

Orozco v Smith & De Groat, Inc.

2011 NY Slip Op 30964(U)

April 4, 2011

Supreme Court, Nassau County

Docket Number: 1732/09

Judge: Denise L. Sher

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SHORT FORM ORDER

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: HON. DENISE L. SHER
Acting Supreme Court Justice

JORGE DIAZ OROZCO,

Plaintiff,

- against -

SMITH & DE GROAT, INC. and COUNTY OF NASSAU,

Defendants.

SMITH & DE GROAT, INC.,

Third-Party Plaintiff,

- against -

WILLIAM A. TEAGUE RESTORATIONS INC.,

Third-Party Defendant.

SMITH & DE GROAT, INC.,

Second Third-Party Plaintiff,

- against -

WILLIAM A. TEAGUE RESTORATIONS INC.,

Second Third-Party Defendant.

TRIAL/IAS PART 32
NASSAU COUNTYIndex No.: 1732/09
Motion Seq. Nos.: 05, 06
Motion Dates: 12/15/10
12/20/10

The following papers have been read on these motions:

	Papers Numbered
Notice of Motion (Seq. No. 05), Affirmation and Exhibits	1
Notice of Motion (Seq. No. 06), Affirmation and Exhibits and Memorandum of Law	2
Plaintiff's Affirmation in Opposition to Motions (Seq. Nos. 05 & 06), Affidavits and Exhibit	3
Third-Party Defendant's Affidavit in Opposition to Motion Seq. No. 06 and in Partial Support of Motion Seq. No. 05 and Exhibit	4
Motion Seq. No. 05 Affirmation In Reply	5
Motion Seq. No. 06 Affirmation in Further Support, in Partial Opposition to Motion Seq. No. 05 and in Reply to Third-Party Defendant's Affidavit in Opposition	6
Third-Party Defendant's Affidavit in Reply and Exhibit	7

Upon the foregoing papers, it is ordered that the motions are decided as follows:

Defendant County of Nassau ("County") moves (Seq. No. 05), pursuant to CPLR § 3212, for summary judgment dismissing the complaint insofar as interposed against it and for, *inter alia*, a conditional order of indemnity on its cross claims as against co-defendant Smith & DeGroat, Inc. ("Smith & DeGroat"). Plaintiff opposes the motion and co-defendant Smith & DeGroat submit partial opposition to same. Third-party defendant William A. Teague Restorations Inc. ("Teague") submits partial support of the motion.

Defendant Smith & DeGroat moves (Seq. No. 06), pursuant to § CPLR 3212, for summary judgment dismissing plaintiff's complaint insofar as interposed against and for a declaration that third-party defendant Teague is obligated to defend and indemnify it and to provide reimbursement for counsel fees and costs incurred to date. Plaintiff and third-party defendant Teague oppose the motion.

In January of 2009, plaintiff injured his leg after falling on an allegedly slippery, leaf-covered, exterior staircase. When the accident occurred, he was performing

demolition/renovation work at a then unoccupied West Hempstead residence owned by defendant County. *See* Defendant County's Affirmation in Support Exhibit K, Jorge Diaz Orozco Deposition Transcript, at pp. 52-53, 67-72, 75; Defendant County's Affirmation in Support Exhibit M, Martin Schackner Deposition Transcript, at pp. 19-20.

Plaintiff contends that he was hired by third-party defendant Teague. According to the plaintiff, third-party defendant Teague's principal had expressly ordered him to engage in certain exterior clean-up duties as part of the renovation work, during which he slipped on the staircase while carrying roof debris to a dumpster. *See* Defendant County's Affirmation in Support Exhibit K, Jorge Diaz Orozco Deposition Transcript, at pp. 71-72, 75, 83-84.

Prior to the accident, in August, 2008, defendant County retained co-defendant Smith & DeGroat as its sole and exclusive property management agent in connection with the subject property and others. *See* Defendant County's Affirmation in Support Exhibit N at ¶ 2[a][I], 8. Thereafter, in October of 2008, defendant Smith & DeGroat had retained third-party defendant Teague to perform the renovation work. *See* Defendant County's Affirmation in Support Exhibit O.

Plaintiff subsequently commenced separate – but since consolidated – actions as against co-defendants County and Smith & DeGroat, interposing claims based on alleged violations of, *inter alia*, Labor Law §§ 200, 241(6). *See* Defendant County's Affirmation in Support Exhibits C and G.

Co-defendants County and Smith & DeGroat have answered, denied the material allegations of the complaint and interposed various defenses and cross claims, including claims for contractual and common law indemnification. *See* Defendant County's Affirmation in

Support Exhibits H- I. Additionally, defendant Smith & DeGroat commenced a third-party action as against third-party defendant Teague asserting claims grounded upon, *inter alia*, contractual and common law indemnification. *See* Defendant County's Affirmation in Support Exhibit I.

Both co-defendants County and Smith & DeGroat now move for summary judgment dismissing the main complaint insofar as asserted against them and for judgment on their respective claims for indemnification. Specifically, defendant County moves for indemnity as against co-defendant Smith & DeGroat, while defendant Smith & DeGroat moves for, *inter alia*, indemnity as against third-party defendant Teague.

With respect to plaintiff's Labor Law § 200 claims, it is settled that "[a] cause of action sounding in violation of Labor Law § 200 or common-law negligence may arise from either dangerous or defective premises conditions at a work site or the manner in which the work is performed." *See Pilato v. 866 U.N. Plaza Associates, LLC*, 77 A.D.3d 644, 909 N.Y.S.2d 80 (2d Dept. 2010); *Rojas v. Schwartz*, 74 A.D.3d 1046, 903 N.Y.S.2d 484 (2d Dept. 2010). *See generally Rizzuto v. L.A. Wenger Contracting Co. Inc.*, 91 N.Y.2d 343, 670 N.Y.S.2d 816 (1998).

Where, as here, an accident arises not from the methods or manner of the work, but from a dangerous premises condition, "a property owner is liable under Labor Law § 200 when the owner created the dangerous condition causing an injury or when the owner failed to remedy a dangerous or defective condition of which he or she had actual or constructive notice." *Chowdhury v. Rodriguez*, 57 A.D.3d 121, 867 N.Y.S.2d 123 (2d Dept. 2008). *See also Reyes v. Arco Wentworth Management Corp.*, ___ A.D.3d ___, 2011 WL 924005 (2d Dept. 2011); *Mott v. Tromel Const. Corp.*, 79 A.D.3d 829, 912 N.Y.S.2d 685 (2d Dept. 2010); *Sullivan v. RGS*

Energy Group, Inc., 78 A.D.3d 1503, 910 N.Y.S.2d 776 (4th Dept. 2010); *Aguilera v. Pistilli Const. & Development Corp.*, 63 A.D.3d 763, 882 N.Y.S.2d 148 (2d Dept. 2009); *Ortega v. Puccia*, 57 A.D.3d 54, 866 N.Y.S.2d 323 (2d Dept. 2008); *Van Salisbury v. Elliott-Lewis*, 55 A.D.3d 725, 867 N.Y.S.2d 454 (2d Dept. 2008) *cf.* *Cody v. State*, ___A.D.3d___, 2011 WL 924353 (2d Dept. 2011).

Relatedly, a general contractor will be liable in such a case “if it has control over the work site and actual or constructive notice of the dangerous condition.” *Van Salisbury v. Elliott-Lewis*, *supra* at 726. *See Lane v. Fratello Const. Co.*, 52 A.D.3d 575, 860 N.Y.S.2d 177 (2d Dept. 2008); *Mott v. Tromel Const. Corp.*, *supra* at 830-831.

Although there is no evidence that defendant County affirmatively created the purportedly dangerous and slippery leaf condition, plaintiff has submitted evidence indicating that the leaf condition may have existed for a substantial period of time prior to the accident and that the failure to timely clear the steps allegedly created a foreseeable dangerous condition to those utilizing them. *See Plaintiff’s Affirmation in Opposition, Stanley Fein Affidavit at ¶¶ 6-7. See also Reyes v. Arco Wentworth Management Corp.*, *supra*. Notably, a “[land]owner has a nondelegable duty to provide the public with a reasonably safe premises,” which includes “the duty to provide “its employees and the employees of independent contractors with a safe place to work.” *Scott v. Redl*, 43 A.D.3d 1031, 842 N.Y.S.2d 485 (2d Dept. 2007) *quoting from Backiel v. Citibank, N.A.*, 299 A.D.2d 504, 751 N.Y.S.2d 492 (2d Dept. 2002) *cf. Mercado v. Slope Associates*, 246 A.D.2d 581, 667 N.Y.S.2d 289 (2d Dept. 1998). *See Galindo v. Town of Clarkstown*, 2 N.Y.3d 633, 781 N.Y.S.2d 249 (2004); *Basso v. Miller*, 40 N.Y.2d 233, 386 N.Y.S.2d 564 (1976); *Segree v. St. Agatha’s Convent*, 77 A.D.3d 572, 909 N.Y.S.2d 364 (1st Dept. 2010); *Boderick v. RY Management Co., Inc.*, 71 A.D.3d 144, 897 N.Y.S.2d 1 (1st Dept.

2009) *cf. Reyes v. Arco Wentworth Management Corp.*, *supra*. Under the circumstances, an issue of fact exists with respect to defendant County's potential liability. *See Scott v. Redl*, *supra* at 1032. *See also Martinez v. City of New York*, 73 A.D.3d 993, 901 N.Y.S.2d 339 (2d Dept. 2010); *Aguilera v. Pistilli Const. & Development Corp.*, *supra* at 765.

Similarly, and with respect to defendant Smith & DeGroat's common law liability, the contractual provisions governing the scope of its duties provide that it had agreed to act as co-defendant County's "agent" to "license, maintain, operate, manage and supervise the property," including but not limited to "any service, maintenance and repairs * * *" *See* Defendant County's Affirmation in Support Exhibit N at ¶ 2[a][I]. However, upon the documents submitted and the parties' conflicting allegations, the precise scope of defendant Smith & DeGroat's contractual duties as defendant County's agent is unclear and cannot be resolved as a matter of law, thereby requiring denial of the motion.

Those branches of the defendant County and defendant Smith & DeGroat's motions which are to dismiss plaintiff's Labor Law § 241(6) claims should also be denied, as plaintiff has identified actionable provisions of the Industrial Code relating to, *inter alia*, "slipping hazards" as to which issues of fact exist on the evidence presented (*e.g.*, 12 NYCRR §§ 23-1.7(d), (e)(1), (2)). *See generally Sullivan v. RGS Energy Group, Inc.*, *supra*; *Nankervis v. Long Island University*, 78 A.D.3d 799, 911 N.Y.S.2d 393 (2d Dept. 2010); *Aragona v. State*, 74 A.D.3d 1260, 905 N.Y.S.2d 237 (2d Dept. 2010); *Cowan v. ADF Const. Corp.*, 26 A.D.3d 802, 809 N.Y.S.2d 735 (4th Dept. 2006); *Smith v. McClier Corp.*, 22 A.D.3d 369, 802 N.Y.S.2d 441 (1st Dept. 2005). *See also Aguilera v. Pistilli Const. & Development Corp.*, *supra* at 765; *Bopp v. A.M. Rizzo Elec. Contractors, Inc.*, 19 A.D.3d 348, 796 N.Y.S.2d 153 (2d Dept. 2005).

Lastly, the parties' respective applications for judgment on their cross claims for

contractual and/or common law indemnification should be denied at this juncture, inasmuch as outstanding factual issues have been presented with respect to, *inter alia*, each movants' alleged negligence in the occurrence of the accident. See generally *Mott v. Tromel Const. Corp., supra*; *Martinez v. City of New York, supra* at 997-998; *Aragundi v. Tishman Realty & Const. Co., Inc.*, 68 A.D.3d 1027, 891 N.Y.S.2d 462 (2d Dept. 2009); *Hirsch v. Blake Housing, LLC*, 65 A.D.3d 570, 884 N.Y.S.2d 141 (2d Dept. 2009). See also *Ezzard v. One East River Place Realty Co., LLC*, 914 N.Y.S.2d 635 (1st Dept. 2011); *Bellefleur v. Newark Beth Israel Medical Center*, 66 A.D.3d 807, 888 N.Y.S.2d 81 (2d Dept. 2009).

The Court has considered the movants' remaining contentions and concludes that they are lacking in merit.


Accordingly, it is,

ORDERED that the motions by defendant County (Motion Seq. No. 05) and defendant Smith & DeGroat (Motion Seq. No. 06) are hereby denied.

All parties shall appear for Trial in Nassau County Supreme Court, Differentiated Case Management Part (DCM) at 100 Supreme Court Drive, Mineola, New York, on April 25, 2011 at 9:30 a.m.

This constitutes the Decision and Order of this Court.

ENTER:



DENISE L. SHER, A.J.S.C.

Dated: Mineola, New York
April 4, 2011

ENTERED

APR 07 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**