Netzahuall v All Will LLC
2015 NY Slip Op 31175(U)
June 16, 2015
Supreme Court, Bronx County
Docket Number: 306553/2009
Judge: Sharon A.M. Aarons
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX Part 24

GABRIEL NETZAHUALL,

Plaintiff,

-against-

ALL WILL LLC and LIMELIGHT CONSTRUCTION CORP.,

Defendant(s).

Index No. 306553/2009

Present: Hon. Sharon A. M. Aarons

DECISION AND ORDER

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion (by Plaintiff) and Affidavits Annexed	1
Answering Affidavits	2
Cross-Motion	3
Opposition to Cross-Motion	4
Reply	5, 6

Recitation, as required by CPLR 2219(a), of the papers considered in the review of motion(s) and/or cross-motion(s), as indicated below:

Papers	Numbered
Notice of Motion (All Will) and Affidavits Annexed	7
Cross-Motion	8
Answering Affidavits	9
Reply	10, 11

Upon the foregoing papers the foregoing motions and cross-motions are consolidated for disposition and decided as follows :

Plaintiff moves for summary judgment pursuant to CPLR 3212 granting him summary judgment on his claims under Labor Law §§ 240(1) and 241(6). Defendant All Will LLC (All Will) submits written opposition. Defendant Limelight Construction Corp.(Limelight) cross-moves to dismiss all claims and cross-claims asserted against it.

By separate motion defendant All Will moves for summary judgment pursuant to CPLR 3212 on its cross-claims against defendant Limelight for common law and contractual indemnification. Defendant Limelight cross-moves for summary judgment pursuant to CPLR 3212 dismissing all cross-claims asserted against it by defendant All Will. Plaintiff submits an affirmation in opposition, but states therein that it takes no position on All Will's motion.

The motions and cross-motions are consolidated for disposition and decided as follows:

Plaintiff's Motion for Summary Judgment, and Limelight's Cross-Motion for Dismissal of Plaintiff's Claims

In this Labor Law action, plaintiff alleges that he was injured on June 25, 209, at premises located at 337 East 138th Street, in Bronx County, during the course of the gut renovation of a five-story building. The building was owned by defendant All Will, and defendant Limelight was acting as the general contractor. Plaintiff alleged in his deposition that he was am employee of non-party subcontractor Bethel Welding, subcontractor employed to install the staircases. The floor had been removed, exposing the underlying joists, and temporary planks and boards had been placed over the joists. Plaintiff was working near an 8 foot by 10 foot opening in the floor, in which a new staircase was being installed. He was walking across this opening on a metal beam, without any safety harness or other fall-arrest device, along with another employee. The beam bent and gave way, causing plaintiff and the other employee to fall through the opening landing two stories below.

In support of the motion, plaintiff submits his sworn, certified deposition; the certified, unsworn deposition transcript of Yong Kim, the managing member of defendant All Will; the certified, unsworn deposition transcript[1] of Gurmej Singh, the president of defendant Limelight; the pleadings and bills of particulars; and an accident report and claims filed with the Workers' Compensation Board. Plaintiff maintains that he was engaged in an elevation-related activity within the purview of Labor Law § 240(1), and thus is entitled to summary judgment in his favor under the statute. Further, plaintiff maintains that he is entitled to judgment under Labor Law § 241(6) based on violations of 12 NYCRR §§ 23-1.7(b) (falling hazard – hazardous openings); 23-1.16 (safety

[1]No party objects to the unsigned transcripts on the plaintiff's motion and accompanying cross-motion. An objection is raised by defendant Limelight in opposition to defendant All Will's separate motion. However, as Limelight and the other parties have themselves each submitted and relied upon the same unsigned deposition transcripts, there is no basis for its objection. *Rodriguez v. Ryder Truck, Inc.*, 91 A.D.3d 935, 937 N.Y.S.2d 602 (2d Dept. 2012).

harness and other devices); and 23-2.7(e) (railings at openings during construction of staircases; 23–2.5(a)(2) (planking beneath floor openings).

Defendant Limelight cross-moves for summary judgment dismissing all claims against it. In support of the cross-motion, defendant Limelight submits the pleadings and bills of particulars; selected portions of the depositions of Singh and Kim; records of the Workers' Compensation Board (WCB) claims made by the plaintiff and maintained by the Workers' Compensation carrier the New York State Insurance Fund (NYSIF); and the affidavit of Michael Coyle, an attorney employed by the NYSIF. The affidavit of Michael Coyle indicates that the NYSIF was the insurance carrier for defendant Lime Light, and that pursuant to a hearing held by the WCB on January 8, 2014, at which plaintiff was represented by counsel, the WCB determined that plaintiff was employed by defendant Limelight. Plaintiff, while continuing to maintain that he was an employee of non-party Bethel Welding, nevertheless concedes that he was determined by the WCB to be an employee of Limelight, and that he accepted Workers' Compensation benefits, and thus does not oppose defendant Limelight's cross-motion to dismiss the plaintiff's claims against Limelight.

Defendant All Will opposes plaintiff's motion for summary judgment. First, defendant All Will asserts that based on the deposition testimony of Singh, Limelight's president, plaintiff was hired to remove trash, and not to assist other workers in installing a staircase. Defendant Limelight accordingly argues that plaintiff was acting outside of the scope of his employment. Secondly, defendant Limelight asserts that plaintiff was not working in an area that required the use of the special devices delineated in Labor Law § 240(1). Third, defendant Limelight maintains that the Industrial Code regulations cited by the plaintiff are inapplicable under the circumstances presented.

The court's function on this motion for summary judgment is issue finding rather than issue determination. (*Sillman v. Twentieth Century Fox Film Corp.*, 3 N.Y.2d 395, 144 N.E.2d 387, 165 N.Y.S.2d 49 [1957]). Since summary judgment is a drastic remedy, it should not be granted where

there is any doubt as to the existence of a triable issue. (*Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 385 N.E.2d 1068, 413 N.Y.S.2d 141 [1978].) Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied. (*Stone v. Goodson*, 8 N.Y.2d 8, 167 N.E.2d 328, 200 N.Y.S.2d 627 [1960]; *Sillman*, 3 N.Y.2d at 404).

Labor Law § 240 (1) applies in the context of the "special hazards" against which the statute is designed to protect, namely, "the exceptionally dangerous conditions posed by elevation differentials at work sites" (*Misseritti v Mark IV Constr. Co.*, 86 N.Y.2d 487, 491, 657 N.E.2d 1318, 634 N.Y.S.2d 35 [1995]). However, not every gravity-related injury is within the ambit of Labor Law § 240 (1). (*See Carey v Five Bros., Inc.*, 106 A.D.3d 938, 966 N.Y.S.2d 153 [2d Dept. 2013] [fall into open manhole not within Labor Law 240 (1)].) The kind of accident triggering section 240(1) coverage is one that will sustain the allegation that an adequate "scaffold, hoist, stay, ladder or other protective device" would have "shield[ed] the injured worker from harm directly flowing from the application of the force of gravity to an object or person" *(Runner v New York Stock Exch., Inc.*, 13 N.Y.3d 599, 604, 922 N.E.2d 865, 895 N.Y.S.2d 279 [2009] [emphasis removed], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 N.Y.2d 494, 501, 618 N.E.2d 82, 601 N.Y.S.2d 49 [1993]).

Labor Law § 241(6) imposes a nondelegable duty of reasonable care 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. (*See Rizzuto v L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 693 N.E.2d 1068, 670 N.Y.S.2d 816 [1998].) The provision requires owners and contractors to comply with specific safety rules and regulations promulgated by the Commissioner of the Department of Labor. (*See Misicki v Caradonna,* 12 N.Y.3d 511, 909 N.E.2d 1213, 882 N.Y.S.2d 375 [2009]). The particular safety rule or regulation relied upon by a plaintiff must mandate compliance with concrete specifications, and

not simply set forth general safety standards or a recitation of common-law safety principles. (*St. Louis v Town of N. Elba*, 16 N.Y.3d 411, 947 N.E.2d 1169, 923 N.Y.S.2d 391 [2011]; *Galarraga v City of New York*, 54 A.D.3d 308, 863 N.Y.S.2d 47 [2d Dept. 2008]).

With respect to the contention that plaintiff was working "outside the scope of his employment," it has in fact been held that a worker performing unauthorized work may be denied summary judgment on his Labor Law claims. (*See Vega v. Renaissance 632 Broadway, LLC*, 103 A.D.3d 883, 962 N.Y.S.2d 200 [2d Dept 2013] [denying plaintiff's motion for summary judgment where defendants raised a triable issue of fact as to whether the plaintiff was acting outside of the scope of his employment when he ascended the ladder and began removing pipes from the ceiling].) In the present case, Mr. Singh, the President of Limelight, testified that he instructed the plaintiff only to remove garbage. He stated during his deposition that he had asked a Mr. Peck from Han Me, Inc., a subcontractor, to find him a worker to clear away garbage, and that plaintiff was hired for that day to clean garbage only. He acknowledged, however, he signed a WCB document entitled, "Employer's Report of Work-Related Injury/Illness," which contained the hand-written notation, in response to the question, "What type of activities did the employee normally perform at work?", that the plaintiff's job duties were "carrying stuff and cleaning (helper)." In view of these admissions, plaintiff's job duties properly included carrying a beam and helping other workers. Under these circumstances, plaintiff can not be said to have improperly engaged in work outside of the scope of his job duties.

Although defendant argues that the present accident is not within the purview of Labor Law § 240(1), that section has been held to apply when a construction worker is injured as the result of the collapse of flooring or a hole in flooring. (*See Serpe v. Eyris Products*, 243 A.D.2d 375, 663 N.Y.S.2d 542 [1st Dept. 1997] [painter fell into unsecured staircase]; *Carpio v. Tishman Constr. Corp.*, 240 A.D.2d 234, 658 N.Y.S.2d 919 [1st Dept. 1997] [painter fell into unprotected hole];

Robertti v. Powers Chang, 227 A.D.2d 542, 642 N.Y.S.2d 715 [2d Dept. 1996] [plaintiff fell through hole caused by collapse of corrugated metal decking]; *Campisi v. Epos Contracting Corp.*, 299 A.D.2d 4, 747 N.Y.S.2d 218 [1st Dept. 2002] [plaintiff stepped into a space between two joists in flooring, fell through the gap].) Here, plaintiff was properly assisting other workers in carrying a bean across an opening, by walking across an unsecured beam, without any safety devices. Accordingly, he had established the necessary predicate for liability under Labor Law § 240(1).

With respect to the claims under Labor Law § 241(6), plaintiff asserts a violation of 12 NYCRR 23-1.7 (b) (1) (I), which states that "[e]very hazardous opening into which a person may step or fall shall be guarded by a substantial cover fastened in place or by a safety railing constructed and installed in compliance with this Part." That section does not apply, however, when covering or securing the opening would prevent the job from being performed. Here, there are issues of fact as to whether covering the opening would have prevented installation of the beam as part of the staircase installation. (*Salazar v. Novalex Contr. Corp.*, 18 N.Y.3d 134, 960 N.E.2d 393, 2011 N.Y. LEXIS 3284, 936 N.Y.S.2d 624, [2011] [worker spreading concrete fell into depression; regulation could not reasonably be interpreted to require covering the opening when doing so would be inconsistent with filling it, an integral part of the job].). With respect to the alleged violation of 12 NYCRR 23-2.5(a)(2), the protections of that section only apply to "shafts other than elevator shafts." The instant accident did not occur in a "shaft." Alleged violations of 12 NYCRR 23-1.16 can not support recovery by the plaintiff in this case as that section, which sets standards for "[s]afety belts, harnesses, tail lines and lifelines," is inapplicable where, as here, plaintiff was not provided with any of those devices. (*D'Acunti v. N.Y. City Sch. Constr. Auth.*, 300 A.D.2d 107, 751 N.Y.S.2d 459 [1st Dept. 2002].) 22 NYCRR 23-2.7(e) is inapplicable as the accident was not caused by the absence of a railing protecting a stairway. (*Sponholz v. Benderson Prop. Dev., Inc.*, 273 A.D.2d 791, 709 N.Y.S.2d 748 [4th Dept. 2000] [22 NYCRR 23-2.7 (e), which required protective railings on

stairways, was not a proximate cause of plaintiff's fall where stairway collapsed].)

Accordingly, plaintiff's motion for summary judgment is granted only to the extent of granting plaintiff judgment on plaintiff's claims under Labor Law § 240(1) and only against defendant All Will. The cross-motion by defendant Limelight is granted dismissing all claims of the plaintiff against defendant Limelight based on the exclusivity provisions of the Workers' Compensation Law.

Defendant All Will's Motion for Summary Judgment Dismissing All Cross-Claims, and Defendant Limelight's Cross-Motion

Defendant All Will moves for summary judgment on its claims for contractual and common law indemnification against defendant Limelight. In support of the motion, defendant All Will submits the pleadings[2] and bills of particulars; plaintiff's sworn, certified deposition; the certified, unsworn deposition transcript of Yong Kim, the managing member of defendant All Will; the certified, unsworn deposition transcript of Gurmej Singh, the president of defendant Limelight; and the affidavit of Yong Kim. Defendant All Will argues that it did not control or supervise the work, and thus defendant All Will should obtain common law indemnification from defendant Limelight.

Defendant Limelight cross-moves to dismiss all of the cross-claims against it.[3] In support of the cross-motion, Limelight submits essentially the same documents, as well as the affidavit of Michael Coyle, an attorney employed by the NYSIF, which was submitted on the cross-motion to

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[2]To the extent that All Will omitted Limelight's answer, it was submitted in reply, and because it is before the Court on other submissions, the record is sufficiently complete and the defect can be ignored. *Long Is. Pine Barrens Socy., Inc. v. County of Suffolk*, 122 A.D.3d 688, 996 N.Y.S.2d 162 (2d Dept. 2014).

[3]The cross-claims against defendant Limelight broadly include common law indemnification, contractual indemnification, and breach of contract to procure insurance.

plaintiff's motion. The affidavit of Michael Coyle indicates that the NYSIF was the insurance carrier for defendant Lime Light, and that pursuant to a hearing held by the WCB on January 8, 2014, at which plaintiff was represented by counsel, the WCB determined that plaintiff was employed by defendant Limelight. Limelight contends that in view of the WCB's finding that it was plaintiff's employer, claims of common law indemnity and contribution against it are barred by Workers' Compensation Law § 11. Further, Limelight contends that there is no evidence that the plaintiff suffered a "grave injury," which present an exception to the rule barring common law claims against the plaintiff's employer. Defendant Limelight also moves to dismiss the claims for contractual indemnification and breach of contract to procure insurance on the ground that there was no written contract between the parties.

Defendant All Will contends that it is not collaterally estopped by the finding of the WCB as it did not have an opportunity to litigate the issue before the WCB. Further, All Will contends that the WCB findings were not properly authenticated as they were produced by an attorney employed by NYSIF, and not the WCB.

Under the doctrine of collateral estoppel, a party is precluded from relitigating an issue which has been previously decided against the party in a prior proceeding where the party had a full and fair opportunity to litigate the issue. (See *Luscher v Arrua*, 21 A.D.3d 1005, 1007, 801 NYS2d 379 [2005]). When a party is not afforded an opportunity to participate in the hearing before the WCB, it is not bound by the WCB's determination made after the hearing. *(Rosario v. Montalvo & Son Auto Repair Ctr.*, Ltd., 118 A.D.3d 973, 989 N.Y.S.2d 73 [2d Dept. 2014] [employer not bound by WCB determination of employee's status as employer was not given notice]).

At the outset, no claim for either contractual indemnification or breach of contract to procure insurance can be interposed against defendant Limelight by defendant All Will, as there was no contractual undertaking by Limelight. The only viable cross-claim against defendant Limelight by

defendant All Will is the claim for common law indemnification.

Because defendant All Will did not participate in the WCB proceeding, it is not bound by the determination by the agency. Moreover, the plaintiff has maintained that he was not an employee of Limelight. Thus, with respect to the cross-claims by All Will against Limelight, issues of fact exist as to whether plaintiff was an employee of Limelight. Under these circumstances, if it is ultimately determined by the trier of fact that the plaintiff is Limelight's employee, the common law indemnity claims is barred by Workers' Compensation Law § 11. On the other hand, if it is ultimately determined by the trier of fact that the plaintiff is not Limelight's employee, the trier of fact will be required to determine if defendant Limelight was negligent in failing to supervise the plaintiff or the worksite. In that regard, the jury may take into consideration whether plaintiff was working for a non-party subcontractor, and whether the non-party was directing the manner of the work performed by him. Consequently, a determination can not be made at this juncture as to defendant All Will's claim for common law indemnification.

Defendant All Will's other claims for contractual indemnity or failure to procure insurance must be dismissed as no contract was shown to have existed.

The cross-claims by Limelight against All Will for common law indemnity must be dismissed as it has not been shown that All Will, the owner, supervised or controlled the work site or the work performed by the plaintiff.

Conclusion

Accordingly, plaintiff's motion for summary judgment is granted only to the extent of granting plaintiff judgment on plaintiff's claims under Labor Law § 240(1) against defendant All Will. The cross-motion by defendant Limelight is granted dismissing all claims of the plaintiff against defendant Limelight based on the exclusivity provisions of the Workers' Compensation Law.

Defendant All Will's motion for summary judgment pursuant to CPLR 3212 on its cross-claims against defendant Limelight for common law and contractual indemnification is denied. Defendant Limelight's cross-motion for summary judgment pursuant to CPLR 3212 dismissing all cross-claims asserted against it by defendant All Will is granted to the extent of dismissing the claims for contractual indemnity and breach of contract.

In view of the foregoing, it is

ORDERED that plaintiff is granted summary judgment against defendant All Will LLC on its claim under Labor Law § 240(1), and it is

ORDERED that the claims of the plaintiff against defendant Limelight Construction Corporation are dismissed, and it is

ORDERED that defendant All Will LLC's claims for contractual indemnity and failure to procure insurance against defendant Limelight Construction Corporation are dismissed, and it is

ORDERED that the cross-claims by Limelight Construction Corporation against All Will LLC for common law indemnity are dismissed.

Dated: June, 16 2015

SHARON A. M. AARONS, J.S.C.