Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ORIN R. KITZES IA Part 17
Justice

x

JOHN STANCATI

- against -

BOVIS LEND LEASE, INC.

x

Index Number 16228 2008

Motion Date April 12, 2010

Motion Cal. Number

Motion Seq. No. 3

The following papers numbered 1 to 17 read on this motion by defendant/third-party plaintiff Bovis Lend Lease, Inc./Bovis Lend Lease LMB, Inc. (defendant) for summary judgment dismissing the complaint, for summary judgment dismissing the counterclaims against it by third-party defendant Harbor Island Contracting Inc. (third-party defendant), and for summary judgment on its third-party claims for contractual indemnification and breach of contract; and on the cross motion by plaintiff John Stancati (plaintiff) for partial summary judgment on his cause of action brought under Labor Law § 240 (1).

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1-4
Notice of Cross Motion - Affidavits - Exhibits.....	5-7
Answering Affidavits - Exhibits.....	8-13
Reply Affidavits.....	14-17

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

This is an action to recover for personal injuries that plaintiff allegedly sustained due to violations of Labor Law § 200, 240 (1), 241 (6), and common-law negligence. Defendant was the construction manager at the subject premises and it had subcontracted concrete work

to plaintiff's employer, third-party defendant. Plaintiff was allegedly working on a scaffold at the premises when he was injured.

Defendant has moved for summary judgment dismissing the claim for Labor Law § 240 (1) and has argued that plaintiff's alleged injuries were not a result of the special hazards that this section was designed to protect against. Labor Law § 240 (1) provides that contractors, owners and their agents "shall furnish or erect, or cause to be furnished or erected ... scaffolding ... and other devices which shall be so constructed, placed and operated as to give proper protection" to workers employed on the premises. In order to recover under Labor Law § 240 (1), a plaintiff's injury must have been proximately caused by a violation of the statute (*see Blake v Neighborhood Hous. Servs. of N.Y. City*, 1 NY3d 280, 287 [2003]; *Camlica v Hansson*, 40 AD3d 796, 797 [2007]).

Defendant has relied upon, among other things, the deposition testimony of John Chester (Chester), its superintendent and plaintiff. Plaintiff testified that while he was working on a scaffold, his foot came into contact with a plank of wood that was used to construct the platform of the scaffold, he lost his balance, and put his arms out to prevent a fall from the scaffold to the ground. He further testified that he supervised third-party defendant's employees in erecting the scaffold, inspected it upon its completion, did not find anything wrong with the scaffold and the way it had been assembled, and that he had used the scaffold prior to the date of the incident. Plaintiff also testified that the overlapping plank of wood which his foot came into contact with had been purposefully placed in that position. He testified that he had observed the overlapping planks of wood prior to his fall, but that there was no action that could be taken to eliminate the overlap because the planking on this type of scaffold was generally placed in such overlapping positions and that the scaffold planking could not be assembled without the overlap. Chester testified that scaffold planking was generally placed in overlapping positions as part of the normal and accepted setup of the scaffold.

Based on this evidence defendant has demonstrated that plaintiff was provided with proper safety devices within the meaning of Labor Law § 240 (1) and that there was no violation of the statute which proximately caused plaintiff's injury (*see Walker v City of New York*, 72 AD3d 936, 937 [2010]; *Camlica v Hansson*, 40 AD3d at 797-798). In opposition, plaintiff has pointed to nothing in the record which has demonstrated that the scaffold was defective and in violation of Labor Law § 240 (1) (*see Walker v City of New York*, 72 AD3d at 937). Therefore, plaintiff has failed to raise a triable issue of fact (*see id.*). Thus, defendant is entitled to summary judgment on this branch of its motion.

Plaintiff has cross-moved for partial summary judgment on the issue of liability on his claim brought under Labor Law § 240 (1). In light of the above decision, plaintiff is not entitled to the relief sought on his cross motion.

Labor Law § 200 provides that owners and contractors may be liable for injuries to workers where they supervised or controlled the work which caused the injury (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]; *Lombardi v Stout*, 80 NY2d 290, 295 [1992]). Defendant has moved for summary judgment dismissing plaintiff's claims brought under Labor Law § 200 and for common-law negligence and has argued that it did not direct or control plaintiff's work and that it did not have notice of or create the alleged condition.

Plaintiff was the foreman for third-party defendant at the worksite. He testified that he did not report to anyone at the worksite, that he supervised third-party defendant's employees in erecting the scaffold, inspected it upon its completion, and had no complaints about it. Chester testified that no one had complained to him about the scaffold, that he did not supervise third-party defendant's employees when they erected the scaffold, and that third-party defendant was responsible for the means and methods of the work of its employees. Chester also testified that he and defendant's other employees who were on the worksite had the authority to stop third-party defendant's employees from working if they observed unsafe practices.

The evidence has demonstrated that defendant did not specifically control the means and methods of the plaintiff's work, but instead was responsible for generally overseeing the worksite, ensuring that safety regulations were followed, and that work progressed as scheduled (*see Natale v City of New York*, 33 AD3d 772, 773 [2006]). Through this evidence, defendant has satisfied its prima facie burden on this branch of its motion by demonstrating that it did not supervise or control plaintiff's work, did not have notice of the alleged condition and did not create the alleged condition. In opposition, plaintiff has failed to raise a triable issue of fact. Thus, defendant is entitled to the relief sought on this branch of its motion.

Defendant has also moved for summary judgment dismissing plaintiff's claim brought under Labor Law § 241 (6) and has argued that the various sections of the Industrial Code that plaintiff has relied upon either do not support a claim under this section or are not applicable to the facts of the instant case. Under Labor Law § 241 (6) all contractors and owners must provide workers engaged in "construction, excavation or demolition work" with "reasonable and adequate protection and safety" in areas where such work is being performed. "In order to establish liability under Labor Law § 241 (6), a plaintiff must demonstrate that the defendant's violation of a specific rule or regulation [promulgated by

the Commissioner of the Department of Labor], was a proximate cause of the accident" (*Mercado v TPT Brooklyn Assoc., LLC*, 38 AD3d 732, 733 [2007]; *see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d at 501-502).

Plaintiff has predicated his claim under Labor Law § 241 (6) upon various sections of the Administrative Code of the City of New York and upon various sections of the Industrial Code, including 12 NYCRR 21.9, 12 NYCRR 23-1.7, 23-1.15, 23-5.1, 23-5.3, 23-5.4, 23-5.5, 23-5.6, 23-5.14, 23-5.18 and 23-6.1. Inasumch as plaintiff has failed to oppose the branch of defendant's motion with regard to alleged violations of the Administrative Code and 12 NYCRR 21.9, 12 NYCRR 23-1.7, 5.1, 5.4, 5.14 and 6.1, defendant is entitled to dismissal of these claims (*see Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 649 [2010]).

12 NYCRR 23-1.15, which sets forth standards for safety railings, does not apply here because plaintiff has not alleged that the incident was the result of an inadequate safety railing (*see e.g. Farrell v Triangle Equities Dev. Co., LLC*, 26 Misc 3d 1201[A] [2009]). Similarly, 12 NYCRR 23-5.18, which relates to manually propelled mobile scaffolds, is not applicable in the instant case because plaintiff has not alleged that he was using such a scaffold at the time of the incident or that such a scaffold caused the incident.

12 NYCRR 23-5.3 provides the general provisions for metal scaffolds, while 12 NYCRR 23-5.5 relates to tube and coupler metal scaffolds, and 12 NYCRR 23-5.6 applies to pole scaffolds. Defendant has satisfied its prima facie burden on this branch of its motion because plaintiff's testimony that he was caused to fall when his foot came into contact with an overlapping plank of wood on the floor of the scaffold has demonstrated that there was no violation of any of the alleged sections of the Industrial Code (*see Monterroza v State Univ. Constr. Fund*, 56 AD3d 629, 630 [2008]). Although defendant may not have demonstrated that the scaffold plaintiff was using at the time of the incident did not fall within the definition of sections 23-5.5 and 23-5.6, even if either of these sections applied, neither of them was violated. In addition, the evidence has demonstrated that there was no violation of the provisions of 12 NYCRR 23-5.3. In opposition, plaintiff has failed to demonstrate that the alleged sections of the Industrial Code were violated and, thus, he has failed to raise a triable issue of fact. Therefore, defendant is entitled to the relief sought on this branch of its motion.

In light of the above decision, defendant is also entitled to summary judgment on the branch of its motion for dismissal of the third-party defendant's counterclaims against it.

Defendant has moved for summary judgment on its third-party claims for contractual indemnification and breach of contract. Despite the decision above which has dismissed

plaintiff's underlying complaint, defendant's third-party claims have not been rendered academic (*see Natarus v Corporate Prop. Invs., Inc.*, 13 AD3d 500, 501 [2004]).

"Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). "The promise should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding facts and circumstances" (*id.* at 491-492). In addition, "[i]nasmuch as a promise by one party to a contract to indemnify the other for attorney's fees incurred in litigation between them is contrary to the well-understood rule that parties are responsible for their own attorney's fees, the court should not infer a party's intention to waive the benefit of the rule unless the intention to do so is unmistakably clear from the language of the promise" (*id.* at 492).

Defendant has submitted a copy of the agreement between the parties along with a notice to admit. Third-party defendant's failure to respond to the notice to admit has resulted in the contents of the agreement between the parties being admitted (CPLR 3123). The clause pertaining to indemnification in the agreement provided that third-party defendant would "indemnify and hold [defendant] harmless" from and against damages, including "cost, expense ... including without limitation, legal fees and disbursements [including legal fees and disbursements incurred in enforcing this indemnity]." Therefore, defendant has demonstrated its entitlement to attorney's fees and disbursements in defending the underlying action as well as attorney's fees and disbursements incurred in enforcing its action for indemnity against third-party defendant. In opposition, third-party defendant has failed to raise a triable issue of fact on this issue. Thus, defendant is entitled to the relief sought on this branch of its motion.

With regard to the branch of defendant's motion for summary judgment on its third-party claim for breach of contract, defendant's submission of a copy of the agreement between it and third-party defendant has demonstrated that an agreement existed in which third-party defendant agreed to procure insurance on behalf of defendant. However, defendant's affirmation by counsel submitted in support of this branch of its motion, which has alleged a breach of this provision of the agreement, is insufficient because it has not been made by a party with personal knowledge of the facts (CPLR 3212 [b]; *see Mattera v Capric*, 54 AD3d 827, 828 [2008]). Nor has defendant submitted any other evidence in admissible form that has demonstrated that there was a breach of the agreement to procure insurance. Therefore, defendant has failed to demonstrate its prima facie entitlement to judgment as a matter of law on its cause of action alleging breach of contract and the opposition papers need not be considered (*see McMahan v McMahan*, 66 AD3d 970, 970-971 [2009]).

Accordingly, the branch of defendant's motion for summary judgment dismissing the cause of action brought under Labor Law § 240 (1) is granted. The branch of defendant's motion for summary judgment dismissing the causes of action brought under Labor Law § 200 and for common-law negligence is granted. The branch of defendant's motion for summary judgment on the cause of action brought under Labor Law § 241 (6) is granted. The branch of defendant's motion for summary judgment dismissing the counterclaims against it is granted. The branch of defendant's motion for summary judgment on its third-party claim for indemnification and attorney's fees and costs is granted and the branch of its motion for breach of contract is denied. Plaintiff's cross motion for partial summary judgment on his claim brought under Labor Law § 240 (1) is denied.

Dated: June 10, 2010

J.S.C.