Aleman v RFR/SF State St., LP

2011 NY Slip Op 32323(U)

August 19, 2011

Supreme Court, New York County

Docket Number: 112906/08

Judge: Paul Wooten

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SCANNED ON 8/29/2011

[* 1]

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

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

EDWARD ALEMAN and LYNN ALEMAN,

Plaintiffs,

- against -

RFR/SF 17 STATE STREET, LP,

Defendant.

INDEX NO. 112906/08

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

RFR/SF 17 STATE STREET, LP,

Third-party Plaintiff,

- against -

PERFECT BUILDING MAINTENANCE, a division of PBM/CMSI, INC.,

Third-party Defendant.

FILED

AUG 29 2011

NEW YORK
COUNTY CLERK'S OFFICE

The following papers numbered 1 to 5 were read on this motion for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1,2
Answering Affidavits — Exhibits (Memo)	3,4
Reply Affidavits — Exhibits (Memo)	5

Cross-Motion: ☐ Yes ☒ No

Motion sequences 001 and 002 are hereby consolidated for purposes of disposition.

These motions arise from an accident in which the plaintiff, an employee on the engineering staff of third-party defendant Perfect Building Maintenance, a division of PBM/CMSI, Inc. ("PBM"), fell from a ladder while removing a damaged wallboard[1] ceiling in the basement of property owned by defendant RFR/SF 17 State Street, LP ("RFR"). The ceiling had been damaged by a persistent problem in which rainwater would seep from the

[1]Also known as drywall, plasterboard, gypsum board, and by the brand name Sheetrock.

cobblestone plaza above the building's cellar, occasionally requiring emergency repairs to the cellar ceiling. The cellar had been so leaking since at least October of 2004 (Stoll Deposition Transcript, Defendant's Affirmation in Support, Exhibit G at 29). The repair work on the date of the subject incident required the complete removal of large, damaged sections of the wallboard comprising the ceiling, which had holes and was hanging in some places (Nappo Deposition Transcript, Plaintiff's Affirmation in Opposition, Exhibit C). After such removal an outside contractor was used to replace the ceiling (Stoll Deposition at 41, 44).

On August 1, 2007, the date of the subject incident, plaintiff was instructed by his supervisor, PBM employee Eric Towse, to "demo" the damaged ceiling. Plaintiff and his coworker, Michael Nappo ("Nappo"), each set up an A-frame ladder, and while standing thereon proceeded to cut portions of the wallboard ceiling using a Sawzall. The wallboard panels comprising the ceiling were attached in places to metal studs, which were also cut through or were pried using a crowbar. After cutting off a portion of the wallboard, plaintiff and Nappo together would manually lower the wallboard using both hands, then relocate their ladders to cut a new portion. Plaintiff estimated at deposition that he and Nappo had so relocated about 25 times by the time of the accident. The last piece pulled down by plaintiff and Nappo measured eight feet by three feet (Nappo Deposition at 43). Plaintiff alleges that, while they were lowering the last piece of the wallboard, plaintiff's ladder skidded, causing him to fall therefrom and suffer injuries.

On or about September 5, 2008, plaintiff commenced the instant action against RFR, alleging common law and Labor Law § 200 statutory negligence, as well as violations of Labor Law §§ 240(1) and 241(6). RFR answered and commenced a third-party lawsuit against PBM.

RFR now makes this motion for summary judgment, alleging that plaintiff cannot make a prima facie case for negligence or Labor Law §§ 240(1) or 241(6). Regarding common law and statutory negligence, RFR contends that Deloy Stoll ("Stoll"), RFR's property manager, had

general responsibility over plaintiff but did not exercise supervision or control over the means, manner, and method of plaintiff's work. Regarding Labor Law § 240(1), also known as the Scaffold Law, RFR argues that plaintiff's work was not repair, but merely maintenance that falls outside the scope of the Scaffold Law. RFR argues that "the plaintiff was not repairing anything at the time of this incident. He was merely taking down damaged ceiling tiles. The item being worked on, the ceiling, was not inoperable or malfunctioning" (RFR's Affirmation in Support at ¶ 12). RFR further argues that the entire ceiling was not being removed, but only "those ceiling tiles that had been damaged" (RFR's Affirmation in Support at ¶ 12). As to the Labor Law § 241(6) cause of action, RFR argues that plaintiff cannot show a violation thereof because the work performed by plaintiff does not qualify as demolition work pursuant to Industrial Code § 23-1.4(b)(16), and therefore plaintiff's work falls outside the scope of the Industrial Code.

Plaintiff submits opposition as to the causes of action based upon Labor Law §§ 240(1) and 241(6), but not as to the common law and statutory negligence causes of action. Plaintiff argues that demolishing and/or repairing a drop ceiling is a covered activity under Labor Law § 240(1). In opposition to RFR's § 241(6) argument, plaintiff cites Second Department case law to support the propositions that removing shelving from a wall in order to demolish the wall, or demolishing part of a sprinkler system qualify as demolition under the Industrial Code.

On or about November 12, 2008, defendant RFR commenced a third-party lawsuit against PBM. RFR's first two causes of action are for negligence, its third and fourth causes of action are for common law and contractual indemnification, respectively, and its fifth cause of action is for breach of contract in failing to procure insurance naming RFR as an additional insured.

Third-party defendant PBM also moves for summary judgment as to all RFR's causes of action, upon the ground that plaintiff did not suffer a grave injury pursuant to Workers' Compensation Law § 11, and upon the ground that there was no written contract between RFR

and PBM for the services being performed by plaintiff at the time of the accident. PBM's motion also seeks summary judgment on the labor law causes of action, and in so doing makes similar arguments to those made by RFR in its motion for summary judgment.

RFR rightly concedes that plaintiff did not suffer a grave injury pursuant to Workers' Compensation Law § 11. As that statute renders PBM immune to causes of action based upon an employee's non-grave injury sounding in negligence and common-law indemnification, summary judgment is therefore appropriate as to RFR's first, second, and third causes of action. However, RFR argues that the contract-based causes of action should stand, as there is an exception to employer's immunity based upon Workers' Compensation Law § 11 for contractual indemnity, and a contract exists between RFR and PBM that provides for PBM to indemnify and hold harmless RFR. PBM argues in reply that the contract in question only provided for PBM to indemnify and hold harmless RFR for the cleaning staff, rather than the engineering staff. PBM also notes that Stoll testified at deposition that the relevant contract is for cleaning only, and engineering services are outside the contract.

Standards

Motion for Summary Judgment

"The proponent of a summary judgment motion [pursuant to CPLR 3212] 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, 185-86 [1st Dept 2006]). The burden then shifts to the 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 228, 228 [1st Dept 2006]).

Scaffold Law

The Scaffold Law, Labor Law § 240(1), provides that contractors and owners "furnish or

erect, or cause to be furnished or erected for the erection . . . of a building or structure, 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." "[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). The Scaffold Law's protection applies to workers utilizing hoisting or scaffolding devices as well as those who erect or demolish those devices (*Metus v Ladies Mile Inc.*, 51 AD3d 537, 538 [1st Dept 2008], citing *Kyle v City of New York*, 268 AD2d 192, 197 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Where a Scaffold Law violation exists, the injured worker's contributory negligence is not considered in determining liability, unless the worker's conduct was the sole proximate cause of the incident (*see Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280, 290 [2003]; *Cody v State of New York*, 52 AD3d 930, 931 [3d Dept 2008]).

In a Scaffold Law case, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential" (*Runner*, 13 NY3d at 603). A plaintiff need not show which safety device would have prevented his injury (*see Cody*, 52 AD3d at 931; *Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]). To prevail, the plaintiff must show that a violation of Labor Law § 240(1) proximately caused a foreseeable injury (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007]). "[T]o prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure, the plaintiff must show that the failure of the structure in question was a foreseeable risk of the task he was performing, creating a need for protective devices of the kind enumerated in the statute" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 10-11 [1st Dept 2011] [internal quotation

marks omitted]).

Common Law Negligence and Labor Law § 200

To prevail on a common law negligence cause of action, plaintiff must show that defendant breached a duty of care owed to plaintiff, and that such breach proximately caused plaintiff's injury. At construction sites, owners and general contractors have a duty of care to provide site workers with a safe place to work; Labor Law § 200 is a codification of the latter duty of care (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). At a construction site, both common law and Labor Law § 200 negligence are limited to parties who exercise supervision or control over the work out of which the injury arises, and also create or have actual or constructive notice of the unsafe condition that causes the injury (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Colon v Lehrer, McGovern & Bovis, Inc.*, 259 AD2d 417, 419 [1st Dept 1999]). Regarding construction site owners, "[i]t is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290 [1992]).

Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation, or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). "In order to state a claim under Labor Law § 241(6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (*Reilly v Newireen Associates*, 303 AD2d 214, 218 [1st Dept 2003], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). To prevail on a motion for summary

judgment on a Labor Law § 241(6) claim, the movant must show that there are no triable issues of fact as to the violation of that Industrial Code provision. The interpretation of the Industrial Code and determination of whether a particular condition is within the scope of the regulation is a matter of law (*Messina v City of New York*, 300 AD2d 121, 123 [1st Dept 2002]).

Contractual Indemnification

A party seeking to impose contractual indemnification must show that it is free from negligence and that the indemnification provision applies; the negligence of the proposed indemnitor is "a non-issue and irrelevant" (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]; citing *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999] [contractual indemnification does not require showing that proposed indemnitor is negligent, but common law indemnification does require such a showing]). "Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483 [1st Dept 2010]).

Discussion

Common Law and Statutory Negligence - Motion Sequence 001

The Court finds that RFR has demonstrated their prima facie entitlement to summary judgment as a matter of law on the issues of common law and statutory negligence. The record demonstrates that other PBM employees directed and controlled the methods of plaintiff's work. Stoll, RFR's property manager, did not exercise supervision and control over the construction work, and had little direct contact with the plaintiff. In opposition plaintiff does not address common law or statutory negligence, and as a result has failed to produce evidentiary proof in admissible form establishing any issues of triable fact that would overcome RFR's prima facie entitlement to summary judgment on these causes of action. Accordingly, summary judgment

as to the common law and statutory negligence causes of action is therefore appropriate.

Scaffold Law - Motion Sequences 001 and 002

RFR and PBM maintain that the plaintiff's work did not fall within any category of work protected by the Scaffold Law, and the statute therefore was never triggered. No other basis for summary judgment as to this cause of action is presented in the motion papers. The main argument presented by the movants is that the plaintiff was pulling down ceiling tiles that were not malfunctioning, and as such the work was not significant to be more than mere maintenance. The record does not support this contention, and the movants therefore fail to make their required prima facie showing.

While part of the cellar ceiling comprised 2' x 2' tiles, the portion pulled down by plaintiff on the date of the accident was composed entirely of large wallboard panels. Plaintiff and his coworker had to saw through the wallboard and connected metal studs before the wallboard could be pulled down. Furthermore, the wallboard was malfunctioning in the sense that it was in an advanced state of disrepair. Portions of the ceiling had deteriorated such that they were hanging (Nappo Deposition at 22), and holes were present, through which Nappo was able to see beams in the space above the ceiling (Nappo Deposition at 35). The work was performed as a preventative measure so that the damaged portions of the ceiling did not fall. RFR's property manager, Stoll, herself stated at deposition that the work was an "emergency repair," and that outside contractors were used to install a new ceiling with 2' x 2' tiles after plaintiff had pulled down the old wallboard ceiling.

Taking all the above facts within the record into consideration, the Court finds that the work performed by plaintiff was not routine maintenance, but rather a repair on a structure within the meaning of Labor Law § 240(1). The motions for summary judgment by both RFR and PBM are therefore denied as to the Scaffold Law cause of action.

Industrial Code Provisions - Motion Sequences 001 and 002

Similar to its argument as to the Scaffold Law, RFR's argument as to Labor Law § 241(6) also maintains that the statute was never triggered, as plaintiff's work did not amount to construction, excavation, or demolition within the meaning of the statute. RFR maintains that plaintiff's task of removing the wallboard ceiling did "not constitute a significant physical change to the configuration or composition of the building which is a multistory commercial property located in Manhattan" (RFR's Affirmation in Support at ¶ 11).

For purposes of Labor Law § 241(6), demolition is defined by the Industrial Code as "The work incidental to or associated with the total or partial dismantling or razing of a building or other structure including the removing or dismantling of machinery or other equipment" (12 NYCRR § 23-1.4[b][16]). The First Department has clarified "that in order to constitute demolition within the meaning of [the Industrial Code], the work must involve changes to the structural integrity of the building as opposed to mere renovation of the interior" (*Cardenas v One State Street, LLC*, 68 AD3d 436, 439 [1st Dept 2009] citing *Solis v 32 Sixth Ave. Co. LLC*, 38 AD3d 389, 390 [1st Dept 2007]). The transcripts in the record make clear that the ceiling taken down by plaintiff was a wallboard ceiling with a mechanical space above it. Taking down this ceiling would not change the structural integrity of the building as a whole, and would be more appropriately considered an interior renovation. Accordingly, the work performed by the plaintiff was not "demolition" as defined by the First Department, such that Labor Law § 241(6) is not applicable (*see Cardenas*, 68 AD3d at 439). Summary judgment in the movants' favor is therefore appropriate as to the Labor Law § 241(6) cause of action.

Contractual Indemnification - Motion Sequence 002

RFR maintains that it is entitled to contractual indemnification from PBM pursuant to a contract executed between RFR and PBM. PBM contends that the engineering work that was

performed by the plaintiff falls outside of the contract, which was intended to cover only cleaning services. RFR's position is that the first numbered paragraph ("Paragraph 1") of the contract, titled "Intent of Specification," signifies the parties' intention to have engineering services, as well as cleaning services, fall within the purview of the contract. Paragraph 1 states as follows:

> "[i]t is the intent of this specification that the building be kept neat and clean at all times. These minimum specifications should, therefore, be referred to as a guide for, rather than a limitation to, the services required to maintain the building effectively."

In reviewing the contract between RFR and PBM in its entirety, the Court finds PBM's position to be persuasive and agrees that the subject contract did not cover engineering work, the type of work being performed by plaintiff at the time of the subject accident. The "specifications" referenced in Paragraph 1 are detailed in six pages within the contract and are designated as "Cleaning, Maintenance, Specification, Staffing, and Frequency" and list only cleaning requirements and schedules. Despite RFR's interpretation, looking at the contract in its totality, the Court finds that the specifications in Paragraph 1 refer only to cleaning services and not other types of services.[2] As a result, PBM has no contractual duty to indemnify and hold harmless RFR (*see Martins*, 72 Ad3d at 483 ["Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify"]; *see also Podhaskie v. Seventh Chelsea Assoc.*, 3 AD3d 361, 362 [1st Dept 2004] ["Indemnity contracts

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[2]Although RFR's opposition did not discuss the subject contract's addendum, the Court notes that such addendum does not require PBM to indemnify and hold harmless RFR for the engineering staff's services. The addendum states that "the contract between RFR [and PBM] is hereby amended to include the payroll of the engineering staff at the referenced premises. The cost of this service shall be all direct payroll cost plus all fringe benefits and related insurance expenses plus a 2% administrative fee. All other terms and conditions are as set forth in the Agreement." The intent manifested in this addendum is for PBM merely to pay the engineering staff's payroll for the consideration of a 2% fee. There is no manifested intention to indemnify, and certainly there is no "clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify" (*Martins*, 72 AD3d at 483).

must be viewed with reference to the purpose of the entire agreement and the surrounding facts and circumstances"]).

The parties remaining arguments have been considered and found unavailing.

Conclusion

For the above reasons and upon the foregoing papers, it is therefore,

ORDERED that the motion by defendant RFR/SF 17 State Street, LP for summary judgment is granted as to the common law negligence and Labor Law §§ 200 and 241(6) causes of action, and is denied as to plaintiff's Labor Law § 240 cause of action; and it is further,

ORDERED that the motion by third-party defendant Perfect Building Maintenance, a division of PBM/CMSI, Inc. for summary judgment is granted as to plaintiff's common law negligence and Labor Law §§ 200 and 241(6) causes of action, and is denied as to plaintiff's Labor Law § 240 (1) cause of action; and it is further,

ORDERED that the motion by third-party defendant Perfect Building Maintenance, a division of PBM/CMSI, Inc. for summary judgment is granted as to defendant RFR/SF 17 State Street, LP's third-party complaint, and the third-party action is dismissed in its entirety, and the Clerk of the Court is directed to enter judgment accordingly; and it is further,

ORDERED that third-party defendant Perfect Building Maintenance, a division of PBM/CMSI, Inc. shall serve a copy of this order with notice of entry upon all parties, and upon the County Clerk and the Clerk of the Trial Support Office within 45 days of entry.

This constitutes the Decision and Order of the Court.

Dated: 8-19-11

FILED
AUG 29 2011
NEW YORK
COUNTY CLERK'S OFFICE

PAUL WOOTEN ***J.S.C.***

Check one: ☐ **FINAL DISPOSITION** ☒ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**