

Ulrich v Flagg World Inc.

2014 NY Slip Op 32955(U)

October 29, 2014

Supreme Court, Suffolk County

Docket Number: 12-13987

Judge: Joseph C. Pastoressa

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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 34 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. JOSEPH C. PASTORESSA
Justice of the Supreme Court

Mot. Seq. # 003 - MotD
004 - MotD

-----X
JOSEPH ULRICH and JOANNE ULRICH,
Plaintiffs,

- against -

FLAGG WORLD INC. and PALMETTO
HOSPITALITY OF GARDEN CITY II, LLC,
Defendants.
-----X

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Upon the following papers numbered 1 to 49 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1 - 17; Notice of Cross Motion and supporting papers 18 - 36; Answering Affidavits and supporting papers 37 - 38, 39 - 40, 41 - 43; Replying Affidavits and supporting papers 44 - 45, 46 - 47, 48 - 49; Other Palmetto's Memorandum of Law; (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the motion by defendant Palmetto Hospitality of Garden City II, LLC. for, inter alia, summary judgment dismissing the complaint against it is granted to the extent indicated herein and is otherwise denied; and it is

ORDERED that the cross motion by defendant Flagg World Inc. for, inter alia, summary judgment dismissing the complaint and cross claims against it is granted to the extent indicated herein and is otherwise denied.

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In 2011, plaintiff Joseph Ulrich commenced an action (Action No. 1) to recover damages for personal injuries he allegedly sustained on May 13, 2009, when he slipped on a piece of cylindrical concrete core debris while descending an interior staircase at the construction site of a new Hyatt Place hotel located at 5 North Avenue, Garden City, New York. The general contractor, Racanelli Construction Co., Inc. ("Racanelli"), hired various subcontractors for the project, including Stat Fire Sprinkler Inc. ("Stat") and Lakeville Mechanical Co., Inc. ("Lakeville"). The complaint also names Hyatt Corporation ("Hyatt"), the operator of the hotel, as a defendant. At the time of the accident plaintiff was employed by nonparty East Hill Metro, which was hired to provide carpentry services for the project. The complaint in Action No. 1 asserts claims for common law negligence and violations of Labor Law §§ 200, 240(1) and 241(6). It also includes a derivative claim on behalf of plaintiff's wife, Joanne Ulrich, for loss of services and reimbursement of medical expenses.

Defendants joined issue asserting general denials, affirmative defenses, and cross claims against each other based on breach of contract, contribution, and indemnification. On May 4, 2012, plaintiff commenced this action (Action No. 2) against the owner of the construction site, Palmetto Hospitality of Garden City II, Inc. ("Palmetto"), and a subcontractor hired to provide laborers for the project, Flagg World Inc. ("Flagg World"). The complaint asserts identical claims on behalf of plaintiff and his wife as the complaint in Action No.1. Palmetto and Flagg both joined issue asserting affirmative defenses and cross claims against each other for breach of contract, contribution, and indemnification. By order dated September 17, 2012, this court granted a motion by Racanelli and joined Action No.1 and Action No. 2 for trial.

Palmetto now moves for summary judgment dismissing the complaint on the grounds plaintiff failed to state actionable claims under Labor Law §§240(1) and 241(6), and that his common law negligence and Labor Law §200 claims should be dismissed because it neither created nor had notice of the alleged dangerous condition. Flagg World cross-moves for summary judgment dismissing the complaint against it, arguing it was not an owner, agent, or general contractor at the time of the accident, and had no authority to control or supervise the activity in which plaintiff was engaged. Flagg World further asserts that plaintiff failed to state a viable claim under Labor Law §240(1), since he fell from a permanent staircase, and that it cannot be held liable for plaintiff's injuries under the doctrine of common law negligence where, as here, there were no complaints about its removal of debris from the worksite or the presence of any core drilling in the subject staircase prior to the accident. Flagg World also seeks dismissal of Palmetto's cross claims against it for breach of contract, contribution and indemnification, arguing that it did not enter any agreement obligating it to indemnify or insure Palmetto, and that it cannot be held liable for common law indemnification or contribution, as no evidence exists that its actions caused the accident or augmented plaintiff's injuries.

Plaintiff opposes the branch of Palmetto's motion seeking dismissal of his claims under Labor Law §§241(6) and 200, and under common law negligence, arguing triable issues exist as to whether Palmetto had notice of the alleged dangerous condition, whether it failed to provide adequate lighting in the subject staircase, and whether it violated Industrial Code 12 NYCRR §23-1.7(e) by failing to ensure that the core drilling debris on which he slipped was removed from the staircase. Plaintiff opposes the branch of Flagg World's motion seeking dismissal of his common law negligence claims on the ground a triable issue exists as to whether Flagg World's employees, who were solely responsible for removing construction debris

from the worksite, created the dangerous condition by permitting the core drilling debris to fall onto the staircase while hauling trash to the exterior of the building. Palmetto opposes Flagg World's motion to the extent it seeks dismissal of the cross claims for common law indemnification or contribution, arguing a triable issue exists as to whether the conduct of Flagg World's employees created the alleged dangerous condition.

Initially, the Court notes that it did not consider the papers submitted in opposition to Flagg World's motion by nonparty Lakeville Mechanical Co., Inc. in reaching its determination, as consideration of such papers would be inappropriate where, as here, the actions commenced by plaintiff were consolidated for the purpose of a joint trial only, thereby preserving the identity and integrity of each action (see CPLR 602[b]; Whiteman v Parsons Transp. Group of N.Y., Inc., 72 AD3d 677; Import Alley of Mid-Is. v Mid-Island Shopping Plaza, 103 AD2d 797; Champagne v Consolidated R. R. Corp., 94 AD2d 738).

It is well settled that on a motion for summary judgment the function of the court is to determine whether issues of fact exist and not to resolve issues of fact or determine matters of credibility (see Doize v Holiday Inn Ronkonkoma, 6 AD3d 573). Furthermore, facts that are alleged by the nonmoving party and all inferences which may be drawn from them must be accepted as true (see O'Neill v Town of Fishkill, 134 AD2d 487). 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; Winegrad v New York Univ. Med. Ctr., 64 NY2d 851; Andre v Pomeroy, 35 NY2d 361). Once the movant meets this burden, the burden shifts to the opposing party to show by tender of sufficient facts in admissible form that triable issues remain which preclude summary judgment (see Winegrad v New York Univ. Med. Ctr., 64 NY2d 851). However, in opposing a summary judgment motion, mere conclusions, unsubstantiated allegations or assertions are insufficient to raise triable issues of fact (Zuckerman v New York, 497 NYS2d 557).

The unopposed branch of Palmetto's motion seeking dismissal of plaintiff's Labor Law § 240(1) is granted, as it is well settled that it does not apply to accidents which involve falls that occur on permanent staircases (see Gallagher v Andron Construction Corporation, 21 AD3d 988; Gold v NAB Construction Corporation, 288 AD2d 434). Further, inasmuch as plaintiff failed to oppose the branch of Palmetto's motion seeking dismissal of his claim under Labor Law §241(6) for alleged violations of 12 NYCRR 23.1.10, 12 NYCRR 23-1.16, 12 NYCRR 23-2.7, and 12 NYCRR 23-1.15, those claims are deemed abandoned (see Rodriguez v Dormitory Auth. of the State of N.Y., 104 AD3d 529; Kronick v L.P. Thebault Co., Inc., 70 AD3d 648; Cardenas v One State St., LLC, 68 AD3d 436; Genovese v Gambino, 309 AD2d 832). In any event, the court finds the alleged violations are inapplicable under the circumstances of this case, as the regulations relate to the construction of stairways and safety railings, and the use of hand tools, safety belts, harnesses, and similar devices. Moreover, Palmetto established its prima facie entitlement to dismissal of plaintiff's claim that it failed to provide adequate lighting in the staircase in violation of 12 NYCRR 23-1.30. Significantly, both plaintiff's supervisor, Brian Lauria, and Racanelli's project foreman, Ray Rhia, testified that the subject stairwell was lit by natural light and incandescent 100 watt bulbs, and plaintiff's conclusory assertion that the lighting was "poor" is insufficient to create an inference that the amount of lighting fell below the statutory standard (see Carty v Port Auth. of N.Y. & N.J., 32 AD3d 732; Cahill v Triborough Bridge & Tunnel Auth., 31 AD3d 347). Nevertheless, it appears Palmetto concedes the viability of plaintiff's Labor Law §241(6) claim alleging a violation of 12 NYCRR23-1.7(e)(1), which

addresses tripping hazards in passageways, as it did not seek its dismissal. Accordingly, the branch of the motion for summary judgment dismissing plaintiff's causes of action under Labor Law §240(1) is granted. Further, the branch of the motion seeking dismissal of the Labor Law §241(6) claim is granted as to the alleged violations of 12 NYCRR 23.1.10, 12 NYCRR 23-1.16, 12 NYCRR 23-2.7, and 12 NYCRR 23-1.15, but denied as to the alleged violation of 12 NYCRR 23-1.7 (e).

As to the branch of the motion for summary judgment dismissing the remaining claims against Palmetto, "Labor Law § 200 codifies the common-law duty of an owner or employer to provide employees with a safe place to work" (Romang v Welsbach Elec. Corp., 47 AD3d 789, 789; see Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 505). Where a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law § 200 if they had control over the worksite and either created or had actual or constructive notice of the dangerous condition that caused the accident (see Kuffour v Whitestone Const. Corp., 94 AD3d 706; Azad v 270 Realty Corp., 46 AD3d 728, 730 [2d Dept 2007]; Kehoe v Segal, 272 AD2d 583). "To establish constructive notice, the plaintiff must show that the dangerous condition was visible and apparent and had existed for a sufficient time prior to the accident to permit defendants' employees to discover and remedy" (Gordon v American Museum of Natural History, 67 NY2d 836, 837; see Gadzhিয়েva v Smith, 116 AD3d 1001). However, "[t]o meet its initial burden on the issue of lack of constructive notice, the defendant must offer some evidence as to when the area in question was last cleaned or inspected relative to the time when the plaintiff fell" (Birnbaum v New York Racing Assn., Inc., 57 AD3d 598, 598-599; see Gadzhিয়েva v Smith, supra). "Mere reference to general cleaning practices, with no evidence regarding any specific cleaning or inspection of the area in question, is insufficient to establish a lack of constructive notice" (Herman v Lifeplex, LLC, 106 AD3d 1050, 1051-1052; see Mahoney v AMC Entertainment, Inc., 103 AD3d 855, 856).

Here, Palmetto failed to meet its prima facie burden on the motion by eliminating a triable issue as to whether it had constructive notice of the alleged dangerous condition (see Husted v Central NY Oil & Gas Co., LLC, 68 AD3d 1220; Nasuro v PI Assoc., LLC, 49 AD3d 829; Lane v Fratello Constr. Co., 52 AD3d 575; Wolfe v KLR Mechanical, Inc., 35 AD3d 916). Significantly, it is undisputed that Palmetto was the owner of the worksite at the time of the accident, and had a statutory and common-law duty to provide workers with a safe place to work. Additionally, Palmetto's own submissions include the deposition testimony of plaintiff and his supervisor, Richard Gale, both of whom testified that on multiple occasions they informed the general contractor's project supervisor, Ray Rhia, that there was excessive debris in the corridors and rooms where they were expected to work, and that the sole laborer they observed at the worksite was not doing a satisfactory job of clearing such debris. Indeed, during his deposition before trial, plaintiff testified that he observed debris fall out of the plastic garbage containers used by the laborer as he would drag them down the staircase. Plaintiff also testified that he had been informed on the morning of his accident that the debris on the second floor had been recently cleared so he could resume his work there, but that he observed debris, including concrete cores, on the surface of the third floor corridor leading to the staircase where the accident occurred. Furthermore, Ray Rhia, who referenced only general cleaning practices followed during the project, failed to state during his deposition when the staircase in question was last cleaned and inspected prior to the accident. Therefore, the branch of Palmetto's motion seeking summary judgment dismissing plaintiff's common law negligence and Labor Law §200 claims as against it is denied.

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Turning to the branch of Flagg World's cross motion seeking dismissal of the complaint against it, Labor Law § 240(1) and 241(6) generally do not impose liability on subcontractors unless the subcontractor has the authority to supervise and control the plaintiff's work or the area of the worksite where the accident occurred (see Russin v Picciano & Son, 54 NY2d 311; DaSilva v Jantron Industries, Inc., 155 AD2d 510; Rosenbaum v Lefrak Corp., 80 AD2d 337). Similarly, Labor Law §200 "is directed at owners and general contractors, and the rare case where a subcontractor may be liable under the statute must include a showing that the subcontractor had authority and control over [the] plaintiff's work" (Frisbee v 156 R.R. Ave. Corp., 85 AD3d 1258, 1259; see Marshall v Glenman Indus. & Commercial Contr. Corp., 117 AD3d 1124; Ryder v Mount Loretto Nursing Home, 290 AD2d 892).

Here, Flagg World established its prima facie entitlement to summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1) and 241(6) by submitting evidence that it did not act as agent of the owner of the worksite or possess the authority to supervise and control plaintiff's work or the area where the accident occurred (see Russin v Louis N. Picciano & Son, supra; Ortiz v I.B.K. Enters., Inc., 85 AD3d 1139; Nascimento v Bridgehampton Constr. Corp., 86 AD3d 189; Kehoe v Segal, supra at 584). By establishing its lack of authority to supervise and control the area of the worksite where the accident occurred, Flagg World also met its prima facie burden on the branch of the motion seeking dismissal of plaintiff's Labor Law §200 claim (see Marshall v Glenman Indus. & Commercial Contr. Corp., 117 AD3d 1124; Simon v Granite Bldg. 2, LLC, 114 AD3d 749; Martinez v City of New York, 73 AD3d 993; Ryder v Mount Loretto Nursing Home Inc., supra). Inasmuch as neither plaintiff nor Palmetto opposed this branch of Flagg World's motion, no triable issues were raised warranting its denial. Therefore, the unopposed branch of Flagg World's motion for summary judgment dismissing plaintiff's claims under Labor Law §§240(1), 241(6) and 200 is granted.

As to the remaining branch of Flagg World's motion, a subcontractor may be held liable for common law negligence "where the work it performed created the condition that caused the plaintiff's injury even if it did not possess any authority to supervise and control the plaintiff's work or work area" (Tabickman v Batchelder St. Condominiums By Bay, LLC, 52 AD3d 593; see Tomyuk v Junefield Assoc., 57 AD3d 518, 521). Thus, "[a]n award of summary judgment in favor of a subcontractor dismissing a negligence cause of action is improper where the evidence raise[s] a triable issue of fact as to whether [the subcontractor's] employee created an unreasonable risk of harm that was the proximate cause of the injured plaintiff's injuries" (Erickson v Cross Ready Mix, Inc., 75 AD3d 519, 523, quoting Marano v Commander Elec., Inc., 12 AD3d 571, 572-573; see Bell v Bengomo Realty, Inc., 36 AD3d 479, 481). Furthermore, consistent with its equitable underpinnings, common law indemnification may only be imposed upon those actively at fault in bringing about the injury (see McCarthy v Turner Constr., Inc., 17 NY3d 369). Similarly, contribution or apportionment among tortfeasors is appropriate only when the tortfeasors share in responsibility for the alleged injury (see Guzman v Haven Plaza Hous. Dev. Fund Co., 69 NY2d 559; DiMarco v New York City Health & Hosps. Corp., 187 AD2d 479, 480).

Here, Flagg failed to establish its prima facie entitlement to summary judgment dismissing the common law negligence and indemnification claims against it by eliminating triable issues of fact as to whether its employees, who were solely responsible for clearing debris from the worksite, created the alleged dangerous condition (see Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra). Significantly, both plaintiff and his supervisor, Richard Bale, testified that they repeatedly made

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complaints to the general contractor about the failure of the laborers to adequately remove the debris from their work areas, and that they believed the concrete core in question fell out of an uncovered garbage container or a plastic bag that was dragged down the subject staircase by a laborer transporting construction debris to the exterior of the building. Additionally, plaintiff testified that although he was informed prior to his accident that the second floor had been recently cleared of debris, he observed debris, including concrete cores, in the hallway of the second floor leading to the subject staircase on the morning of his accident. Therefore, the branch of Flagg's motion seeking summary judgment dismissing the common law negligence claims against it is denied.

Lastly, Flagg World established, prima facie, that it did not enter any agreement requiring it indemnify or insure Palmetto by submitting the deposition testimony of its principal, Steven Flagg, who testified that Flagg World entered an agreement with the project's general contractor, Racanelli, to provide laborers for the worksite, and that it was contractually obligated to indemnify and insure Racanelli only (see Ramcharan v Beach 20th Realty, LLC, 94 AD3d 964; Persaud v Bovis Lend Lease, Inc., 93 AD3d 831, 941 NYS2d 208 [2d Dept 2012]; Sumba v Clermont Park Assoc., LLC, 45 AD3d 671). Since Palmetto did not submit any evidence contradicting Flagg World's prima facie showing, the branch of Flagg World's motion for summary judgment dismissing Palmetto's cross claims for contractual indemnification and failure to procure insurance is granted. However, inasmuch as a triable issue remains as to whether the conduct of Flagg World's employees created the alleged dangerous condition, the branch of the motion seeking dismissal of the cross claims for common law indemnification or contribution against it is denied (see McCarthy v Turner Constr., Inc., supra; Kielty v AJS Constr. of L.I., Inc., 83 AD3d 1004; Erickson v Cross Ready Mix, Inc., supra).

Dated: October 29, 2014


HON. JOSEPH C. PASTORELLA, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION

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