

Pylilo v Metropolitan Tower Life Ins. Co.

2011 NY Slip Op 30145(U)

January 14, 2011

Sup Ct, New York County

Docket Number: 107985/07

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK -- NEW YORK COUNTY
HON. EILEEN A. RAKOWER

PART 15

F

Index Number : 107985/2007

PHYLILLO, JOSEPH vs. Phylilo

METROPOLITAN TOWER LIFE

SEQUENCE NUMBER : 004

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

his motion to/for _____

Notice of Motion/ Order to Show Cause -- Affidavits -- Exhibits ... _____

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1, 2

3, 4

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/19/11



HON. EILEEN A. RAKOWER

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):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

-----X
JOSEPH PYLILO, I n d e x N o .
107985/07

Plaintiff,

Seq.: 004&005

-against-

METROPOLITAN TOWER LIFE INSURANCE
COMPANY and IDEAL INTERIORS, INC.,

Defendants.

-----X
METROPOLITAN TOWER LIFE INSURANCE Third-Party Index
No.:
COMPANY and IDEAL INTERIORS, INC., 590810/07

Third-Party Plaintiffs,

FILED

-against-

JAN 24 2011

POMALEE ELECTRIC CO. INC.,

NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Defendant.

-----X
EILEEN A. RAKOWER, J.S.C.

Motion sequence numbers 004 and 005 are hereby consolidated for disposition. This is an action to recover damages sustained by a journeyman electrician when a conduit that he was carrying fell off his shoulder while he was working at a construction site located in Stuyvesant Town in the County and State of New York on October 10, 2006.

In motion sequence number 004, defendants and third-party plaintiffs Metropolitan Tower Life Insurance Company (Metropolitan) and Ideal Interiors, Inc.

(Ideal) (together, defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Joseph Pylilo's complaint against them, as well as for summary judgment in their favor on their third-party claim for contractual indemnification against third-party defendant Pomalee Electric Company, Inc. (Pomalee).

In motion sequence number 005, third-party defendant Pomalee moves, pursuant to CPLR 3212, for summary judgment dismissing the third-party action against it. In addition, Pomalee moves for preclusion of the alleged indemnity agreement between Ideal and Pomalee and dismissal of the third-party action as an appropriate sanction for spoliation of evidence by defendants.

Stuyvesant Town is a complex of 42 apartment buildings owned by defendant Metropolitan. Metropolitan's property manager, non-party Rose Associates (Rose), was responsible for the day-to-day operation of the complex and hired some of the contractors necessary for an alterations renovation project underway at the time of plaintiff's accident (the project). Rose hired defendant Ideal to serve as general contractor on the project. Ideal hired Pomalee to bring the buildings' basement, storage and walkways up to code. Plaintiff was hired by Pomalee to assist in installing large electrical servers, as well as to run new electrical lines to the storage areas. Metropolitan did not hire any of the subcontractors or contractors associated with the project.

Plaintiff stated that, on the morning of his accident, he reported to a store front in Stuyvesant Town (the building). After meeting his foreman, John Clarke (Clarke), also a Pomalee employee, he and Clarke walked down to the basement of the building, which consisted of two rooms. Pomalee kept its materials in the smaller of the two rooms, and the work was going on in the larger one. Plaintiff explained that, on the date of his accident, Clarke instructed him to continue installing conduit lines. Plaintiff noted that he only took instructions from the owner's son or from Clarke. Plaintiff then proceeded to his work area in the basement where he worked for approximately two to three hours. When plaintiff ran out of conduit, he walked back to the smaller room where the materials were stored to retrieve some. The conduit consisted of 10-foot long pieces bundled into groups of 10. Each bundle of conduit weighed 30 to 40 pounds.

Plaintiff then lifted a bundle of electrical conduit and rested it on his left shoulder. Once the bundle was in place, plaintiff made sure that there was sufficient

clearance in front of and in back of him. As plaintiff turned to his right, the front end of the conduit that he was carrying allegedly got caught in what appeared to be a thin dark brown hanging rope that was dangling between some columns which were present in the materials room. As the rope snagged the front end of the bundle, the front end of the bundle moved upwards and the bundle fell off plaintiff's shoulder. Plaintiff maintains that he was injured when his left hand then became pinned by the conduit to his shoulder, and he was caused to stumble backward. Plaintiff noted that, prior to his accident, he never saw any hanging ropes in the materials room, he was never warned about any hanging ropes and he had no idea what purpose the ropes might have served.

Plaintiff's foreman, Clarke, testified that Pomalee was hired to upgrade the egress lighting for the project. Clarke explained that Pomalee provided all of its own materials and tools for the project. Clarke also maintained that Ideal never instructed Pomalee employees as to how to perform their work. At the time of the accident, Clarke and plaintiff, an apprentice electrician, were the only ones working in the building. After working for several hours, plaintiff informed him that he had picked up a bundle of conduit the wrong way and twisted his shoulder. Clarke maintains that plaintiff did not make mention any ropes at this time, and that he had never observed any hanging ropes at the accident scene.

Clarke further testified that when plaintiff reported to work the next day, he asked Clarke to fill out an accident report (the Pomalee accident report). In the Pomalee's accident report, Clarke stated that "while [plaintiff was] lifting bundle of pipe-twisted left arm [and] shoulder" (Defendants' Notice of Motion, Exhibit S, Pomalee Accident Report, dated October 16, 2006). It should be noted that there was no mention of a clothesline or rope in said report.

In his affidavit, Keven Wenzel (Wenzel), Metropolitan's associate director, stated that Rose kept Metropolitan apprised of the progress of the project. In addition, Metropolitan did not inspect any of the work involved, nor did it instruct or direct the contractors and subcontractor as to how to perform their work. In addition, Wenzel maintained that Metropolitan never received any complaints about hanging ropes in the basement area, nor was Metropolitan responsible for the placement of any such ropes.

In his affidavit, Dennis O'Connor (O'Connor), Ideal's project superintendent

at the time of the accident, stated that, although Ideal monitored the progress of the work to make sure that it conformed to plans and specifications, plaintiff was instructed solely by his foreman, and that Ideal did not supervise or direct plaintiff's work in any way. O'Connor also stated that he was familiar with the room where plaintiff's accident took place, and that he observed said room on the day of the accident. O'Connor maintained that the room did not contain any hanging clotheslines or ropes, nor did Ideal install any such clotheslines or ropes. O'Connor also noted that he never received any complaints regarding the same.

Shortly after the accident, pursuant to Ideal's custom and practice, O'Connor prepared an accident report (the Ideal accident report). In the Ideal accident report, O'Connor stated, in pertinent part:

Pomalee Electric employee Joe [Pylilo] [l]ifted a bundle of 3/4 inch pipe consisting of 10, 10 foot pieces lost balance causing pain to his left shoulder. He was asked if he needed medical attention and he stated no. Employee kept working throughout the day. Pomalee supervisor notified by John Clarke on site

(Defendants' Notice of Motion, Exhibit Q, Ideal's October 10, 2006 Accident Report).

In his affidavit, Frank Cama (Cama), Ideal's project manager at the time of the accident, stated that he visited the work site approximately once a week. Cama also maintained that he never observed any clotheslines or ropes hanging from the ceiling or between the columns. Cama also asserted that Ideal never placed any such ropes, nor did it ever receive any complaints about any hanging ropes.

“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” (*Santiago v Filstein*, 35 AD3d 184, 185-186 [1st Dept 2006], quoting *Winegrad v New York University Medical Center*, 64 NY2d 851, 853 [1985]). 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]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *DeRosa v City of New York*, 30 AD3d 323, 325 [1st Dept 2006]). If there is any doubt as to the

existence of a triable issue of fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]; *Grossman v Amalgamated Housing Corporation*, 298 AD2d 224, 226 [1st Dept 2002]).

Initially it should be noted that, although plaintiff argues that defendants are not entitled to dismissal of his Labor Law § 240 (1) claim against them, a review of the record indicates that plaintiff never asserted a Labor Law § 240 (1) claim in his complaint and/or bill of particulars. In any event, at the time of the accident, plaintiff was involved in work that did not impose a gravity-related risk, so as to come within the purview of Labor Law § 240 (1), when, while walking at ground level and carrying the bundle of conduit over his shoulder, the conduit fell, causing plaintiff to injure his shoulder (*see Meslin v New York Post*, 30 AD3d 309, 310 [1st Dept 2006] [plaintiff's injuries were not compensable under Labor Law § 240 (1) where plaintiff was allegedly injured when he stepped off a scaffold, which was at ground level, onto a pipe, which then rolled and caused him to fall into a three-foot deep hole]).

Labor Law § 241 (6) provides, in pertinent part, as follows:

“All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

* * *

- (6) All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped ... as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places. ...”

Labor Law § 241 (6) imposes a nondelegable duty on owners and contractors to provide reasonable and adequate protection and safety to workers (*see Ross v Curtis-Palmer Hydro-Electric Company*, 81 NY2d 494, 501-502 [1993]). However, Labor Law § 241 (6) is not self-executing, and in order to show a violation of this statute, and withstand a defendant's motion for summary judgment, it must be shown that the defendant violated a specific, applicable, implementing regulation of the

Industrial Code, rather than a provision containing only generalized requirements for worker safety (*id.*).

Plaintiff premises his Labor Law § 241 (6) claim against defendants on violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2). Initially, it should be noted that Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2) are sufficiently specific to support a Labor Law § 241 (6) claim (*Smith v McClier Corporation*, 22 AD3d 369, 370 [1st Dept 2005]; *Lopez v City of New York Transit Authority*, 21 AD3d 259, 259-260 [1st Dept 2005]).

Industrial Code 12 NYCRR 23-1.7 (e) (1), which deals with “tripping” hazards in passageways, does not apply to the facts of this case (*see Parker v Ariel Associates Corporation*, 19 AD3d 670, 672 [2d Dept 2005]). Here, plaintiff does not allege that his injuries were caused by him tripping on dust or debris. Instead, plaintiff alleges that his shoulder was injured when the bundle of conduit he was carrying snagged a hanging rope. Moreover, plaintiff was not in a passageway at the time of the accident, but instead, he was in a room where he was gathering the materials necessary to perform his assigned work for the day (*Adams v Glass Fab, Inc.*, 212 AD2d 972, 973 [4th Dept 1995]).

Industrial Code 12 NYCRR 23-1.7 (e) (2) is also inapplicable to the facts of this case, as, in addition to relating to tripping hazards, that section requires that floors or other work areas be kept free from the accumulation of dirt and debris, as well as from scattered tools and materials and sharp projections. As stated previously, plaintiff’s accident was not caused as a result of tripping, debris or scattered tools (*see Waitkus v Metropolitan Housing Partners*, 50 AD3d 260, 260 [1st Dept 2008]).

Thus, defendants are entitled to summary judgment dismissing plaintiff’s Labor Law § 241 (6) claim predicated on violations of Industrial Code 12 NYCRR 23-1.7 (e) (1) and (2).

Labor Law § 200 is a “codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work’ [citation omitted]” (*Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]; *see also Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]). Labor Law § 200 (1) states, in pertinent part, as follows:

1. All places to which this chapter applies shall be so constructed, equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.”

Although the parties in this case argue the issue of supervision, or lack thereof, on their part, that standard applies in Labor Law § 200 cases which involve injuries resulting from the means and methods of the work. However, in this case, plaintiff’s injuries allegedly arose from an unsafe condition created by a hanging rope. In such a case, the proponent of a Labor Law § 200 claim must demonstrate that the defendant created or had actual or constructive notice of the allegedly unsafe condition that caused the accident (*see Keating v Nanuet Board of Education*, 40 AD3d 706, 708-709 [2d Dept 2007] [where plaintiff’s injuries stemmed not from the manner in which the work was performed, but rather from a dangerous condition on the premises, general contractor was liable in common-law negligence and Labor Law § 200 when it had control over the work site and actual or constructive notice of the same]; *Thomas v Claffee*, 24 AD3d 749, 751 [2d Dept 2005]; *Murphy v Columbia University*, 4 AD3d 200, 202 [1st Dept 2004] [to support finding of a Labor Law § 200 violation, it was not necessary to prove general contractor’s supervision and control over plaintiff because the injury arose from the condition of the work place created by or known to contractor, rather than the method of plaintiff’s work]).

A review of the testimonial and documentary evidence in this case reveals that defendants did not create or have actual or constructive notice of the allegedly unsafe condition that caused the accident, i.e., the hanging rope. In fact, the testimonial and documentary evidence strongly suggest that the hanging rope, put forth by plaintiff as the cause of his accident, did not even exist.

To this effect, Clarke, Wenzel, O’Connor and Cama all assert that they never hung any ropes in the materials room, they never observed any hanging ropes in the material room, nor did anyone make any complaints about the same. In addition, both the Ideal and Pomalee accident reports, which were based upon statements offered by plaintiff, fail to make any mention of a hanging rope as the reason for plaintiff’s

accident. Moreover, in relaying the details of his accident to Clarke, plaintiff's own foreman, plaintiff only stated that he had picked up a bundle of conduit the wrong way and twisted his shoulder, thus not mentioning the involvement of any ropes. As such, defendants are entitled to summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 claims against them.

Defendants move for summary judgment in their favor on their contractual indemnification claim against Pomalee. Pomalee moves for summary judgment dismissing the third-party action against it. The third-party action asserts claims for contractual indemnification and breach of contract for failure to procure insurance against it. Pomalee argues that it is entitled to dismissal of defendants' third-party claim for contractual indemnification and defense on the ground that, as the Ideal/Pomalee subcontract was not signed until after the date of the accident and was not intended to be applied retroactively, there was no written agreement in effect at the time of the accident.

Indemnity contracts must be viewed with reference to the purpose of the entire agreement and the surrounding facts and circumstances (*Podhaskie v Seventh Chelsea Associates*, 3 AD3d 361, 362 [1st Dept 2004]). An indemnification clause in a contract executed after an accident may be applied retroactively where the evidence establishes that the agreement was made as of a pre-accident date and the parties intended it to be in effect as of that date (*Temmel v 1515 Broadway Associates, L.P.*, 18 AD3d 364, 365 [1st Dept 2005]; *Pena v Chateau Woodmere Corporation*, 304 AD2d 442, 443-444 [1st Dept 2003]).

Evidence in the case indicates that the Ideal/Pomalee contract was intended to be in effect on the date of plaintiff's accident, even though Pomalee did not sign and fax it back to Ideal until November 10, 2006, one month after plaintiff's accident. Here, evidence in the record indicates that Ideal initially faxed Pomalee the Ideal/Pomalee subcontractor agreement on September 18, 2006. On the first page of the Ideal/Pomalee contract, the period for which the subcontract was to be in effect was stated as July 22, 2006 to July 22, 2007. In addition, Pomalee complied with all the terms of the subcontract prior to plaintiff's accident. For example, Pomalee provided to Ideal a certificate of insurance and purchased various insurance policies required for the job.

Although Pomalee argues that, as the subcontract at issue was not job specific,

there is no indication that the agreement pertains to Pomalee's work on the instant project, Toni Ann Minieri, Ideal's account manager, testified that none of Ideal's subcontracts were job specific, but ran from policy period to policy period. In addition, Pomalee only worked for Ideal at Stuyvesant Town. Thus, under the totality of the circumstances, the indemnification and defense provision of the Ideal/Pomalee subcontract at issue in this case was in effect prior on the date of plaintiff's accident.

Pomalee also asserts that the third-party action should be dismissed on the ground that defendants are responsible for the spoliation of evidence. To this effect, Pomalee argues that defendants failed to preserve key evidence, which consisted of a folder containing all of the indemnity agreements and corresponding documentation for the insurance period of 2006 to 2007.

Under the common-law doctrine of spoliation, "when a party negligently loses or intentionally destroys key evidence, thereby depriving the non-responsible party from being able to prove its claim or defense, the responsible party may be sanctioned by the striking of its pleading" (*Baglio v St. John's Queens Hospital*, 303 AD2d 341, 342 [2d Dept 2003]). "To impose a sanction for spoliation of evidence, it must be established that the individual to be sanctioned was responsible for the loss or destruction of evidence crucial to the establishment of a claim or defense, at a time when he was on notice that such evidence might be needed for future litigation" (*Haviv v Bellovin*, 39 AD3d 708, 709 [2d Dept 2007]).

Although the folder at issue in this case may have included indemnification agreements with other contractors, only the Ideal/Pomalee subcontract, and its indemnification and defense provision, is at issue in the third-party action at bar. As this document was clearly made available to Pomalee, Pomalee is not entitled to a sanction of dismissal of the third-party action for spoliation of evidence against defendants. Moreover, it should be noted that the testimonial evidence in this case indicates that Pomalee never requested that Ideal preserve said folder, and that Pomalee did not even request said folder until October of 2009, more than three years after the accident.

"A party is entitled to full contractual indemnification provided that the 'intention to indemnify can be clearly implied from the language and purposes of the entire agreement and the surrounding facts and circumstances'" (*Drzewinski v Atlantic Scaffold & Ladder Company, Inc.*, 70 NY2d 774, 777 [1987], quoting

Margolin v New York Life Insurance Company, 32 NY2d 149, 153 [1973]; see *Torres v Morse Diesel International, Inc.*, 14 AD3d 401, 403 [1st Dept 2005]).

The indemnification and defense provision contained in the contract between Pomalee and Ideal states, in pertinent part:

HOLD HARMLESS

To the fullest extent permitted by law, Subcontractor will indemnify and hold harmless (name of contractor) and Owner, their officers, directors ... and employees from and against any and all claims, suits ... damages, losses and expenses, including legal fees and all court costs and liability ... arising in whole or in part and in any manner from injury and/or death of persons or damage to or loss of any property resulting from the acts, omissions ... in connection with the performance of any work by or for subcontractor pursuant to any contract ... except those claims, suits ... damages caused by the negligence of (name of contractor). Subcontractor or [sic] will defend and bear all costs of defending any actions or proceedings brought against (name of contractor) and/or Owner ... agents and employees arising in whole or in part out of any such acts, omissions, breach or default (Defendants' Notice of Motion, Exhibit O, Ideal/Pomalee Subcontract, at 3).

The indemnification and defense provision at issue in this case does not contain a restriction limiting coverage to incidents arising from the negligence of Pomalee. In fact, the indemnification and defense provision only requires that the accident "arise" out of Pomalee's work. As the evidence in the record indicates that plaintiff's work was supervised and directed by his foreman, a Pomalee employee, and that the accident was caused during a time when plaintiff was carrying a bundle of conduit to an area where he was to perform work, plaintiff's accident arises out of or results from the performance of Pomalee's work (see *Longwood Central School District v American Employers Insurance Company*, 35 AD3d 550, 552 [2d Dept 2006] [where plaintiff's accident occurred as he was traversing a parking lot to inspect a frozen pipe, court found that his accident arose out of ARA's work]).

In light of the fact that plaintiff's complaint has been dismissed against

defendants in its entirety, the third-party action is dismissed, with the exception that Pomalee pay defendants' costs in defending the instant action up to this point, pursuant to the subject indemnification and defense provision.

Wherefore it is hereby

ORDERED that defendants/third-party plaintiffs Metropolitan Tower Life Insurance Company and Ideal Interiors, Inc.'s motion seeking to dismiss plaintiff's complaint is granted, and the complaint is dismissed in its entirety; and it is further

ORDERED that Metropolitan Tower Life Insurance Company and Ideal Interiors, Inc.'s motion seeking contractual indemnification as against third-party defendant Pomalee Electric Company, Inc. is granted only to the extent that Pomalee Electric Company, Inc. shall pay Metropolitan Tower Life Insurance Company and Ideal Interiors, Inc.'s costs in defending the instant action up until this point; and it is further

ORDERED that third-party defendant Pomalee Electric Company, Inc.'s motion for summary judgment dismissing the third-party action against it is denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: January 14, 2011



Eileen A. Rakower

FILED

JAN 24 2011

NEW YORK
COUNTY CLERK'S OFFICE