

Levine v Citnalta Constr. Corp.

2013 NY Slip Op 30146(U)

January 18, 2013

Sup Ct, New York County

Docket Number: 113807/08

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

MARK LEVINE,

Plaintiff,

Index No.: 113807/08

Motion Date: 03/16/12

- v -

Motion Seq. No.: 02

CITNALTA CONSTRUCTION CORP., THE CITY OF
NEW YORK, and THE SCHOOL CONSTRUCTION
AUTHORITY,

Motion Cal. No.: _____

Defendants.

THE CITY OF NEW YORK and
THE SCHOOL CONSTRUCTION AUTHORITY,
Third-Party Plaintiffs,

FILED

- v -

JAN 28 2013

BOSTWICK PURCELL ARCHITECTS, P.C.,
Third-Party Defendant.

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

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

PAPERS NUMBERED

1, 2
3 - 4
5 - 7

Cross-Motion: Yes No

Upon the foregoing papers,

On this motion, plaintiff moves for partial summary judgment against defendants on the claims for violations of Labor Law 240 (1) & 241 (6). The third-party defendant, who contracted with the third-party plaintiffs to provide architectural and

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

engineering work on the project and was also plaintiff's employer at the time of the accident, cross-moves for summary judgment dismissing the third-party complaint that seeks contribution, common law and contractual indemnification. By separate motion (Motion Sequence No. 3), defendants move for summary judgment dismissing plaintiff's complaint and summary judgment on their third party claims.

This action arises out of an accident that occurred on April 11, 2008, at the site of an under-construction public high school in northern Manhattan. Plaintiff alleges that he was injured while climbing a ladder to access a portion of the roof under construction for purposes of conducting an inspection. Defendant Cinalta Construction was the general contractor on the project while the City and the Authority own the premises. The Authority contracted with third-party defendant Bostwick Purcell for architectural and engineering consulting services in connection with the project. Plaintiff testified that he worked for Bostwick on the project as an architectural field representative charged with making sure the building was built according to the construction documents and specifications.

At the time of the accident, plaintiff testified that he had finished inspecting the lower roof and walked over to the aluminum ladder that led to the higher roof over the gym at an elevation of approximately 25 feet. On the other side of the

wall separating the two roofs, which extended above both roofs, was a wooden ladder leading down to the higher roof. Plaintiff claims the two ladders were tied together with a thin metal wire. Plaintiff walked up the aluminum ladder to its top, kept his left foot on the aluminum ladder while turning around the right side of the aluminum ladder by pivoting and placed his left foot on the wooden ladder. At that point plaintiff states that the wooden ladder fell seven to eight feet when he shifted his weight onto it and he ended up on top of the ladder which was lying about one foot off the ground with its fall arrested by a metal pipe lodged against the bottom end of the ladder. Following the accident, plaintiff states that he felt pain in his back and proceeded to place the wooden ladder back in the position it was in before the accident, climbed back up and down the ladders and returned to his office on site.

Defendants argue that the manner in which plaintiff describes the occurrence and site of the accident are at odds with their description of the facts. Defendants rely upon the testimony of Sam Kamden, a project officer with the Authority, who testified that the ladders were not affixed to each other but that the wooden ladder was tied back to the wall although he could not say how or if the mesh was affixed to the wall. He also testified that there was a gas pipe in close proximity to the bottom of the wooden ladder that helped to secure it so it

wouldn't move. Another project manager, Garry Elliott, also testified that wooden ladder had been attached by wire to various pipes and that the bottom of the ladder had been lodged against a vertical pipe support to prevent it from "kicking out." Defendants further cite various other witnesses testifying that the ladders were wired to other pipes.

Based upon the conflicting testimony of the parties, the court shall deny the parties' respective motions for summary judgment as to the Labor Law 240 (1) & 241 (6) claims. Where a plaintiff-worker testifies that while inspecting premises under construction a ladder utilized for conducting such an inspection allegedly slides out from under the worker, a claim under Labor Law 240 (1) is stated. Prats v Port Authority of New York and New Jersey, 100 NY2d 878, 880 (2003). Plaintiff's testimony that the wooden ladder slipped and fell underneath him is sufficient to set forth a prima facie case of liability under the statute. Dowling v McCloskey Community Services Corp., 45 AD3d 1232, 1233 (3d Dept 2007) (plaintiffs deposition testimony that ladder slipped out from underneath him established prima facie entitlement to partial summary judgment). However, in this case defendants have introduced testimony and photographs alleging that the wooden ladder was properly braced and secured and the plaintiff has indicated that there were wires attached to the wooden ladder to brace it against the metal ladder.

Thus this is not a case where no safety device was provided or the evidence of the failure of the safety device is uncontroverted. See Velasco v Green-Wood Cemetery, 8 AD3d 88, 89 (1st Dept 2004) (uncontroverted evidence that ladder was unsecured and no other safety devices provided merits summary judgment for plaintiff). Plaintiff testified that on prior occasions the ladder had been "tied down" and that following his fall he placed the wooden ladder back in a position where it would be steady and then ascended the ladder to get back off the roof. Plaintiff did not report the incident until two days later. The testimony of Citnalta's witness was that he inspected the site on a daily basis and did not observe that the ladder was not tied down prior to plaintiff's accident. Based upon the conflicting testimony currently in the record, neither party has demonstrated whether in these circumstances the ladder did, or did not provide proper protection and therefore summary disposition on plaintiff's Labor Law 240 (1) claim shall be denied. See Seepersaud v City of New York, 38 AD3d 753, 755 (2d Dept 2007); Taglioni v Harbor Cove Associates, 308 AD2d 441, 442 (2d Dept 2003) ("Where an employee is injured in a fall from a ladder, which is not otherwise shown to be defective, the issue of whether the ladder provided the employee with the proper protection required under this statute is a question of fact for the jury").

With respect to plaintiff's claim under Labor Law 241 (6), "plaintiff allege[s] the violation of a sufficiently specific Industrial Code provision (12 NYCRR 23-1.21 [b])." Cevallos v Morning Dun Realty, Corp., 78 AD3d 547, 549 (1st Dept 2010). On this motion, plaintiff specifically relies upon Industrial Code (12 NYCRR) Section 23-1.21 (b) (4) (i) which states in pertinent part that "[a]ny portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place." As stated previously, there are issues of contested fact as to whether the ladder was fastened in a manner compliant with the regulation.

Defendants argue however that the cited regulation is inapplicable here because the ladder was not a regular means of access between the different levels of the roof. See Artoglou v Gene Scappy Realty Corp., 57 AD3d 460, 462 (2d Dept 2008) (Labor Law 241 [6] claim dismissed where plaintiff fell off allegedly defective ladder used to access roof of defendants' building where ladder at issue was not used as 'a regular means of access between floors or other levels'). Plaintiff testified that he accessed the roof on a regular basis during the three months prior to the accident including accessing the roof on a daily basis in the three weeks preceding the accident. This testimony is sufficient to raise an issue of fact as to whether the wooden

ladder constitutes a "regular means of access" for purposes of the relied upon Industrial Code section and therefore the court shall deny summary judgment as to the Labor Law 241 (6) claim. Avendano v. Sazerac, Inc., 248 AD2d 340, 341 (2d Dept 1998) (issue of fact as to whether the plaintiff used the ladder as a regular means of access).

The court shall also deny defendants' motion to dismiss the Labor Law 200 and negligence claims in the complaint as there are issues of fact as to the control over the plaintiff's work and work premises and any notice the defendants may have had as to the dangerous condition of the ladder. See Artoglou v Gene Scappy Realty Corp., supra, 57 AD3d 460, 462 (2d Dept 2008) ("Since the plaintiff alleged that the defendants provided him with an allegedly dangerous or defective ladder, in order to obtain summary judgment the defendants were required to establish that they neither created the alleged danger or defect in the instrumentality nor had actual or constructive notice of the dangerous or defective condition" and failed to do so).

The court shall grant the motion of defendant School Construction Authority for contractual indemnification against third-party defendant Bostwick Purcell and shall deny the separate cross-motion to dismiss that claim. Article 8 of the parties' consulting contract entitled "insurance" provides that Bostwick would indemnify the Authority from all claims "arising

out of or in connection with or as a result of or consequence of the performance of the Services of [Bostwick] under this agreement." Therefore, contrary to Bostwick's argument, no negligence on its part is necessary to trigger the contractual obligation to indemnify. As stated by the Court ruling upon on similar facts

"[Third-party plaintiff] is entitled to summary judgment on its [] claim for contractual indemnification against the [third-party defendant]. [The parties] entered into an [] Agreement for the [] project in which the [third-party defendant] agreed to indemnify [third-party plaintiff] against "claims for damage to persons or property suffered as a result of the alterations." Since there is no question that plaintiff's injuries arose out of the alterations, [third-party plaintiff] is entitled to be indemnified.

Dwyer v. Central Park Studios, Inc., 98 AD3d 882, 884, 2012 NY Slip Op 06184, 3 (1st Dept, September 18, 2012).

Furthermore, the agreement provides for partial indemnification in the event that the third-party plaintiffs are found negligent and any indemnification is limited to the extent that it excludes the pro rata share of any damages, fees, costs and expenses due to the third-party plaintiffs' negligence. Such an indemnification provision therefore does not run afoul of General Obligations Law 5-322.1. Dutton v Charles Pankow Builders, Ltd., 296 AD2d 321, 322 (1st Dept 2002) (where clause calls for partial, not full, indemnification for personal injuries partially caused by indemnitee's negligence by phrasing excluding liability created by indemnitee's sole and exclusive

negligence, clause is enforceable). Therefore, the court shall grant summary judgment to the third-party plaintiffs on their claim for contractual indemnification with the extent of the indemnification obligation to be determined after the issue of third-party plaintiffs' negligence is adjudicated.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is DENIED; and it is further

ORDERED that the third-party defendant's cross-motion is DENIED; and it is further

ORDERED that the parties are directed to attend a status conference on February 21, 2013 in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013 at 2:30 P.M.

This is the decision and order of the court.

Dated: January 18, 2013

<p>FILED</p> <p>JAN 28 2013</p> <p>NEW YORK COUNTY CLERK'S OFFICE</p>	<p>ENTER:</p> <p><i>[Signature]</i></p> <p>DEBRA A. JAMES J.S.C.</p>
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