Millan v Montauk Prop., L.L.C.

2013 NY Slip Op 31103(U)

May 15, 2013

Sup Ct, Suffolk County

Docket Number: 09-36748

Judge: Jerry Garguilo

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

[* 1]

COPY

SHORT FORM ORDER

INDEX No. 09-36748

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 47 - SUFFOLK COUNTY

PRESENT:

Hon. JERRY GARGUILO
Justice of the Supreme Court

MOTION DATE 12-27-12
ADJ. DATE 2-20-13
Mot. Seq. # 003 - MG

JOSE MILLAN,

Plaintiff,

- against -

MONTAUK PROPERTIES, L.L.C., G. FORTE CONSTRUCTION CO., INC., and MARTINO PIZZERIA, INC. d/b/a MAMA'S RESTAURANT,

Defendants.

BORDA, KENNEDY, ALSEN & GOLD, LLP
Attorneys for Plaintiff
1805 Fifth Avenue
Bay Shore, New York 11706

NICOLINI, PARADISE, FERRETTI & SABELLA, PLLC
Attorneys for Defendant/Second Third-Party Plaintiff G. Forte Construction
114 Old Country Road, Suite 500
Mineola, New York 11501

MONTAUK PROPERTIES, L.L.C. and MARTINO PIZZERIA, INC. d/b/a MAMA'S RESTAURANT,

Third-Party Plaintiffs,

- against -

CVS PHARMACY, INC.

Third-Party Defendant,

BELLO & LARKIN
Attorneys for Defendant/Third-Party Plaintiffs Montauk Properties and Martino Pizzeria
150 Motor Parkway, Suite 405
Hauppauge, New York 11788

EDWARDS WILDMAN PALMER, LLP
Attorneys for Defendants CVS Albany and Hook Superex, LLC
111 Huntington Avenue
Boston, MA 02199

G. FORTE CONSTRUCTION CO., INC.,

Second Third-Party Plaintiff,

- against -

CVS PHARMACY, INC.

Second Third-Party Defendant.

MCANDREW, CONBOY & PRISCO, LLP
Attorneys for Defendants CVS Albany and Hook Superex, LLC
1860 Walt Whitman Road - Suite 800
Melville, New York 11747

JH

MONTAUK PROPERTIES, L.L.C. and MARTINO PIZZERIA, INC. d/b/a MAMA'S RESTAURANT,

Third Third-Party Plaintiffs,

- against -

CVS ALBANY, LLC and HOOK-SUPERX, LLC,

Third Third-Party Defendants.

----------X

Upon the following papers numbered 1 to 34 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 20 ; Notice of Cross Motion and supporting papers __; Answering Affidavits and supporting papers 21 - 28; 29 - 30 ; Replying Affidavits and supporting papers 31 - 34 ; Other __; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by third-party defendant CVS Albany, LLC, for, inter alia, summary judgment dismissing the third-party complaints and cross claims against it is granted; and it is

ORDERED that the court, upon its own motion, searches the record pursuant to CPLR 3212(b) and awards third-party defendant Hook-Superx, LLC, summary judgment dismissing the third-party complaint and the cross claims against it.

Plaintiff Jose Millan commenced this action to recover damages for personal injuries he allegedly sustained on April 28, 2008, while working on the renovation and expansion of a pizzeria located at 922 Merrick Road, Copiague, New York. The pizzeria is owned and operated by defendant Martino Pizzeria, d/b/a Mama's Restaurant. Plaintiff, who was in the process of installing a sprinkler system for the pizzeria, allegedly injured himself when the ladder he was climbing unexpectedly slid, causing him to fall to the floor. At the time of the accident plaintiff was employed by non-party BK Engineering, a subcontractor hired by defendant G. Forte Construction Company ("Forte"), the general contractor for the project. Defendant Montauk Properties, LLC, is the owner of the strip mall where the pizzeria and other businesses are located. By way of his amended complaint, plaintiff alleges causes of action against the defendants for common law negligence, premises liability, and violations of Labor Law §§ 200, 240 (1), and 241(6).

On or about August 10, 2011, Mama's Restaurant and Montauk Properties (herein jointly referred to as "Montauk") impleaded CVS Albany, LLC, i/s/h/a CVS Pharmacy, Inc. ("CVS"), the tenant of the adjoining retail space, as a third-party defendant to the action. Montauk alleges, inter alia, that the accident occurred in CVS's rear stock room where a water valve necessary for the completion of plaintiff's work was located. The third-party complaint contains claims for contribution and common law and contractual indemnification. In September 2011, Forte also commenced a second third-party action against CVS containing similar claims and allegations. Following commencement of the second third-party action, Montauk filed a fourth third-party action, which names CVS and the predecessor to its lease agreement, Hook-Superx, LLC, as defendants to the action. CVS joined the third-party complaints asserting a general denial, affirmative defenses, and counterclaims against the third-party plaintiffs for common law and contractual indemnification, contribution, and breach of contract.

CVS now moves for, inter alia, summary judgment dismissing the third-party complaints and cross claims against it on the grounds it neither possessed nor controlled the area where the accident allegedly occurred, and it did not exercise any supervisory authority over plaintiff's work or safety since it was not an owner, general contractor or statutory agent at the time of the alleged accident. In opposition, Montauk argues that the motion is premature, since CVS failed to produce any witnesses possessing knowledge of its management and operations on the day of the subject accident. Montauk further avers that CVS failed to meet its prima facie burden on the motion, as deposition testimony by plaintiff's supervisor and the owner of the pizzeria raises a triable issue as to whether the accident occurred inside of CVS's stock room rather than the pizzeria. The motion also is opposed by Forte, which adopts the arguments and evidentiary support set forth in Montauk's opposition papers.

At his examination before trial, plaintiff testified that no one other than his supervisor controlled his work at the time of the accident. Plaintiff testified that he brought his own tools and safety equipment, including the ladder, to the worksite. Plaintiff testified that the accident occurred as he and his partner, who were each holding opposite ends of a long metal pipe, were climbing their respective ladders to place the pipe on hangers that were already installed on the ceiling. He testified that his ladder slid beneath him and caused him to fall to the floor as he got to the tenth rung of the ladder. He further testified that he was working on the right side of the restaurant at the time of the accident, and that he had leaned his unopened A-frame ladder against the sheet rack wall rather than opening up the ladder for support.

At his examination before trial, plaintiff's supervisor, Patrick Scala, testified that plaintiff was his lead foreman on the project, and that he was one of two employees of BK Engineering working at the site at the time of the accident. Mr. Scala testified that the project entailed the renovation and expansion of the pizzeria into the retail space previously occupied by another tenant. He testified that he visited the worksite once or twice per week, and that on those occasions he would inspect plaintiff's work and discuss the progress of the project with Forte's foreman. Mr. Scala testified that plaintiff and his partner were required to run a pipe connecting the fire water main from the street through CVS's stock room located at the back of the building, because CVS did not want the water main to be placed directly in its store. He testified that there was no ceiling in the stock room and that the walls consisted of cinder blocks. Mr. Scala further testified that someone, perhaps plaintiff's partner at the worksite, informed him that the accident occurred in CVS's stock room rather than the inside the pizzeria. He also testified that he could not confirm whether the accident occurred in the stock room or some other part of the premises.

Article 15 of CVS's lease agreement with Montauk, entitled "Access by Landlord," states, in pertinent part, as follows:

> Landlord may have free access to the Premises at all reasonable times for the purpose of examining same or making any alterations or repairs required by Article 10 or which the Landlord may deem necessary for its safety or preservation.

Article 33 of the lease agreement further provides that:

> Tenant shall, during the entire term hereof, keep in full force and effect a policy of public liability and property damage insurance with insurance with respect to claims arising from the use and occupancy of the Premises by Tenant . . . A certificate reflecting such insurance coverage and designating Landlord as insured thereunder shall be delivered to Landlord upon request therefor.

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 eliminate any material issue of fact (*see* ***Alvarez v Prospect Hosp.***, 68 NY2d 320, 508 NYS2d 923 [1986]; ***Winegrad v New York Univ. Med. Ctr***, 64 NY2d 851, 487 NYS2d 316 [1985]; ***Andre v Pomeroy***, 35 NY2d 361, 362 NYS2d 131 [1974]). The burden will then shift to the nonmoving party to demonstrate that there are material issues of fact, however, mere conclusions and unsubstantiated allegations are insufficient to raise such triable issues (*see* ***Zuckerman v City of New York***, 49 NY2d 557, 427 NYS2d 595 [1980]; ***Perez v Grace Episcopal Church***, 6 AD3d 596, 774 NYS2d 785 [2d Dept 2004]).

Generally, "Labor Law §§ 200, 240, and 241 apply to owners, general contractors, or their "agents" (***Guclu v 900 Eighth Ave. Condominium, LLC***, 81 AD3d 592, 593, 916 NYS2d 147 [2d Dept 2011]). A party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the "ability to control the activity which brought about the injury" (***Walls v Turner Constr. Co.***, 4 NY3d 861, 863-864, 798 NYS2d 351 [2005]; *see* ***Russin v Louis N. Picciano & Son***, 54 NY2d 311, 445 NYS2d 127 [1981]). "The term 'owner' within the meaning of article 10 of the Labor Law encompasses a 'person who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit'"(***Zaher v Shopwell, Inc.***, 18 AD3d 339, 339-340, 795 NYS2d 223 [1st Dept 2005], *quoting* ***Copertino v Ward***, 100 AD2d 565, 566, 473 NYS2d 494 [1984]). The statute may also apply to a lessee,where the lessee has the right or authority to control the work site, even if the lessee did not hire the general contractor (***Zaher v Shopwell, Inc.***, *supra*, 339-340, 795 NYS2d 233; *see* ***Bart v Universal Pictures***, 277 AD2d 4, 715 NYS2d 240 [1st Dept 2000]). However, the key criterion in determining whether a lessee should be held liable under the statute is whether it had the authority to insist that the plaintiff follow proper safety procedures while performing his work (*see* ***Ferluckaj v Goldman Sachs & Co.***, 12 NY3d 316, 880 NYS2d 879 [2009];***Guclu v 900 Eighth Ave. Condominium, LLC***, *supra*; ***Grilikhes v International Tile & Stone Show Expos***, 90 AD3d 480, 934 NYS2d 384 [1st Dept 2011]; ***Bart v Universal Pictures***, *supra*).

Here, CVS established its prima facie entitlement to summary judgment dismissing the third-party complaints and cross claims against it by submitting evidence that it was not an owner, general contractor or statutory agent, and that it did not possess supervisory authority over plaintiff's work such that it had the right to insist that he followed proper safety practices while performing his work (*see* ***Ferluckaj v Goldman Sachs & Co.***, *supra*; ***Allan v DHL Express (USA), Inc.***, 99 AD3d 828, 952 NYS2d 275 [2d Dept 2012]; ***Guclu v 900 Eighth Ave. Condominium, LLC***, *supra*; ***Grilikhes v International Tile & Stone Show Expos***, *supra*; ***Guzman v L.M.P. Realty Corp.***, 262 AD2d 99, 691 NYS2d 483 [1st Dept 1999]). Significantly, plaintiff testified that no one other than Patrick Scala controlled or supervised his work at the time of the alleged accident. Moreover, it is undisputed that

CVS was not the owner of the premises and did not act as Montauk's agent for the project. Indeed, CVS's lease agreement specifically granted Montauk free access to the stockroom for the purpose of making alterations such as the installation of the fire sprinkler system, and it did not obligate or authorize CVS to inspect the safety procedures followed during such work (*cf* ***Bart v Universal Pictures***, *supra*; ***Copertino v Ward***, *supra*).

Additionally, CVS submitted evidence that it was not contractually obligated to indemnify Montauk or its contractors for any injuries arising from performance of the work, as there was no such requirement in its lease and it did not enter any other agreement with Montauk relating to the expansion of the pizzeria or the installation of the sprinkler system (*see* ***Araujo v City of New York***, 84 AD3d 993, 922 NYS2d 806 [2d Dept 2011]; ***O'Berg v MacManus Group, Inc.***, 33 AD3d 599, 822 NYS2d 306 [2d Dept 2006]; ***Lipshultz v K & G Indus.***, 294 AD2d 338, 742 NYS2d 90 [2d Dept 2002]). Further, where, as here, it did not provide plaintiff the defective ladder and the accident arose from alleged defects or dangers in the methods or materials of the work rather than the existence of a defective premises condition, CVS cannot be held liable under the theories of contribution and/or common law indemnification (*see* ***Rizzuto v L.A. Wenger Contr. Co., Inc.***, 91 NY2d 343, 352, 670 NYS2d 816 [1998]; ***Raquet v Braun***, 90 NY2d 177, 659 NYS2d 237 [1997]; ***Guzman v Haven Plaza Hous. Dev. Fund Co.***, 69 NY2d 559, 516 NYS2d 451 [1987]; ***Ortega v Puccia***, 57 AD3d 54, 866 NYS2d 323 [2d Dept 2008]; *see also* ***Arteaga v 231/249 W 39 St. Corp.***, 45 AD3d 320, 847 NYS2d 5 [1st Dept 2007]).

In opposition, Montauk and Forte failed to raise any significant triable issues requiring denial of the motion (*see* ***Alvarez v Prospect Hospital***, *supra*; ***Zuckerman v City of New York***, *supra*). The deposition testimony by Patrick Scala stating that another worker informed him the accident occurred in CVS's stock room is insufficient for the purpose of raising a triable issue, as it constitutes hearsay evidence. Although such evidence may be considered in opposition to a motion for summary judgment, it will not bar summary judgment if it is the only evidence submitted to prove the truth of the matter asserted (*see* ***Narvaez v NYRAC***, 290 AD2d 400, 737 NYS2d 76 [1st Dept 2002]; ***Guzman v L.M.P. Realty Corp.***, *supra*; ***Thomas v Our Lady of Mercy Med. Ctr.***, 289 AD2d 37, 734 NYS2d 33 [1st Dept 2001]). Moreover, even assuming, arguendo, that the alleged accident occurred inside CVS's stock room, CVS cannot be held liable for plaintiff's injuries since it neither contracted to have the work performed nor possessed the authority to control plaintiff's work or safety procedures (*see* ***Allan v DHL Express (USA), Inc.***, *supra*; ***Guclu v 900 Eighth Ave. Condominium, LLC***, *supra*).

Furthermore, Montauk failed to demonstrate that facts essential to opposing the motion are within the exclusive knowledge and control of CVS (*see* CPLR 3212[f]; ***Martinez v Kreychmar***, 84 AD3d 1037, 923 NYS2d 648 [2d Dept 2011]; ***Cavitch v Mateo***, 58 AD3d 592, 871 NYS2d 372 [2d Dept 2009]), and the "mere hope or speculation that evidence sufficient to defeat a motion for summary judgment may be uncovered by further discovery is an insufficient basis for denying the motion" (***Woodard v Thomas***, 77 AD3d 738, 740, 913 NYS2d 103 [2d Dept 2010]; *see* ***Conte v Frelen Assoc., LL C***, 51 AD3d 620, 858 NYS2d 258 [2d Dept 2008]). Therefore, the motion by third-party defendant CVS Albany, LLC, for, inter alia, summary judgment dismissing the third-party complaints and cross claims against it is granted. Inasmuch as CVS's lease predecessor, third-party defendant Hook-Superx, was neither in possession of the subject premises nor contractually obligated to supervise plaintiff's

safety procedures or indemnify Montauk for his injuries, the court, upon its own motion, searches the record and awards it summary judgment dismissing the third-party complaint and cross claims against it.

Dated: 5/15/13

J.S.C.

____ **FINAL DISPOSITION** __X__ **NON-FINAL DISPOSITION**