

Dunbar v Plaza Constr. Corp.

2014 NY Slip Op 30139(U)

January 15, 2014

Supreme Court, New York County

Docket Number: 107014/10

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

EA
1/17/14
E

PRESENT: _____
Justice _____

PART _____

Index Number : 107014/2010
DUNBAR, ROBERT
VS.
PLAZA CONSTRUCTION
SEQUENCE NUMBER : 004
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

is decided in accordance with the annexed decision.

FILED

JAN 21 2014

NEW YORK
COUNTY CLERK'S OFFICE

JAN 17 2014

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

Dated: 1/15/14

CR, 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 55

-----X
ROBERT DUNBAR, JR. and DEBORAH DUNBAR,

Plaintiffs,

Index No. 107014/10

-against-

DECISION/ORDER

PLAZA CONSTRUCTION CORP. and
"ABC CORP.," the name of said corporation being
fictitious and unknown to plaintiffs,

Defendants.

-----X
PLAZA CONSTRUCTION CORP.,

Third-Party Plaintiff,

FILED

-against-

JAN 21 2014

R&J CONSTRUCTION CORP.,

NEW YORK
COUNTY CLERK'S OFFICE

Third-Party Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion:

| Papers | Numbered |
|--|--------------|
| Notice of Motion and Affidavits Annexed..... | <u>1,2</u> |
| Affirmations in Opposition..... | <u>2,3,4</u> |
| Reply Affidavits..... | <u>5,6</u> |
| Exhibits..... | <u>7</u> |

Plaintiffs Robert Dunbar, Jr. ("Mr. Dunbar") and Deborah Dunbar ("Mrs. Dunbar")
(hereinafter collectively referred to as "plaintiffs") commenced the instant action against
defendants Plaza Construction Corp. ("Plaza") and "ABC Corp." ("ABC"), the name of said
corporation being fictitious and unknown to plaintiffs, to recover for injuries Mr. Dunbar

RECORDED
JAN 17 2014

allegedly sustained when he was working on a construction project at a building located at 225 East 34th Street, New York, New York (hereinafter the “premises” or the “building” or the “project”) on June 24, 2007. Defendant Plaza now moves for an Order pursuant to CPLR § 3212 (1) for summary judgment dismissing plaintiffs’ Labor Law § 200 and common-law negligence claims; and (2) granting it summary judgment on its third-party complaint against third-party defendant R&J Construction Corp. (“R&J”). Plaintiff also moves for an Order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability pursuant to Labor Law § 240(1) against Plaza. The motions are consolidated for disposition. For the reasons set forth below, Plaza’s motion is granted in part and denied in part and plaintiffs’ motion is denied.

The relevant facts are as follows. Mr. Dunbar was working on a construction project to erect a twenty-story building. Plaza was the general contractor on the project and entered into a contract with R&J as subcontractor for drywall and carpentry work for the project. At the time of Mr. Dunbar’s accident, he was employed by non-party Atlantic Hoisting & Scaffolding (“Atlantic”) as a hoist elevator mechanic, specifically assigned to dismantle the hoist elevators at the premises. Mr. Dunbar alleges that at approximately 9:30 a.m. on June 24, 2007, he was working at the premises to dismantle the hoist tower in the area where the top of the hoist elevator was even with the third floor of the building when the foreman called the men for a coffee break. He further alleges that he intended to enter the building by walking from the top of the hoist car onto the exposed third floor by stepping between a guardrail system of three horizontal cables, which was installed by R&J. Mr. Dunbar allegedly grabbed the middle cable with his right hand, threw his leg over and was intending to proceed under the highest cable when the middle cable dislodged from the wall causing plaintiff to lose his balance and fall

between the hoist cars to the cement below sustaining injuries. At the time of Mr. Dunbar's accident, he was wearing a safety harness with a lanyard and a clip but was not clipped onto any structure.

In or around May 2010, plaintiffs commenced the instant action alleging violations of Labor Law §§ 200, 240(1), 241(6), a claim for common-law negligence and a claim for loss of consortium on behalf of Mrs. Dunbar, Mr. Dunbar's wife. In or around February 2012, Plaza commenced a third-party action against R&J alleging causes of action for contribution and indemnification. Plaza now moves for an Order pursuant to CPLR § 3212 (1) for summary judgment dismissing plaintiffs' Labor Law § 200 and common-law negligence claims; and (2) for summary judgment on its third-party complaint against R&J. Plaintiffs also moves for an Order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability on their claim against Plaza pursuant to Labor Law § 240(1).

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Wayburn v. Madison Land Ltd. Partnership*, 282 A.D.2d 301 (1st Dept 2001). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.*

The court first turns to Plaza's motion. As an initial matter, that portion of Plaza's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs'

Labor Law § 200 and common-law negligence claims is granted. “Section 200 of the Labor Law is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work.” *Comes v. New York State Elec. & Gas Corp.*, 82 N.Y.2d 876, 877 (1993). “An implicit precondition to this duty ‘is that the party charged with that responsibility have the authority to control the activity bringing about the injury.’” *Id.*, citing *Russin v. Picciano & Son*, 54 N.Y.2d 311, 317 (1981). “[W]here such a claim arises out of alleged defects or dangers arising from a subcontractor’s methods or materials, recovery against the owner or general contractor cannot be had unless it is shown that the party to be charged exercised some supervisory control over the operation.” *Ross v. Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 504 (1993). “This rule is an outgrowth of the basic common-law principle that ‘an owner or general contractor [sh]ould not be held responsible for the negligent acts of others over whom [the owner or general contractor] had no direction or control.’” *Id.*, citing *Allen v. Cloutier Constr. Corp.*, 44 N.Y.2d 290, 299 (1978). Additionally, even if a general contractor did not supervise or control the work site, liability may attach if it “had actual or constructive notice of the unsafe condition causing the accident.” *Akins v. Baker*, 247 A.D.2d 562, 563 (2d Dept 1998)(internal citations omitted).

In the instant action, Plaza has established its prima facie right to summary judgment dismissing plaintiffs’ Labor Law § 200 and common-law negligence claims on the grounds that it did not supervise, direct or control plaintiff’s activities and that it did not have any notice, constructive or actual, of any problems with the cable guardrails at the project. Plaintiff testified that on the date of his accident, he only received instructions from his foreman, an employee of Atlantic, and not from any employee of Plaza. Further, Scott Palumbo, Plaza’s Safety

Coordinator, has affirmed that Plaza did not direct, instruct, supervise or control the work being performed by Atlantic's employees at the project at any time. Additionally, Mr. Palumbo testified that his duties include visiting every Plaza construction project and conducting safety audits based on his observations of the worksites and that he visited the project at issue approximately every week or every other week. He further affirmed that Plaza never received any complaints regarding the cable guardrail system or observed any problems with the cable guardrail system during its observations of the project and that it was never issued any violations or sanctions based on problems with the cable guardrail system.

In response, plaintiffs have failed to raise an issue of fact sufficient to defeat Plaza's motion for summary judgment. Plaintiffs' assertion that Plaza exercised supervisory control over Mr. Dunbar's activities pursuant to the contract Plaza maintains with Atlantic is without merit. Pursuant to that contract, "[t]he Subcontractor shall undertake and complete the Work under the direction and supervision of and to the satisfaction of, [Plaza], the Architect, and the Owner" and shall attend meetings with Plaza to schedule and coordinate their work around other subcontractors. However, "neither retention of inspection privileges nor a general power to supervise alone constitute control sufficient to impose liability." *Pacheco v. South Bronx Mental Health Council*, 179 A.D.2d 550, 551 (1st Dept 1992). Further, a general contractor's "general supervision and coordination of a worksite [is] insufficient to trigger liability." *Vasiliades v. Lehrer McGovern & Bovis*, 3 A.D.3d 400, 401-402 (1st Dept 2004); *see also Mitchell*, 12 A.D.3d at 201 (finding that supervision that merely includes "generally overseeing the coordination of the subcontractors" is insufficient to impose liability.) Plaintiffs' assertion that Plaza had constructive notice of the defect in the cable guardrail system based on Mr. Palumbo's testimony

that Plaza's observed the worksite once every week or every other week and based on the testimony of Bob Eckert, Vice President of R&J, that Plaza would on occasion report observed problems with the cables to R&J's employees is also without merit. "The notice must call attention to the specific defect or hazardous condition, and its specific location." *Cahill v. Triborough Bridge & Tunnel Auth.*, 31 A.D.3d 347, 351 (1st Dept 2006); *see also Mitchell v. New York Univ.*, 12 A.D.3d 200 (1st Dept 2004). A "general notice of potential conditions...[is] not enough to meet plaintiff's burden" of establishing notice. *Mitchell*, 12 A.D.3d at 201. As plaintiffs have not presented any evidence that Plaza observed problems with the specific cable guardrail which caused Mr. Dunbar's accident, that portion of Plaza's motion for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims is granted.

However, that portion of Plaza's motion for an Order pursuant to CPLR § 3212 for summary judgment on its third-party complaint against R&J is granted in part and denied in part. As an initial matter, Plaza has failed to establish its prima facie right to summary judgment on its first cause of action for contribution and its second cause of action for common-law indemnification against R&J. Under New York's contribution statute, "two or more persons who are subject to liability for damages for the same personal injury, injury to property or wrongful death, may claim contribution among them whether or not an action has been brought or a judgment has been rendered against the person from whom contribution is sought." CPLR § 1401. Further, a claim for "indemnity involves an attempt to shift the entire loss from one who is compelled to pay for a loss, without regard to his own fault, to another party who should more properly bear responsibility for the loss because it was the actual wrongdoer." *Trustees of Columbia University v. Mitchell/Giurgola Associates*, 109 A.D.2d 449 (1st Dept 1985). Implied

indemnity allows one who “is held vicariously liable solely on account of the negligence of another to shift the entire burden of the loss to the actual wrongdoer.” *Id.* The one seeking indemnity must prove not only that it was not guilty of any negligence beyond statutory liability, but must also prove that the indemnitor was guilty of some negligence that contributed to the causation of the accident. *Corieia v. Professional Data Management, Inc.*, 259 A.D.2d 60 (1st Dept 1999).

In the instant action, Plaza is not entitled to summary judgment on its causes of action for contribution and common-law indemnification against R&J as it has failed to make a prima facie showing that Mr. Dunbar’s injuries were caused, in whole or in part, by R&J’s negligence. Plaza has not shown that the middle cable that dislodged from the wall causing plaintiff to fall occurred due to R&J’s negligence and not the sole negligence of plaintiff. Further, Plaza has not shown that the cable guardrail had any manufacture defects or that it was improperly installed by R&J. Indeed, Bob Eckert, Vice President of R&J, testified that the cable guardrail was not installed improperly but that it became dislodged from the wall due to Mr. Dunbar’s improper use of the equipment.

However, Plaza has established its prima facie right to summary judgment on its third cause of action against R&J for contractual indemnification. Pursuant to the contract between Plaza and R&J,

To the extent permitted by law, [R&J] shall indemnify, defend, save and hold...[Plaza]...harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with:

1. The performance of Work by [R&J]...any act or omission of any of the foregoing;
2. Any accident or occurrence which happens, or is alleged to

- have happened, in or about the place where such Work is being performed or in the vicinity thereof...(b) while any of [R&J]'s property, equipment or personnel are in or about such place or the vicinity thereof by reason of or as a result of the performance of the Work; or
3. The use, misuse, erection, maintenance, operation or failure of any machinery or equipment...whether or not such machinery or equipment was furnished, rented or loaned by...[Plaza]...to [R&J].

As Mr. Dunbar's accident occurred "in or about the place" where R&J performed its work "or in the vicinity thereof" while R&J's property and equipment, namely, the cable guardrail system, was "in or about such place or the vicinity thereof by reason of...the performance of" R&J's work, R&J must defend and indemnify Plaza from all claims connected with or arising out of such accident. To the extent Plaza's third-party complaint alleges a cause of action for breach of contract against R&J for failure to provide Plaza defense and indemnification in this action, such cause of action is duplicative as this court has already granted Plaza summary judgment on its third cause of action for contractual defense and indemnification from R&J.

The court next turns to plaintiffs' motion for an Order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim against Plaza. As an initial matter, Plaza's assertion that plaintiffs' motion should be denied as untimely as it was filed more than sixty days after the Note of Issue was filed in violation of the Preliminary Conference Order is without merit. While it is well-settled that "statutory time frames-like court-ordered times frames are not options, they are requirements, to be taken seriously by the parties," an untimely summary judgment motion may be addressed if the party provides the court with a reasonable excuse for the delay. *Miceli v. State Farm Mut. Auto. Ins. Co.*, 3 N.Y.3d 725, 726-727 (2004). Although it is undisputed that plaintiffs' motion was filed

after the sixty-day time limit, plaintiffs have offered a reasonable excuse for their failure to comply with such time limit. After defendant Plaza filed its motion for summary judgment, fully returnable in June 2013, plaintiffs made a request to Plaza's counsel via e-mail for an extension of time to respond to Plaza's motion in order to file a cross-motion for summary judgment. Subsequently, a stipulation was circulated and signed by all parties extending plaintiffs' time to respond to Plaza's motion until August 15, 2013. Additional stipulations were circulated and signed by all parties further extending plaintiffs' time for the above until December 2013, the final one of which was so-ordered by this court. Although plaintiff failed to cross-move but instead moved separately for summary judgment, plaintiffs did so based on their belief they had consent of the parties and of this court. Thus, as plaintiffs have provided a reasonable excuse for the delay, the court will address the merits of their motion for summary judgment.

Pursuant to Labor Law §240(1),

All contractors and owners and their agents . . . who contract for but do not control the work, in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

Labor Law §240(1) was enacted to protect workers from hazards related to the effects of gravity where protective devices are called for either because of a difference between the elevation level of the required work and a lower level or a difference between the elevation level where the worker is positioned and the higher level of materials or load being hoisted or secured. See *Rocovich v. Consolidated Edison*, 78 N.Y.2d 509, 514 (1991). Liability under this provision is contingent upon the existence of a hazard contemplated in §240(1) and a failure to use, or the

inadequacy of, a safety device of the kind enumerated in the statute. *Narducci v. Manhasset Bay Associates*, 96 N.Y.2d 259 (2001). Owners and contractors are subject to absolute liability under Labor Law §240(1), regardless of the injured worker's contributory negligence. *See Bland v. Manocherian*, 66 N.Y.2d 452 (1985). Only if the plaintiff was the sole proximate cause of his injuries would liability under this section not attach. *See Robinson v. East Medical Center, LP*, 6 N.Y.3d 550 (2006).

In the instant action, plaintiffs have established their prima facie right to summary judgment on the issue of liability on their Labor Law § 240(1) claim against Plaza as they have shown that Mr. Dunbar's injury occurred due to Plaza's failure to provide an adequate safety device to prevent him from falling to the ground three stories below after a cable guardrail he was holding onto gave way in violation of Labor Law §240(1). As an initial matter, Mr. Dunbar's injury clearly occurred due to a gravity-related hazard as the accident flowed directly from the application of the force of gravity onto plaintiff when he was stepping off a hoist elevator and the middle guardrail cable he was holding onto dislodged from the wall. Further, an employee working on top of a hoist elevator is considered the kind of foreseeable risk within the contemplation of Labor Law § 240(1) as it involves "inherent risk attributable to an elevation differential." *Buckley v. Columbia Grammar and Preparatory*, 44 A.D.2d 263, 267 (1st Dept 2007). The fact that the cable guardrail dislodged from the wall and caused plaintiff to fall to the ground below is proof that there was a failure to provide adequate safety devices to protect plaintiff from such a fall pursuant to Labor Law § 240(1). Although plaintiffs do not dispute that Mr. Dunbar was wearing a harness at the time of the accident, Mr. Dunbar alleges that such harness was insufficient under the statute as there were no lifelines or other devices to connect

the lanyard and clip to in order to provide sufficient safety protection and that at the project, there were no safety lines, lifelines or rope grab installed and that he was never given instructions on how to “hook in” his harness while on the project.

However, in response, Plaza has raised an issue of fact sufficient to defeat plaintiffs’ motion for summary judgment. As an initial matter, there exists an issue of fact as to whether Plaza provided a sufficient safety device required by Labor Law § 240(1). It is undisputed that Plaza provided plaintiff with a harness and hook to use while on the project. Although plaintiff alleges that there was nowhere to “hook onto,” Mr. Palumbo has testified that there were numerous places available to Mr. Dunbar for him to “hook onto” as he “could find a piece of the hoist to hook up to...he could take a strap and wrap it around the column; he could insert a hook into a column and hook off to the hook...” Additionally, there exists an issue of fact as to whether Mr. Dunbar was the sole proximate cause of the accident. Plaintiff has alleged that his accident occurred during his attempt to enter the building on the third floor from the top of the hoist car by holding onto the middle cable guardrail and throwing his leg over to proceed under the highest cable. However, Mr. Palumbo testified that such use of the cable guardrail system was improper and that Mr. Dunbar should have instead unhooked the cables before entering the building as that was the proper procedure and Mr. Dunbar was instructed as such. Mr. Eckert, R&J’s Vice President, also testified that the proper way to access the building would have been to unhook all the cables and not to use one of the cables as a support. Thus, plaintiffs’ motion must be denied.

Accordingly, that portion of Plaza’s motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing plaintiffs’ Labor Law § 200 and common-law negligence claims

is granted; that portion of Plaza's motion for an Order pursuant to CPLR § 3212 granting it summary judgment on its third-party complaint against R&J is granted to the extent that Plaza is only entitled to summary judgment on its third cause of action against R&J for contractual indemnification; and plaintiffs' motion for an Order pursuant to CPLR § 3212 for partial summary judgment on the issue of liability on their Labor Law § 240(1) claim against Plaza is denied. This constitutes the decision and order of the court.

Dated: 1/15/14

Enter: _____

CR
J.S.C.

FILED

JAN 21 2014

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