

Bedson v The Clarett Group, LLC

2012 NY Slip Op 31007(U)

April 13, 2012

Sup Ct, New York County

Docket Number: 115400/08

Judge: Doris Ling-Cohan

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

PART 36

Index Number : 115400/2008

BEDSON, THOMAS J.

VS.

CLARETT GROUP

SEQUENCE NUMBER : 003

DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

n this motion to/for _____

PAPERS NUMBERED

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

1, 2

Answering Affidavits — Exhibits _____

3, 4, 5

Replying Affidavits _____

6, 7, 8

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *is denied in accordance with the attached memorandum decision.*

FILED

APR 16 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 4/12/12


JUDGE 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 : IAS PART 36

-----x
THOMAS J. BEDSON and CHRISTINE BEDSON

Plaintiffs,

- against -

THE CLARETT GROUP, LLC,
200 WEA SUB CO., LLC,
BOVIS LEND LEASE INC.,
200 WEST END AVENUE, CONDOMINIUM,
CARAN PROPERTIES, INC.,
CARAN PROPERTIES, LLC, and
CARAN PROPERTIES REALTY, LLC.,

Defendants.

-----x

THE CLARETT GROUP, LLC,
200 WEA SUB CO., LLC and
BOVIS LEND LEASE LMB, INC.,

Third-party Plaintiffs,

- against -

S.J. ELECTRIC INC.,

Third-party Defendant.

-----x

HON. DORIS LING-COHAN, J.:

Defendants/third-party plaintiffs The Clarett Group, LLC ("Clarett"), 200 WEA Sub Co., LLC ("200 WEA"), and Bovis Lend Lease LMB, Inc. ("Bovis") move, pursuant to CPLR 3212, for summary judgment dismissing all claims against them. The movants also seek summary judgment on their claims for contractual defense and indemnity against third-party defendant S.J. Electric Inc. ("S.J. Electric").

Index No. 115400/08

Motion Seq. 003

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BACKGROUND

Plaintiffs, Thomas J. Bedson ("Mr. Bedson") and Christine Bedson ("Mrs. Bedson"), husband and wife, commenced this action seeking to recover damages and for personal injuries resulting from an accident during a construction project at 200 West End Avenue, New York, New York (the "subject premises"). The following facts are gleaned from the submission of the parties.

The construction project entailed the formation of a 27-story residential condominium building at the subject premises. The parties were participants in the project. Mr. Bedson, an electrician, was employed by third-party defendant S.J. Electric, Inc. ("S.J. Electric"), an electrical subcontractor for the construction project. 200 WEA owned the subject premises. Clarett was the real estate developer for the construction project. Bovis was the construction manager. Caran Properties, Inc., also sued herein as Caran Properties, LLC. and Caran Properties Realty, LLC. ("Caran") was the property manager for the subject premises. 200 West End Avenue Condominium ("Condominium") became the owner of the common areas after the completion of the construction project.

Plaintiffs allege that on July 21, 2008, Mr. Bedson slipped and fell as he was descending a wet, slippery interior staircase at the subject premises. The staircase was regularly used by workers on the construction project. Prior to the alleged incident, Mr. Bedson had been assigned to perform a walk-through of the penthouse apartments to determine whether items on a punch

list had been completed. The main function of the walk-through was to detect safety hazards on the construction project and eliminate them.

Immediately before the alleged incident, Gabriel Ruiz ("Mr. Ruiz"), a maintenance worker for Caran at the subject premises, had been mopping the staircase before stepping away to get fresh water. He did not witness the incident. When he returned, he saw Mr. Bedson on the floor at the bottom of the staircase. He helped Mr. Bedson get up and accompanied him to the lobby to report the incident.

The Complaint alleges claims for negligence, violations of Labor Law §§ 200 and 241(6), violations of the Administrative Code, and loss of consortium. Specifically, the Complaint alleges that defendants were negligent in the ownership, operation, and maintenance of the subject premises, and in permitting the work on the construction project to be done in a dangerous and unsafe manner. Mrs. Bedson also claims that she has been deprived of the services of her husband as a result of the alleged incident.

The Bill of Particulars contains similar allegations, and states that Mr. Bedson sustained severe, permanent back injuries.

Clarett, 200 WEA, and Bovis, answered, generally denying the allegations in the Complaint, asserting several affirmative defenses, and alleging cross claims against co-defendants for contribution or indemnification. Clarett, 200 WEA, and Bovis

* 5]
also filed a third-party complaint against S.J. Electric, alleging claims for breach of contract and contractual indemnity.

Condominium and Caran also answered, denying the allegations in the Complaint, asserting various affirmative defenses, and cross-claiming against Clarett, 200 WEA, Bovis, and S.J. Electric for contribution or indemnification. S.J. Electric filed an answer to the third-party Complaint, denying the allegations therein and asserting several affirmative defenses.

Clarett, 200 WEA, and Bovis now seek summary judgment dismissing all claims against them and awarding them contractual defense and indemnity against S.J. Electric.

DISCUSSION

It is well settled that 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 demonstrate the absence of any material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

[* 6]

As stated, the Complaint alleges causes of action for common law negligence, violation of Labor law §§ 200 and 241(6), as well as applicable sections of the Administrative Code of the City of New York ("Administrative Code"), and loss of consortium.

Common law negligence and violation of Labor Law §200

Where, as here, a case involves allegedly dangerous conditions on the premises, a party may be liable in common law negligence and under Labor Law §200 if the party has control over the work site and has actual or constructive notice of the dangerous condition (*Wynne v B. Anthony Constr. Corp.*, 53 AD3d 654, 656 [2d Dept 2008]).

In seeking summary judgment, the moving defendants contend that they did not have any control over the staircase on which Mr. Bedson reportedly slipped and fell, and did not have notice of the alleged dangerous condition. To support their position, the moving defendants offer, *inter alia*, transcripts from the depositions of Mr. Bedson, Mr. Ruiz, a maintenance worker for Caran, and Charlotte Sturgis ("Ms. Sturgis"), a senior project manager for Bovis. Defendants also submit an affidavit from Ms. Sturgis stating that the construction project work on the common areas, including the staircases in the subject premises, had been completed and these areas were turned over to Condominium and Caran months before the alleged incident (Sturgis Aff, Plaintiffs' Aff in Opp, ¶6).

At a deposition held on November 12, 2010, Mr. Bedson testified that on the date of the alleged incident, he had been

assigned to walk through the penthouse floors of the subject premises, including the apartments and hallway, and make a punch list of all unfinished electrical work (Bedson Deposition Transcript, Not of Mot, Exh E, p. 19). Upon leaving one apartment, on his way to inspect another, he approached the staircase and looked down to make sure that his path was clear before descending (*id.* at 37-38). Mr. Benson further stated that he held on to the handrail to his right side as he descended the staircase, but nonetheless, slipped on a wet substance and fell to the bottom of the stairs (*id.* at 39), landing on his lower back and butt (*id.* at 40). He also stated that he yelled for help and Mr. Ruiz came to his aide (*id.* at 47). Mr. Benson stated that Mr. Ruiz apologized to him, explaining that he had just poured water down the steps to mop them (*id.* at 47-49). Mr. Ruiz then helped Mr. Benson get up, assisted him onto the elevator, and accompanied him to the lobby to report the incident (*id.* at 50).

At a deposition held on December 17, 2010, Mr. Ruiz testified that he performed maintenance work for Caran at the subject premises for more than three years before the alleged incident (Ruiz Deposition Transcript, Not of Mot, Exh F, p. 10). He also testified that his maintenance duties included cleaning the lobbies and staircases in the common areas (*id.* at 13-15). He further stated that he usually mopped the staircases approximately every two weeks, and on the date of the alleged

incident, he had been mopping the staircase on which Mr. Bedson reportedly slipped and fell (*id.* at 18, 20). Mr. Ruiz testified:

I was working from the 25th on the way to the 24th floor I grabbed a bucket and a mop of water, clean water, only clean water. I ... go all the way to the penthouse, start my way down. Every two or three floors go get more clean water. Come on up and - no soap or nothing just mop on the stairs and when I got to the 24th floor, I went downstairs again to get more clean water, and when I came up he was on the floor[.] I didn't see nothing. I only see he was on the floor, and I help him out to get up.

(*id.* at 18-19). Mr. Ruiz stated that he did not tell anyone that he was going to mop the staircase, and did not put up any cones or warning signs before he started mopping the staircase (*id.* at 22-23).

At a deposition held on July 7, 2010, Ms. Sturgis testified, in essence, that on the date of the alleged incident, Clarett, Caran, and Bovis were involved with punch list work that was being performed on two of the penthouse apartments that had not yet been turned over to Condominium (Sturgis Deposition Transcript, Not of Mot, Exh G, p. 60, 64-65). She acknowledged that Mr. Bedson was performing punch list work in the two penthouse apartments when the alleged incident occurred (*id.* at 173). Ms. Sturgis was responsible for filling out reports of the alleged incident (*id.* at 90). She further stated that she completed the incident report (*id.* at 91-93) and conducted an investigation (*id.* at 108-109).

The incident stated, in part:

Tommy slipped down a wet staircase going from Penthouse B (25th floor) to Penthouse A (24th floor). Tommy slipped on the third stair and then slid down the rest of the staircase injuring his back. He injured his wrist while trying to break his fall. The stairs had been wet with water out of a bucket and left to dry by the 200 WEA Condo Building Maintenance staff. No "Wet Floor" signs had been posted at either floor by the building staff

(Incident Report, Plaintiff's Aff In Opp, Exh E). The Accident Report, which was completed by S.J. Electric's foreman, states, in part, that "[Mr. Bedson] was walking down the stairs and fell. The stairs were wet from the cleaning crew" (Accident Report, Plaintiff's Aff in Opp, Exh F).

In opposition to the summary judgment motion, plaintiffs argue that defendants violated Labor Law §200 by creating or permitting a slip and fall hazard on the staircase during the construction project. Plaintiffs also assert that the moving defendants had control over the common areas where the alleged incident occurred.

Plaintiffs also rely on Ms. Sturgis' deposition testimony to support their position. They also submit transcripts from the depositions of Harry Jupiter ("Mr. Jupiter"), Executive Vice President of Clarett; Anthony Delano Wesley ("Mr. Wesley"), who was employed by Caran as the superintendent of 200 WEA; and Jeff McKenna, an employee of S.J. Electric, who served as the general foreman for the construction project.

Mr. Jupiter testified, in essence, that Bovis was responsible for insuring the safety of the workers on the construction project (Jupiter Deposition Transcript, Plaintiffs' Aff in Opp, Exh A, p. 41). Mr. Wesley testified, in part, that the purpose of "wet floor caution sign" is to alert anyone in the area that the floor might be damp, and that such signs are required as a safety precaution to prevent accidents (Wesley Deposition Transcript, Plaintiffs' Aff in Opp, Exh B, p. 34).

On review of the submissions, the Court concludes that the moving defendants failed to establish entitlement to judgment dismissing the common law negligence and Labor Law §200 claims against them. The submissions by plaintiffs and each of the moving defendants were contradictory on which entity had control of the staircase on the date of the alleged incident. Thus, the submissions reveal triable issues of fact as to whether the moving defendants had control over the work site and had notice of the dangerous condition so as to defeat summary judgment. The request for summary judgment dismissing the claims for common law negligence and violation of Labor Law §200 must be denied.

Violation of Labor Law §241(6) and the Administrative Code

The request for summary judgment dismissing the claims for violation of Labor law §241(6) and the Administrative Code must also be denied. Labor Law § 241(6) imposes a non-delegable duty upon owners engaged in construction, construction managers, general contractors, and their agents to provide reasonable and

adequate protection and safety to the persons employed therein (see *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). To prevail on a cause of action asserted under Labor Law § 241(6), plaintiffs must set forth a violation of a specific rule or regulation promulgated by the Commissioner of the Department of Labor (see *id.*).

Here, plaintiffs allege that defendants violated various sections of Rule 23 of the Industrial Code, including §23-1.7(d), which states:

Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing

(12 NYCRR 23-1.7[d]). Section 23-1.7(d) requires that all work areas be free from slipping hazards (*id.*), and causes of action invoking that statute must be based upon violations of specific codes, rules, or regulations applicable to the circumstances of the accident (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494).

Contrary to defendants' contention, §23-1.7(d) contains specific directives that are sufficient to sustain a cause of action under Labor Law §241(6) (*Colucci v Equitable Life Assurance Society of the United States et al.*, 218 AD2d 513, 516-517 [1st Dept 1995]). Moreover, at the very least, the submissions raise triable issues of fact as to whether the staircase where the alleged incident occurred was a passageway to

the work site so as to defeat summary judgment (see *Whalen v City of New York*, 270 Ad2d 340, 342 [2d Dept 2000]).

Request for Contractual Defense and Indemnity

The moving defendants also seek contractual defense and indemnity from S.J. Electric based on the general indemnity clause in article 12 of the Electrical Subcontract among Bovis, as contractor, 200 WEA, as owner, Clarett, as agent, and S.J. Electric as subcontractor. The enforceability of the contractual defense provision cannot be disputed (see *Brown v Two Exchange Plaza Partners*, 76 NY2d 172, 178 [1990]). The provision clearly establishes that S.J. Electric is obligated to defend the moving defendants against plaintiffs' claims. The conclusory assertion that plaintiffs' claims did not arise out of S.J. Electric's work under the subcontract is simply insufficient to defeat summary judgment. Thus, the moving defendants are entitled to judgment obligating S.J. Electric to defend them against its claims.

However, General Obligations Law § 5-322.1 prohibits a party from being indemnified for its own active fault. The existence of genuine issues of fact regarding defendants' negligence precludes summary judgment on their claim for contractual indemnification (see *Zeigler-Bonds v Structure Tone, Inc.*, 245 AD2d 80 [1st Dept 1997]). Should, however, it be determined that the moving defendants are free from negligence in the causing of plaintiff's accident, the moving defendants would be entitled to

contractual indemnification from S.J. Electric, based upon the general indemnity clause in article 12 of the Electrical Subcontract. Thus, that portion of the moving defendants' motion which seeks contractual indemnification from S.J. Electric, is granted, conditionally, upon a finding of no negligence on the part of moving defendants.

Accordingly it is

ORDERED that the motion for summary judgment is granted to the extent that it is

ORDERED that third-party defendant S.J. Electric Inc. is obligated to provide a defense for defendants The Claret Group, LLC., 200 WEA SUB Co., LLC, and Bovis Lend Lease LMB, Inc. in this action and indemnification, provided that there is a determination that defendants were not negligent in the causing of plaintiff's accident, and it 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.

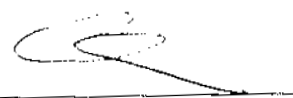
Dated:

4/13/12

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Doris Ling-Cohan, J. S. C.