

Breen v 25 Broadway Off. Props., LLC

2011 NY Slip Op 30021(U)

January 5, 2011

Supreme Court, New York County

Docket Number: 101406/09

Judge: Doris Ling-Cohan

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

PRESENT: HON. DORIS LING-COHAN
Justice

PART 36

Breen

INDEX NO.

101406/09

MOTION DATE

- v -

MOTION SEQ. NO.

003

25 Broadway Office Properties LLC

MOTION CAL. NO.

4 Board - Realty section

The following papers, numbered 1 to _____ were read on this motion to/for 4 cross motion for summary judgment

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2
5, 6
7

Cross-Motion: Yes No

3, 4

Upon the foregoing papers, it is ordered that this motion 4 cross-motion

for summary judgment are decided in accordance with the attached memorandum decisions.

FILED

JAN 07 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/5/11

[Signature]

HON. DORIS LING-COHAN ^{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 STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----x
DANIEL BREEN,

Plaintiff,

Index No.: 101406/09

-against-

Motion Seq. No.: 003

25 BROADWAY OFFICE PROPERTIES, LLC,

Defendant.

-----x
25 BROADWAY OFFICE PROPERTIES, LLC,

Third-Party Plaintiff,

Third-Party Index No.:
590726/09

-against-

TIMBIL MECHANICAL, INC.,

Third-Party Defendant.

FILED
DECISION

-----x
DORIS LING-COHAN, J.:

JAN 07 2011

BACKGROUND

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves, pursuant to CPLR 3212, for partial summary judgment as against defendant 25 Broadway Office Properties, LLC (25 Broadway) with respect to liability on his cause of action based on Labor Law § 240 (1). 25 Broadway cross-moves, pursuant to CPLR 3212, for conditional summary judgment as against third-party defendant Timbil Mechanical, Inc. (Timbil), based on contractual and common-law indemnification.

Plaintiff alleges that he was seriously injured when he fell from a height to the concrete floor below after the two-level

scaffold on which he was standing tipped over without warning. Plaintiff asserts that the scaffold was neither secured or braced so as to provide proper protection from the effects of gravity.

Plaintiff was employed by third-party defendant Timbil as a union steamfitter, and Timbil was engaged to construct and install chiller plants at the work site owned by 25 Broadway.

At his examination before trial (EBT), plaintiff testified that, on January 13, 2009, he was working on a scaffold platform, installing a new chiller unit. Plaintiff's EBT, at 13, 16-17. On the morning of the occurrence, plaintiff and his co-workers assembled the scaffold from which he eventually fell. The scaffold was "two sections high," which enabled plaintiff to access the ceiling height that was approximately 20 feet high. *Id.* at 17, 30. When fully assembled, the scaffold platform was 13 feet high. *Id.* at 30. The scaffold was assembled with four wheels at the base, which were locked in place by plaintiff prior to the accident. *Id.* at 17, 26-27, 37. According to plaintiff, there was no guardrail around the scaffold's platform. *Id.* at 30-31.

To access the scaffold platform, plaintiff climbed a ladder on the side of the scaffold. *Id.* at 32. Plaintiff stated that there were no safety devices of any kind, including safety lines, to prevent him from falling while working on the scaffold. *Id.* at 33. Moreover, plaintiff said that, even if safety lines had been provided, there was no place to tie off such safety devices.

Id. at 35.

Plaintiff stated that, on the morning of the accident, he and a co-worker would move the scaffold into position and then lock the wheels, and that he had ascended and descended that scaffold five times on the morning of the accident without incident. *Id.* at 37. Furthermore, according to plaintiff, each time the scaffold would move, he would check its structural integrity. *Id.* at 37-38.

At the time of the accident, plaintiff was standing on the top of the scaffold using a 20-pound electrical chopping gun to chop concrete off the I-beam, and the only protective gear with which he was provided was a face shield. *Id.* at 38-40, 42-43. The chopping gun that plaintiff was using vibrates like a jackhammer. *Id.* at 43.

Plaintiff testified that, while he was using the chopping gun, the scaffold seemed to move and fall to his right. *Id.* at 44. As the scaffold fell, plaintiff said that he tried to jump towards a flange, which was too far away. *Id.* Plaintiff fell to the concrete surface beneath the scaffold, thereby causing his injuries. *Id.* at 46.

Jose Trinidad (Trinidad), plaintiff's co-worker, provided an affidavit in which he confirmed that the scaffold and plaintiff fell to the concrete floor. Motion, Ex. 6. It is noted that the only eyewitnesses to the occurrence were plaintiff and Trinidad.

Chris Benson (Benson), 25 Broadway's chief engineer and

building manager, was also deposed in this matter. Benson testified that he was at the building where the work was being performed on the day of the accident, and that he received a call that someone fell off the scaffold in the building's basement. Breen EBT, at 13-14, 34. When he arrived at the accident site, Benson stated that he saw plaintiff bleeding and the scaffold laying on its side on the floor. *Id.* at 14, 34, 36. Benson also said that the New York City Building Department (DOB) was called to investigate after the accident, and that it is his belief that Timbil was issued a violation by DOB. *Id.* at 42-45.

William M. Ross (Ross), Timbil's owner, was also deposed in this matter. Ross was not at the work site on the day of the accident, but he identified the C-2 "Employer's Report of Work Related Injury/Illness" form that his company filed. Ross EBT, at 82-86. Ross confirmed that the scaffold from which plaintiff fell had no guardrails. *Id.* at 94-95. Ross also acknowledged that Timbil received a scaffold violation from DOB as a result of plaintiff's accident. *Id.* at 96-97.

The C-2 form filed by Timbil states, in pertinent part:

"Mr. Breen was standing on scaffolding using a chopping gun. The scaffolding fell one way and Mr. Breen fell the opposite way."¹

In its cross motion, 25 Broadway adopts the arguments posited by plaintiff in his motion, and asserts that only Timbil

¹It is also noted that Ross testified as to what other persons who were not deposed told him about the occurrence, but since that constitutes inadmissible hearsay, the court is not considering that portion of his testimony.

employees, or persons engaged by Timbil, were working on the project, and that 25 Broadway did not direct or control any Timbil workers, or any subcontractors, concerning the work at the job site. Further, 25 Broadway states that the contract executed between 25 Broadway and Timbil provides, in pertinent part:

"3. (a) To the fullest extent permitted by law, and notwithstanding paragraph (b) below, the Contractor [Timbil] shall indemnify and hold harmless the Owner [25 Broadway], Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Work to the extent that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, to any of your employees or the employee of your agents or subcontractors regardless of whether or not such claim, damage, loss or expense is caused in part by a party identified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in the Contract Documents.

(b) To the fullest extent permitted by law the Contractor shall indemnify and hold harmless the Owner, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of resulting from performance of the Work, provided that such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than the Work itself) including the loss of use resulting therefrom, but only to the extent caused in whole or in part by negligent acts or omissions of the Contractor, a Subcontractor, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by the party indemnified hereunder. Such obligation shall not be construed to negate, abridge, or reduce other rights or obligations of indemnity which would otherwise exist as to a party or person described in the Contract Documents."

Motion, Ex. 7.

In addition, Timbil acquired commercial general liability insurance in which it named 25 Broadway as an additional insured. *Id.*

Neither 25 Broadway, nor Timbil, presents any opposition to plaintiff's motion.

In opposition to 25 Broadway's cross motion, Timbil asserts that the contractual provision cited above violates New York's General Obligations Law (GOL) § 5-322.1 and is, therefore, unenforceable, and that, pursuant to Workers' Compensation Law § 11, plaintiff and any person entitled to indemnification for his injuries are limited to Workers' Compensation benefits, unless the worker is gravely injured, which has not been alleged in the instant matter.

DISCUSSION

"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 [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary

judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

Section 240 (1) of the New York Labor Law states, in pertinent part:

"All contractors and owners and their agents, except owners of one and two-family dwellings who contract for but do not direct or control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

As stated by the Court in *Rocovich v Consolidated Edison Company* (78 NY2d 509, 513 [1991]),

"It is settled that section 240 (1) is to be construed as liberally as may be for the accomplishment of the purpose for which it was thus framed. Thus, we have interpreted the section as *imposing absolute liability* for a breach which has proximately caused an injury. ... In furtherance of this same legislative purpose of protecting workers against the known hazards of the occupation, we have determined that the duty under section 240 (1) is *nondelegable* and that an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control [internal quotation marks and citations omitted]."

Plaintiff's motion for partial summary judgment on the issue of liability on his Labor Law § 240 (1) cause of action is granted.

Plaintiff has established prima facie entitlement to judgment based on the deposition testimony attached to his motion. It appears to be uncontroverted that plaintiff's

injuries were caused by the scaffold on which he was working tipping over, coupled with the fact that he was not provided with any other safety devices. Furthermore, the admission by Timbil that it received a violation from DOB based on the unsafe condition of the scaffolding provides additional support to plaintiff's assertions.

Since plaintiff has met his burden of proof, and his motion has not been opposed, the court grants him the relief sought.

That portion of 25 Broadway's cross motion seeking common-law indemnification is denied, but that portion of 25 Broadway's cross motion for contractual indemnification is granted for the reasons stated below.

Pursuant to Workers' Compensation Law Article 2, § 11, a worker who is injured on a jobsite, as well as those persons who are entitled to recover damages, contribution or indemnity with respect to such injuries, are limited to the remedies specified in the Workers' Compensation Law as against the worker's employer, unless the worker suffers a "grave injury" or

"a claim or cause of action for contribution or indemnification [is] based upon a provision in written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered."

None of the parties has alleged that plaintiff suffered a "grave injury" as defined in the Workers' Compensation Law and, therefore, claims sounding in common-law indemnification and

contribution do not lie. The question that remains is whether the indemnification provision appearing in the contract entered into between 25 Broadway and Timbil is valid and enforceable.

"There appears to be no dispute that [25 Broadway] is prohibited from filing a common-law contribution claim against [Timbil] because [Timbil] is plaintiff's employer and plaintiff did not sustain a grave injury within the meaning of Workers' Compensation Law § 11. [25 Broadway] asserts, however, that a claim for contractual indemnification lies since [Timbil]'s negligence also contributed to plaintiff's injuries in that [Timbil], having control of the workplace, failed to provide plaintiff with the necessary safety equipment to prevent his fall."

Brooks v Judlau Contracting, Inc., 11 NY3d 204, 208 (2008).

Timbil contends that the contractual indemnification provision appearing above violates the provisions of GOL § 5-322.1. The court disagrees.

Section 5-322.1 of GOL prohibits a party involved in construction, alteration, maintenance or repair of a building from contracting with another to indemnify or hold it harmless for injuries arising out of its own negligence. However, 25 Broadway is

"not precluded by General Obligations Law § 5-322.1 from obtaining partial contractual indemnification pursuant to the [Timbil] contract [to obtain] indemnification for [Timbil]'s negligence only."

Minorczyk v Dormitory Authority of State of New York, 74 AD3d 675, 675-676 (1st Dept 2010).

The contract provision in question states that Timbil is to indemnify and hold 25 Broadway harmless for any bodily injuries that result "in part" from 25 Broadway's actions, but only "to

the fullest extent permitted by law." Courts have interpreted the phrase "to the fullest extent permitted by the law" to limit the promisor's indemnification obligations to those situations in which the promisee is no more than partially liable for the worker's injuries. *Brooks v Judlau Contracting, Inc.*, 11 NY3d 210, *supra*.

In the case at bar, there is no evidence that 25 Broadway was in any way negligent, or that it supervised or controlled plaintiff's work, and, therefore, it has demonstrated its entitlement to indemnification under the contract. *Priestly v Montefiore Medical Center/Einstein Medical Center*, 10 AD3d 493 (1st Dept 2004).

"Given the lack of any showing of active negligence on the part of the owner, any finding of negligence in this case would be based solely on the acts or omissions of [Timbil], although attributable by statute to the owner. In such circumstances, [Timbil], which assumed a contractual duty ... is liable for the full amount of any recovery as well as the owner's legal fees in defending this action."

Ortiz v Fifth Avenue Building Associates, 251 AD2d 200, 201-202 (1st Dept 1998); *Conrad v 105 Street Associates, LLC*, 55 AD3d 461, 462 (1st Dept 2008) (given "the absence of any evidence of negligence on the part of [25 Broadway], [25 Broadway] is entitled to conditional summary judgment on its claim for contractual indemnification against [Timbil]").

CONCLUSION

Based on the foregoing, it is hereby


ORDERED that plaintiff's motion for partial summary judgment

on the issue of liability on his Labor Law § 240 (1) cause of action is granted, with damages to be determined at trial; and it is further

ORDERED that defendant/third-party plaintiff's cross motion seeking conditional summary judgment as against third-party defendant with respect to contractual indemnification and reasonable attorney's fees in the underlying action is granted but the cross motion is otherwise denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiff shall serve a copy upon all parties with notice of entry.

Dated: 1/5/11


Doris Ling-Cohan, J.S.C.

J:\Summary Judgment\Breen.25 Broadway.wpd

FILED
JAN 07 2011
NEW YORK
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