

Cadena v Ditmas Mgt. Corp.

2014 NY Slip Op 33542(U)

April 29, 2014

Supreme Court, Queens County

Docket Number: 23475-2012

Judge: Robert L. Nahman

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NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HON. ROBERT L. NAHMAN
Justice

IAS PART 19

EDWIN CADENA,
Plaintiff,

- against -

Index No.: 23475-2012

Motion
Date: November 24, 2014

DITMAS MANAGEMENT CORP., JONSIR
REALTY LLC, and P.J.B. CONTRACTING
CORP.,
Defendants.

Mot.
Cal. Nos.: 26 & 27

Mot. Seq.
Nos: 3 & 4

DITMAS MANAGEMENT CORP. and
JONSIR REALTY, LLC.,

Third-Party Plaintiffs,

- against -

REAL DEAL DECORATORS, LLC.,

Third-Party Defendants.

Upon the following papers numbered 1 to 35 read on this motion by plaintiff Edwin Cadena for partial summary judgment on liability under Labor Law §§ 240(1) and 241(6); the defendants/third-party plaintiffs Ditmas Management Corp. (Ditmas) and Jonsir Realty, LLC (Jonsir) motion for summary judgment dismissing plaintiff's complaint and seeking an extension of time to move for summary judgment with respect to their third-party claims against third-party defendant Real Deal Decorations, LLC (Real Deal); the cross motion by Real Deal for summary judgment dismissing the third-party action by Ditmas and Jonsir against it or, in the alternative, severing the third-party action from the main action; and a cross motion by plaintiff similarly seeking to sever the third-party action:

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Numbered

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Plaintiff commenced this action to recover for personal injuries allegedly sustained when he fell while descending from a fire escape ladder in the course of employment at a residential apartment complex owned by defendants Jonsir and managed by defendant Ditmas. Defendant Ditmas contracted with third-party defendant Real Deal, plaintiff's employer, to scrape, prime, and repaint two fire escapes located in front of the subject building.

On the date of the accident plaintiff and his co-worker were to perform painting work. The workers accessed the fire escapes from street level by using the retractable, permanently fixed, metal ladders that were part of the fire escapes. They were also provided with an 8-foot A-frame ladder owned by defendants and safety harnesses with a 4-foot lanyard and clip. Each morning before commencing work, plaintiff and his co-worker would use the A-frame ladder to reach the fire escape ladders in their retracted position approximately twelve to fifteen feet above street level. The A-frame ladder was not tall enough to enable them to access the first fire escape platform, but it allowed them to pull the fire escape ladders down in order to ascend from street level. At the end of the day, they would return the fire escape ladders to their retracted positions by using the A-frame ladder again. Although the workers would use the harness lanyards while working, they detached them while moving from one level to another or from the fire escape to street level. The workers would also carry their painting materials and equipment up and down the fire escape ladders.

Immediately before he fell, plaintiff descended the retractable fire escape, removed his harness, then climbed back up to retrieve a paint can from the fire escape's first level. As he was descending the retractable fire escape ladder the second time, he was holding the ladder with his left hand and a paint can and brush in his right hand. He was not wearing a harness as he descended again. He had climbed down approximately two of the twelve to fifteen total rungs when he felt the fire escape ladder wobble, causing his hand to slip. When he tried to grab the ladder again, his glove became stuck in a metal part and he fell 4 to 6 feet to the ground.

LABOR LAW § 240(1)

On a motion for summary judgment, the proponent bears the burden of demonstrating prima facie entitlement to summary judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Labor Law § 240(1), commonly called the "Scaffold Law," provides:

"All contractors and owners and their agents . . . 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 . . . and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.”

The statute imposes strict liability upon owners and their agents for work safety practices guarding against “the risk of falling from an elevated work site or being hit by an object falling from an elevated work site” (*Rocovich v Consolidated Edison Co.*, 167 AD2d 524, 526 [1990], *affd* 78 NY2d 509 [1991]; *see also Bland v Manocherian*, 66 NY2d 452 [1985]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513 [1985]).

Here, plaintiff satisfies his prima facie burden of demonstrating that defendants violated Labor Law § 240(1) because the fire escape ladder failed to provide proper protection for the work being performed, and that such violation was the proximate cause of his injuries (*see Carrion v City of New York*, 111 AD3d 872, 873 [2013]; *Zhu Wei Shi v Jun Lan Zhang*, 76 AD3d 558 [2010]). As plaintiff was expected to and did use the subject retractable fire escape ladder to access the work site, it functioned as a safety device under Labor Law § 240(1) (*see e.g. De Jara v 44-14 Newtown Rd. Apt. Corp.*, 307 AD2d 948 [2003]). He further testified that the fire escape ladder moved or wobbled while he was descending, which is sufficient to establish that such safety device was inadequate to prevent his fall (*see Jimenez v RC Church of Epiphany*, 85 AD3d 974 [2011]; *Rudnik v Brogor Realty Corp.*, 45 AD3d 828 [2007]; *De Jara*, 307 AD2d 948; *Acosta v Bentley Apts.*, 298 AD2d 124 [2002]). Plaintiff also proffered an expert affidavit opining that the narrow, rounded rungs of the fire escape ladder were not suitable for balance and stability, particularly since plaintiff had to carry his painting materials and equipment by hand as he used the fire escape ladder.

Additionally, defendants violated the statute by failing to provide adequate lifelines or safety nets to protect plaintiff from falling, based on plaintiff’s testimony that the lanyard on his harness was too short to attach to the fire escape while he was descending the ladder, and no other lifelines or safety nets were provided (*see Vetrano v J. Kokolakis Contr., Inc.*, 100 AD3d 984, 985-986 [2012]; *Berrios v 735 Ave. of the Ams., LLC*, 82 AD3d 552 [2011]). Contrary to defendants’ contention, plaintiff was not recalcitrant merely because he did not use the harness and lanyard while descending the fire escape ladder, as there were no attachment points available on that part of the fire escape and there was no evidence that plaintiff deliberately refused to use the harness (*see Garzon v Viola*, 124 AD3d 715 [2015]; *Berrios*, 82 AD3d 552; *Moniuszko v Chatham Green, Inc.*, 24 AD3d 638 [2005]). Even if plaintiff had removed his harness after finishing painting for the day, the sole proximate cause of the accident was the faulty fire escape ladder (*id.*).

In opposition, defendants fail to raise a triable issue of fact regarding the alleged

violation of Section 240(1) (*see Campbell v 111 Chelsea Commerce, L.P.*, 80 AD3d 721 [2011]; *Rudnik*, 45 AD3d 828). Defendants' contention that third-party defendant Real Deal's foreman testified that plaintiff's hand slipped from the ladder, causing him to simply lose his balance, is insufficient to defeat summary judgment.

LABOR LAW § 241

Labor Law § 241(6) provides in pertinent part:

“All areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.”

The statute, enacted to provide workers engaged in construction, demolition, and excavation work with reasonable and adequate safety protections, places a non-delegable duty upon owners and contractors to comply with specific safety regulations set forth in the New York State Industrial Code regulations (12 NYCRR § 23 *et seq*) (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-502 [1993]). Thus, a plaintiff supports a Labor Law § 241(6) cause of action by demonstrating that his or her injuries were proximately caused by a violation of an Industrial Code rule applicable to the circumstances of the accident and setting forth a concrete standard of conduct rather than a mere reiteration of common-law principles (*Id.* at 502; *Cabrera v Revere Condominium*, 91 AD3d 695, 696 [2012]).

Plaintiff seeks summary judgment on and opposes dismissal of his Section 241(6) cause of action only insofar as based on the alleged violation of Industrial Code section 23-1.16, which governs and sets forth standards of use for safety belts, harnesses, tail lines, and lifelines. This regulation is applicable, given plaintiff's testimony that the harness and lanyard were too short to be used as he descended the fire ladder escape it is disingenuous for defendants to contend that he should have moved the lanyard's hook to successive anchor points as he descended because he had to carry painting supplies in one hand and hold onto the ladder with his other hand (*see e.g. Bellreng v Sicoli & Massaro, Inc.*, 108 AD3d 1027, 1030 [2013]; *Latchuk v Port Auth. of N.Y. & N.J.*, 71 AD3d 560 [2010]). However, although the harness was not “properly attached either to a securely anchored tail line, directly to a securely anchored hanging lifeline or to a tail line attached to a securely anchored hanging lifeline[.]” whether the regulation was violated remains to be determined, as the record is unclear whether plaintiff fell more than five feet (*cf. Jerez v Tishman Const. Corp. of New York*, 118 AD3d 617 [2014]).

Thus, summary judgment for defendants on the Labor Law § 241(6) claim as predicated on a violation of Industrial Code regulation 23-1.16 is premature, but is warranted as based on the remaining alleged violations that plaintiff has apparently abandoned (*see Harsch v City of New York*, 78 AD3d 781, 783 [2010]), namely, Industrial Code sections 23-

1.7, 1.8, 1.15, 1.17, 1.21 and 23-5.

LABOR LAW § 200 AND COMMON-LAW NEGLIGENCE

Under Labor Law § 200, owners and contractors have a common-law duty to provide employees with a safe place to work (*see Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Imposing liability on an owner or contractor under a Labor Law § 200 and/or a common-law negligence cause of action requires evidence that the owner or contractor either had authority to control and supervise the manner in which the underlying work was performed, or that the owner or contractor created or had actual or constructive notice of the alleged dangerous condition which caused the accident (*see DiMaggio v Cataletto*, 117 AD3d 984, 986 [2014]; *Giovanniello v E.W. Howell, Co., LLC*, 104 AD3d 812, 814 [2013]). “A defendant has the authority to supervise or control the work for purposes of Labor Law § 200 when that defendant bears the responsibility for the manner in which the work is performed” (*Ortega v Puccia*, 57 AD3d 54, 62 [2008]).

Defendants argue that they are entitled to summary judgment under Labor Law § 200 and common-law negligence because they did not have notice of any defective condition or any control over plaintiff’s work sufficient to support liability. In opposition, plaintiff highlights deposition testimony by the building superintendent and third-party defendant Real Deal’s foreman that the workers were not permitted to access the fire escape from the building’s interior through apartment windows. Therefore, a triable issue of fact exists with respect to whether defendants exercised the requisite control over the manner in which plaintiff accessed the fire escape to perform his work (*see Carballo v 444 E. 87th St. Owners Corp.*, 14 AD3d 526 [2005], *citing Gonzalez v Stern's Dept. Stores*, 211 AD2d 414 [1995]).

Third-Party defendant Real Deal’s cross motion seeks to dismiss the third-party action on the ground that defendants failed to timely commence it within 30 days following the completion of depositions, in accordance with the compliance conference order dated December 18, 2013 (CPLR §1010). Defendants commenced the third-party action on May 23, 2014, 59 days past the April 14, 2014 deadline (the last deposition was taken on March 25, 2014). Although defendants offer scant explanation for the delay, such delay was relatively short, and the court may afford third-party defendant the opportunity to complete discovery without causing undue delay of the trial of the main action or otherwise prejudicing the substantial rights of any party (*see Annanquartey v Passeser*, 260 AD2d 517 [1999]; *Pescatore v American Export Lines, Inc.*, 131 AD2d 739 [1987]; *Gomez v City of New York*, 78 AD3d 482 [2010]). The court likewise exercises its discretion in denying the cross motions to sever the third-party action for indemnification and contribution, as the interests of judicial economy and consistency would be best served by a single trial to adjudicate the closely-related questions of fact and law in the main and third-party actions (CPLR 603; *see Chiarello v Rio*, 101 AD3d 793 [2012]; *Zawadzki v 903 E. 51st St., LLC*, 80 AD3d 606 [2011]; *Naylor v Knoll Farms of Suffolk County, Inc.*, 31 AD3d 726 [2006]).

The court notes that defendants/third-party defendants timely responded to Real Deal's Notice for Discovery & Inspection during the pendency of these cross motions. In order to minimize any resulting prejudice inured by the parties, Real Deal is directed to serve any outstanding requests for disclosure, including notices for deposition, within fifteen (15) days of service of a copy of this order with notice of entry. The parties are advised to expeditiously respond to such requests. As an upcoming appearance has been scheduled in the Trial Settlement Part on June 8, 2015, any further requests shall be made before the justice therein.

The court has considered the parties' remaining contentions and deems them unavailing. Accordingly, it is

ORDERED that the branch of plaintiff's motion for summary judgment on his claims pursuant to Labor Law § 240(1) is granted; the remaining branches of plaintiff's motion are denied; and it is further

ORDERED that the branch of defendants' summary judgment motion is granted only to the extent of dismissing the Labor Law § 241(6) claim as predicated on alleged violations of Industrial Code sections 23-1.7, 1.8, 1.15, 1.17, 1.21 and 23-5, but is denied in all other respects. The branches defendants' summary judgment motion to dismiss plaintiff's claims under Labor Law §241(6) claim based on an alleged violation of Industrial Code section 23-1.16 and plaintiff's claims under Labor Law § 200 and common-law negligence are denied; and it is further

ORDERED Real Deal Decorations LLC's and plaintiff's cross motions to dismiss the third party action or in the alternative to sever the third-party action from the main action are denied; and it is further

ORDERED that the branch of the defendants/third-party plaintiffs Ditmas Management Corp. (Ditmas) and Jonsir Realty, LLC (Jonsir) motion seeking an extension of time to move for summary judgment with respect to their third-party claims against third-party defendant Real Deal Decorations, LLC (Real Deal) is denied.

Dated: April 29, 2015

Robert L. Nahman, J.S.C.