff was an employee of AM&G and was working at the building, at a work site consisting of scaffolding with a sidewalk bridge, erected by Everest. The safety devices present on the sidewalk bridge

included protective wooden side-panels, approximately three feet in height. Plaintiff alleges that on a date prior to his fall, AM&G cut out and removed a portion of a side-panel to be used as a trash chute to remove rubble. The panel was later re-covered with a plywood patch.

On December 5, 2007, Plaintiff leaned against the patched panel while he was working. It broke away and he fell ten to twelve feet on to a truck full of debris and equipment. Plaintiff noted that there were no other security features set up, such as a lifeline, and he was never instructed to use any.

AM&G filed a "C-2" workers compensation injury report. In response to the question "What was Employee Doing When Injured," AM&G stated:

"Loading equipment into a truck from the sidewalk bridge. Section of sidewalk bridge panel had been removed previously for a trash chute. This opening was covered for [sic] a small piece of plywood. Mr. Kochanowicz leaned against this plywood patch, it broke free and he fell off the bridge . . ."

(C-2 form, attached to Plaintiff's Motion, Ex. 10).

Plaintiff received workers compensation benefits for his injury.

DISCUSSION

A. Plaintiff's Motion (sequence 001)

Plaintiff moves for summary judgment based on his Labor Law § 240(1) claim. Labor Law § 240 imposes upon owners and contractors a non-delegable duty to provide proper and adequate

safety devices to afford protection to those working on a building or structure subject to elevation-related hazards (see, *Gordon v. E. Ry. Supply, Inc.*, 82 NY2d 555 [1993]). "Any breach of the statute will impose absolute liability upon the owner and general contractor" (*Correia v. Professional Data Management, Inc.* 259 AD2d 60 [1st Dept, 1999]).

Plaintiff argues that the sidewalk bridge's wall, in its modified and weakened state, was an inadequate safety device, and that, had he been provided a lifeline, he would not have fallen. 410 Corp. counters that a question of fact remains because the C-2 report does not state that the plywood patch was installed by AM&G. 410 Corp. also seeks to submit Plaintiff's December 5, 2007 medical records, which it claims raises a question of fact because the document notes "[patient] states he tripped and broke his fall on an outstretched hand" (Medical Report, attached to Opposition Affidavit, Ex. A, p. 3), rather than explaining that he fell. Notably, the record also states "Mechanism of Injury, fell a distance of: [patient] reported he fell off a platform onto his right wrist" (id, p.1).

Evidence contained in a business record, such as the medical record 410 Corp. relies upon, is hearsay unless it is germane to the diagnosis or treatment provided (*Rivera v. City of New York*, 293 AD2d 383 [1st dept, 2002]; CPLR 4518). 410 Corp. does not explain how the written statement of an unidentified

treating physician purporting to relate that Plaintiff tripped rather than fell is germane to diagnosis or treatment of his injuries. Accordingly, the medical record is inadmissible on this ground and insufficient to raise a question of fact.

410 Corp.'s argument that there remains a question of fact regarding whether AM&G patched the wall is unpersuasive. Who patched the wall is unimportant for strict liability purposes under § 240(1). The crux of this inquiry is whether the wall was "proper and adequate." Plaintiff's testimony that he fell when a modified and patched section of a safety wall broke away under him has not been rebutted. Accordingly, Plaintiff's motion is granted.

B. Everest's Motion (sequence 002)

1. The complaint & cross-claims

Everest moves for summary judgment dismissing the complaint and all cross-claims against it on the ground that it was not present at the work site and exerted no control over Plaintiff's work. In support, Everest submits its contracts with AM&G (Everest Motion, Ex. F), which show that Everest's work was limited to installing and removing the sidewalk bridge and scaffolding, and states in pertinent part:

"The customer agrees to make no modifications or changes to the installation without prior written consent of Everest Any unauthorized changes are the sole responsibility of the customer" (Id, ¶ 2)

* * *

"It is the customer's responsibility for the continued

safe use of the equipment" (Id, ¶ 6).

Everest also submits the affidavit and deposition testimony of its owner, Christopher Downes. Downes testified that Everest did not design the side-walls with a trash chute. He also stated that Everest did not make the modification to the side-wall subsequent to installation, and Everest did not consent to the making of the modification.

Plaintiff submits an affirmation of no position regarding Everest's motion.

410 Corp. argues that there is no evidence that the patch was installed by AM&G, and no evidence that Everest inspected the bridge at any time after installation, and, therefore, Everest may have been negligent. Everest counters that its contract requires its customer to inspect and properly use their equipment once it is installed, and that there is no evidence on the record that the sidewalk bridges were improperly erected.

Because Everest left the job site upon completion and was not scheduled to return until AM&G was finished with its work on the building, and then only to dismantle the bridge and scaffolding, it does not qualify as an agent under Labor Law § 240(1) and § 241 (see, *Morales v. Spring Scaffolding, Inc.* 24 AD3d 42, 46-7 [1st Dept, 2005]). At

the time of the accident, Everest had no control over the use of the sidewalk bridge or, as shown by its contract with AM&G, responsibility for its maintenance. Moreover, it was not present at the job site and did not have authority to supervise or control work (*Holt v. Welding Services, Inc.*, 264 AD2d 562, 564 [1st Dept, 1999]). Finally, there is no evidence supplied showing that Everest was negligent in selecting the materials to build the sidewalk bridge or in erecting the bridge itself. Accordingly, no questions of fact exist regarding Everest's lack of liability in common law negligence, or under the Labor Law.

2. Common Law Indemnification

"A party sued solely for its own alleged wrongdoing, rather than on a theory of vicarious liability, cannot assert a claim for common law indemnification" (*Esteva v. Nash*, 55 AD3d 474, [1st Dept, 2008]). Everest was not sued here on a theory of vicarious liability. Accordingly, Everest is not entitled to the common-law indemnification it seeks in its cross-claim.

In accordance with the foregoing, it hereby is
ORDERED that Plaintiff's motion for partial summary judgment against 410 Corp. as to liability under Labor Law 240(1) is granted; and it further is

ORDERED that defendant Everest's motion for

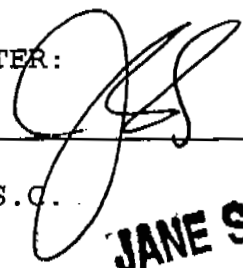
summary judgment dismissing the complaint and all cross-claims against it is granted, and the complaint is severed and dismissed as to it, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed upon the submission of an appropriate bill of costs; and it further is

ORDERED that defendant Everest's motion for summary judgment on its cross-claim for indemnification is denied and upon searching the record the cross-claim is dismissed; and it further is

ORDERED that counsel for the remaining parties shall appear for a pre-trial conference in Part 55, 60 Centre Street, Room 432, New York, NY, on ~~June 7~~ ^{June 7} 2010 at 2:00 PM.

Dated: May 11, 2010

ENTER:



J.S.C. **JANE S. SOLOMON**

FILED
MAY 18 2010
NEW YORK
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