

DeVirgilio v 1634-1646 Broadway Realty Co., Inc.

2017 NY Slip Op 31483(U)

July 13, 2017

Supreme Court, New York County

Docket Number: 162149/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ
Justice

PART 13

GARY DeVIRGILIO,
Plaintiff

INDEX NO. 162149/2014

- v -

MOTION DATE 06/07/17

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

1634-1646 BROADWAY REALTY CO., INC., TREBUHS
REALTY CO., INC., BESPOKE THEATRICALS LLC and
STAGE ENTERTAINMENT USA, INC.,
Defendants.

The following papers, numbered 1 to 10 were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

1-3

Answering Affidavits — Exhibits _____

4 - 6; 7

Replying Affidavits _____

8 - 9; 10

Cross-Motion: Yes No

Upon a reading of the foregoing cited papers, it is Ordered that Defendant Bespoke Theatricals LLC's (herein "Bespoke") motion for summary judgment pursuant to CPLR §3212 to dismiss the Complaint is partially granted. The motion for summary judgment on its' Cross-Claims against Defendant Stage Entertainment USA, Inc. (herein "Stage"), is denied. Defendant Stage's motion for summary judgment pursuant to CPLR §3212 to dismiss the Complaint is partially granted. Defendant Stage's motion to dismiss Defendant Bespoke's Cross-Claims, is denied.

Plaintiff commenced this action for personal injuries allegedly sustained on September 15, 2014 when he was employed to remove a production's equipment from the theater by demolishing the set. Plaintiff, as a stagehand, was employed by the non-party owners of the Winter Garden Theater, the Shubert Organization. Plaintiff allegedly injured his shoulder when he was inside a dumpster that tipped over. Defendant Bespoke contracted to act as General Manager on behalf of Defendant Stage, the producer of the play *Rocky* (Bespoke Moving Papers Ex. I). Plaintiff was granted a default judgment on non-appearing Defendants 1634-1646 Broadway Realty Co., Inc. and Trebuh's Realty Co., Inc. by this court's Order dated April 7, 2015. The Note of Issue was filed on October 7, 2016.

Defendant Bespoke now moves for summary judgment dismissing the Complaint and for judgment on its Cross-Claims for contractual indemnification and attorneys' fees against Defendant Stage. Defendant Stage moves for summary judgment dismissing the Complaint and all Cross-Claims asserted against it. Plaintiff opposes both motions. Defendants Bespoke and Stage oppose each others summary judgment motions on the Cross-Claims.

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v City of New York, 81 NY2d 833, 652 NYS2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 569 NYS2d 337 [1999]). In determining the motion, the court must construe the evidence in the light most favorable to the non-moving party (*SSBS Realty Corp. v Public Service Mut. Ins. Co.*, 253 AD2d 583, 677 NYS2d 136 [1st Dept. 1998]; *Martin v Briggs*, 235 AD2d 192, 663 NYS2d 184 [1st Dept. 1997]). Thus, a party opposing a summary judgment motion must assemble and lay bare its affirmative proof to demonstrate that genuine triable issues of fact exist (*Kornfeld v NRX Tech., Inc.*, 93 AD2d 772, 461 NYS2d 342 [1983], *aff'd* 62 NY2d 686, 465 NE2d 30, 476 NYS2d 523 [1984]).

The "public policy [of] protection of workers requires that the [Labor Law] statutes in question be construed liberally to afford the appropriate protections to the worker" (*Kosavick v Tishman Constr. Corp. of New York*, 50 AD3d 287, 855 NYS2d 433 [1st Dept. 2008]). Labor Law §240[1] and §241[6] only applies to owners, general contractors and their agents (*Russin v Picciano & Sons*, 54 NY2d 311, 445 NYS2d 127, 429 NE2d 805 [1981]).

Labor Law §240[1] imposes absolute liability on owners, contractors and their agents for their failure to provide workers with safety devices that properly protect against elevator-related hazards while they are engaged in certain enumerated activities, including demolition (*Runner v New York Stock Exch.*, 13 NY3d 599, 895 NYS2d 279, 922 NE2d 865 [2009]). On a Labor Law §240[1] claim, a party can be held liable if it was a "statutory agent" of the owner (*Voultepsis v Gumley-Haft-Klierer, Inc.*, 60 AD3d 524, 875 NYS2d 74 [1st Dept. 2009]). Statutory agency turns on the authority to supervise and control the employee (*Fox v Brozman-Archer Realty Servs.*, 266 AD2d 97, 698 NYS2d 654 [1999]), and "[o]nly upon obtaining the authority to supervise and control does the third party fall within the class of those having nondelegable liability as an 'agent' under sections 240 and 241" (*Russin, supra*). Work performed by a plaintiff in loading a dumpster and rearranging the debris in it creates a covered elevation-related risk (*Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 937 NYS2d 157, 960 NE2d 948 [2011]).

Similar to *Ortiz*, Plaintiff fell from an elevated-related risk when the dumpster he was directed to climb inside during the scope of his employment, tipped over because it was allegedly unsteady. Issues of fact remain as to whether Defendant Bespoke qualifies as a "statutory agent" under Labor Laws §240(1) and §241(6) definitions because of the type of control and authority it had over the production. Bespoke was contracted to be the General Manager for the *Rocky* production with the clear authority to "supervise and manage" the production, as well as act as the "authorized agent" of Stage, and oversee the day-to-day management (Plaintiff's Opposition Papers to Bespoke's Motion Ex. C, B).

Likewise, issues of fact remain as to whether Defendant Stage acted as an "authorized agent" under the Labor Law §240(1) and §241(6). Stage is the owner of Rocky Manager, which is a managing member and founder of Rocky Productions LP, the production company for the *Rocky* musical (herein "*Rocky Productions*", Plaintiff's Opposition to Stage's Motion Ex. G). Issues of fact remain as to the extent of supervisory control Stage had to insist proper safety practices were followed (*Butt v Bovis Lend Lease LMB, Inc.*, 47 AD3d 338, 847 NYS2d 84 [1st Dept. 2007]). Rocky Productions contracted with Plaintiff's employer, Shubert, for the production of *Rocky* where Rocky Productions had the responsibility to return the theater to the condition existing before the *Rocky* play began (Plaintiff's Opposition to Stage's Motion Ex. F). Rocky Productions then contracted with Jake Bell Production Services Limited to oversee the production crew, who were employees of the production (Plaintiff's

Opposition to Stage's Motion Ex. B). Defendant Stage made decisions on what to keep and what to dispose of with regards to the set (Plaintiff's Opposition to Stage's Motion Ex. D).

The agreement expressly stated that the "[p]roducer agrees to save, defend, indemnify and hold Shubert and its Affiliates harmless from and against any and all claims, damages, liabilities, costs and expenses; including...injury to Shubert's employees" (Plaintiff's Opposition to Stage's Motion Ex. E).

Plaintiff's §241(6) claim rests on various alleged violations of the Industrial Code. Since issues of fact remain as to whether Defendants Bespoke and Stage qualify as statutory agents under Labor Law's §241(6), this court addresses each individual alleged violation.

Plaintiff's claim that the Defendants Bespoke and Stage violated §241(6) for failure to comply with Industrial Code (12 NYCRR) § 23-1.28 (b), which mandates that "[w]heels of hand-propelled vehicles shall be maintained free-running and well secured to the frames of the vehicles," must be dismissed. §241(6) cause of action should be dismissed for lack of nonspectulative evidence, in admissible form, that one of the cart's wheels was defective (*Ruggiero v Cardella Trucking Co.*, 16 AD3d 342, 793 NYS2d 337 [1st Dept. 2005]). Plaintiff failed to offer any admissible proof that the wheels of the dumpster were defective at the time.

Plaintiff's Labor Law §241(6) claim based on violations of 12 NYCRR §23-2.1(b) also must be dismissed. Section §23-2.1(b) lacks the specificity required to qualify as a predicate for §241(6) liability (*Canning v Barneys N.Y.*, 289 AD2d 32, 734 NYS2d 116 [1st Dept. 2001]).

Plaintiff's claims based on 12 NYCRR § 23-3.3 (b)(5), §23-3.1(1) and §23-3.3(b)(4) are valid. The project called for the dismantling or razing of a building or structure, in whole or in part, and there were significant changes to the structural integrity of the theater. Furthermore, Plaintiff was directed to stand in the dumpster (an elevated risk), on accumulated debris, while his co-worker continued the work of demolition.

Plaintiff's claim based on 12 NYCRR §23-3.3(c) is valid. "The thrust of this subdivision is to fashion a safeguard, in the form of 'continuing inspections,' against hazards which are created by the progress of the demolition work" (*Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 935 NYS2d 551, 959 NE2d 488 [2011]). Here, as similar in *Wilinski*, Defendants failed to meet their burden of showing either that they complied with the regulation or that their noncompliance did not cause Plaintiff's accident.

Labor Law §200 codifies the common law duty imposed upon an owner or general contractor to maintain a safe construction site (*Rizzuto v L.A. Wenger Contracting Co.*, 91 NY2d 343, 670 NYS2d 816, 693 NE2d 1068 [1998]). In a Labor Law §200 claim, liability can only be found if defendant exercised control or supervision over the work (*Zak v UPS*, 262 AD2d 252, 692 NYS2d 374 [1st Dept. 1999]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49, 618 NE2d 82 [1993]). Unlike Labor Law §240(1) and §241(6) claims, general supervisory duties are insufficient to support liability under Labor Law §200 (*Buccini v 1568 Broadway Assocs.*, 250 AD2d 466, 673 NYS2d 398 [1st Dept. 1998]). "The term 'owner' is not limited to the titleholder of the property where the accident occurred and encompasses a person 'who has an interest in the property and who fulfilled the role of owner by contracting to have work performed for his benefit" (*Scaparo v Vill. Of Illion*, 13 NYS3d 864, 893 NYS2d 823, 921 NE2d 590 [2009]). Liability may be imposed where there is "some nexus between the owner and the worker,... and the burden placed upon a defendant seeking summary judgment on the ground that it is not an owner is a heavy one" (*Abbatiello v Lancaster Studio Assoc.*, 3 NY3d 46, 781

NYS2d 477 [2004]).

Issues of fact remain as Defendant Stage has not established it had no control and authority over the work being done as Producer of *Rocky*. As stated herein, Stage was responsible for determining what parts of the set to remove and what parts to leave behind, and was responsible to leave the theater in the same condition it was in prior to the production (Plaintiff's Opposition Papers to Stage Ex. D).

No genuine issues of fact remain with Defendant Bespoke since Bespoke did not supervise or control the work of the plaintiff, or provide any equipment that could have been the proximate cause of the accident, to be considered an owner or general contractor under Labor Law §200 and the common law. Plaintiff's Labor Law §200 and common law negligence claims against Bespoke must be dismissed.

Defendant Bespoke's motion for summary judgment on its cross-claims against Defendant Stage is denied. Issues of fact remain as to Bespoke's role and its negligence in causing Plaintiff's accident. Likewise, Stage's motion for summary judgment to dismiss Bespoke's Cross-Claims is denied as it remains feasible that Bespoke would be entitled to indemnification including costs and attorneys fees from Stage pursuant to the contract between them.

Accordingly, it is ORDERED, that Defendant Bespoke Theatricals LLC's motion for summary judgment is partially granted, and it is further,

ORDERED, that Defendant Stage Entertainment USA, Inc.,'s motion for summary judgment to dismiss the Complaint is partially granted, and it is further,

ORDERED, that Plaintiff's Labor Law §241(6) cause of action based upon violations of Industrial Code sections 12 NYCRR § 23-1.28 (b) and §23-2.1(b) are hereby severed and dismissed against Defendants Bespoke Theatricals LLC and Stage Entertainment USA, Inc., and it is further,

ORDERED, that Plaintiff's causes of action asserted in the Complaint for violations of Labor Law §200 and common law negligence against Defendant Bespoke Theatrical LLC are hereby severed and dismissed, and it is further,

ORDERED, that the causes of action asserted in the Complaint under Labor Law §240(1) and §241(6) remain in effect against Defendant Bespoke Theatricals LLC, and it is further,

ORDERED, that Defendant Bespoke Theatricals LLC's motion for summary judgment on its' Cross-Claims against Defendant Stage Entertainment USA, Inc., is denied, and it is further,

ORDERED, that Defendant Stage Entertainment USA, Inc.,'s motion for summary judgment to dismiss Defendant Bespoke Theatricals LLC's Cross-Claims, is denied, and it is further,

