

Masiello v 21 E. 79th St. Corp.
2013 NY Slip Op 31554(U)
July 16, 2013
Supreme Court, New York County
Docket Number: 104521/07
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ
Justice

PART 13

PHILIP C. MASIELLO,
Plaintiff,
-against -

INDEX NO. 104521/07
MOTION DATE 06-19-13
MOTION SEQ. NO. 005
MOTION CAL. NO. _____

21 EAST 79TH STREET CORPORATION, 23 EAST 79TH
STREET CORPORATION, BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT, LLC and PELHAM
PLUMBING & HEATING CORP.,
Defendants.

23 EAST 79TH STREET CORPORATION,
Third-Party Plaintiff,
-against -

FILED

INDEX NO. 591028//07

JUL 17 2013

FINE-LINE RESTORATION, INC.,
Third-Party Defendant.

COUNTY CLERK'S OFFICE
NEW YORK

The following papers, numbered 1 to 13 were read on this motion to/ for Reargue:

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____ cross motion _____
Replying Affidavits _____

PAPERS NUMBERED	
1 - 4	_____
5 - 7, 8 - 9	_____
10 - 11, 12 - 13	_____

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is Ordered that third-party defendant, FINE-LINE RESTORATION INC.'s motion pursuant to CPLR 2221, seeking to reargue the October 11, 2012 decision of this Court, is granted. Upon reargument third-party defendant, FINE-LINE RESTORATION INC.'s motion for summary judgment, dismissing the third-party complaint and the complaint in the main action, is denied.

Fine-Line Restoration Inc. (hereinafter referred to as "Fine-Line") seeks an Order pursuant to CPLR §2221 granting reargument of its prior motion for summary judgment. Upon reargument Fine-Line seeks an Order granting summary judgment pursuant to CPLR §3212 dismissing the third-party complaint on the grounds it is barred by Worker's Compensation Law §11 and dismissing the complaint in the main action for failure to state an evidentiary or legal basis for the plaintiff's claims.

A Court has discretion to grant a motion to reargue upon a showing that it, "overlooked or misapprehended the relevant facts, or misapplied any controlling

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

principle of law”(Foley v. Roche, 68 A.D. 2d 558, 418 N.Y.S. 2d 588 [N.Y.A.D. 1st Dept., 1979]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (Ul Haque v. Daddazio, 84 A.D. 3d 940, 922 N.Y.S. 2d 548 [N.Y.A.D. 2nd Dept., 2011]).

Absent language in an Order or Stipulation indicating otherwise, a post note of issue motion for summary judgment is deemed made when it is served, not when it is filed (Aqueel v. Tony Casale, Inc., 44 A.D. 3d 572, 845 N.Y.S. 2d 8 [N.Y.A.D. 1st Dept., 2007] citing CPLR §2211 and Fontanez v. Lazarus, 68 A.D. 3d 558, 889 N.Y.S. 2d 844 [N.Y.A.D. 1st Dept., 2009]).

Fine Line contends that this Court misapprehended and misapplied controlling law. Plaintiff filed his Note of Issue on November 30, 2011 (Mot. Exh. P). The Preliminary Order of the Hon. Shirley Werner Kornreich, dated September 4, 2008, directed that dispositive motions “shall be made,” on or before 60 days after the Note of Issue is filed (Mot. Exh. Q). The motion was served on all parties on January 30, 2012, within the sixty day period for it to be “made,” and was timely. The filing date for the motion, March 5, 2012, over a month after the service, is irrelevant because there is no provision in the order stating that filing should take place on the same date.

Philip C. Masiello (hereinafter referred to as “plaintiff”) and 21 East 79th Street Corporation, 23 East 79th Street Corporation and Brown Harris Stevens Residential Management, LLC (hereinafter referred to collectively as, “the East 79th Street defendants”) do not oppose granting Fine Line reargument. They only oppose the summary judgment relief.

Fine-Line has established that this Court misapprehended the language of the September 4, 2008 Preliminary Conference Order and misapplied the controlling law.

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Worker’s Compensation Law §11 permits a claim for contractual indemnification to a third-party by the employer based on liability for injuries sustained by an employee acting within the scope of employment, but the party seeking to be indemnified must prove through competent medical evidence that the person sustained a “grave injury” (Portelli v. Trump Empire State Partners, 12 A.D. 3d 280, 786 N.Y.S. 2d 5 [N.Y.A.D. 1st Dept., 2004]). Worker’s Compensation Law §11 defines a grave injury as, “...death, permanent or total loss of use or amputation of an arm, leg, hand or foot,

loss of multiple fingers, loss of multiple toes..." (McKinney's Cons. Laws of NY, Book 64, Worker's Compensation Law §11). The only determination to be made is whether an injury falls within the Worker's Compensation Law §11, narrowly defined, objective requirements (Castro v. United Container Machinery Group, Inc., 96 N.Y. 2d 398, 761 N.E. 2d 1014, 736 N.Y.S. 2d 287 [2001] and Fiorentino v. Atlas Park LLC, 95 A.D. 3d 424,944 N.Y.S. 2d 60 [N.Y.A.D. 1st Dept.,2012]).

An indemnification agreement entered into prior to the date of plaintiff's accident, avoids preclusion of claims against a plaintiff's employer under Worker's Compensation Law §11 (Rodrigues v. N & S Building Contractors, Inc., 5 N.Y. 3d 427, 839 N.E. 2d 357, 805 N.Y.S. 2d 299 [2005]; Gary v. Flair Beverage Corp., 60 A.D. 3d 413, 875 N.Y.S. 2d 4 [N.Y.A.D. 1st Dept., 2009] and Portelli v. Trump Empire State Partners,12 A.D. 3d 280, 786 N.Y.S. 2d 5 [N.Y.A.D. 1st Dept., 2004]). In determining whether the parties had an indemnity agreement, the Court must consider whether the parties entered into written contract that has an indemnity provision related to the job or site where the claim related to the injury took place. The Court must then examine whether the indemnity provision in the contract was sufficiently particular to establish that the Worker's Compensation Law §11, requirements are met (Rodrigues v. N & S Building Contractors, Inc., 5 N.Y. 3d 427, supra).

Phillip Masiello, brought this action for personal injury pursuant to Labor Law §200, §240[1] and §241[6]. Plaintiff claims he was injured on September 27, 2004, at 21 East 79th Street, New York, New York, when he fell while standing on an eight foot high, aluminum, A-frame ladder. Plaintiff was employed by Fine-Line as a painter, and claims that he fell while painting a wall above a doorway because the ladder was defective and fell out from under him (Mot. Exhs. A &K to Exh. A). Phillip Masiello alleges in his September 17, 2007, Verified Bill of Particulars that amongst other injuries, he sustained multiple fractures of his right tibia requiring open reduction internal fixation, and internal derangement of his right ankle (Mot. Exh. C to Exh. A). A subsequent Bill of Particulars dated June 22 2011, refers to necrosis of the right ankle (Mot. Exh. N to Exh. A).

Fine-Line contends that the third-party action is barred by Worker's Compensation Law §11, because there was no "grave injury" as defined by the statute. Plaintiff did not sustain permanent and total loss of his foot, he also returned to work post-accident. Fine-Line claims that there is no indemnification agreement between it and the East 79th Street defendants. The East 79th Street defendants have provided multiple copies of contracts and not all copies have an indemnification agreement (Mot. Exh. J to Exh. A and Partial Opp. Exh. B). To the extent that a written contract exists, there was no specific contractual indemnity cause of action asserted in the third-party complaint, therefore, no basis to maintain the third-party action. The language in the third-party complaint is boilerplate and does not refer to specific indemnification provisions in any alleged contract (Mot. Exh. D to Exh. A). Fine-Line claims that it would be severely prejudiced if the East 79th Street defendants are deemed to have asserted contractual claims. The discovery related to the defense of this action has been completely based on common law claims asserted in the third-party complaint.

The East 79th Street defendants, oppose summary judgment contending that the third-party complaint does state a claim for contractual indemnity in the fifth and eleventh paragraphs (Mot. Exh. D to Exh. A). The fifth paragraph of the third-party complaint provides that prior to the date of the accident the parties entered into a written agreement and refers to the specific terms of the contract related to indemnification (Mot. Exh. D to Exh. A). The East 79th Street defendants contend that the claim for contractual indemnification, even if not stated clearly should be liberally construed to exist. Fine-Line cannot claim that it was unaware of the East 79th Street defendants' contract or the contractual indemnification claims since a copy of the contract was exchanged as part of the September 8, 2008, Response to Notice for Discovery and Inspection (Partial Opp., Exh. B) and produced at the deposition of Joe Scsepko, Fine-Line's President (Mot. Exh. M to Exh. A).

Labor Law §240[1] is applied to stationary objects and liability attaches to objects that need or require securing. The standard involved in securing an object, is the presence of a foreseeable elevation risk in light of the work being performed (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263, 841 N.Y.S. 2d 249 [N.Y.A.D. 1st Dept., 2007]). Conflicting testimony concerning whether an inadequate safety device was provided, or plaintiff was the proximate cause of his injuries, is a basis to deny summary judgment (Cahill v. Triborough Bridge & Tunnel Auth., 4 N.Y. 3d 35, 823 N.E. 2d 439, 790 N.Y.S. 2d 74 [2004] and D'Antonio v. Manhattan Contracting Corp., 41 A.D. 3d 205, 838 N.Y.S. 2d 513 [N.Y.A.D. 1st Dept., 2012]). Speculative and conclusory arguments concerning whether plaintiff is the sole cause of his injuries based on the use of a ladder is not sufficient to obtain summary judgment (Fanning v. Rockefeller University, 106 A.D. 3d 484, 964 N.Y.S. 2d 525 [N.Y.A.D. 1st Dept., 2013] and Ross v. 1510 Associates, 106 A.D. 3d 471, 964 N.Y.S. 2d 514 [N.Y.A.D. 1st Dept., 2013]).

Labor Law §241[6], establishes a nondelegable duty of owners and contractors to provide "reasonable and adequate protection and safety" for construction workers (Padilla v. Frances Schervier Housing Development Fund Corporation, 303 A.D. 2d 194, 758 N.Y.S. 2d 3 [N.Y.A.D. 1st Dept., 2003]). To establish liability the plaintiff is required to specifically plead and prove violations of the Industrial Code regulations, which are the proximate cause of the injuries. The Industrial Code section cited must be a "positive command," and not a reiteration of common law negligence (Buckley v. Columbia Grammar and Preparatory, 44 A.D. 3d 263, 841 N.Y.S. 2d 249 [N.Y.A.D. 1st Dept., 2007]). Causes of action pursuant to Labor Law §241(6), are subject to valid defenses of contributory negligence and comparative negligence (Ross v. Curtis-Palmer Hydro Electric Company, 81 N.Y. 2d 494, 618 N.E. 2d 82, 601 N.Y.S. 2d 49 [1993]).

23 N.Y.C.R.R. 1.21[b][4][iii] requires ladders to have firm footings. The defendant is required to make an affirmative showing that the ladder complied with this requirement to obtain summary judgment (Estrella v. GIT Industries, Inc., 105 A.D. 3d 555, 963 N.Y.S. 2d 110 [N.Y.A.D. 1st Dept., 2013]). 23 N.Y.C.R.R. 1.21[e][3], applies to stepladders, it requires firm level footings. Work performed at a height of at least ten feet above the footing additionally requires that, "...the stepladder shall be

steadied by a person stationed at the foot of the stepladder or such stepladder shall be secured against sway by mechanical means.” Defendants are required to establish that the facts apply to the case or that a violation of this provision is not the proximate cause of the accident to obtain summary judgment (*Losurdo v. Skyline*, 24 A.D. 3d 1235, 807 N.Y.S. 2d 249 [N.Y.A.D. 4th Dept., 2005] and *Vega v. Renaissance 632 Broadway, LLC*, 103 A.D. 3d 883, 962 N.Y.S. 2d 200 [N.Y.A.D. 2nd Dept., 2013]).

Labor Law § 200 imposes a common law duty on an owner or contractor to maintain a safe construction site. An implicit precondition to the common law duty is that the party charged must have authority or exercise direct supervisory control over the activity that resulted in the injury, mere directions as to the time and quality of the work is not enough to impose liability (*Esposito v. New York City Industrial Development Agency*, 305 A.D. 2d 108, 760 N.Y.S. 18 [N.Y.A.D. 1st Dept., 2003] *aff'd*, 1 N.Y. 3d 526, 802 N.E. 2d 1080, 770 N.Y.S. 2d 682 [2003]). Labor Law §200 requires that the plaintiff establish that the defendant had either actual or constructive notice of the unsafe condition that caused the accident (*Mitchell v. New York Univ.*, 12 A.D. 3d 200, 784 N.Y.S. 2d 104 [N.Y.A.D. 1st Dept. 2004] and *Vasquez v. Urbahn Associates, Inc.*, 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept., 2010]).

Fine-Line seeks to dismiss the plaintiff’s Labor Law §240[1] causes of action contending that plaintiff’s conduct was the sole proximate cause of his injuries, and not the ladder. The Labor Law §241[6], causes of action should be dismissed because the Industrial Code sections cited by plaintiff do not apply to the type of “A frame” ladder use that it is alleged caused his injuries. The East 79th Street defendants should not be liable under Labor Law § 200, because they did not exercise any direct control or supervision over the work performed by the plaintiff.

Plaintiff opposes the motion, claiming that Fine-Line concedes that he was working at a building undergoing restoration; that the ladder moved without any support or being held; causing him to fall to the ground. Plaintiff is not required to establish that the ladder was defective. The plaintiff testified that the floor where the ladder was placed was uneven. Fine-Line has not provided any evidence and relies only on speculative conclusions that the plaintiff misused the ladder. Pursuant to Labor Law §240[1], liability is absolute where statutory violations proximately caused injuries as occurred in this action. Plaintiff contends that the elements of Labor Law §241[6] are satisfied and there were violations of 23 N.Y.C.R.R. 1.21[b][4][ii] and 23 N.Y.C.R.R. 1.21[e][3] which require that ladders be placed upon level surfaces and have sound firm footing. Fine-Line failed to meet their burden of proof pursuant to Labor Law §200. There was no affirmative evidence submitted establishing the defendants lacked supervision of the plaintiff’s work, or that they were unaware and did not create the condition that caused plaintiff to fall.

Upon review of all the papers submitted this Court finds that defendants have established that this Court misapprehended the language of the September 4, 2008, Preliminary Conference Order and misapplied the controlling law in finding that Fine Line’s motion was untimely.

Fine-Line has not met its burden of proof for purposes of obtaining summary judgment. There are no specifically titled causes of action asserted in the third-party complaint. Fine-Line has not established that it was unaware of, or prejudiced by the East 79th Street defendants claims for indemnification. The claims for common law liability are also not specifically stated in the complaint. The copies of the contracts were exchanged in September 8, 2008 and there was an opportunity to question the terms of the contract at the deposition of Fine-Line's President prior to the completion of discovery. The copies of the contract provided by the East 79th Street defendants are dated July 13, 2004, prior to the September 27, 2004, date of the accident and there is an indemnification provision in at least one copy. There are issues of fact related to the East 79th Street defendants' indemnification claims and Fine-Line's liability under the July 13, 2004 contract.

Fine-Line has not met its initial burden of proof concerning the plaintiff's Labor Law §240[1] and Labor Law § 200 claims. Fine-Line relies on speculative conclusions concerning the cause of the accident. There is no evidence submitted that plaintiff is the sole basis for the ladder tipping based on his deposition testimony that the floor was uneven. There remain issues of fact concerning the circumstances of the accident. The East 79th Street defendants owned and managed the property and there remain issues of fact concerning the extent to which Fine-Line was responsible for the supervision and control of the area where the work was performed. Fine-Line has not met its burden of proof under Labor Law §241[6], it did not establish that 23 N.Y.C.R.R. 1.21[b][4][iii], and 23 N.Y.C.R.R. 1.21[e][3], do not apply to "A frame ladders." There remain issues of fact concerning the cause of plaintiff's injuries and potential statutory violations.

Accordingly, it is ORDERED that third-party defendant, FINE-LINE RESTORATION INC.'s motion pursuant to CPLR 2221, seeking to reargue the October 11, 2012, Decision and Order of this Court, is granted; and it is further,

ORDERED that, the October 11, 2012, Decision and Order of this Court is vacated; and it is further,


ORDERED that, upon reargument third-party defendant, FINE-LINE RESTORATION INC.'s motion pursuant to CPLR §3212, for summary judgment dismissing the third-party complaint, and plaintiff's underlying action, is denied

FILED

ENTER:

JUL 17 2013

COUNTY CLERK'S OFFICE
NEW YORK



MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: July 16, 2013

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