

Poalacin v Mall Props., Inc.

2015 NY Slip Op 30058(U)

January 23, 2015

Supreme Court, Queens County

Docket Number: 700446/2012

Judge: Allan B. Weiss

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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

NELSON POALACIN

Plaintiff,

-against-

MALL PROPERTIES, INC., KMO-361 REALTY ASSOCIATES, LLC, THE GAP, INC., JAMES HUNT CONSTRUCTION and WEATHER CHAMPIONS, LTD.

Defendants.

WEATHER CHAMPIONS, LTD.

Third-party Plaintiff,

-against-

APCO INSULATION CO INC.

Third-party Defendant.

MALL PROPERTIES, INC., KMO-361 REALTY ASSOCIATES, LLC, THE GAP, INC., JAMES HUNT CONSTRUCTION ,

Second Third-party Plaintiffs,

-against

HARLEYSVILLE INSURANCE

Second Third-party Defendant.

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Number: 700446/ 2012

Motion Date: 7/31/14 &
9/ 22/14

Motion Seq. Nos. 7, 8, 9

MALL PROPERTIES, INC., KMO-361 REALTY
ASSOCIATES, LLC, THE GAP, INC., JAMES HUNT
CONSTRUCTION ,

Third Third-party Plaintiffs,

-against

APCO INSULATION CO INC.

Third Third-party Defendant.

The following papers numbered 1 to 41 read on this motion by defendant/third-party plaintiff Weather Champions, LTD (Weather Champions) for summary judgment on its third-party causes of action for contractual indemnification and common-law indemnification against third-party defendant/third third-party defendant APCO Insulation Co., Inc. (APCO); and on this motion by defendants/second third-party plaintiffs/third third-party plaintiffs Mall Properties, Inc. (Mall Properties), KMO-361 Realty Associates LLC (KMO-361 Realty), The Gap, and James Hunt Construction for summary judgment dismissing plaintiff's claims under Labor Law §§ 240(1), 241(6), and 200 and common-law negligence and all cross claims asserted against them, for summary judgment on their cross claims for contractual indemnification and common-law indemnification and contribution against Weather Champions, for summary judgment on their second third-party claims against second third-party defendant Harleysville Insurance (Harleysville) and for an order declaring that Harleysville must defend and indemnify them, and for summary judgment on their third third-party claims for contractual indemnification and common-law indemnification and contribution against APCO; and on this motion by Harleysville for summary judgment dismissing the second third-party complaint against it and for an order declaring that Harleysville does not have a duty to defend and indemnify Mall Properties, KMO-361 Realty, and The Gap in the instant action and, if James Hunt Construction qualifies as an additional insured under the policy issued to Weather Champions, that the Harleysville insurance policies are excess over the insurance policy issued by The Netherlands Insurance Company to James Hunt Construction; and on this cross motion by APCO for leave to amend its answer to the third third-party complaint to deny the allegation in paragraph 10 that APCO was performing work pursuant to the Blanket Subcontractor Agreement.

	Papers <u>Numbered</u>
Notice of Motion - Affidavits - Exhibits	1 - 12
Notice of Cross Motion - Affidavits - Exhibits	13 - 16
Answering Affidavits - Exhibits	17 - 31
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Upon the foregoing papers it is ordered that the motions and cross motion are determined as follows:

Plaintiff was employed as a laborer for APCO, which was hired by Weather Champions to perform insulation work in the construction of a GAP store located at The Gate Mall in Manhasset, New York. The Gap, the lessee of the premises, hired James Hunt Construction to act as the general contractor on the project, which, in turn, subcontracted with Weather Champions to install the air conditioning system in the store. The subject property was owned by KMO-361 Realty and managed by Mall Properties. On November 26, 2011, plaintiff, while insulating ductwork hanging three feet below the ceiling in the basement of the store, was allegedly injured when he fell from a ladder as it shook. Plaintiff subsequently commenced this action against defendants under Labor Law § 240(1), 241(6), and 200 and common-law negligence. On November 6, 2012, Weather Champions brought a third-party action against APCO for common-law indemnification, contractual indemnification, contribution, and breach of contract to procure insurance. On June 28, 2013, Mall Properties, KMO-361 Realty, The GAP, and James Hunt Construction instituted a second third-party action against Harleysville seeking a declaratory judgment that Harleysville must defend and indemnify them. On October 29, 2013, Mall Properties, KMO-361 Realty, The GAP, and James Hunt Construction commenced a third third-party action against APCO alleging contractual indemnification, common-law indemnification, contribution, and breach of contract to procure insurance.

The court will first address that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment dismissing plaintiff's claim under Labor Law § 240(1) insofar as asserted against them. To prevail on a Labor Law § 240(1) cause of action, a plaintiff must demonstrate that there was a violation of the statute and that the violation was a proximate cause of the accident (*see Blake v Neighborhood Hous. Servs. of New York City, Inc.*, 1 NY3d 280 [2003]). Labor Law § 240(1) requires owners, contractors, and their agents to provide workers with appropriate safety devices to protect against "such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured" (*see Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501 [1993]). Liability under Labor Law §

240(1) does not attach when the plaintiff had adequate safety devices available; that the plaintiff knew that they were available and that he or she was expected to use them; that the plaintiff chose for no good reason not to do so; and that, if the plaintiff had not made that choice, he or she would not have been injured (*see Gallagher v New York Post*, 14 NY3d 83 [2010]; *Cahill v Triborough Bridge & Tunnel Auth.*, 4 NY3d 35 [2004]). In support of their motion, Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction assert that plaintiff's own negligent conduct in using a ladder which he knew to be defective instead of looking for another ladder at the job site, rather than any violation of Labor Law § 240(1), was the sole proximate cause of his accident. At his deposition, plaintiff testified that he knew that the subject ladder was unstable from the "first moment" he used it because the ladder was missing two of the four rubber feet as well as the first metal rung on the bottom of the ladder. Plaintiff also testified that he knew that there was a hydraulic ladder on the first floor of the work site, which his supervisor stated that plaintiff could use to perform the insulation work, but he did not get it after realizing that the subject ladder was unstable. In short, despite there being other adequate safety devices available for plaintiff's use at the work site, plaintiff's own negligent conduct - choosing to use a ladder he knew was unstable - was the sole proximate cause of his accident (*see e.g. Robinson v. East Med. Ctr., LP*, 6 NY3d 550 [2006]). In opposition, plaintiff failed to submit any evidence raising a triable issue of fact. Therefore, the branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment dismissing plaintiff's Labor Law § 240(1) claim insofar as asserted against them is granted.

To recover under Labor Law § 241(6), a plaintiff must establish the violation of an Industrial Code provision, which sets forth specific, applicable safety standards, in connection with construction, demolition, or excavation work (*see Ross*, 81 NY2d at 502-505). In his bill of particulars, plaintiff herein alleges violations of Industrial Code provisions 12 NYCRR 23-1.21, 23-1.15, 23-1.7, 23-1.16, 23-1.32, 23-2.1, and 23-5.

As a threshold matter, it is noted that, in opposing that branch of Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction's summary judgment motion for summary judgment dismissing plaintiff's Labor Law § 241(6) claim insofar as asserted against them, plaintiff has abandoned all Industrial Code provisions except 12 NYCRR 23-1.21(b)(3)(iv) and (b)(4)(ii). As such, the branch of Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction's summary judgment motion seeking dismissal of plaintiff's claim under Labor Law § 241(6) predicated on a violation of 12 NYCRR 23-1.15, 23-1.7, 23-1.16, 23-1.32, 23-2.1, and 23-5 is hereby granted.

Furthermore, Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction established their entitlement to judgment as a matter of law dismissing the Labor Law § 241(6) claim premised on a violation of 12 NYCRR 23-1.21(b)(3)(iv) and

(b)(4)(ii) by demonstrating, as previously discussed, that plaintiff's own negligent conduct in choosing to work on the subject ladder rather than using another ladder available at the work site was the sole proximate cause of his accident (*see Riffo-Veloza v Village of Scarsdale*, 68 AD3d 839 [2009]). In opposition, plaintiff failed to raise a triable issue of fact. Therefore, that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment dismissing plaintiff's claim under Labor Law § 241(6) predicated on a violation of 12 NYCRR 23-1.21(b)(3)(iv) and (b)(4)(ii) is also granted.

Turning to that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment dismissing the Labor Law § 200 and common-law negligence claims against them, said defendants established their entitlement to judgment as a matter of law. In opposition, plaintiff failed to raise a triable issue of fact. Where, as here, a claim arises out of alleged defects or dangers in the methods or materials of the work rather than the condition of the premises, recovery against the owner or general contractor cannot be had under the common law or Labor Law § 200 unless it is shown that the party to be charged had the authority to supervise or control the performance of the work (*see Cambizaca v New York City Tr. Auth.*, 57 AD3d 701 [2008]; *Ferrero v Best Modular Homes, Inc.*, 33 AD3d 847 [2006]). In this case, plaintiff's deposition testimony makes clear that Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction did not exercise any supervision or control over the method or manner of the injured plaintiff's insulation work (*see Lombardi v Stout*, 80 NY2d 290 [1992]; *Lofaso v J.P. Murphy Assoc.*, 37 AD3d 769 [2007]). Plaintiff testified at his deposition that his supervisor, Chris, was an employee of APCO and was the only person who gave plaintiff instructions concerning how to perform his work at the site.

In light of the dismissal of the main action against Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction, the cross claims by Weather Champions for contractual indemnification, common-law indemnification, and contribution asserted against them, the cross claims by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for contractual indemnification, common-law indemnification, and contribution asserted against Weather Champions, and the third third-party claims by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for contractual indemnification, common-law indemnification, and contribution against APCO are dismissed as academic (*see Hoover v IBM Corp.*, 35 AD3d 371 [2006]; *Cardozo v Mayflower Ctr., Inc.*, 16 AD3d 536 [2005]).

Notwithstanding dismissal of the complaint against Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction, the cross claim by Weather Champions for breach of contract to procure insurance is not rendered academic (*see Natarus v Corp. Prop.*

Investors, Inc., 13 AD3d 500 [2004]). Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction established, without contradiction, that there was no contract requiring them to procure insurance for Weather Champions (*see Morales v 569 Myrtle Ave., LLC*, 17 AD3d 418 [2005]). As such, that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment dismissing Weather Champions' cross claim for breach of contract to procure insurance against them is granted.

The court will now address that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment on their second third-party claim for a declaration that Harleystown is obligated to defend and indemnify them in the instant action and the motion by Harleystown for summary judgment dismissing the second third-party complaint against it and for a declaration that it is not obligated to defend and indemnify Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction. Inasmuch as the main action has been dismissed against Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction, that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction with respect to Harleystown's duty to indemnify them is denied, and that branch of Harleystown's motion seeking a declaration that it does not have a duty to indemnify Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction is granted.

An insurer's obligation to defend, however, is broader than its obligation to indemnify (*see Seaboard Sur. Co. v Gillette Co.*, 64 NY2d 304, 310 [1984]). In support of its motion and in opposition to the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction, Harleystown contends that it has no duty to defend Mall Properties, KMO-361 Realty, and The Gap because they are not additional insureds under its insurance policies issued to Weather Champions. In opposition to Harleystown's motion and in support of their separate motion, Mall Properties, KMO-361 Realty, and The Gap assert that Harleystown has a duty to defend them because Harleystown's letter dated March 26, 2012 denied coverage to Mall Properties, KMO-361 Realty, and The Gap solely on the grounds that it did not have enough information to determine if James Hunt Construction was actively negligent in the happening of plaintiff's accident and, therefore, Harleystown is now precluded from raising an additional defense to coverage (i.e., that Mall Properties, KMO-361 Realty, and The Gap are not additional insureds). It is well-established that the party claiming insurance coverage bears the burden of proving entitlement, and a party that is not named an insured or an additional insured on the face of the policy is not entitled to coverage (*see New York State Thruway Auth. v Ketco, Inc.*, 119 AD3d 659 [2014]; *York Restoration Corp. v Solty's Constr., Inc.*, 79 AD3d 861 [2010]). The contract between James Hunt Construction and Weather Champions, Harleystown's insured, requires Weather Champions to procure general liability coverage and excess/umbrella coverage and "The Contractor shall

be named as an additional insured under the general liability and excess/umbrella liability policies.” In addition, the Harleysville general liability insurance policy issued to Weather Champions provides that an insured is “any person or organization for whom you are performing operations only as specified under a written contract . . . that requires that such person or organization be added as an additional insured on your policy.” Read together, these documents demonstrate that only James Hunt Construction was required to be named as an additional insured and that Mall Properties, KMO-361 Realty, and The Gap are not additional insureds under the Harleysville insurance policies issued to Weather Champions. Moreover, Mall Properties, KMO-361 Realty, and The Gap’s contention that Harleysville is precluded from denying coverage to Mall Properties, KMO-361 Realty, and The Gap on the ground that they are not additional insureds is unavailing because the defense and indemnification of Mall Properties, KMO-361 Realty, and The Gap was never tendered to Harleysville. In any event, where, as here, a claim is denied because the claimant is not an insured under an insurance policy, a disclaimer pursuant to Insurance Law § 3420(d) is not required (*see State Farm Fire & Cas. Co. v Raabe*, 100 AD3d 738 [2012]; *York*, 79 AD3d at 863). Based on the foregoing, Harleysville is entitled to a declaration that it does not have an obligation to defend and indemnify Mall Properties, KMO-361 Realty, and The Gap in this action.

While Harleysville does not dispute that James Hunt Construction qualifies as an additional insured under its insurance policies issued to Weather Champions, it contends that it does not have a duty to defend James Hunt Construction because those policies are excess over James Hunt Construction’s own insurance policy issued to it by The Netherlands Insurance Company. Paragraph D of the Harleysville commercial general liability insurance policy issued to Weather Champions states,

“Any coverage provided by this endorsement to an additional insured shall be excess over any other valid and collectible insurance available to the additional insured whether primary, excess, contingent or on any other basis unless the “written contract” specifically requires that this insurance be primary and that the additional insured’s primary coverage be non-contributory.”

Although the contract between James Hunt Construction and Weather Champions does not expressly state that the additional insured coverage provided to James Hunt Construction under the Harleysville general liability policy is primary, it has been held that coverage for an additional insured is primary coverage unless unambiguously stated otherwise (*see Pecker Iron Works of N.Y., Inc. v Traveler’s Ins. Co.*, 290 AD2d 426 [2002] *affirmed* 99 NY2d 391 [2003]). As such, the court concludes that Harleysville is obligated to provide primary coverage to James Hunt Construction as an additional insured under its policy issued to

Weather Champions and, therefore, has a duty to defend James Hunt Construction in this action.

APCO's cross motion for leave to amend its answer to the third third-party complaint in order to deny the allegation that it was performing work on the subject construction project pursuant to the Blanket Subcontractor's Agreement between Weather Champions and APCO dated May 12, 2011 is granted. Leave to amend a pleading should be freely granted, absent prejudice or surprise resulting from the delay (CPLR 3025[b]). In this case, the note of issue has been vacated. In addition, Weather Champions and Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction failed to show prejudice or surprise by the amendment given that the underlying facts remain the same. Furthermore, it cannot be said that the proposed amendment is palpably insufficient as a matter of law. As such, the court hereby deems the amended answer containing a denial to the allegations in paragraph 10 of the third third-party complaint, which was submitted in support of APCO's cross motion, served and filed nunc pro tunc.

Next, the court will turn to Weather Champions' motion which was, in effect, for conditional summary judgment on its third-party causes of action for contractual indemnification and common-law indemnification against APCO. A court may render a conditional judgment on the issue of indemnity pending determination of the primary action so that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed (*see State v Travelers Prop. Cas. Ins. Co.*, 280 AD2d 756, 757 [2001]). The right to contractual indemnification depends upon the specific language of the contract (*see George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2008]). The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances (*id.*). In support of its summary judgment motion, Weather Champions asserts that the Blanket Subcontractor Agreement between Weather Champions and APCO dated May 12, 2011 was in effect at the time of plaintiff's accident and was applicable to the insulation work performed by APCO at the subject construction project. In opposition, APCO argues that there was no enforceable written agreement between Weather Champions and APCO in effect at the time of the accident requiring APCO to indemnify Weather Champions. The first paragraph of the Blanket Subcontractor Agreement states "All Contracts, Purchase Orders, Job Orders, etc., verbal or written, hereinafter accepted by you shall be presumed accepted subject to all terms and conditions of this Blanket Agreement." Thus, the plain language of the contract makes clear that it was intended to apply to all jobs for which Weather Champions hired APCO as a subcontractor, including the subject construction project. Therefore, based on the a careful reading of the contract, there was a binding indemnification agreement between Weather

Champions and APCO in effect on the date of the accident (*see e.g. Rodrigues v N & S Bldg. Contrs., Inc.*, 5 NY3d 427 [2005]).

Inasmuch as this court has found that there was an enforceable written indemnification agreement between Weather Champions and APCO at the time of plaintiff's accident, paragraph 6 of the Blanket Subcontractor Agreement provides,

“The Subonctractor shall indemnify and hold harmless Weather Champions, Ltd. and their agents and employees, for all claims, damages, losses and expenses, including attorney's fees, arising out of the Work, provided that any such claim, damage, loss or expense is . . . caused in whole or part by any negligent act or omission of the Subcontractor, and Subcontractors of the Subcontractor directly or indirectly employed by any of them or anyone for whose acts any of them may be liable, excluding, however, the sole negligence of the parties indemnified hereunder.”

As previously discussed, plaintiff's own negligent conduct in choosing to work on a defective ladder rather than using another ladder available at the work site was the sole proximate cause of his accident. Therefore, that branch of Weather Champions' motion for summary judgment on its third-party cause of action for contractual indemnification against APCO is denied.

That branch of Weather Champions' motion which was, in effect, for conditional summary judgment on its third-party cause of action for common-law indemnification against APCO is also denied. To establish a claim for common-law indemnification, the party seeking indemnity must prove that it was not negligent and that the proposed indemnitor was guilty of some negligence that contributed to the accident or, in the absence of any negligence, had the authority to direct, supervise, and control the work giving rise to the injury (*see Benedetto v Carrera Realty Corp.*, 32 AD3d 874 [2006]). Here, it has been found that plaintiff's negligent conduct in using a ladder which he knew to be defective instead of looking for another adequate ladder available at the job site was the sole proximate cause of the accident. Furthermore, Weather Champions failed to submit any competent medical evidence demonstrating whether plaintiff sustained a “grave injury” as defined in Workers' Compensation Law § 11 (*see generally Giglio v St. Joseph Intercommunity Hosp.*, 309 AD2d 1266 [2003]; *Way v Grantling*, 289 AD2d 790 [2001]).

Accordingly, Weather Champions' motion for summary judgment on its third-party causes of action for contractual indemnification and common-law indemnification against APCO is denied. Those branches of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment dismissing plaintiff's claims under

Labor Law §§ 240(1), 241(6), and 200 and common-law negligence and all cross claims insofar as asserted against them are granted. In addition, that branch of the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction for summary judgment on their second third-party complaint against Harleystville and for an order declaring that Harleystville is obligated to defend and indemnify them is granted only to the extent that this court finds and declares that Harleystville has a duty to defend James Hunt Construction in this action. In all other respects, the motion by Mall Properties, KMO-361 Realty, The Gap, and James Hunt Construction is denied. The motion by Harleystville for summary judgment dismissing the second third-party complaint against it is granted only to the extent that this court finds and declares that Harleystville does not have a duty to defend and indemnify Mall Properties, KMO-361 Realty, and The Gap in the instant action. In addition, Harleystville does not have an obligation to indemnify James Hunt Construction in the action. It is further declared that the Harleystville general liability insurance policy issued to Weather Champions is not excess over the insurance policy issued by Netherlands Insurance Company to James Hunt Construction and, therefore, Harleystville has a duty to defend James Hunt Construction as an additional insured in this action. APCO's cross motion for leave to amend its answer to the third third-party complaint is granted.

Dated: January 23, 2015

J.S.C.