

Lipari v At Spring, LLC
2011 NY Slip Op 30004(U)
January 4, 2011
Supreme Court, New York County
Docket Number: 106047/2007
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON

PART 55

Index Number : 106047/2007
LIPARI, JOSEPH
VS.
AT SPRING, LLC
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE 8/23/10
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1-7
45
6

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is decided together with motions 006 and 007 in accordance with the amended memorandum decision and order.*

Next -- Pre-trial conference scheduled for 2/7/11 at 2 PM.

FILED

JAN 05 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/4/11

JANE S. SOLOMON
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/JUDG. SETTLE ORDER /JUDG.

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

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

-----x
JOSEPH LIPARI,

Plaintiff,

DECISION and ORDER

-against-

Index No.: 106047/07

AT SPRING, LLC, CJ TAN SPRING, LLC,
SHAWMUT WOODWORKING & SUPPLY, INC.,
d/b/a SHAWMUT DESIGN & CONSTRUCTION,
and LONGCHAMP SOHO, LLC,

Defendants.

FILED

JAN 05 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----x
AT SPRING, LLC, CJ TAN SPRING, LLC, and
SHAWMUT WOODWORKING & SUPPLY, INC.,
d/b/a SHAWMUT DESIGN & CONSTRUCTION,

Third-Party Plaintiff,

-against-

Index No.: 590774/07

IMPERIAL WOODWORKING COMPANY,

Third-Party Defendant,

-----x

JANE S. SOLOMON, J.:

Plaintiff Joseph Lipari (Lipari) was injured in a construction accident at a store on Spring Street in Soho. He brought this suit under Labor Law §§ 200, 241(6) and 240(1). In these motions, defendants request summary judgment dismissing the complaint, and defendant Longchamps Soho, LLC (Longchamps) seeks leave to be added as a plaintiff in the third-party action against Imperial Woodworking Company (Imperial). Lipari also seeks summary judgment as to liability on his Labor Law § 240(1) claim. The motions are decided as follows.

005, 006,
007

[* 3]

FACTS

Longchamps is the commercial tenant of premises owned by defendant CJ Tam Spring, LLC (Owner). Owner's managing agent is AT Spring, LLC (AT Spring). Longchamp hired defendant Shawmut Woodworking & Design, LLC (Shawmut) to renovate its second floor showroom. Shawmut subcontracted the installation of architectural woodwork to Imperial, which hired Lipari's employer, an entity identified as Wood Pro Installers, to perform the actual installation (David Margulies EBT, Aff. of William G. Kelly, Esq., Ex N).

The project involved positioning undulating wood panels so they appear to peel down from the walls, upon which merchandise could be displayed. A drop ceiling was suspended from hidden wires to resemble sturdy wooden beams overhead; panels between the faux beams were fastened with screws.

Workers fastening the wires in the space above the drop ceiling (also called the loft) placed Masonite boards under themselves as they worked. Lipari, an experienced construction worker, used an A-frame ladder in the "closed" position to reach the loft. He was tightening clamps on a beam, which is part of the process of fastening the wire to the actual ceiling above. He fell and sustained injuries. How he fell is disputed.

According to Lipari, he asked his foreman for a Baker's scaffold, which is a relatively stable platform. He was told

that there was a Baker's scaffold at the work site but it was being used elsewhere, and he was directed to use a ladder instead. He used the ladder as told, with no one on the ground holding it to keep it secure. He used it in the closed position because the work area was too small to use it in the open position. He felt the ladder slip, and grabbed onto a ceiling panel, but the panel gave way. The ladder fell over sideways, and Lipari fell to the ground.

An alleged eyewitness, Frank Higgins, submits an affidavit in support of Lipari stating that Lipari was on an A-frame ladder in the closed position near him, the ladder slid over, and Lipari fell on top of him (Aff. Of Frank Higgins, Ex. A to plaintiff's opposition to motion for summary judgment).

Defendants contend that Lipari was told specifically not to use the closed A-frame ladder; that he should use the Baker's scaffold, which would be made available if he needed it; and that it is common knowledge among experienced workers, such as Lipari, that using an A-frame ladder in the closed position is dangerous. Workers at the site, Lipari included, were told that if a leaning-type ladder was used, they needed to have someone to hold and secure it.

Defendants and Imperial offer two possible explanations for how the accident happened. One explanation is that he was crawling inside the loft (i.e., above the drop ceiling) and

heading toward the ladder when he misjudged the location of the edge of the ceiling; he crawled out on a Masonite board that was cantilevered over the edge, and fell. According to this explanation, there is no failure or defect in the ladder; he simply fell from a height. This version of events finds support in the accident report and testimony from Lipari's foreman, James Caulfield (Aff. of Barbara Sheehan, Esq., in support of Defendants' motion, Ex. M and Ex. S).

Another explanation for the accident is found in an accident report, apparently written and signed by Lipari and dated ten days after the accident, which states that he "Fell off ladder about 5' high from floor masonite was placed by someone else on top of ceiling I was working off and over hanged [illegible] I put my hand out and lost balance and fell" (Lipari Accident Report, Sheehan Aff. at Ex. M). While not entirely consistent with his deposition testimony, the Lipari Accident Report implies that his fall was not causally related to a failed ladder or other safety device, although the description of the circumstances is ambiguous.

Another accident report was prepared by Shawmut's assistant superintendent on the site, David Margulies (Margulies Accident Report, Kelly Aff., Ex. O). Margulies was at the accident location immediately after it occurred, and he spoke to Lipari and other workers about what happened, and prepared the

accident report soon thereafter. He saw the A-frame ladder still standing after the accident (Margulies EBT, Kelly Aff., Ex. N, 37). Another witness, who said that he was Lipari's partner on the job, heard Lipari fall and immediately went to the accident scene, where he saw Lipari on the ground and the ladder in the upright position (Roy Ramski EBT, Kelly Aff., Ex. S, 39).

The Margulies Accident Report states that Lipari was on the fifth step of the ladder, climbing toward the loft, when he leaned on a piece of Masonite board that was cantilevered "approximately four inches over the solid surface. [Lipari] leaned on this section [but it] did not hold him" (Margulies Accident Report). Lipari then lost his balance, and he fell over. Margulies noted that the A-frame ladder was in good condition, and that it was the appropriate device for Lipari's task.

In the subcontract between Shawmut and Imperial, it was agreed that Imperial would defend and indemnify the owner¹, architect/engineer and Shawmut from any claims, damages or loss arising out of the work and caused in whole or in part by any negligent act or omission of Imperial, its subcontractors or any of their employees (Subcontract, Sheehan Aff., Ex. I, ¶ 4[M]).

Lipari commenced this lawsuit in May 2007, naming

¹ Longchamps is named on the face of the subcontract as "Owner".

Owner, AT Spring and Shawmut as defendants. These defendants brought a third-party action against Imperial seeking common law contribution and contractual indemnification. Lipari subsequently amended the complaint to add Longchamps as a defendant.

DISCUSSION

That part of defendants' motion for leave to amend the third-party action summons and complaint to add Longchamps as a third-party plaintiff is granted without opposition.

Imperial's motion for summary judgment dismissing the third-party complaint is premised on two notions: First, that it only supplied architectural wood and played no part in the accident, so it could not have been negligent. Second, that the evidence shows that Lipari's accident was entirely his own fault, and did not involve a defective ladder or any other basis for finding liability under Labor Law § 240(1). The first argument fails because there is evidence that Lipari's employer was an Imperial subcontractor, so the subcontractor's negligence is attributable to Imperial under the terms of the subcontract with Shawmut. If Lipari was the only negligent actor, as Imperial suggests, that negligence is attributable to Imperial for the purposes of indemnification under the Subcontract. In other words, Imperial could be responsible for paying defendants'

litigation costs if Lipari's complaint is dismissed. The second argument, that there is no §240(1) liability as a matter of law, is discussed below.

To succeed on a §240(1) claim, a plaintiff must establish that there was a violation of the statute, and that the violation proximately caused his injury (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259 [2001]). "The point of Labor Law §240(1) is to compel contractors and owners to comply with the law, not to penalize them when they have done so" (*Blake v Neighborhood Housing Services of N.Y. City, Inc.*, 1 NY3d 280 [2003]). A fall from a scaffold or ladder does not in itself establish that the proper protection was not provided (*id.*, citing *Alava v City of N.Y.*, 246 AD2d 624, 625 [2d Dept 1998]). In this case, defendants contend that the proper protection was provided, both in the availability of a Baker's scaffold, and the provision of an A-frame ladder that functioned flawlessly.

Lipari's testimony is at odds with that of his co-workers Caulfield, Margulies and Ramski, and with some of the information recorded in the accident reports. On a motion for summary judgment, it is not the court's role to make determinations of witness credibility. If Lipari is believed, a reasonable jury could find he has made a prima facie case for liability under §240(1), because he was given an improper ladder which malfunctioned, causing his injury. Higgins's testimony

supports this view. Moreover, if the version of the accident related by Caulfield is believed, that Lipari fell from the loft without the involvement of a ladder, summary judgment would be appropriate because his injury could be attributed to the failure to provide an appropriate safety device as required under §240(1).

If Margulies, Ramski and the accident reports are given credence, however, a reasonable jury could find that there was no failure of a safety device; indeed, that Lipari was provided with the appropriate device, and his fall was not the proximate result of a §240(1) violation. Accordingly, summary judgment regarding liability under §240(1) is denied to all parties, and that part of Imperial's motion to dismiss the third-party action based upon a failure of Lipari's §240(1) claim likewise must be denied.

Summary judgment also is denied with respect to Labor Law §241(6). Under the New York State Industrial Code, all ladder footings shall be "firm", i.e., not slippery, and when work is performed on a leaning ladder from rungs between 6 and 10 feet above the ladder footing, the ladder must be held securely by a person stationed at the foot of the ladder, or by mechanical means (12 NYCRR 23-1.21[b][4][iii - iv]). The testimony indicates that Lipari was working just 5 feet above the ground, so there is no requirement under this code section that the ladder be secured. However, if the testimony that the ladder

slipped out from under Lipari is believed, he can make out a prima facie case for §241(6) liability, and his own negligence in using the A-from in a closed position may be considered in the context of defendants' contention that his negligence was a contributing factor in the accident. Since the §241(6) claim survives, the third-party action against Imperial cannot be dismissed because the alleged code violation, and Lipari's alleged comparative negligence, are some evidence of negligence attributable to an Imperial subcontractor or its employees, thereby triggering the obligation to indemnify under paragraph 4(M) of the Subcontract.

Finally, that branch of defendants' motion seeking summary judgment dismissing the common law negligence and Labor Law §200 claims is granted because the defendants had no direct participation in the oversight of Lipari's work (see *Comes v NYS Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

Accordingly, it hereby is

ORDERED that third-party defendant Imperial' motion for summary judgment dismissing the third-party complaint (motion 005) is denied; and it further is

ORDERD that defendants' motion for summary judgment (motion sequence 006) is granted to the extent that Lipari's common law negligence and Labor Law §200 claims are dismissed; and it further is

ORDERED that that branch of defendants' motion seeking to amend the third-party complaint to add Longchamps as a third-party plaintiff is granted, and the third-party complaint is amended in the form annexed as Ex. V to the motion upon service of a copy hereof with notice of entry, and third-party defendant Imperial shall serve an answer thereto within 20 days of said service; and it further is

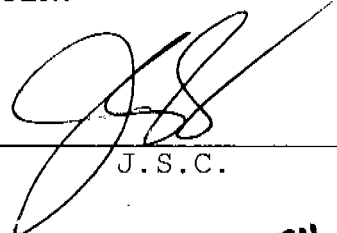
ORDERED that defendants' motion is otherwise denied; and it further is

ORDERED that Lipari's motion for summary judgment as to liability on this Labor Law §240(1) claim (motion sequence 007) is denied; and it further is

ORDERED that counsel shall appear in Part 55 for a pre-trial conference on February 7, 2011 at 2 PM, of which courtesy copies hereof is notice.

Dated: January 4, 2011

ENTER:



J.S.C.

JANE S. SOLOMON

FILED

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