

Barros v Bette & Cring, LLC

2014 NY Slip Op 33597(U)

January 28, 2014

Supreme Court, Saratoga County

Docket Number: 20102767

Judge: Thomas D. Nolan

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STATE OF NEW YORK

SUPREME COURT

COUNTY OF SARATOGA

PAUL BARROS,

Plaintiff,

-against-

BETTE & CRING, LLC, 38 HIGH ROCK, LLC
and STONE BRIDGE IRON AND STEEL, INC.,

Defendants.

DECISION AND ORDER

RJI No. 45-1-2011-0688

Index No. 20102767

BETTE & CRING, LLC and 38 HIGH ROCK, LLC,

Third-Party Plaintiffs,

-against-

STONE BRIDGE IRON AND STEEL, INC.,

Third-Party Defendant.

STONE BRIDGE IRON AND STEEL, INC.,

Fourth-Party Plaintiff,

-against

MID STATE STEEL ERECTORS, INC.,

Fourth-Party Defendant.

PRESENT: HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

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FILED

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On January 29, 2009, while shoveling snow from the third-floor deck of a multi-story commercial building under construction, plaintiff allegedly slipped and fell and as a result, allegedly sustained injuries to his right shoulder and neck requiring two surgeries and preventing him from returning to work as an ironworker. In his action to recover damages for his injuries, plaintiff, in an amended complaint, sues 38 High Rock, LLC (38 High Rock), the building's owner, Bette & Cring, LLC (Bette & Cring), the general contractor, and Stone Bridge Iron and Steel, Inc. (Stone Bridge), a subcontractor hired by Bette & Cring both to fabricate and to erect the building's steel components. Defendants 38 High Rock and Bette & Cring assert cross-

claims and third-party actions against Stone Bridge seeking contractual and common law indemnification and alleging a breach of a contractual provision requiring that Stone Bridge obtain insurance indemnifying them. In a fourth-party action against Mid State Steel Erectors, Inc. (Mid State), plaintiff's employer and the subcontractor hired by Stone Bridge to perform the erection component of its subcontract, Stone Bridge seeks common law contribution and/or indemnification in the event plaintiff establishes he sustained a "grave injury" in addition to contractual contribution and/or indemnification and asserts a claim that Mid State breached its agreement by failing to have Stone Bridge added as a named insured under its liability insurance policy.

Discovery has been completed. The action is scheduled for trial.

Defendants Bette & Cring and 38 High Rock move for summary judgment dismissing plaintiff's amended complaint in its entirety on their contentions, even if plaintiff's version of the accident were accepted, that neither of these defendants exercised supervision or control over Mid State's work and that neither possessed actual or constructive notice of the slipping hazard which caused or contributed to plaintiff's injuries. Thus, they assert that they are entitled to dismissal of plaintiff's Labor Law § 200 and common law negligence causes of action. In addition, relying on Gaisor v Gregory Madison Avenue, LLC, 13 AD3d 58 (1st Dept 2004), these defendants assert that plaintiff's Labor Law § 241 (6) cause of action fails as a matter of law since Industrial Code § 12 NYCRR 23-1.7 (d), the regulation plaintiff principally relies upon, is inapplicable here since the snow which caused or contributed to plaintiff's slip was "the very condition that [plaintiff] was charged with removing". Further, defendants Bette & Cring and 38 High Rock seek summary judgment for breach of contract, contractual indemnification, and

common law indemnification on their amended third-party complaint against Stone Bridge on their contentions that the parties' contract requires Stone Bridge to indemnify and hold harmless both the general contractor and owner from the negligence, if any, of either Stone Bridge or its subcontractor, Mid State, and also that Stone Bridge breached its contract by failing to provide for them a defense to and indemnification of plaintiff's claims.

In its motion, Stone Bridge, as defendant and third-party plaintiff, seeks summary judgment against plaintiff and Mid State on its contention that, while providing general supervision over Mid State, it did not exercise sufficient control over Mid State's work methods to support plaintiff's common law negligence and Labor Law § 200 causes of action. Stone Bridge also cites the Gaisor holding as a predicate for dismissing plaintiff's Labor Law § 241 (6) cause of action. Stone Bridge additionally seeks summary judgment dismissing the cross claims and amended third-party complaint of defendants Bette & Cring and 38 High Rock and opposes their motion seeking common law and contractual indemnification and the claim that it breached its agreement to procure insurance naming it as an additional insured. And, finally, Stone Bridge seeks summary judgment determining that Mid State is liable to it on its claim for contractual indemnification.

Fourth-party defendant Mid State opposes Stone Bridge's summary judgment motion directed against it and cross-moves to dismiss Stone Bridge's fourth-party complaint seeking common law and contractual contribution or indemnification and alleging breach of contract for failing to procure insurance covering Stone Bridge and as well, opposes Bette & Cring's and 38 High Rock's motion seeking dismissal of plaintiff's complaint. Mid State argues that plaintiff did not sustain a "grave injury" as defined in Workers' Compensation Law § 11 and, as a matter

of law, Mid State cannot be held liable to Stone Bridge for common law contribution or indemnification.¹

In opposition to the summary judgment motions of Bette & Cring, 38 High Rock, and Stone Bridge, plaintiff urges that there are triable issues first over whether Bette & Cring, 38 High Rock and Stone Bridge exercised more than general supervision and control over the work being performed by Mid State and in fact, plaintiff asserts that all the moving defendants except 38 High Rock were responsible for snow removal so as to subject them to the common law negligence and Labor Law § 200 claims. Second, plaintiff urges that Labor law § 241 (6) covers these facts, and the Gaisor holding does not mandate dismissal, since in Hecker v State of New York, 92 AD3d 1261 (4th Dept 2012), affd 20 NY3d 1087 (2013), reargument denied 21 NY3d 987 (2013), the court envisioned an issue of comparative fault in a case in which the task of snow removal fell within the injured employee's job duties.

As on all summary judgment motions, the court's initial role is issue identification, not issue resolution, Speller v Sears, Roebuck & Co., 100 NY2d 38, 44 (2003) or stated differently, the court's role is not to try issues of fact but to determine whether there are such issues to be tried. Sommer v Federal Signal Corp., 79 NY2d 540, 554 (1992). Provided the movant establishes by competent and admissible evidence a prima facie entitlement to judgment, Connor v Tee Bar Corp., 302 AD2d 729 (3rd Dept 2002), the nonmovant, to defeat the motion, must demonstrate the existence of material triable issues of fact by "affirmative proof to demonstrate that the matters are real and capable of being established upon a trial". Nelson v Lundy, 298

¹Mid State's cross motion also seeks dismissal of plaintiff's amended complaint insofar as it asserts claims directly against it. The court has reviewed the amended complaint and it alleges no causes of action against Mid State.

AD2d 689, 690 (3rd Dept 2002). The facts must be viewed in the light most favorable to the party opposing summary judgment, here plaintiff on defendants Bette & Cring's, 38 High Rock's and Stone Bridge's motions, Stone Bridge as third-party defendant on the third-party plaintiffs' motions, and Mid State on Stone Bridge's motion. Cahill v Triborough Bridge & Tunnel Auth., 4 NY3d 35, 37 (2004); Czarnecki v Welch, 13 AD3d 952 (3rd Dept 2004). And, in doing so, the court must "accord [the opposing party] the benefit of every reasonable inference from the record proof, without making any credibility determinations". Winne v Town of Duanesburg, 86 AD3d 779, 781 (3rd Dept 2011).

First, addressed are the motions directed at plaintiff's common law negligence and Labor Law § 200 claims. Owners and contractors have a common law and statutory duty to provide workers with a safe place to work. Jock v Fien, 80 NY2d 965 (1992). Plaintiff was assigned the task of clearing snow from the third floor deck before participating in the task of erecting steel. The hazard posed by the snow was obvious and, according to Mid State's foreman, Gregory Catlin (Catlin),² whose crew included plaintiff, Mid State generally removed snow in areas where it was scheduled to erect steel. Although Catlin testified he was not sure whether Mid State was "technically responsible [to remove snow]" under its subcontract, "it's something we just normally do to continue with the project". Stated differently, Catlin testified that "[w]hen it snowed, we shoveled paths to our work areas. We kept areas open so we could continue working" and that "[all crew members] had to work on the task [snow removal]". In his deposition, plaintiff confirmed that he had been directed that morning to remove snow from the

²Deposition of Gregory Catlin - Exhibit W to Notice of Motion of defendants Bette Cring and 38 High Rock.

third floor by his foreman,³ that after he (and two co-workers) slipped and fell, and after plaintiff complained and told the foreman he was “not doing that [shoveling] anymore”, that the supervisor reassigned him to the second floor to inspect and tighten bolts and he continued those tasks until mid-afternoon when he left early to seek medical attention.

Common law and Labor Law § 200 causes of action against an owner and contractor may be pursued when the accident resulted from the “means and methods” of the work or from a “hazardous condition” on the work site. Harrington v Fernet, 92 AD3d 1070 (3rd Dept 2012). Under a “means and methods” theory, i.e., wherein a worker is injured as the result of the manner in which construction-type work was performed, the dispositive issue is whether or not the owner and contractor exercised more than general control or supervision over the work and exercised actual control over the day to day work activity and methods and manner of a subcontractor. Carney v Allied Craftsman General Contractors, Inc., 9 AD3d 823 (3rd Dept 2004). Under a “hazardous condition” theory, the plaintiff must demonstrate that the owner or contractor either created the condition or had actual or constructive notice of it and failed to remedy the condition within a reasonable time. Actual supervision and control over the injured worker’s activity is not relevant to this type of claim. Edick v General Electric Co., 98 AD3d 1217 (3rd Dept 2012); Harrington v Fernet, *supra*.

In this case, snow was on areas where Mid State’s work that day was to be performed, and before the resumption of erecting the steel components, snow had to be cleared. Plaintiff’s employer directed some of its workers, including plaintiff, to shovel it from the deck. Snow removal from areas where it was erecting steel fell within Mid State’s traditional scope of work

³During his deposition, plaintiff identified Sam Olhaus as his foreman, not Catlin.

notwithstanding that its subcontract with Stone Bridge did not specifically assign responsibility to Mid State. The evidence, principally the deposition testimony from Bette & Cring's job superintendent and Stone Bridge's and Mid State's foremen, establishes prima facie that Bette & Cring, 38 High Rock, and Stone Bridge did not exercise any control over the work methods and manner by which Mid State's workers prepared the jobsite, including snow removal from it, before continuing the task of erecting steel. The record discloses Mid State's foreman directed its ironworkers to work that day, not with input from the moving defendants and assigned them their first task to clear snow from their work area. The "means and methods" theory has no application here.

And, although obviously snow qualifies as a hazardous condition to workers engaged in construction tasks, and although the condition on the decking was or should have been known to the owner and other contractors on site, it was not their duty to clear snow from areas where Mid State was working. Rather, as Mid State's foreman explained, clearing snow was a task Mid State's workers "normally did" to continue erecting steel. Indeed, plaintiff testified at his deposition that the senior members of the crew, after arriving at the jobsite that morning, "voted" to work that day, and as a result, the crew's first job was to clear snow from the third floor so steel erection could proceed there. In short, the "hazardous condition" theory for imposing common law or Labor Law § 200 liability on defendants also does not apply here. The cause of plaintiff's fall - slipping on snow while clearing it - was a hazard inherent in the work plaintiff was obligated to perform and did not give rise to a common law or Labor Law § 200 statutory duty on the part of the defendants. Hansen v Trustees of Methodist Episcopal Church of Glen Cove, 51 AD3d 725 (2nd Dept 2008). Upon these facts, the moving defendants - Bette & Cring,

38 High Rock and Stone Bridge - met their threshold burden and plaintiff fails to show a triable issue and therefore, the moving defendants' respective motions are granted and the first and second causes of action in plaintiff's amended complaint are dismissed, without costs.

Next addressed is the Labor Law § 241 (6) claim alleged in the third cause of action of plaintiff's amended complaint. Labor Law § 241 (6) places a non-delegable duty upon owners and contractors to "provide reasonable and adequate protection for workers when a concrete and specific section of State Industrial Code is violated", and it imposes absolute liability on owners and contractors if a violation of the statute is a proximate cause of the worker's injury. St. Louis v Town of North Elba, 16 NY3d 411 (2011); Rizzuto v L.A. Wenger Contracting Co., 91 NY2d 343 (1998). To prevail on a § 241 (6) cause of action, "plaintiff need not show that defendants exercised supervision or control over the work site" and the "Industrial Code should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace". St. Louis, supra at 415 - 416.

Here, the relevant code section, 12 NYCRR § 23-1.7 (d) titled, "Slipping Hazards", reads as follows:

Employers shall not suffer or permit any employee to use a floor, passageway, walkway, scaffold, platform or other elevated working surface which is in a slippery condition. Ice, snow, water, grease and any other foreign substance which may cause slippery footing shall be removed, sanded or covered to provide safe footing.

This regulation is sufficiently concrete and specific to support a § 241 (6) cause of action. Rizzuto v L.A. Wenger Contracting Co., 91 NY2d 343, 350-351 (1998); Sullivan v RGS Energy Group, Inc., 78 AD3d 1503 (4th Dept 2010). Nonetheless, under § 241 (6), recovery has been barred when the employee was injured while remedying the slipping hazard. In Gaisor v Gregory

Madison Ave., LLC, 13 AD3d 58 (1st Dept 2004), an ironworker, as directed by his foreman, was clearing ice and snow from an upper floor in a building under construction when he slipped and fell. Plaintiff's Labor Law § 241 (6) claim, premised on a violation of § 23-1.7 (d), was dismissed "since the snow on which plaintiff slipped was the very condition he was charged with removing". This rule was expressed much earlier by the Court of Appeals in Mullen v Geneseo County Elec. Light Power & Gas Co., 202 NY 275 (1911). Cases with facts similar to those here have followed the Gaisor rule. In Smith v Nestle Purina Petcare Co., 105 AD3d 1384 (4th Dept 2013), plaintiff, while stepping off a ladder, slipped on accumulated grain dust and a hose. The court sustained plaintiff's Labor Law § 241 (6) cause of action under 12 NYCRR 23-1.7 (c) (2) as there was a triable issue whether the hose constituted a "scattered tool" that resulted in a tripping hazard but dismissed plaintiff's claim based upon an alleged violation of 12 NYCRR 23-1.7 (d). Citing Gaisor, the court concluded that the foreign substance (grain dust) on which plaintiff slipped was "the very condition he was charged with removing" and thus was an integral part of the task plaintiff was performing". In Lanza v MCP50, LLC, 2013 NY Misc LEXIS 3980 (Sup Ct, NY County 2013), a laborer, directed by his foreman to clean snow from a ramp and platform, slipped and fell. Insofar as plaintiff's Labor Law § 241 (6) claim based upon § 23-1.7 (d), the court, citing Gaisor, found the regulation did not apply because "the snow on which plaintiff allegedly slipped was the very condition he was charged with removing". And, in Shaw v Resnick 57 Park Place, LLC, 33 Misc 3d 1224 (A) (Sup Ct, Kings County 2011), plaintiff, a roofer, was tasked with sweeping water from his work area and later while working in that area allegedly slipped on wet roofing paper. The court, citing Gaisor, dismissed plaintiff's Labor Law § 241 (6) cause of action premised on section 23-1.7 (d), and found that the condition

(the slippery floor) was related to the plaintiff's assigned task of clearing water from the work area.

In opposition, plaintiff offers Hecker v State of New York, 92 AD3d 1261 (4th Dept 2012), affd 20 NY3d 1087 (2013), reargument denied 21 NY3d 987 (2013), in which a construction worker fell while shoveling snow from a platform and ramp so that he could get to his designated work site. The trial court, relying on Gaisor, dismissed the Labor Law § 241 (6) claim premised on 12 NYCRR 23-1.7 (d). The Appellate Division, Fourth Department affirmed dismissal but held that the trial court erred in its reliance on Gaisor when it concluded that snow removal was an integral part of the claimant's work and in doing so, commented, by way of dicta, that "even if snow removal fell within the scope...of [claimant's] responsibility, such would only be relevant in determining comparative fault, and would not require a grant of summary judgment in defendant's favor".⁴ Citing Hecker, plaintiff urges that, at a minimum and accepting the fact that snow removal was part of Mid State's contractual obligation (a point plaintiff contests since the subcontract is silent concerning snow and ice removal), the presence of a triable issue of comparative fault between plaintiff and defendants precludes summary judgment.

In the court's analysis, despite plaintiff's well-presented argument, Hecker does not preclude summary judgment on these facts. Nor does it deflect the weight of Gaisor and its progeny. First, there is no evidence that any of the moving defendants - Bette & Cring, 38 High Rock or Stone Bridge - were negligent in any way. The defendants did not participate in the

⁴In sustaining dismissal, the court concluded that 22 NYCRR 23-1.7 (d) did not apply for another reason, namely because "claimant was not using the area where he fell as a floor, passageway or walkway at the time of his fall".

snow removal effort on the third level and they did not direct Mid State or its employees to remove the snow that morning or dictate the manner in which the workers did so. And, the language in Hecker on which plaintiff relies, that an issue of comparative fault is presented when a plaintiff sustains injury when in the process of removing the condition that caused or contributed to his fall, is simply dicta. Plaintiff's fall here was caused by the condition he was then in the process of remediating, and following the principle enunciated in Gaisor, defendants' motions are granted and the third cause of action in plaintiff's amended complaint is dismissed, without costs.

Next, that portion of Mid State's motion seeking dismissal of the first, third, and fifth causes of action in Stone Bridge's fourth-party complaint seeking common law contribution and/or indemnification on the ground that plaintiff did not sustain a "grave injury" within the meaning of Workers' Compensation Law § 211 is moot based upon dismissal of plaintiffs' complaint against Stone Bridge and accordingly that portion of Mid State's cross motion is denied, without costs.

Left for decision are the motions related to contractual contribution and/or indemnification and alleged breach by Stone Bridge and Mid State of the provision in their respective contracts concerning their obligation to procure insurance in the case of Stone Bridge for Bette & Cring and 38 High Rock and in the case of Mid State for Stone Bridge.

The claims of Bette & Cring and 38 High Rock against Stone Bridge based upon its alleged failure to name them as additional insureds as required by its subcontract must be dismissed since documentary evidence establishes that both are considered "additional insureds" under Stone Bridge's policy O1CIO36833 issued by American States Insurance Company

(Exhibit X to Affidavit of Sean A. Tomko dated September 23, 2013). Likewise, Mid State establishes that Stone Bridge is considered an additional insured under policy CLS 1270914 issued by Scottsdale Insurance Company (Exhibit A to Affidavit of Ronald W. Rehak dated October 9, 2013). Therefore, Mid State's cross motion is granted to the extent that the fourth cause of action in the fourth-party complaint is dismissed, without costs, and Stone Bridge's cross motion seeking summary judgment in its favor on said fourth cause of action in the fourth-party complaint is denied, without costs.

Now, the motions of Bette & Cring and 38 High Rock seeking indemnification from Stone Bridge and Mid State based upon their respective subcontract. Section 9.1 in Stone Bridge's subcontract provides:

To the fullest extent permitted by law, the Subcontractor shall indemnify, defend and hold harmless the Contractor, as well as the Owner and A/E from and against all claims, damages, loss, liability or expense of any kind, which is in any way connected with the Project, to the extent such arises or results from any negligent act, omission, breach of statutory duty or obligation, on the part of the Subcontractor or any other person for whom the Subcontractor is responsible. The indemnity does not extend to that part of any claims, damages, loss liability or expenses arising from the negligent acts or omissions of the contractor.

This indemnification includes, but is not limited to, any claims, damages, loss, liability or expense of any kind, which is in any way connected with the Project and which is based upon a statutory duty or obligation on the part of the Contractor where the Contractor is not found to have committed a negligent act or omission. Subcontractor agrees to purchase and maintain such insurance and will protect it and the Contractor including contractual coverage.

Subcontractor's obligation to indemnify includes attorneys' fees, defense costs and legal costs in addition to any judgment or settlement incurred. If the indemnity established under this Section

is made void in whole or in part by operation of law, Subcontractor shall in such event, defend, indemnify and hold harmless Bette & Cring, the Owner, and their agents to the fullest extent permitted by law.

Article 8 of Mid State' subcontract provides:

INDEMNIFICATION. To the fullest extent permitted by law, the Subcontractor shall indemnify and hold harmless the Owner, Contractor, Architect, Architect's consultants, and agents and employees of any of them from and against claims, damages, losses and expenses, including but not limited to attorney's fees, arising out of or resulting from performance of the Subcontractor's Work under this Subcontract, provided that any such claim, damage, loss or expense is attributable to bodily injury, sickness, disease or death, or to injury to or destruction of tangible property (other than Work itself), but only to the extent caused by the negligent acts or omissions of the Subcontractor, the Subcontractor's Sub-subcontractors, anyone directly or indirectly employed by them or anyone for whose acts they may be liable, regardless of whether or not such claim, damage, loss or expense is caused in part by a party indemnified hereunder.

Indemnity provisions in a contract must be strictly construed. Hooper v AGS Computers, Inc., 74 NY2d 487, 491 (1989). Here, the indemnity provision in Stone Bridge's subcontract extends to claims alleging breach of statutory duty [i.e., Labor Law § § 200 and 241 (6)] in instances, as here, where the contractor, Bette & Cring, is not found to have been negligent. Thus, Stone Bridge must indemnify Bette & Cring and 38 High Rock for all expenses, including attorneys' fees incurred in defense of this action regardless of any lack of negligence by Stone Bridge.

The motions of Bette & Cring and 38 High Rock for summary judgment on the second cause of action in their amended third-party complaint are granted, without costs, and if the parties are unable to resolve the amount of attorneys' fees and other litigation expenses to be paid

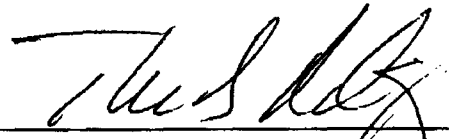
to Bette & Cring and 38 High Rock within sixty (60) days hereof, the court will schedule a hearing on the issue.

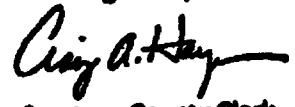
The indemnification clause in Mid State's contract with Stone Bridge is more limited. It requires Mid State to indemnify Stone Bridge only when Stone Bridge or its employees have been found negligent. Here, there has been no such finding. Accordingly, Stone Bridge is not entitled to indemnification under the contract. Stone Bridge's cross motion to dismiss the second and third causes of action in the fourth-party complaint is granted, without costs.

This constitutes the decision and order of the court. The original decision and order is forwarded to counsel for defendants Bette & Cring and 38 High Rock. The court, based upon the extensive submissions, dispenses with the requirement that the original motion papers be filed with the Clerk. CPLR 2220 (a). Such original papers shall be retrieved from Chambers by the attorneys for Bette & Cring and 38 High Rock. Counsel for defendants Bette & Cring and 38 High Rock is not relieved from the applicable provisions of CPLR 2220 relating to filing, entry and notice of entry of the decision and order.

So Ordered.

DATED: January 28, 2014
Saratoga Springs, New York


HON. THOMAS D. NOLAN, JR.
Supreme Court Justice

ENTERED
Craig A. Hayner

Saratoga County Clerk

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