Hart v Commack Hotel, LLC

2010 NY Slip Op 33766(U)

June 22, 2010

Supreme Court, Suffolk County

Docket Number: 27879/2008

Judge: William B. Rebolini

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Short Form Order

SUPREME COURT - STATE OF NEW YORK

I.A.S. PART 7 - SUFFOLK COUNTY

PRESENT:

WILLIAM B. REBOLINI
Justice

Thomas Hart,

Plaintiff,

-against-

Commack Hotel, LLC, HMB Management Co. and Howard Johnson,

Defendants.

Commack Hotel, LLC, HMB Management Co. s/h/a HMD Management Co.,

Third-Party Plaintiffs,

-against-

Hart Roofing & Waterproofing, Inc.,

Third-Party Defendant.

Index No.: 27879/2008

Motion Sequence No.: 001; MD
Motion Date: 12/14/09
Submitted: 4/7/10

Motion Sequence No.: 002; XMOT.D
Motion Date: 12/14/09
Submitted: 4/7/10

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Upon the following papers numbered 1 to 33 read upon these motions for summary judgment: Notice of Motion and supporting papers, 1 - 12; Notice of Cross Motion and supporting papers, 13 - 27; Answering Affidavits and supporting papers, 28 - 29; 30 - 31; Replying Affidavits and supporting papers, 32 - 33.

The plaintiff commenced this action to recover damages pursuant to Labor Law §§ 200, 240 (1), and 241 (6), and for common-law negligence, for injuries he allegedly suffered in a fall from the roof of a hotel owned and operated by the defendant Commack Hotel, LLC. (Commack) and managed by the defendant HMB Management Co.

The plaintiff now moves for summary judgment on the issue of liability pursuant to Labor Law Section 240(1). The defendants/third party plaintiffs oppose plaintiff's motion and cross move for summary judgment dismissing plaintiff's complaint and, alternatively, for summary judgment with respect to their third party claim for indemnification as against the third party defendant.

The plaintiff testified at his deposition that he was the president and sole owner of the third-party defendant Hart Roofing & Waterproofing, Inc. (Hart Roofing), which was hired by Commack to replace a damaged roof on its facility. The plaintiff testified that he did not generally perform the roofing work himself, that he employed six workers and a foreman and that Hart Roofing had scaffolding and safety harnesses at the site. All but approximately 10 feet of the roof had "perimeter protection" in the form of scaffolding or secondary roofs, which protected the roofers from falling off the roof. While on the roof assessing his workers' progress, the plaintiff saw that one of his workers needed assistance in stretching the roofing membrane and decided to help him. The plaintiff testified to the effect that he was aware that this was in the 10-foot area without roof protection but chose to proceed anyway. As the plaintiff kneeled on the membrane at the perimeter of the roof, he realized that the membrane was over the edge of the roof and his knee slipped, causing him to fall off the roof . He also testified that no one, other than himself or his foreman, directed how his workers were to perform their work.

Labor Law § 240 (1) requires that safety devices be so "constructed, placed and operated as to give proper protection to a worker" (Klein v. City of New York, 89 NY2d 833 [1996]). The legislative purpose behind section §240 (1) is to protect workers by placing the ultimate responsibility for safety practices where such responsibility belongs, on the owner and contractor instead of on workers, who are "scarcely in a position to protect themselves from accident" (Rocovich v. Consolidated Edison Co., 78 NY2d 509 [1991]). In order to prevail upon a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that this violation was a proximate cause of his injuries (see, Bland v. Manocherian, 66 NY2d 452 [1985]; Sprague v. Peckham Materials Corp., 240 AD2d 392 [2nd Dept., 1997]). While an injured plaintiff's contributory negligence will not exonerate a defendant who has violated §240 (1) (see, Raquet v. Braun, 90 NY2d 177[1997]), a defendant is not liable under §240 (1) where there is no evidence of a violation and the proof reveals that the plaintiff's own negligence was the sole proximate cause of the accident (see, Robinson v. East Med. Ctr., 6 NY3d 550 [2006]; Montgomery v. Fed. Express Corp., 4 NY3d 805 [2005]). Here, the evidence submitted by the plaintiff does not establish his

entitlement to summary judgment as a matter of law inasmuch as there remains an issue of fact as to whether his actions were the sole proximate cause of his injuries. His deposition testimony reveals that there were adequate safety devices at the site and there is a question of fact as to whether he chose to disregard their absence in the area where the accident took place (see, Chang Han Kim v. Clymer Cent. School, 72 AD3d 1547 [4th Dept., 2010]; Masullo v. 1199 Housing Corp., 63 AD3d 430 [1st Dept., 2009]; Wzonteck v. A & L, Inc., 61 AD3d 1404 [4th Dept., 2009]; Coates v. Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints, 56 AD3d 599 [2nd Dept., 2008]). Accordingly, the plaintiff's motion is denied and so much of defendants' motion which seeks to dismiss the Labor Law §240 (1) claim is correspondingly denied.

To establish liability under Labor Law §241 (6), a plaintiff must plead and prove the violation of a specific Industrial Code regulation that is applicable to the circumstances of his accident (see, Ross v. Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494 [1993]). Here, the plaintiff's complaint and bill of particulars are devoid of any reference to a specific regulation. The failure to identify a violation of any specific provision of the Industrial Code precludes liability under Labor Law §241 (6) (see, Torres v. Mazzone Admin. Group, 46 AD3d 1040 [3rd Dept., 2007]; Owen v. Commercial Sites, 284 AD2d 315 [2nd Dept., 2001]) and counsel's representation that the plaintiff has the right and the intent to serve a supplemental bill of particulars, without identifying any specific regulation, is insufficient to withstand defendants' motion. Accordingly, the plaintiff's Labor Law §241 (6) cause of action is dismissed.

The protection provided by Labor Law §200 codifies the common-law duty of an owner or general contractor to provide employees with a safe place to work (see, Jock v. Fien, 80 NY2d 965 [1992]). It applies to owners, contractors, or their agents (see, Russin v. Louis N. Picciano & Son, 54 NY2d 311 [1981]) who exercised control or supervision over the work and either created an allegedly dangerous condition or had actual or constructive notice of it (see, Lombardi v. Stout, 80 NY2d 290 [1992]). Where, as here, the injury allegedly arises not from a dangerous condition at the property but, rather, from the method or material controlled by the contractor, no liability attaches under the common law or Labor Law §200 (see, Comes v. New York State Elec. & Gas Corp., 82 NY2d 876 [1993]) and any general supervisory duties exercised by the defendants did not rise to the level of supervision or control necessary to hold them liable under Labor Law §200 (see, Haider v. Davis, 35 AD3d 363 [2nd Dept., 2006]; Ferrero v. Best Modular Homes, 33 AD3d 847 [2nd Dept., 2006]). Accordingly, summary judgment dismissing the plaintiff's Labor Law §200 and common-law negligence claims is granted to the defendants.

Lastly, the defendants seek summary judgment on their claim for common-law indemnification over and against Hart Roofing. The defendants are not barred from making such claim because the plaintiff, as sole officer and share holder of Hart Roofing, elected not to be covered under its workers' compensation insurance (see, Continental Inc. Co. v. State of New York, 99 NY2d 196 [2002]; Workers' Compensation Law § 54 [6]). Nevertheless, to establish a claim for common-law indemnification, "the one seeking indemnity must prove not only that it was not guilty of any negligence beyond some statutory liability but must also establish that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident" (Perri

v. Gilbert Johnson Enter., 14 AD3d 681 [2nd Dept., 2005]; Priestly v. Montefiore Med. Ctr./Einstein Med. Ctr., 10 AD3d 493 [1st Dept., 2004]; Correia v. Professional Data Mgt., 259 AD2d 60 [1st Dept., 1999]). Here, the defendants have not been found vicariously liable to the plaintiff, and the issue as to whether some negligence on the part of Hart Roofing contributed to the plaintiff's accident remains unresolved (see, Benedetto v. Carrera Realty Corp., 32 AD3d 874 [2nd Dept., 2006]; Coque v. Wildflower Estates Dev., 31 AD3d 484 [2nd Dept., 2006]). Therefore, summary judgment on the defendants' claim for common-law indemnification over and against Hart Roofing is denied as premature.

The plaintiff's Labor Law §§ 200 and 241 (6), and common-law negligence claims, dismissed herein, are severed and his remaining Labor Law § 240 (1) claim, as well as the third-party claims, shall continue.

Accordingly, it is

ORDERED that the plaintiff's motion for an order pursuant to CPLR §3212 granting summary judgment as to the liability of defendant Commack Hotel, LLC, pursuant to Labor Law §240 (1), is denied; and it is further

ORDERED that the cross motion by defendants Commack Hotel, LLC and HMB Management Co. for an order pursuant to CPLR §3212 granting summary judgment dismissing the complaint or, alternatively, summary judgment on their third-party claim for common-law indemnification over and against the third-party defendant, is granted to the extent that the plaintiff's Labor Law §200 and 241 (6), and common-law negligence claims are dismissed, and is otherwise denied.

Dated: June 22, 2010

William B Rebolini

HON. WILLIAM B. REBOLINI, J.S.C.