

Schlenk v Plaza-Realty Co.

2015 NY Slip Op 30322(U)

March 2, 2015

Supreme Court, Suffolk County

Docket Number: 11-15703

Judge: James C. Hudson

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**Supreme Court, State of New York
Suffolk County-J.A.S. Part XL**

PRESENT:

HON. JAMES HUDSON
Acting Justice of the Supreme Court

MOTION DATE 5-23-14 (#001)
MOTION DATE 9-4-14 (#002)
MOTION DATE 9-17-14 (#003)
ADJ. DATE 10-22-14
Mot. Seq. # 001 - MD
002 - MotD
003 - MotD

X-----X
THOMAS SCHLENK,

Plaintiff,

- against -

PLAZA-REALTY CO., COMMACK LLC, and
INVISION.COM INC.,

Defendants.
-----X

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Upon the following papers numbered 1 to 51 read on these motions for summary judgment; Notice of Motion/ Order to Show Cause and supporting papers 1-15, 16-27, 28-33; Notice of Cross Motion and supporting papers _____; Answering Affidavits and supporting papers 34-38, 39-40, 41-42; Replying Affidavits and supporting papers 43-45, 46-47, 48-49, 50-51; Other _____; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that the motion (001) by plaintiff Thomas Schlenk, the motion (002) by defendant Plaza-Realty Co-Commack, LLC, and the motion (003) by defendant Invision.com, Inc., are consolidated for the purpose of this determination; and it is

ORDERED that the motion by plaintiff for partial summary judgment on his Labor Law § 240 (1) claim is denied; and it is

ORDERED that the motion by defendant Plaza-Realty Co-Commack, 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 motion by defendant Invision.com, Inc., for, inter alia, summary judgment dismissing the complaint and all cross claims against it is granted to the extent indicated herein and is otherwise denied.

Plaintiff Thomas Schlenk commenced this action to recover damages for personal injuries allegedly sustained on December 28, 2010, when he fell from a ladder while performing repairs on the HVAC system of an office building owned by defendant Plaza-Realty Co-Commack, LLC (“Plaza”). Defendant Invision.com, Inc. (“Invision”), was the tenant of the office building which contracted for the work that led to plaintiff’s fall. The accident allegedly happened while plaintiff was climbing to the roof of the building via an extension ladder which was 32 feet in length. Plaintiff had climbed approximately 25 feet up the ladder when it allegedly moved from beneath him, causing him to fall to the ground and injure his left leg. At the time of the alleged accident, plaintiff was employed by nonparty Best Climate Control. By way of an amended complaint, plaintiff alleges causes of action against defendants for common law negligence and for violations of Labor Law §§ 200, 240 (1), and 241 (6).

Plaintiff now moves for summary judgment on the issue of liability on his Labor Law § 240 (1) claim. Plaintiff asserts that he is entitled to summary judgment as a matter of law since it is undisputed that defendant failed to provide him with a secured ladder and other safety devices designed to avoid the accident. Plaza opposes the motion and moves for summary judgment dismissing the complaint against it, arguing, inter alia, that it cannot be held liable for plaintiff’s injuries, as it was an out-of-possession landlord at the time of the accident, and that plaintiff was engaged in routine maintenance when he fell from the ladder. Alternatively, Plaza seeks conditional summary judgment on its cross claim against Invision for contractual indemnification.

Invision opposes the branch of Plaza’s motion seeking conditional judgment on its contractual indemnification cross claim, arguing that the indemnification provision of its lease agreement with Plaza is unenforceable. Alternatively, it argues that enforcement of such provision would be premature. Invision also moves for summary judgment dismissing the complaint against it, adopting arguments similar to those set forth in Plaza’s moving papers. Plaintiff opposes only those branches of defendants’ motions for judgment dismissing his Labor Law § 240 (1) claim, arguing that his work on defendants’ inoperable air conditioning unit constituted repairs rather than mere maintenance, and that defendants’ failure to provide him with any safety devices other than an unsecured ladder to perform his work was a violation of the statute.

Initially, the Court notes that by failing to address the branches of defendants’ motions for summary judgment dismissing the causes of action based on common law negligence and violation of Labor Law §§ 200 and 241 (6), plaintiff is deemed to have abandoned those claims (*see*

Rodriguez v Dormitory Auth. of the State of N.Y., 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Kronick v L.P. Thebault Co., Inc.*, 70 AD3d 648, 892 NYS2d 895 [2d Dept 2010]; *Cardenas v One State St., LLC*, 68 AD3d 436, 890 NYS2d 41 [1st Dept 2009]; *Genovese v Gambino*, 309 AD2d 832, 833, 766 NYS2d 213 [2d Dept 2003]). Therefore, the branches of defendants' motions seeking summary judgment dismissing plaintiffs' claims under the common law and Labor Law §§ 200 and 241 (6) are granted.

As to the remaining branch of plaintiff's motion, Labor Law § 240 (1) imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards such as falling from a scaffold or ladder (*see Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 634 NYS2d 35 [1995]; *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). Labor Law § 240 (1) applies to both lessees who contracted for the work (*see Copertino v Ward*, 100 AD2d 565, 473 NYS2d 494 [1984]), and to owners of the subject property, regardless of whether such owners were parties to the contract, had notice of its performance, or obtained a benefit from such work (*see Sanatass v Consolidated Investing Co., Inc.*, 10 NY3d 333, 858 NYS2d 67 [2008]; *Coleman v City of New York*, 91 NY2d 821, 666 NYS2d 553 [1997]).

The reach of Labor Law § 240 (1) extends only to injuries sustained while performing tasks "during the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (*Martinez v City of New York*, 93 NY2d 322, 326, 690 NYS2d 524 [1999]). However, "it is not necessary that an employee be actually working on his [or her] assigned duties at the time of the injury" (*Reeves v Red Wing Co.*, 139 AD2d 935, 936, 527 NYS2d 916 [1988]; *see Boncore v Temple Beth Zion*, 299 AD2d 953, 954, 751 NYS2d 337 [2002]), so long as the task he or she was engaged in at the time of the accident was "necessary and incidental" to the work the employee was hired to perform (*see Gowans v Otis Marshall Farms, Inc.*, 85 AD3d 1704, 1075, 925 NYS2d 783 [4th Dept 2014]; *Bagshaw v Network Serv. Mgmt.*, 4 AD3d 831, 772 NYS2d 161 [4th Dept 2004]). Nevertheless, not every fall from a ladder or scaffold establishes that "proper protection was not provided, and the issue of whether a particular safety device provided proper protection is generally a question of fact for the jury" (*Alava v City of New York*, 246 AD2d 614, 615, 668 NYS2d 624 [1998]; *Degen v Uniondale Union Free Sch. Dist.*, 114 AD3d 822, 980 NYS2d 790 [2d Dept 2014]). Moreover, to prevail on a claim pursuant to Labor Law § 240 (1), a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries (*see Bland v Manocherian*, 66 NY2d 452, 497 NYS2d 880 [1985]; *Sprague v Peckham Materials Corp.*, 240 AD2d 392, 658 NYS2d 97 [2d Dept 1997]).

Although plaintiff demonstrated that he was engaged in a covered activity when he fell from the ladder (*see Gowans v Otis Marshall Farms, Inc.*, *supra*; *Pakenham v Westmere Realty, LLC*, 58 AD3d 986, 871 NYS2d 456 [3d Dept 2009]; *Bagshaw v Network Serv. Mgmt.*, *supra*), he failed to establish, prima facie, that a breach of the statute was a proximate cause of his injuries (*see Karanikolas v Elias Taverna, LLC*, 120 AD3d 552, 992 NYS2d 31 [2d Dept 2014]; *Degen v Uniondale Union Free Sch. Dist.*, 114 AD3d 822, 980 NYS2d 790 [2d Dept 2014]; *Chacha v Glickenhauz Doynow Sutton Farm Dev., LLC*, 69 AD3d 896, 894 NYS2d 480 [2d Dept 2010]; *Pakenham v Westmere Realty, LLC*, *supra*; *Zeitner v Herbmax Sharon Assocs.*, 194 AD2d 414, 599 NYS2d 234 [1st Dept 1993]). Significantly, plaintiff testified that a gust of wind, rather than

a defect with the ladder or lack of any safety device, caused the ladder to fall to the ground (*see Chacha v Glickenhau Doynow Sutton Farm Dev., LLC, supra; Zeitner v Herbmax Sharon Assocs., supra; Mack v Altmans Stage Lighting Co.*, 98 AD2d 468, 470 NYS2d 664 [2d Dept 1984]). Indeed, plaintiff testified that he had previously used the same ladder to safely access defendants' roof on a prior occasion, and that he had been provided with bungee cord, which he planned to use to secure the ladder to the roof of the building once he climbed to the top, in his pocket at the time of the accident.

Having determined that a triable issue exists as to whether defendants' alleged violation of Labor Law § 240 (1) was a proximate cause of plaintiff's accident, the branches of defendants' motions for summary judgment dismissing such claim are denied (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]).

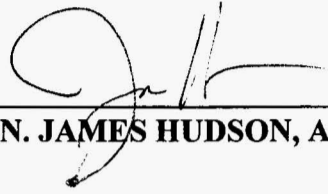
Turning to the branch of Plaza's motion for conditional summary judgment on its contractual indemnification claim over and against Invision, the lease agreement between Plaza and Invision states, in relevant part, as follows:

The Landlord shall not be responsible for the loss of or damage to property, or injury to persons, occurring in or about the demised premises, by reason of any existing or future condition, defect, matter or thing in said demised premises or the property of which the premises are a part, or for the acts, omissions or negligence of other persons or tenants in and about said property. The Tenant agrees to indemnify and save the Landlord harmless from all claims and liability for losses of or damage to property, or injuries to persons occurring in or about the demised premises

"The right to contractual indemnification depends upon the specific language of the contract" (*Roldan v New York Univ.*, 81 AD3d 625, 628, 916 NYS2d 162 [2d Dept 2011]). Although indemnification clauses which fail to include the necessary savings language to prevent a party from indemnifying itself against its own negligence may be held void and unenforceable (*see Itri Brick & Concrete Corp. v Aetna Cas. & Sur. Co.*, 89 NY2d 786, 795, 658 NYS2d 903 [1997]), even clauses which fail to include such language may be enforced where the party to be indemnified is found to be free of any negligence (*see Brown v Two Exch. Plaza Partners*, 76 NY2d 172, 179, 556 NYS2d 991 [1990]; *Collins v Switzer Constr. Group, Inc.*, 69 AD3d 407, 408, 892 NYS2d 94 [1st Dept 2010]). Thus, "[a] party who has been held liable to an injured worker solely on the basis of the statutory liability imposed by section 240 (1), without any fault on its part, is entitled to recover under a contract of indemnity" (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 64, 693 NYS2d 596 [1st Dept 1999]; *see Brown v Two Exch. Plaza Partners, supra; Lazzaro v MJM Indus.*, 288 AD2d 440, 733 NYS2d 500 [2d Dept 2001]). Furthermore, "[a] court may render a conditional judgment on the issue of contractual indemnity pending determination of the primary action in order that the indemnitee may obtain the earliest possible determination as to the extent to which he or she may expect to be reimbursed" (*see George v Marshalls of MA, Inc.*, 61 AD3d 931, 932, 878 NYS2d 164 [2d Dept 2009]; *O'Brien v Key Bank*, 223 AD2d 830, 831, 636 NYS2d 182 [3d Dept 1996]).

Here, inasmuch as plaintiff's claims under the common law and Labor Law §§ 200 and 241 (6) have been dismissed, and Plaza's remaining liability under Labor Law § 240 (1), if any, is statutory, it is entitled to conditional summary judgment on its cross claim for contractual indemnification over and against Invision (see *Bermejo v New York City Health & Hosps. Corp.*, 119 AD3d 500, 989 NYS2d 490 [2d Dept 2014]; *Mathews v Bank of Am.*, 107 AD3d 495, 968 NYS2d 15 [1st Dept 2013]; *Mouta v Essex Mkt. Dev. LLC*, 106 AD3d 549, 966 NYS2d 13 [1st Dept 2013]; *Correia v Professional Data Mgt.*, *supra*). In opposition, Invision failed to raise any triable issues warranting denial of the motion. Accordingly, the court grants the branch of Plaza's motion for conditional summary judgment on its cross claim for contractual indemnification against Invision.

DATED: MARCH 2, 2015



HON. JAMES HUDSON, A.J.S.C.

____ FINAL DISPOSITION X NON-FINAL DISPOSITION