Kolenovic v 56th Realty, LLC
2015 NY Slip Op 30327(U)
March 10, 2015
Supreme Court, New York County
Docket Number: 153177/12
Judge: Joan M. Kenney

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 8

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DZEVAT KOLENOVIC,

Plaintiff,

-against-

Index No. 153177/12

56TH REALITY, LLC, THE MANHATTAN ART & ANTIQUES CENTER, and GLENWOOD MANAGEMENT CORP.,

Defendants.

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Joan Kenney, J.:

This action arises from an accident that occurred on September 30, 2010, at premises located at 300 East 56th Street, also known as 1050 2nd Avenue, in Manhattan (the building).

Plaintiff moves, pursuant to CPLR 3212, for summary judgment on the issue of defendants' liability under Labor Law § 240 (1). Defendants The Manhattan Art & Antiques Center (the MAAC) and Glenwood Management Corp. (Glenwood)[1] cross-move, (1) pursuant to CPLR 3025, for leave to amend their answer to assert the affirmative defense of the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6), and (2) pursuant to CPLR 3212, for summary judgment in their favor dismissing the complaint, and/or pursuant to CPLR 3211, for dismissal of the complaint.

BACKGROUND

[1]This court granted defendant 56th Realty, LLC's motion for summary judgment dismissing the complaint as against it on July 15, 2013. 56th Realty, LLC is no longer a party in this action.

At the time of his accident, plaintiff was a maintenance worker/handyman assigned to find and fix a leak in the roof over Gallery 39 of the MAAC located in the building. The leak was caused by a heavy rain that fell the night before. In order to access the roof, plaintiff had to climb a metal ladder affixed to the outside of the building, and use that same ladder to descend from the roof. Plaintiff contends that, while he was descending the ladder, he fell and was injured. According to plaintiff, he fell because (1) the ladder shook; (2) the ladder was wet; (3) it was raining and windy; and (4) there was not enough room between the rungs of the ladder and the wall for him to place his feet.

THE PLEADINGS

Plaintiff's complaint alleges two causes of action, common-law negligence and violations of Labor Law §§ 200, 240 (1) and 241 (6). Glenwood's answer[2] asserts one cross claim against the MAAC and 56th Realty, LLC (56th) for contribution or common-law indemnity, and a cross claim against 56th alone for contractual indemnification.

DISCUSSION

Amendment of Defendants' Answer

[2]Although the MAAC was served with the complaint and the amended complaint, it has not answered, and its time to do so elapsed long ago. The answer now before the court was made solely by Glenwood.

Defendants seek to amend Glenwood's answer in order to assert affirmative defenses based on the exclusivity provisions of Workers' Compensation Law §§ 11 and 29 (6), which are based on the alleged alter ego relationship between Glenwood and 56th, and the fact that 56th was plaintiff's employer. Plaintiff urges the court to deny this post-note of issue amendment because he would be surprised and prejudiced.

CPLR 3025 (b)

CPLR 3025 (b) provides, in relevant part, that "[a] party may amend his or her pleading . . . at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just . . ."

> "Leave to amend a pleading should be freely given (*see* CPLR 3025 [b]), provided the amendment is not palpably insufficient, does not prejudice or surprise the opposing party, and is not patently devoid of merit. A determination whether to grant such leave is within the Supreme Court's broad discretion, and the exercise of that discretion will not be lightly disturbed [internal quotation marks and citations omitted]"

(*Douglas Elliman, LLC v Bergere*, 98 AD3d 642, 643 [2d Dept 2012]; *see also Bonavita v McNicholas*, 72 AD3d 859, 859 [2d Dept 2010] [leave to amend answer to assert defense that action is barred by Workers' Compensation Law granted because proposed amendment would not cause prejudice or surprise, and was not palpably insufficient or patently devoid of merit]).

Alter Egos

In its answer, Glenwood "admits it was the rental and sales agent for 56th Realty but denies it otherwise managed the premises and specifically denies it was involved with, or had the authority to, maintain, repair or improve the premises and it further had no authority over workers hired in that regard" (Glenwood Answer, ¶ 4).

Lisa Guida (Guida), a management representative for Glenwood, attests that the building was owned by 56th and managed by Glenwood (Guida aff, ¶ 2). In September of 2010, Glenwood had an on-site manager, Toni Todres, a Glenwood employee, who would assign repair work to 56th's handymen and porters (*id.*, ¶ 5). Glenwood also had a management supervisor in the building who would direct 56th's handymen and porters (*id.*, ¶ 6; *but see* Plaintiff's tr at 24: Sal Hot, an employee of 56th, supervised all 56th employees in the building; Sal Hot was employed by 56th, and his duties extended throughout the entire building, including the MAAC [Guida tr at 27-28, 29]).

Defendants contend that Glenwood and 56th were alter egos of each other. As such, if plaintiff cannot bring an action against 56th on the basis of Workers' Compensation Law §§ 11 and 29 (6), such an action is also barred against Glenwood.

"A defendant may establish itself as the alter ego of a plaintiff's employer by demonstrating that one of the entities controls the other or that the two operate as a single integrated

entity" (*Batts v IBEX Constr., LLC*, 112 AD3d 765, 766 [2d Dept 2013], citing *Quizhpe v Luvin Constr. Corp.*, 103 AD3d 618, 619 [2d Dept 2013]). "[A] mere showing that the entities are related is insufficient where a defendant cannot demonstrate that one of the entities controls the day-to-day operations of the other" (*Batts*, 112 AD3d at 767; *see also Zhiwei Mao v Krantz & Levinson Realty Corp.*, 117 AD3d 944, 945 [2d Dept 2014]).

In her deposition testimony, Guida attested that Glenwood manages about 25 buildings and that each "is a separate ownership entity. There are common principals from Glenwood Management on each of those ownership entities, so those are the only properties that Glenwood manages" (Guida tr at 12; *see also id.* at 13: "Some of the upper management people at Glenwood Management are also involved with 56th Realty"). She testified that she knew no principal or owner of 56th, and that she only "probably" knew a contact person at 56th (*id.* at 13). When asked what her day-to-day responsibilities were with respect to the building, she responded, "I deal with all of the properties that Glenwood manages. So, day-to-day, not technically, but all of the buildings fall under my umbrella of responsibility" (*id.* at 15). Her responsibility consists of "legal matters or potential legal matters going on in any given building" (*ibid.*).

According to Guida, Glenwood employed a management supervisor who would "oversee the operation of several buildings.

So, it's not -- this particular building is not his only building of responsibility" (*id.* at 19). Glenwood's management supervisor for the building in May of 2010 was Eugene Wetzel (Wetzel tr at 16), but in September of 2010, Mel Farrell was Glenwood's management supervisor[3] (*id.* at 15). Wetzel described his duties as Glenwood's management supervisor as "[o]verseeing the operations of the buildings, coordinating with the [sic] and advising the operations of the buildings, tenant relations" (*id.* at 14). When asked, "[a]nd did any of your day-to-day duties require you to make regular visits to the properties you oversee?", he responded, "[n]ot regularly, no" (*ibid.*).

Glenwood's on-site manager in September of 2010 was Toni Todres[4] (Guida tr at 17). On the day-to-day basis, her job was "to deal with tenant issues, repair complaints and assigning, filling out work orders, assigning the appropriate person to address that repair, scheduling of employees, doing payroll records, supervising move-ins, move-outs, primarily tenant-related issues" (*id.* at 20).

With respect to payroll obligations, Glenwood "collects the time cards, tabulates whatever it has to tabulate and sends it off to an outside payroll company who then issues the check on behalf of 56 Realty" (*id.* at 51).

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[3]No testimony of Mel Farrell is before the court.

[4]No testimony of Toni Todres is before the court.

Amanda Broomer (Broomer) was Glenwood's manager for the MAAC (*id.* at 21). On a day-to-day basis, "[s]he manages the properties. She collects the rents. She enters into leases with the tenants at that building, the gallery tenants at that building" (*id.* at 26).

In her affidavit, Guida attests that 56th and Glenwood are "closely related companies" and that Carol Pittleman (Pittleman) is the managing partner of 56th and president of Glenwood (Guida aff, ¶ 3). According to Guida, Pittleman also "maintains a principal ownership interest in both companies" (*ibid.*). Guida states that "56th Realty LLC and Glenwood Management Corp. share an office at 1200 Union Turnpike, New Hyde Park, New York 11040. Glenwood Management also managed the payroll of 56th Realty LLC's employees who worked" in the building (*id.*, ¶ 4). "Additionally, in September 2010, Glenwood Management Corp. maintained a liability insurance policy with OneBeacon Insurance. . . . 56th Realty LLC was a named insured on that policy" (*ibid.*). According to Guida, Glenwood's "management supervisor also had the authority to fire employees of 56th Realty LLC" (*id.*, ¶ 6).

In the Management Agreement between 56th and Glenwood, Glenwood agreed "on behalf of Owner to supervise the work of [56th's] employees, *other than repairs and maintenance* [emphasis added]" (Management Agreement, Article II (g). Thus, 56th, not

Glenwood, was responsible for supervising plaintiff's repair or maintenance work. With respect to plaintiff's assignment on the day of his accident, 56th's superintendent, Sal Hot, told plaintiff to go to the roof and see if he could repair the leak (Plaintiff's aff, ¶ 2).

The evidence before the court discloses that 56th and Glenwood were not alter egos. There is no evidence that "one of the entities controls the other or that the two operate as a single integrated entity" (*Batts*, 112 AD3d at 766). Rather, the evidence demonstrates that Glenwood performed duties that are appropriate to management. There is no evidence that either 56th or Glenwood controlled the other, or that they operated as one entity. Thus, amendment of the answer based on a defense that 56th and Glenwood are alter egos must be denied.

Workers' Compensation Law § 11

Section 11 of the Workers' Compensation Law prohibits most third-party claims for contribution or common-law indemnification brought by an employee against his or her employer (*see e.g. Echevarria v 158th St. Riverside Dr. Hous. Co., Inc.*, 113 AD3d 500, 502 [1st Dept 2014]). Although the parties contend that there is an issue of fact concerning the identity of plaintiff's employer, that issue has already been decided by this court's July 15, 2013 Order:

> "ORDERED that defendant, 56th Realty, LLC's cross motion to dismiss, pursuant to Section

> 11 and 29 (6) of the New York Workers' Compensation Law, on grounds that this action is barred as cross movant was plaintiff's employer, is granted"

(July 15, 2013 Order, second decretal paragraph). That determination is law of the case, and the question of the identity of plaintiff's employer need not be discussed further (*concerning the doctrine of law of the case, see e.g. Chanice v Federal Express Corp.*, 118 AD3d 634, 635 [1st Dept 2014]).

Because Glenwood was not an alter ego of 56th, amendment of the answer on the basis of Workers' Compensation Law § 11 is denied.

Workers' Compensation Law § 29 (6)

Pursuant to this provision of the Workers' Compensation Law:

> "6. The right to compensation or benefits under this chapter, shall be the exclusive remedy to an employee . . . when such employee is injured or killed by the negligence or wrong of another in the same employ . . . The limitation of liability of an employer set forth in section eleven of this article for the injury or death of an employee shall be applicable to another in the same employ . . ."

Defendants assert that this section applies here because Glenwood was the alter ego of 56th. This does not avail them for two reasons. First, Glenwood was not the alter ego of 56th. Second, there is no allegation or proof that plaintiff was injured as the result of any negligence or wrong on the part of a

Glenwood worker "in the same employ."

Thus, amendment of Glenwood's answer is denied. The proposed amendment based on Workers' Compensation Law and the alleged status of Glenwood as an alter ego of 56th is palpably insufficient and without merit.

The Standard for Summary Judgment

> "Since summary judgment is the equivalent of a trial, it has been a cornerstone of New York jurisprudence that the proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law. Once this requirement is met, the burden then shifts to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact that precludes summary judgment and requires a trial [citations omitted]"

(*Ostrov v Rozbruch*, 91 AD3d 147, 152 [1st Dept 2012]). The court must determine whether that standard has been met based "on the evidence before the court and drawing all reasonable inferences in plaintiff's favor" (*Melman v Montefiore Med. Ctr.*, 98 AD3d 107, 137-138 [1st Dept 2012]).

Plaintiff's Motion and Defendants' Cross Motion for Summary Judgment on the Labor Law § 240 (1) Cause of Action

Labor Law § 240 (1) provides, in pertinent part:

> "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, ladders, slings, hangers,

> blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed."

"Labor Law § 240 (1) . . . evinces a clear legislative intent to provide exceptional protection for workers against the special hazards that arise when the work site either is itself elevated or is positioned below the level where materials or load [are] hoisted or secured [internal quotation marks and citations omitted]" (*Harris v City of New York*, 83 AD3d 104, 108 [1st Dept 2011]). "The statute imposes absolute liability on building owners and contractors whose failure to 'provide proper protection to workers employed on a construction site' proximately causes injury to a worker" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011], quoting *Misseritti v Mark IV Constr. Co.*, 86 NY2d 487, 490 [1995]). "To establish liability under Labor Law § 240 (1), a plaintiff must demonstrate both that the statute was violated and that the violation was a proximate cause of injury; the mere occurrence of an accident does not establish a statutory violation" (*DeRosa v Bovis Lend Lease LMB, Inc.*, 96 AD3d 652, 659 [1st Dept 2012]). When considering a section 240 (1) claim, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch., Inc.*, 13 NY3d 599,

603 [2009]).

The Issue of Whether Plaintiff was Engaged in Routine Maintenance or Repair Work

Section 240 (1) of the Labor Law does not apply to "routine maintenance that is not performed in the context of construction or renovation. Replacement of parts that routinely wear out is considered maintenance, outside the purview of this section. Where something has gone awry, however, requiring repair, section 240 (1) is applicable [internal citation omitted]" (*Parente v 277 Park Ave. LLC*, 63 AD3d 613, 614 [1st Dept 2009]).

> "Essentially, routine maintenance for purposes of [Labor Law § 240 (1)] is work that does not rise to the level of an enumerated term such as repairing or altering. In distinguishing between what constitutes repair as opposed to routine maintenance, courts will consider such factors as whether the work in question was occasioned by an isolated event as opposed to a recurring condition; whether the object being replaced was a worn-out component in something that was otherwise operable; and whether the device or component that was being fixed or replaced was intended to have a limited life span or to require periodic adjustment or replacement [internal quotation marks and citations omitted]"

(*Soriano v St. Mary's Indian Orthodox Church of Rockland, Inc.*, 118 AD3d 524, 526-527 [1st Dept 2014]). "Whether a particular activity constitutes a repair or routine maintenance must be decided on a case-by-case basis, depending on the context of the work. A factor to be taken into consideration is whether the

work in question was occasioned by an isolated event as opposed to a recurring condition" (*Dos Santos v Consolidated Edison of N.Y., Inc.*, 104 AD3d 606, 607 [1st Dept 2013]). When "it cannot be determined as a matter of law whether plaintiff was engaged in routine maintenance or a repair covered under Labor Law § 240 (1) when he was injured" (*Montalvo v New York & Presbyt. Hosp.*, 82 AD3d 580, 581 [1st Dept 2011]), a question of fact is raised which must be resolved by the trier of fact.

Here, there is no question. Plaintiff was engaged in repair work at the time of his accident. The heavy downpour of the night before caused damage to the roof which required repair in order to stop the leaks coming from the roof into the MAAC. Plaintiff was not replacing parts that routinely wear out, and no showing has been made that such a heavy rainfall was a recurring condition rather than an isolated event. Therefore, plaintiff's accident falls within the intendment of section 240 (1) of the Labor Law.

Whether the Permanently Affixed Ladder Was a Safety Device

Defendants maintain that section 240 (1) does not apply because the ladder from which plaintiff fell was a permanently affixed, normal appurtenance of the building. In support of this contention, they cite several cases (*see Marin v AP-Amsterdam 1661 Park LLC*, 60 AD3d 824, 825 [2d Dept 2009] ["The statute generally does not apply to objects that are part of a building's

permanent structure"]; *Gelo v City of New York*, 34 AD3d 636, 637 [2d Dept 2006] ["the permanently affixed ladder from which the injured plaintiff fell was a normal appurtenance to the building and was not designed as a safety device to protect the injured plaintiff from elevation-related risks"]; *Nastasi v Span, Inc.*, 8 AD3d 1011, 1012 [4th Dept 2004] ["(t)he staircase upon which the plaintiff fell was a normal appurtenance to the (trailer) and was not designed as a safety device to protect him from an elevation-related risk"]). None of these cases deal with an object that was the sole means of accessing a work site.

"It is axiomatic that Supreme Court is bound to apply the law as promulgated by the Appellate Division within its particular Judicial Department (McKinney's Cons Laws of NY, Book 1, Statutes § 72 [b])" (*D'Alessandro v Carro*, 123 AD3d 1, 6 [1st Dept 2014]). The Appellate Division, First Department, has held that a permanently affixed ladder that is the sole access to the injured worker's work site is a safety device within the meaning of Labor Law § 240 (1) (*see e.g. Griffin v New York City Tr. Auth.*, 16 AD3d 202, 203 [1st Dept 2005] [the "permanently affixed ladder which provided the sole access to his work site . . . (was) a 'device' within the meaning of Labor Law § 240 (1)"]; *Crimi v Neves Assoc.*, 306 AD2d 152, 153 [1st Dept 2003] ["The permanently affixed ladder from which plaintiff fell, which was the only means of gaining access to his elevated work site, was a

'device' within the meaning of Labor Law § 240 (1)"]).

Accordingly, the ladder from which plaintiff fell was a safety device within the intendment of Labor Law § 240 (1). As it is undisputed that the ladder was too close to the wall and shook while plaintiff was descending it, this court concludes that the ladder was inadequate to protect plaintiff from a fall.

Whether Glenwood and the MAAC are Liable Under Labor Law § 240 (1) for Failure to Provide an Adequate Safety Device

As set forth above, section 240 (1) binds owners, contractors and their agents. The question here is whether Glenwood and/or the MAAC is bound under the statute.

It is undisputed that neither Glenwood nor the MAAC was the owner of the building, and, as plaintiff's accident did not occur within the construction context, neither party could be considered a general contractor. That leaves the question of agency.

In his Reply Affirmation, dated May 23, 2014, plaintiff's counsel raises the issues of agency and special employment for the first time. "[O]rdinarily, courts do not consider issues first mentioned in reply in support of a motion for summary judgment. The reason behind this rule is to prevent the opposing party from being deprived of a fair opportunity to respond to the argument [internal citations omitted]" (*Burlington Ins. Co. v Guma Constr. Corp.*, 66 AD3d 622, 624 [2d Dept 2009]; see also *Ginsberg v Rudey*, 280 AD2d 267, 267 [1st Dept 2001]

["contention . . . is raised for the first time in his reply brief, and we decline to consider it"]). This court also declines to consider whether Glenwood and/or the MAAC was an agent of 56th, and whether plaintiff was a special employee of Glenwood.

In light of the above, there remains an issue of fact as to whether defendants may be held liable under Labor Law § 240 (1), and the parts of plaintiff's motion and defendants' cross motion which seek summary judgment on the section 240 (1) claim must be denied.

Defendants' Cross Motion for Summary Judgment Dismissing Plaintiff's Common-Law Negligence and Labor Law §§ 200 and 241 (6) Causes of Action

Common-Law Negligence and Labor Law § 200

"It is well established that Labor Law § 200 is a codification of the common-law duty imposed on an owner or general contractor to maintain a safe construction site. In other words, a claim arising pursuant to the provision is 'tantamount to a common-law negligence claim in a workplace context' [internal citations omitted]" (*Cappabianca v Skanska USA Bldg. Inc.*, 99 AD3d 139, 149 [1st Dept 2012]). "Claims for personal injury under the statute and the common law fall into two broad categories: those arising from an alleged defect or dangerous condition existing on the premises and those arising from the manner in which the work was performed" (*id.* at 143-

144).

In this matter, there was a dangerous condition inherent in the property, i.e., the ladder which was too close to the wall to allow a worker's feet to safely rest on the rungs, and the shaking of the ladder. However, defendants failed to address plaintiff's common-law negligence and Labor Law § 200 causes of action. Therefore, the part of defendants' cross motion which seeks summary judgment dismissing plaintiff's common-law negligence and Labor Law § 200 causes of action is denied.

Labor Law § 241 (6)

> "Labor Law § 241 (6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation, or demolition work is being performed. To state a claim under section 241 (6) a plaintiff must identify a specific Industrial Code provision 'mandating compliance with concrete specifications' [internal citations omitted]"

(*Capuano v Tishman Constr. Corp.*, 98 AD3d 848, 850 [1st Dept 2012]). In plaintiff's bill of particulars, he alleges that defendants violated Industrial Code sections 23-1.7 and 23-1.21.

The part of defendants' cross motion that seeks summary judgment dismissing plaintiff's section 241 (6) claim must be denied. First, plaintiff's accident did not occur in a construction, demolition or excavation context. Second,

defendants failed to address this cause of action in their cross motion.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendants' cross motion is denied.

Dated: 3/10/15.

ENTER:

J.S.C. JOAN M. KENNEY