

Ruane v Allen-Stevenson School

2010 NY Slip Op 31716(U)

July 6, 2010

Sup Ct, New York County

Docket Number: 103575/2006

Judge: Judith J. Gische

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SCANNED ON 7/8/2010
[* 1]
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

HON. JUDITH J. GISCHE

PRESENT: _____

PART 10

Index Number : 103575/2006
RUANE, EDWARD
VS.
ALLEN-STEVENSON SCHOOL
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 003

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

FILED

JUL 07 2010

COUNTY CLERK'S OFFICE
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 7/6/10

JJG
HON. JUDITH J. GISCHE 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):

FILED
JUL 07 2010
COUNTY CLERKS OFFICE
NEW YORK

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Edward Ruane,
Plaintiff (s),

-against-

The Allen-Stevenson School, F.J. Sciame
Construction Company, Inc., and
Sciame Development, Inc.,

Defendant (s).

-----X
F.J. Sciame Construction Co., Inc.,

3rd Party Plaintiff,

-against-

Met Sales & Installations Corp.,

3rd Party Defendant.

-----X
F.J. Sciame Construction Co., Inc.,

2nd - 3rd Party Plaintiff

-against-

Intrepid Electrical Contracting Co., Inc. and
Pyramid Floor Covering, Inc.,

2nd- 3rd Defendant

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
FJS n/m (3212) w/KPW affirm, exhs	1
Met x/m (3212) w/DC affirm, exhs	2
Met amended x/m w/DC affirm	3
FJS reply w/KPW affid, exhs	4
Met reply w/DC affirm, exh	5
FJS sur-reply w/KPW affirm	6

Decision/Order
Index No.: 103575-2006
Seq. No.: 003

PRESENT:
Hon. Judith J. Gische
J.S.C.

T.P. Index No.:
590373-2007

T.P. Index No.:
590207-2008

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

This is an action in which plaintiff Edward Ruane, a laborer, contends that he was injured because of violations of sections 240, 241 [6] and 200 of the Labor Laws. Defendant The Allen-Stevenson School ("school") is the owner of building where Ruane's accident occurred. The school had a contract for construction services with the other named defendants, F.J. Sciamè Construction Company, Inc. and Sciamè Development, Inc., the general contractor ("Sciamè"), for the project. The school and Sciamè now move for summary judgment, dismissing Ruane's Labor Law § 200 claim against them. The school and Sciamè also seek summary judgment on their contractual indemnification claims against 3rd party defendant Met Sales & Installations, Corp. ("Met"). Met has cross moved to dismiss the Sciamè's third party complaint against them.

The moving defendants have answered; Ruane filed his note of issue on September 17, 2008. The school and Sciamè brought their motion for summary judgment on November 30, 2009. Met's cross motion was brought February 23, 2010. The school and Sciamè's motion is timely because it was brought within 120 days of the filing of the note of issue (CPLR § 3212; Brill v. City of New York, 2 NY3d 648 [2004]). The school and Sciamè, however, argue that Met's cross motion should not be considered on the merits, but denied as untimely. The court disagrees. Even if the cross motion was brought beyond the statutory deadline, Met's cross motion was made in response to, seeks the same relief as, and is based upon the same issues,

arguments and facts set forth in, a timely motion for summary judgment (Osarjo v. BRF Construction Corp., 23 AD3d 202 [1st Dept 2005]; Altschuler v. Gramatan Management, 27 AD3d 304, 304-305 [1st Dept 2006]; Conklin v. Triborough Bridge and Tunnel Authority, 49 AD3d 320 [1st Dept 2008]). Furthermore, since the court can always search the record and grant summary judgment to a non-moving party, the timeliness of the motion in chief controls (Lapin v. Atlantic Realty Apts. Co., LLC, 48 A.D.3d 337 [1st Dept 2008]). Therefore, the motion and cross motion will be decided on the strength of their respective merits and the court's decision and order is as follows;

Arguments

Ruane is a laborer; his task was to install metal partitions in a bathroom. On August 29, 2005, the day of the accident, he was employed by Met. The accident occurred at the school. Ruane states in his bill of particulars, and testified at his deposition ("EBT"), that he fell on debris in a poorly lit area. The fall took place on a short flight of stairs leading to the main floor. Although he walked down the concrete stairs without incident, when he ascended the stairs an hour later, he fell. At the time he was carrying one of the metal partitions weighing approximately 20 pounds.

After he fell, Ruane noticed a piece of conduit under a piece of fiberglass on the stairs. He stated that he had not seen the debris before he fell because not only was he carrying a partition, but the area was very dark. Ruane noticed the light was out and he told "the laborer for the other two bathrooms . . . to put bulbs in there." However, when asked whether he asked anyone to replace the bulb in the socket over the stairwell he said there was no one around to ask and hadn't noticed that particular light out until he was about to go up the stairs.

According to plaintiff, Sciame's workers were responsible for clearing the debris at the job site and in the area where he had to work. This was based upon his prior interactions with Sciame's workers. His first day on the job the bathrooms where he had to work were not empty. One bathroom was crammed with work materials. There were workers in the other bathroom installing ceiling tile. He complained to Sciame's "GC" (someone whose name he did not know) that the bathrooms had to be cleared out. That person complied and directed his men to clear the bathrooms. One bathroom was cleared immediately and he was able to do his work.

Sciame denies that it was negligent because it did not control the manner or means Ruane did his job, nor did Sciame instruct Ruane on what to do. Sciame argues further that it was Met that provided Ruane with all the necessary equipment for him to install the partitions and John Leone, the principal of met, told Ruane what he needed to do and how to do it.

In support of Sciame's motion for summary judgment against Met, Sciame argues that Leone entered into a contract on behalf of Met and that the contract, dated January 3, 2005 ("Met's contract") refers, and is subject, to "Terms and Conditions set forth on the Reverse Side . . ." and that such terms and conditions are "an integral part of this purchase order." The terms and conditions referred to by Sciame consist of two pages. Directly under the words "Terms and Conditions of Purchase Order" it states that "[To Be Printed on Reverse Side]." Steven Colletta, Sciame's vice president, provides his sworn affidavit that he reviewed all of Sciame's contracts, including the contracts involved in this particular project. He states that Met's contract included these terms and conditions.

Met's principal, Leone, testified at his EBT that he signed the agreement, but does not recall seeing the "terms and conditions" pages attached to the contract and denies signing them. Thus, in support of Met's cross motion for summary judgment, Met argues that although he remembers signing the contract, and Sciame has provided a signed copy of the contract, Sciame has only provided – and can only locate – an unsigned copy of the terms and conditions. Furthermore, Met argues it is illogical for a two page document to be "printed on the reverse side. Met also claims that Sciame's motion for summary judgment on its indemnification claims against Met is premature because the trier of fact must decide whether Sciame was negligent because if it was, Sciame cannot be indemnified for its own negligence.

Plaintiff opposes Sciame's motion, arguing that Sciame's laborers were in charge of debris removal and none of the other subcontractors had laborers who handled that aspect of the job. Thus, plaintiff contends there is an issue of fact about whether Sciame was negligent in keeping the area free from debris, tripping hazards, and otherwise violated sections of the Industrial Code.

Law Applicable to Motions for Summary Judgment

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980). A party may not defeat a motion for summary judgment with bare allegations

of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

When an issue of law is raised in connection with a motion for summary judgment, the court may and should resolve it without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003).

Discussion

Labor Law § 200 (Common Law Negligence)

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site. Rizzuto v. L.A. Wenger Contracting Co., supra. A prima facie case is that the defendant exercised supervision and control over the work performed or had actual or constructive notice of the dangerous condition alleged, or created the condition (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 7 NY3d 805 [2006]; Rizzuto v. L.A. Wenger Contracting Co., supra at 352; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st dept. 1998]).

Even assuming that the school and Sciame have established they did not instruct Ruane how to do his job, he contends that Sciame did not clear debris or replace light bulbs that blew out, creating the conditions that resulted in his accident. These contentions raise has raised triable issues of fact that Sciame may not only have exercised overarching supervisory control over the operation (Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]; Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505 [1993]) but also either had notice of, or created, the dangerous condition alleged (Sheridan v. Beaver Tower Inc., 229 AD2d 302 [1st Dept. 1996] *lv den* 89 NY2d 860 [1996]; O'Sullivan v. IDI Construction Co., Inc., 28 AD3d 225 *aff'd* 7 NY3d

805 [2006]; Rizzuto v. L.A. Wenger Contracting Co., *supra*; Gonzalez v. United Parcel Serv., 249 AD2d 210 [1st Dept. 1998]). These triable issues of material fact defeat the school and Sciame's motion for summary judgment dismissing the common law/ Labor Law § 200 claims against them and that branch of their motion is denied.

The Third Party Action

Sciame relies on an unsigned document — “Terms and Conditions”— as the basis for its contractual indemnification claim against Met. However, that is the only evidence it provides that Leone signed that document on behalf of Met. Leone denies signing the document and although Met’s contract indicates there are “Terms and Conditions...” printed on the reverse side, a two page document cannot be printed on the reverse side.

Notwithstanding Colleta’s sworn affidavit to the contrary, there is a triable issue of fact whether the defendants/3rd party plaintiffs have an indemnification agreement with Met. An unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound (Flores v. Lower East Side Service Center, Inc., 4 N.Y.3d 363 [2005]). This is true of indemnification agreements under the Worker’s Compensation Law as well (Flores v. Lower East Side Service Center, Inc., *supra*).

Here, although Leone admits he signed the contract, he denies he saw or signed the two page document Sciame contends are the terms and conditions of that contract. Met’s contract refers to terms and conditions “printed on the reverse side,” suggesting the terms and conditions are one page. The terms and conditions that Sciame is relying on for contractual indemnification is, however, a two page document. Thus,

while the contract that Leon signed may have had terms and conditions that he is bound by, even if he did not read them, Sciame has failed to prove that the two-page terms and conditions it is relying upon applies to the Met's contract.

Arguments by Sciame, that Leone signed the terms and conditions, but is now conveniently "forgetting" he did so to avoid indemnifying the 3rd party plaintiff, or that Leone has made prior, contradictory statements, merely attack his credibility. The court cannot resolve issues of credibility on a flat record; they must be decided by the jury who can weigh the evidence and draw legitimate inferences therefrom, notwithstanding the sworn affidavit of Steven Colletta who has stated in a sworn affidavit that (S.J. Capelin Assocs. v. Globe Mfg. Corp., 34 NY2d 338 [1974]); also: Flores v. Lower East Side Service Center, Inc., supra at 371).

Sciame's motion is also denied because there are material questions of fact as to whether Sciame was negligent under the common-law and/or Labor Law § 200 in Ruane's alleged accident (Rhodes-Evans v. 111 Chelsea LLC, 44 AD3d 430 [1st Dept 2007]).

Met's cross motion for summary judgment dismissing the third party action is also denied in its entirety because there are triable issues of fact whether it must indemnify Sciame.

Conclusion

In accordance with the foregoing, Sciame's motion for summary judgment is denied. Met's cross motion is also denied.

Since the note of issue has been filed, this case is ready to be tried. Plaintiff shall serve a copy of this decision/order on the Office of Trial Support so the case can

be scheduled for trial.

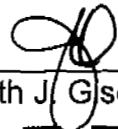
Any relief requested but not specifically addressed is hereby denied.

This branch of Sciame's motion is also denied because Sciame has not proved its freedom from negligence as there are triable issues of fact whether Sciame allowed debris to accumulate on the steps and/or failed to maintain proper lighting, or created the dangerous condition alleged.

This constitutes the decision and order of the court.

Dated: New York, New York
July 6, 2010

So Ordered:



Hon. Judith J. Gische, JSC

FILED

JUL 07 2010

**COUNTY CLERK'S OFFICE
NEW YORK**