

Nunez v LMJ Vision, Inc.
2014 NY Slip Op 31558(U)
June 18, 2014
Supreme Court, New York County
Docket Number: 150346/2011
Judge: Ellen M. Coin
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK**

-----X
JUNIOR NUNEZ and SULLY NUNEZ,

Plaintiffs,

-against-

LMJ VISION, INC. d/b/a VISIONARY OPTICS
and/or THE GELMAN'S OPTICAL, INC. d/b/a
VISIONARY OPTICS, THE WEST 17TH STREET
COMPANY and INTER-NEXT NYC INC.,

Defendants.

-----X
LMJ VISION, INC. d/b/a VISIONARY OPTICS
and/or THE GELMAN'S OPTICAL, INC. d/b/a

VISIONARY OPTICS,

Third-Party Plaintiffs

-against-

INTERNEXT, INC. and GILBERT DISPLAYS,
INC.,

Third-Party Defendants

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For Plaintiff:

Sarisohn, Sarisohn, Carner, LeBow & DeVita
By Michael Carner, Esq.
350 Veterans Memorial Highway
Commack, New York 11725
631-543-7667

For Defendant West 17th:

Armienti, DeBellis, Guglielmo & Rhoden, LLP
By Sharon Schweidel, Esq.
39 Broadway, Suite 520
New York, New York 10006
212-809-7074

For Defendant Inter-Next:

no appearance

INDEX NO. 150346/2011
MOTION DATE : 4/30/2014
MOTION SEQ. NO. 002, 004 & 005

DECISION & ORDER

For Defendants LMJ and Gelman's:

Lewis, Brisbois, Bisgaard & Smith
By Joshua M. Jemal, Esq.
77 Water Street, Suite 2100
New York, New York 10005
212-232-1300

For Third-Party Defendant Gilbert:

DeCicco, Gibbons & McNamara, P.C.
By Christopher K. Hough, Esq.
14 East 38th Street
New York, New York 10016
212-447-1222

ELLEN M. COIN, J.,

In motion sequence 002,¹ plaintiffs move for summary judgment pursuant to CPLR 3212 on plaintiff's cause of action under Labor Law §240(1) against defendant owner The West 17th Street Company (West 17) and defendant tenants LMJ Vision, Inc.(LMJ) and The Gelman's Optical, Inc. (Gelman). On June 23, 2010, plaintiff Junior Nunez (plaintiff) was employed by third-party defendant Gilbert Displays, Inc. (Gilbert) at LMJ's premises to install, clean and paint wall cabinets as part of the renovation work on the first floor of the premises in preparation for the opening of LMJ's optics outlet. Plaintiff alleges that the overall renovation involved painting, installation of electrical equipment, removal of fixtures and units, replacing the displays and replacing the flooring. On that day, plaintiff fell head-first into an exposed stairwell opening in the floor containing a staircase leading down to the basement. As a result, plaintiff alleges to have suffered head injuries, rendering him permanently disabled.

In motion sequence 004, Gilbert moves for summary judgment pursuant to CPLR 3212 dismissing the third-party complaint as barred pursuant to Workers' Compensation Law §11.

In motion sequence 005, LMJ and Gelman move for summary judgment pursuant to CPLR 3212 dismissing the complaint entirely.² In its argument, LMJ's motion closely tracks its argument submitted as part of its opposition in motion sequence 002. All three motion sequences are joined for common disposition.

¹In motion sequence 002, West 17 cross-moves against LMJ on its claim for contractual indemnification in the event plaintiff succeeds on its motion. By stipulation of the parties dated April 25, 2014, West 17 has discontinued with prejudice its cross-claim for contractual indemnification and defense against LMJ and Gelman's as part of LMJ's assumption of its defense and indemnification obligations. Accordingly, West 17's cross-motion is denied as moot.

² During the pendency of the motion and prior to oral argument, the parties concurred in their respective briefings that the action, including all cross-claims, should be dismissed as against Gelman. Accordingly, this branch of the motion sequence 005 is granted on consent.

Discussion

Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The burden is on the moving party to make a prima facie showing of entitlement to summary judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If a prima facie showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Zuckerman*, 49 NY2d at 562). Mere conclusions, unsubstantiated allegations or expressions of hope are insufficient to defeat a summary judgment motion (*Zuckerman*, 49 NY2d at 562; *see also Ellen v Lauer*, 210 AD2d 87, 90 [1st Dept 1994][it “is not enough that the party opposing summary judgment insinuate that there might be some question with respect to a material fact in the case. Rather, it is imperative that the party demonstrate, by evidence in admissible form, that an issue of fact exists . . .”] [citations omitted]).

Labor Law § 240(1) Cause of Action

New York Labor Law § 240(1), informally known as the “scaffold law,” requires that fee owners, general contractors, and their agents “furnish or erect...scaffolding, hoists, stays...and such other devices which shall be so constructed, placed and operated so as to give proper protection” to the construction workers engaged in “the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure.” The purpose of the scaffold law is to provide exceptional protection for workers against special hazards that arise when the work site is elevated or positioned below the level where materials or loads are hoisted, and includes events such as falling from a height or being struck by a falling object that was improperly

hoisted or inadequately secured (*see Zory v Consolidated Edison Co. of New York, Inc.*, 248 AD2d 708 [2nd Dep't 1998]; *see also Kyle v City of New York*, 268 AD2d 192 [1st Dep't 2000], *lv denied* 97 NY2d 608 [2002]). Labor Law § 240(1) is violated when plaintiff is exposed to an elevation-related risk while engaged in an activity covered by the statute, and defendant fails to provide a safety device adequate to protect plaintiff against the elevation-related risk entailed in the activity or provides an inadequate one (*see Fernandez v BBD Developers, LLC*, 103 AD3d 554, 555 [1st Dept 2013]).

In support of his motion, plaintiff submits his own deposition testimony, the testimony of an eye-witness co-worker Edward Zeis and LMJ's principal Andrew Gelman, and a copy of the agreement between LMJ and Gilbert. Plaintiff argues that the evidence conclusively establishes that he suffered an injury as a result of exposure to an elevation related hazard in the form of an exposed stairwell opening while performing installation, painting and cleaning work around it without a safety device.

LMJ argues, in opposition, that plaintiff may not recover under Labor Law §240(1), because delivery, installation and cleaning of wall cabinets does not either constitute covered construction related activity or involve the type of special gravity related hazards contemplated by the Legislature. LMJ also argues that a fall involving a staircase cannot support a Labor Law §240(1) violation as it is a permanent structure. LMJ's final portion of the opposition relies on certain portions of Gelman's testimony that he personally observed on several occasions that the opening containing the stairwell was covered with a wooden board, which LMJ argues raises a triable issue of fact defeating summary judgment.

In their briefings, both sides rely on a recent decision by the Court of Appeals in *Soto v J. Crew Inc.* (21 NY3d 562 [2013]) in determining if plaintiff's work qualifies as "cleaning" within the meaning of the statute. In *Soto*, the Court of Appeals was presented with the issue of whether the employee of a commercial cleaning company hired to provide janitorial services to a retail store could recover under Labor Law §240(1) for falling from a four-foot ladder while dusting a six-foot-high display shelf. The Court of Appeals reasserted its prior rulings that the term "cleaning," as included within the statute, is not confined merely to commercial window washing, but may be applied "to other types of cleaning projects that present hazards comparable in kind and degree to those presented on a construction site" (21 NY3d at 568 [citations omitted]). The Court prescribed a four-part test to exclude cleaning activities that do not entail the special hazards contemplated by Labor Law §240(1):

1. "[t]he task [i]s routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises;
2. requires neither specialized equipment or expertise, nor the unusual deployment of labor;
3. generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and
4. in light of the core purposes of Labor Law §240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project

(*Id.*). In applying the formula, the court must weigh all of the factors and look at the totality of circumstances (*Id.* at 568-69).

Here plaintiff's activities do not remove this accident from the scope of Labor Law §240(1). According to Gelman's deposition testimony, the purpose of the renovation work was to alter the existing premises to LMJ's specifications as part of preparation for the opening of a

new optics store. Plaintiff's work was an integral part of this alteration, and did not involve recurring ordinary maintenance in the course of daily care. With regard to the element of specialized equipment or expertise, LMJ isolates plaintiff's activity to the very act he was performing at the time of the fall-wiping clean the shelves after their attachment. LMJ argues that wiping dust and dirt is a type of work that any human being, big or small, young or old, could do without much exertion, and thus does not warrant the extraordinary protections afforded by Labor Law §240(1). LMJ's selection of one isolated task is insufficient to defeat the application of §240(1) protections that otherwise apply (*Mutadir v 80-90 Maiden Lane Del LLC*, 110 AD3d 641, 643 [1st Dept 2013] [citing *Prats v Port Auth. of New York & New Jersey*, 100 NY2d 878, 882 [2003]]). Gilbert's service to LMJ went beyond the scope of ordinary domestic duties. Gilbert charged \$90,402.00 for wall-to-wall installation of shelving, built-in wall cabinets, displays, the sales station, furniture, and exam room cabinetry. Plaintiff was involved in all aspects of this work, beyond merely wiping dust (Dep. of Junior Nunez 115:15-22; 116:9-18; 121:3-10; 122-15-25, Ex. 9 to Affirmation of Christopher K. Hough, dated December 19, 2013).

While Gilbert's work for LMJ did not in itself involve significant elevation risks, the unguarded stairwell opening, flush with the floor level, created a significant and inherently dangerous elevation exposure to the workers of both Gilbert and Internext (*see Carpio v Tishman Constr. Corp. of New York*, 240 AD2d 234, 235 [1st Dept 1997]; *cf Gomez v 2355 Eighth Ave., LLC*, 45 AD3d 493, 493 [1st Dept 2007]). Although Gelman testified that some sort of cover over the stairwell opening was in place when he was on the premises, an unsecured board was insufficient as a safety device, as it could easily have been moved, inadvertently

pushed or temporarily removed for access, with nothing in its place to secure the hole (*see Alonzo v Safe Harbors of the Hudson Hous. Dev. Fund Co., Inc.*, 104 AD3d 446, 450 [1st Dept 2013]). The narrow width of the store premises only magnified the proximity to the workers of the exposed opening, as plaintiff had to work around its edges while installing and cleaning the wall shelving.

Finally, plaintiff's work was part of an ongoing renovation project. LMJ's renovation alterations were sufficiently substantial to constitute covered construction work for the purposes of Labor Law §240(1) application. Internext's contract price was \$96,000.00, bringing the total bill for the store's renovation to \$186,400.00. Pursuant to the job contract, Internext's work included demolition and removal of debris, reconstruction of the premises according to provided plans, light and electrical work, porcelain flooring, installation of a new storefront tempered glass with signage, remodeling of the back room and laying a new basement floor (Ex.V to Affirmation of Michael Carner, dated October 31, 2013). The work lasted two months, from May to July 2010, and was still in progress as of the date of the accident (Dep. of Andrew Lee Gelman 52:16-19; Exhibit BB to Carner Aff.). Because plaintiff's accident occurred during and as part of the covered renovation activities, plaintiff is entitled to the protection afforded by Labor Law §240(1).

LMJ's reliance on Zeis' testimony indicating that at the moment of the fall plaintiff was not paying attention to the gaping hole as he was speaking with a co-worker (Dep. of Edward Zeis 44:15-24, Ex. 6 to Hough Affirm.) is unavailing, as comparative negligence is not a defense to a §240(1) claim and cannot defeat his entitlement to summary judgment (*see e.g. Bland v*

Manocherian, 66 NY2d 452, 461 [1985]).³ Nor were plaintiff's actions the sole proximate cause of the accident, as neither he nor Gilbert had responsibility to secure the stairwell opening, and the evidence does not suggest that plaintiff was the one who removed the cover (*cf. Barreto v Metropolitan Transp. Auth.*, 110 AD3d 630, 632 [1st Dept 2013][worker's failure to place manhole cover precludes recovery]; *Bahrman v Holtsville Fire Dist.*, 270 AD2d 438, 439 [2nd Dept 2000] [worker's own removal of the cardboard cover precludes summary judgment]).

Plaintiff's fall into an exposed stairwell does not come within the permanent structure exclusion. First introduced in *Ryan v Morse Diesel, Inc.* (98 AD2d 615, 616 [1st Dept 1983]), it applies to any accident caused by a defect in a permanent passageway used to move from one workspace to another. Here plaintiff never intended to use the staircase as passageway to the basement: he unwittingly fell into the middle of the hole in the floor containing the permanent structure (Zeis Dep. 43:14; 71:4-7, 15-24).

Moreover, the permanent structure exclusion is not applicable where the defect it contains is of such nature as to foreseeably expose workers to elevation-related injuries (*see Garcia v Neighborhood Partnership Hous. Dev. Fund Co., Inc.*, 113 AD3d 494, 495 [1st Dept 2014] [collapse of a floor supports a Labor Law §240(1) claim]; *Vasquez v Urbahn Assoc. Inc.*, 79 AD3d 493, 495 [1st Dept 2010] [collapse of a staircase]). While the question of foreseeability turns on prior knowledge of the defect in the permanent structure and may, as in *Vasquez*,

³ LMJ's argument that there is a factual discrepancy in how the accident happened, whether plaintiff was speaking with a co-worker while walking around the work area, as Zeis testified, or whether he was cleaning the shelving when he stepped into the hole, as plaintiff alleges, is insufficient to raise a material issue of fact, as it merely raises a dispute as to how the accident happened, without affecting the outcome under the applicable legal theory (*See Pichardo v Urban Renaissance Collaboration Ltd. Partnership*, 51 AD3d 472, 473 [1st Dept 2008]).

warrant a trial when the evidence is in dispute, here the unguarded stairwell in the floor was an open and obvious defective condition which made plaintiff's fall a certainty.

As the Court grants plaintiff summary judgment on its cause of action pursuant to Labor Law §240(1), so much of motion sequence 005 as seeks dismissal of the complaint as against LMJ is denied.

Worker's Compensation Law §11

The third-party complaint, in relevant part, asserts against Gilbert the sixth and eighth causes of action for common law indemnification, seventh cause of action for contribution, ninth cause of action for contractual indemnification and tenth cause of action for breach of covenant to procure insurance in LMJ's name. In support of its motion to dismiss, Gilbert argues that the "exclusive remedy" clause under Workers' Compensation Law §11 (Section 11) bars all third-party claims against plaintiff's employer as the accident occurred in the course of his employment; plaintiff did not experience a "grave injury"; and Gilbert's written contract with LMJ did not include a contractual indemnification clause.

Grave Injury

Absent an express written indemnification agreement, or a "grave injury" as enumerated in Section 11, an employer's liability for an employee's on-the-job injury is ordinarily limited to workers' compensation benefits (*Tonking v Port. Auth. of New York & New Jersey*, 3 NY3d 486, 490 [2004]). With respect to "grave injury," Section 11 provides:

"An employer shall not be liable for contribution or indemnity to any third person based upon liability for injuries sustained by an employee acting within the scope of his or her employment for such employer unless such third person proves through competent medical evidence that such employee has sustained a "grave injury" which shall mean only one or more of the following: death, permanent and total loss of use or amputation

of an arm, leg, hand or foot, loss of multiple fingers, loss of multiple toes, paraplegia or quadriplegia, total and permanent blindness, total and permanent deafness, loss of nose, loss of ear, permanent and severe facial disfigurement, loss of an index finger or an acquired injury to the brain caused by an external physical force resulting in permanent total disability.”

Central to the legislative underpinnings of Section 11 is “immunity from tort liability for employers who provide workers’ compensation coverage by exposing employers to third-party liability ‘only in cases involving *narrowly defined* grave injuries. The injuries enumerated as grave were deliberately both narrowly and completely described. The list is exhaustive, not illustrative: it is not intended to be extended absent further legislative action” (*Rubeis v The Aqua Club, Inc.*, 3 NY3d 408, 415-16 [2004] [quoting Governor’s Approval Mem, Bill Jacket at 55, 1996 NY Legis Ann, at 460]). In *Rubeis*, the Court of Appeals specifically addressed the definition of the term “permanent total disability” in the “acquired injury to the brain” category of grave injury. To determine whether a worker’s head injury constitutes “grave injury” under Section 11, the court must consider only the worker’s ability to be employed in any capacity, and not his ability to perform day-to-day functions (*Rubeis*, 3 NY3d at 413, 417).

On a motion for summary judgment, “the moving party bears the burden of establishing an absence of grave injury. It is not the burden of the party moved against to show the presence of a grave injury” (*Way v Grantling*, 289 AD2d 790, 793 [3rd Dept 2001])[denying summary judgment where movant failed to offer medical expert testimony on the issue of “acquired injury to the brain”category]). In support of its summary judgment motion, Gilbert argues that plaintiff’s alleged postconcussive syndrome has not caused him such a degree of disability that he cannot engage in any gainful employment. As proof, Gilbert offers plaintiff’s own deposition testimony that he is able to walk, travel and take care of himself and that he, together with his

wife, at some point after the accident, worked as a salesman for a coffee distributor Oregano Gold, earning from the sales between seven and eight thousand dollars in 2012. (Nunez Ctd. Dep., dated May 24, 2013, 103:5-10, Ex 11 to Hough Affirm).

Gilbert does not offer any expert testimony as to plaintiff's medical condition in the context of the "grave injury" test enunciated in *Rubeis*, and instead relies on its counsel's interpretation of plaintiff's medical records and an IME report issued by Dr. Elton Strauss for LMJ. The lack of medical expert opinion is nonetheless not fatal to Gilbert's motion. In opposition, LMJ fails to address so much of Gilbert's motion as concerns the issue of "grave injury." Accordingly, the Court deems LMJ to concede that plaintiff's alleged postconcussive syndrome does not rise to the level of "grave injury."

Contractual Indemnification

Indemnification is the right of one party to shift the entire loss to another and is based on common law or on a contractual obligation (*see Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 296 [1991]; *see also Zurich Ins. Co. Lumbermen's Cas. Co.*, 233 AD2d 186, 187 [1st Dept 1996]). A claim for contractual indemnification arises from an express agreement by which one party agrees to hold the other harmless for claims brought against it by a third party (*Tonking v Port Auth. of New York & New Jersey*, 3 NY3d 486, 490 [2004]; *see also* 28 N.Y. Prac., Contract Law § 26:16). Additionally, such an agreement must be reduced to writing to qualify as an exception to Section 11 immunity from third-party actions.

LMJ relies on Paragraph 3.6 of Gilbert's agreement, which limits Gilbert's financial exposure to LMJ to the contract price of the project. There is no mention, or even a hint, of indemnification, contribution or duty to defend in this paragraph, or any other part of the

contract. LMJ's argument that Paragraph 3.6 is sufficiently ambiguous to raise a material issue of fact is not legally sound. "When a party is under no legal duty to indemnify, a contract assuming [the] obligation [of indemnification or contribution] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." (*Cordeiro v TS Midtown Holdings, LLC*, 87 AD3d 904, 907 [1st Dept 2011][citation and quotation marks omitted]). Any perceived ambiguity could not be the basis of an affirmative duty to indemnify. Absent an express written indemnification provision, Section 11 bars all of LMJ's indemnification claims against Gilbert.

Finally, as LMJ did not address the tenth cause of action for failure to procure insurance, the Court deems this cause of action abandoned. In any event, there does not appear in the body of Gilbert's contract any express obligation to either procure insurance for LMJ or name it as an additional insured on Gilbert's policy. Paragraph 4.01 only obligates Gilbert to carry insurance in its own name, that is, to be an insured contractor.

In accordance with the foregoing, it is hereby

ORDERED that plaintiffs' motion for summary judgment pursuant to CPLR 3212, motion sequence 002, is granted as against defendants The West 17th Street Company and LMJ Vision, Inc. on plaintiffs' claim pursuant to Labor Law §240(1), and the motion is otherwise denied; and it is further

ORDERED that the cross-motion of defendant The West 17th Street Company for summary judgment pursuant to CPLR 3212 as against defendant LMJ Vision, Inc. on a cross-claim for contractual indemnification is denied as moot; and it is further

ORDERED that the motion of Gilbert Displays, Inc. for summary judgment pursuant to CPLR 3212 dismissing the third-party action, motion sequence 004, is granted, and the Clerk of Court is directed to sever and dismiss the third-party action, together with all claims and cross-claims, as against third-party defendant Gilbert Displays, Inc. with prejudice and costs as taxed by the Clerk, and the remainder of the action shall continue; and it is further


ORDERED that so much of the motion of defendants LMJ Vision, Inc. and The Gelman's Optical, Inc. for summary judgment pursuant to CPLR 3212, motion sequence 005, as seeks dismissal of the action as against defendant The Gelman's Optical, Inc. is granted on consent, and the balance of the motion is denied; and it is further

ORDERED that the Clerk of Court is directed to sever and dismiss all claims and cross-claims as against defendant The Gelman's Optical, Inc. with prejudice and without costs, and the remainder of the action shall continue.

This constitutes the Decision and Order of the Court.

Date: 6/18/14

ENTER:



Ellen M. Coin, A.J.S.C.