

Wencewicz v Shawmut Design & Const.
2013 NY Slip Op 30840(U)
April 18, 2013
Supreme Court, New York County
Docket Number: 109791/2008
Judge: Saliann Scarpulla
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

HON. SALIANN SCARPULLA

PRESENT: _____
Justice

PART 19

Index Number : 109791/2008
WENCEWICZ, JAROSLAW
vs.
SHAWMUT DESIGN
SEQUENCE NUMBER : 005
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ **No(s).** _____

Answering Affidavits — Exhibits _____ **No(s).** _____

Replying Affidavits _____ **No(s).** _____

Upon the foregoing papers, it is ordered that this motion is

decided per the memorandum decision dated 4/18/13
which disposes of motion sequence(s) no. 005 and 007.

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

(Handwritten mark)

FILED

APR 24 2013

NEW YORK
COUNTY CLERK'S OFFICE

APR 23 2013

Dated: 4/18/13

(Signature), J.S.C.

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
JAROSLAW WENCEWICZ and MALGORZATA
WENCEWICZ,

Plaintiffs,

-against-

Index No.:109791/2008

Submission Date: 11/28/2012

SHAWMUT DESIGN AND CONSTRUCTION,
LIZ CLAIBORNE, INC., VORNADO 640 FIFTH
AVENUE L.L.C., LCI HOLDINGS, INC.,
THE MOSTAZAFAN FOUNDATION OF NEW
YORK, ALAVI FOUNDATION, 650 FIFTH
AVENUE COMPANY and DRYWALL &
ACOUSTICS CONSTRUCTION CORPORATION,

DECISION AND ORDER

Defendants.

-----X
SHAWMUT DESIGN AND CONSTRUCTION,

Third-Party Plaintiff,

-against-

ROCKMOR ELECTRIC ENTERPRISES, INC.,

Third-Party Defendant.

FILED

APR 24 2013

NEW YORK
COUNTY CLERK'S OFFICE

For Plaintiffs:
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For Third-Party Defendant Rockmor Electric Enterprises
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Papers considered in review of plaintiffs' motion for summary judgment (motion seq. no. 005):

Notice of Motion/Affirm. of Counsel/Exhibits.....1
Affirm. of Counsel in Opp. to Motion.....2
Affirm. in Reply.....3



Affirm. in Further Support.....4

Papers considered in review of Rockmor's motion for summary judgment (motion seq. no. 007):

Notice of Motion/Affirm. of Counsel/Memo of Law/Exhibits.....1
 Affirm. of Counsel in Opp. to Motion.....2
 Affirm. in Reply.....3

HON. SALIANN SCARPULLA, J.:

Motion sequence numbers 005 and 007 are consolidated for disposition.

In this action to recover damages for personal injuries, plaintiffs Jaroslaw Wencewicz ("Wencewicz") and Malgorzata Wencewicz move (motion seq. no. 005) for partial summary judgment against defendants Shawmut Design and Construction ("Shawmut"), Liz Claiborne, Inc. ("Liz Claiborne"), 650 Fifth Avenue Company ("650"), and Alavi Foundation ("Alavi") on the issue of liability based on Labor Law § 240(1).

Third-party defendant Rockmor Electric Enterprises, Inc. ("Rockmor") moves (motion seq. no. 007) for: (1) summary judgment dismissing Shawmut's third-party complaint, and all claims for contribution, common law indemnification, and contractual indemnification; and (2) summary judgment on its cross-claim against Drywall & Acoustics Construction Corporation ("Drywall") for common law indemnification.

Wencewicz is an electrician who worked on a construction project to build a Juicy Couture store at 650 Fifth Avenue, New York, NY ("the premises"). On June 6, 2008, Wencewicz fell from a ladder at the premises and suffered personal injuries from the fall. In his complaint, Wencewicz asserts negligence and Labor Law §§200, 240(1) and 241(6) causes of action.

On December 11, 2008, Shawmut commenced a third-party action against Rockmor for contribution, common law indemnification, contractual indemnification, and breach of contract for failure to procure insurance. Shawmut was hired by Liz Claiborne to serve as the general contractor for the project. Shawmut subcontracted electrical work to Rockmor, Wencewicz's employer.

Wencewicz testified at his deposition that on the day of his accident, Rockmor's foreman, Cesar Acrillo, directed him to bring an electrical panel from the basement up to the ground floor, with the help of another worker, Anatoly Gutkin ("Gutkin"). To complete this work, Wencewicz and Gutkin decided to carry the electrical panel up a wooden ladder that was built at the site between the basement and ground floor ("the ladder"). The panel weighed approximately sixty pounds.

Gutkin carried one end of the panel up the ladder first, with Wencewicz carrying the other end of the panel and following Gutkin up the ladder. Wencewicz testified that as he climbed the ladder, one of the ladder rungs immediately "broke at the moment when I stepped on it" causing him to fall. Wencewicz testified that as he fell from the ladder, a second ladder rung broke because he fell onto it.

Wencewicz testified that he did not lose his grip or balance prior to his fall. He also testified that his hand was severely cut as a result of the fall. His injuries included torn tendons and nerves, but the bones in his hand were unharmed.

Wencewicz testified that the ladder was "the only available way" to transport the electrical panel from the basement to the ground floor that he knew about, and that the other subcontractors on site also carried tools and equipment on the ladder. He testified that a hoist was installed on site prior to his accident, but that he could not use it because a worker from another trade had set up a ramp in front of the hoist.

Wencewicz submits an affidavit from Gutkin, the co-worker who helped him carry the electrical panel up the ladder. In his affidavit, Gutkin states that the accident occurred while he was "lifting the panel from above" and Wencewicz was "pushing and guiding the panel up the ladder." Gutkin stated that as Wencewicz climbed the ladder, "one of the steps of the ladder broke and caused him to fall and injure his left hand."

Shawmut's superintendent, Donald Putnam ("Putnam"), testified at his deposition that he was responsible for coordinating construction work among the subcontractors and handling safety issues at the site. Putnam testified that he instructed Drywall, a subcontractor hired to perform carpentry work, to construct a ladder from the basement to the ground floor that complied with OSHA. Drywall finished the ladder approximately one month before the accident.

Putnam testified that he conducted daily visual inspections of the ladder, and that he conducted a "toolbox talk" discussing ladder safety with the workers. According to Putnam, the ladder was a "one man ladder."

Putnam also testified that there was an escalator that could be used to travel between the basement and ground floors, but that it required passage through a common area. Putnam also testified that a freight elevator existed, which Shawmut used for deliveries of construction materials. In order to use the escalator or freight elevator, workers were required to obtain permission from Putnam.

Putnam testified that Shawmut never provided a hoist, scaffolding, or any other safety device to Wencewicz. Putnam further testified that the hoist on site belonged to Rockmor, and that other subcontractors used the hoist as well.

John Gagliardi ("Gagliardi"), a carpenter employed by Drywall, was also deposed. Gagliardi built the ladder with his foreman, James Campabasso. Gagliardi testified that he did not know whether Shawmut provided any specifications for the ladder, and that he was not aware of any laws governing the construction of ladders. He also testified that he did not inspect the wood prior to building the ladder, and that he did not know whether he inspected the ladder after it was built.

Gagliardi testified that the ladder was the only access point between the basement and ground floors for the workers. He testified that the workers typically carried tools and equipment on the ladder. Gagliardi never observed any of the workers using the escalator near the common area to travel from the basement to the ground floor.

Cesar Grillo ("Grillo"), a foreman at Rockmor, testified that every subcontractor on the job site used the ladder as a "two-man ladder." Grillo testified that the workers

used the hoist to carry equipment when it was available. Otherwise, the workers carried equipment on the ladder, which was "the only means of traveling between the floors." Grillo testified that it is common protocol to avoid transporting construction materials on an escalator in a common area.

Grillo testified that he complained to Shawmut about the ladder prior to the accident because "the ladder was to (sic) steep and that we didn't feel comfortable climbing up this particular ladder." Wencewicz submits an affidavit from Daniel Javier ("Javier"), a Rockmor electrician. In his affidavit, Javier states that he "complained that the built wood ladder was unsafe to the general contractor a long time before the step broke."

Kathleen Murphy, director of management services at Jones Lang LaSalle, the company that manages the building at 650 Fifth Avenue was also deposed. Murphy testified that 650 owned the premises on the date of the accident, and that Alavi Foundation was an owner of 650. She also testified that Liz Claiborne was 650's tenant. Murphy testified that she informed Shawmut that construction materials were not permitted on the escalators or elevators.

Rockmor submits an expert affidavit from Dr. William Marletta ("Dr. Marletta"), a certified safety professional who inspected the ladder on July 22, 2008. In his affidavit, Dr. Marletta states that the ladder was dangerous and defective. According to Dr. Marletta, the wood obtained to construct the ladder "should not have been used because

of the large (2" diameter), extensive knot in the wood cleat creating a dangerous ladder to use." Dr. Marletta also stated that the width of the ladder was excessive and dangerous. He further stated that the "hazard should have been identified through ordinary and adequate inspection."

Dr. Marletta concluded that "the sole proximate cause of the accident was the inadequate construction of the job-made ladder." Dr. Marletta states that the "fact that Mr. Wencewicz and Mr. Gutkin were carrying an electrical panel box at the time of the accident was of no consequence to the accident happening."

Shawmut submits a copy of its subcontract agreement with Rockmor. Under the subcontract, Rockmor is required to defend and indemnify Shawmut to the "the full extent permitted by applicable law . . . from and against any and all claims, damages or loss (including attorney's fees) arising out of or resulting from any work of and caused in whole or in part by any negligent act or omission" of Rockmor.

I. Wencewicz's Motion for Summary Judgment

Wencewicz now moves for summary judgment on his Labor Law §240(1) claim asserted against Shawmut, 650, Liz Claiborne, and Alavi. Wencewicz argues that Shawmut, 650, Liz Claiborne, and Alavi violated §240(1) because they failed to provide proper protection to prevent Wencewicz from harm directly flowing from the application of the force of gravity. Wencewicz also argues that defendants failed to provide other safety devices to protect him in the event that the ladder failed.

Shawmut, 650, Liz Claiborne, and Drywall (collectively, "the defendants") oppose the motion. The defendants argue that a triable issue of fact exists as to whether Wencewicz was the sole proximate cause of his accident. The defendants contend that Wencewicz caused his accident through improper use of the ladder – i.e., carrying equipment on it and using the ladder as a two-man ladder. The defendants also contend that Wencewicz is a recalcitrant worker that refused to use other safer means to transport the electric panel such as the hoist, escalator, or elevator.

II. Rockmor's Motion for Summary Judgment

Rockmor moves for summary judgment dismissing Shawmut's third-party complaint, and all claims for contribution, common law indemnification, and contractual indemnification. Rockmor argues that it is not liable to Shawmut for contribution or common law indemnification because: (1) Rockmor did not build the ladder which was the sole proximate cause of the accident; and (2) any contribution or common law indemnification claim against Rockmor is barred by Workers Compensation Law § 11 because Wencewicz did not sustain a "grave injury."

In addition, Rockmor argues that Shawmut is not entitled to contractual indemnification because: (1) Rockmor was not negligent in causing Wencewicz's accident; and (2) the indemnification provision is void under General Obligations Law § 5-322.1. Rockmor also argues that, in the event that it is not dismissed from this action, it is entitled to common law indemnification from Drywall.

In opposition, Shawmut argues that its third party complaint should not be dismissed because: (1) a triable issue of fact exists as to Rockmor's negligence; and (2) the indemnification provision is not void under General Obligations Law § 5-322.1. Shawmut also argues that as a result of Rockmor's negligence, Rockmor is not entitled to common law indemnification from Drywall. Shawmut further argues that its breach of contract claim should survive because Rockmor did not address this claim in its motion papers.

Discussion

A movant seeking summary judgment must make a *prima facie* showing of entitlement to judgment as a matter of law and offer sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985). Once a showing has been made, the burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980).

I. Wenciewicz's Motion for Summary Judgment

Labor Law § 240(1) imposes absolute liability on building owners, construction contractors, and their agents with regard to elevation-related risks to workers at construction sites. *Rodriguez v. Forest City Jay St. Assocs.*, 234 A.D.2d 68, 68 (1st Dep't 1996). The statute was designed to prevent those types of accidents in which the protective device proved inadequate to shield the injured worker from harm directly

flowing from the application of the force of gravity to an object or person. *Runner v. New York Stock Exchange*, 13 N.Y.3d 599, 604 (2009); *Luongo v. City of New York*, 72 A.D.3d 609, 610 (1st Dep't 2010).

If a plaintiff makes a *prima facie* showing that the ladder he was using collapsed, there is a presumption that the ladder was an inadequate safety device. *Kosavick v. Tishman Construction Corp.*, 50 A.D.3d 287, 288 (1st Dep't 2008). The burden then shifts to the defendant, who may defeat plaintiff's summary judgment motion only if there is a "plausible view of the evidence – enough to raise a fact question – that there was no statutory violation and that plaintiff's own acts or omissions were the sole cause of the accident." *Blake v. Neighborhood Hous. Servs. of N.Y. City*, 1 N.Y.3d 280, 289 n. 8 (2003); *Kosavick*, 50 A.D.3d at 288.

Here, I find that Wenciewicz made a *prima facie* showing that the ladder he was using collapsed. Wenciewicz testified that a rung on the ladder immediately broke as he stepped onto it, which caused him to fall. Wenciewicz also submitted Gutkin's affidavit stating that one of the ladder rungs broke causing Wenciewicz's fall.

The defendants do not dispute that the ladder rung broke, but instead argue that Wenciewicz was the sole proximate cause of the accident. Based on the documentary evidence and testimony submitted, I find that the defendants fail to raise a triable issue of fact as to whether Wenciewicz was the sole proximate cause of the accident. First, the defendants did not submit any evidence in support of their argument that Wenciewicz or

Gutkin caused the ladder rung to break by falling onto it. Both Wencewicz and Gutkin testified that the ladder rung broke on its own. Wencewicz also testified that he did not lose his grip or balance before the ladder rung broke.

The defendants also failed to submit any expert evidence to rebut Dr. Marletta's conclusion that the inadequate construction of the ladder was the sole proximate cause of the accident. Dr. Marletta stated that the ladder rung broke due to the large knot at the center of the rung and due to the ladder's excessive length. Dr. Marletta further stated that the fact that Wencewicz was carrying the electrical panel on the ladder with Gutkin did not cause the accident.

To raise an issue of fact regarding a plaintiff's recalcitrance, a defendant must show that: "(a) plaintiff had adequate safety devices at his disposal; (b) he both knew about them and that he was expected to use them; (c) for 'no good reason' he chose not to use them; and (d) had he used them, he would not have been injured." *Tzic v. Kasampas*, 93 A.D.3d 438, 439 (1st Dep't 2012).

I find here that the defendants failed to raise a triable issue of fact as to whether Wencewicz was a recalcitrant worker. Wencewicz testified that he did not know of any other way to transport the electrical panel except for the ladder and hoist. Wencewicz further testified that the hoist was unavailable on the day of his accident because it had been blocked by a worker from another trade. Although Putnam testified that an escalator and elevator existed, the workers were not permitted to use the escalator or the elevator

without Putnam's permission. There is also no evidence that any of the workers were informed that they should ask permission to use escalator or elevator to transport equipment or materials for their work assignments.

Accordingly, the plaintiff Jaroslaw Wencewicz's motion for partial summary judgment against defendants Shawmut, Liz Claiborne, 650, and Alavi on the issue of liability based on Labor Law § 240(1) is granted.

II. Rockmor's Motion for Summary Judgment

Rockmor moves for summary judgment dismissing Shawmut's third-party complaint, and all claims for contribution, common law indemnification, and contractual indemnification.¹

A. Shawmut's Contribution and Common Law Indemnification Claims

Workers' Compensation Law § 11 prohibits "third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury' or the claim is 'based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered.'" *Rodrigues v. N & S Bldg. Contractors, Inc.*, 5 N.Y.3d 427, 429-30 (2005).

¹ The record indicates that there are no claims for contribution, common law indemnification, or contractual indemnification against Rockmor, except for those asserted by Shawmut.

Rockmor is entitled to judgment as a matter of law dismissing Shawmut's third-party claims for contribution and common law indemnification. These claims against Rockmor are prohibited under Workers Compensation Law § 11. Wenciewicz did not suffer a "grave injury" such as a loss of his hand or fingers. Wenciewicz testified that his hand was cut and the bones in his hand were unharmed.

Accordingly, Rockmor's motion for summary judgment dismissing Shawmut's third-party claims for contribution and common law indemnification is granted.

B. Shawmut's Contractual Indemnification Claim

Rockmor moves for summary judgment dismissing Shawmut's claim for contractual indemnification. Under the terms of the contract, Rockmor is required to indemnify Shawmut for losses resulting from Rockmor's negligence.

Rockmor has demonstrated its entitlement to judgment as a matter of law dismissing Shawmut's contractual indemnification claim. Based on the documentary evidence, I find that Wenciewicz's accident was caused by the defendants' failure to provide an adequate safety device to protect Wenciewicz from falling. Rockmor demonstrated that it did not construct the ladder that caused Wenciewicz's fall. The ladder was constructed by Drywall, at the direction of Shawmut.

Shawmut fails to raise a triable issue of fact as to any negligent act or omission by Rockmor that caused the accident. Shawmut argues that Rockmor did not instruct Wenciewicz to use the hoist, or other available means to transport the panel. However,

Wencewicz's inability to use the hoist or other means to transport the panel cannot be attributed to Rockmor. The evidence indicates that the hoist, which belonged to Rockmor, was blocked by a worker from another trade, and that the other means of transporting the panel such as the escalator or elevator were not available to the workers, or even made known to them. As the general contractor at the site, Shawmut was responsible for providing workers with a safe means to transport their tools and equipment from the basement to the ground floor, not Rockmor.

Accordingly, Rockmor's motion for summary judgment dismissing Shawmut's contractual indemnification is granted.

C. Shawmut's Breach of Contract Claim

Rockmor failed to address Shawmut's breach of contract claim for failure to procure insurance, thus Rockmor's motion for summary judgment dismissing Shawmut's breach of contract claim is denied.

D. Rockmor's Common Law Indemnification Claim

Based on my finding that Rockmor did not negligently cause Wencewicz's accident, Rockmor's motion for summary judgment on its common law indemnification claim against Drywall is denied as moot.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff Jaroslaw Wencewicz's motion for partial summary judgment (motion seq. no. 005) against defendants Shawmut Design and Construction, Liz

Claiborne, Inc., 650 Fifth Avenue Company, and Alavi Foundation on the issue of liability based on Labor Law § 240(1) is granted; and it is further

ORDERED that third-party defendant Rockmor Electric Enterprises, Inc.'s motion for summary judgment (motion seq. no. 007) dismissing Shawmut Design and Construction's third-party complaint and all claims for contribution, common law indemnification, and contractual indemnification pursuant to CPLR § 3212 is granted to the extent that Shawmut's third-party claims for contribution, common law indemnification, and contractual indemnification are dismissed, and the motion otherwise denied; and it is further

ORDERED that third-party defendant Rockmor Electric Enterprises, Inc.'s motion for summary judgment (motion seq. no. 007) on its cross-claim for common law indemnification against Drywall & Acoustics Construction Corporation pursuant to CPLR § 3212 is denied as moot.

This constitutes the decision and order of the Court.

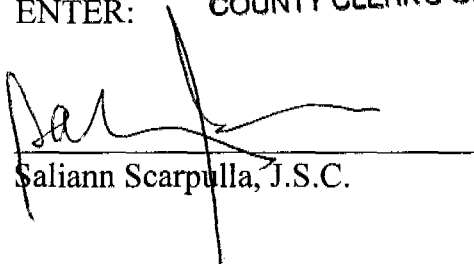
Dated: New York, NY
April 18, 2013

FILED

APR 24 2013

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Saliann Scarpulla, J.S.C.