

Canty v 133 E. 79th St., LLC
2017 NY Slip Op 31742(U)
August 17, 2017
Supreme Court, New York County
Docket Number: 156588/15
Judge: Lynn R. Kotler
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. LYNN R. KOTLER, J.S.C.PART 8THOMAS CANTY

INDEX NO. 156588/15

MOT. DATE

MOT. SEQ. NO. 002, 003 and 004.

- v -

133 EAST 79TH STREET, LLC et al.The following papers were read on these motions to/for summary judgment (002 and 003) and dismiss/sever (004)

Motion sequence number 002

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF Doc. No(s) 59-68

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF Doc. No(s) 84-85, 86-88, 112

Replying Affidavits

NYSCEF Doc. No(s) 114

Motion sequence number 003

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF Doc. No(s) 46-58

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF Doc. No(s) 83, 113

Replying Affidavits

NYSCEF Doc. No(s) 105-106, 115

Motion sequence number 004

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF Doc. No(s) 91-100

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF Doc. No(s) 101-104

Replying Affidavits

NYSCEF Doc. No(s) 108

In this action, plaintiff seeks to recover for negligence and alleged violations of the Labor Law when the lid of his employer's gang box fell onto his hand. In motion sequence number 002, defendant 133 East 79th Street, LLC ("133 East") moves for summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it, as well as for summary judgment on its cross-claim for contractual indemnification from codefendant Spieler & Ricca Electrical Co., Inc. ("Spieler"). Plaintiff opposes the motion and Spieler opposes the motion as to 133 East's cross-claim for contractual indemnification.

In motion sequence number 003, Spieler moves for summary judgment in its favor, dismissing plaintiff's complaint and all cross-claims against it. Plaintiff and 133 East oppose that motion.

Finally, in motion sequence number 004, defendant Lend Lease (US) Construction LMB, Inc. ("Lend Lease") moves for an order dismissing and/or alternatively severing the third third-party action brought by Spieler against it. Spieler opposes that motion.

Because they are interrelated, the motions are hereby consolidated for the court's consideration

Dated: 8/17/17HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

and disposition in this single decision/order. Issue has been joined, and the motions were timely brought after note of issue was filed. Therefore, summary judgment relief is available. The court's decision follows.

The facts are largely undisputed. On May 23, 2013, plaintiff was working as a foreman for Cross-Country Construction ("Cross-Country") at the construction site located at 133 East 79th Street, New York, New York, (the "Site"). Plaintiff claims that he sustained injuries when a metal lid of Cross-Country's gang box fell on his hand while he was attempting to remove a tool from said gang box. The following facts are based upon plaintiff's deposition testimony.

The gang box was made of steel and was approximately four to five feet long and four feet wide. Power tools, like chipping guns, mixing drills, T6 guns and skill saws, were normally kept inside. The gang box had a hinged lid that opened up by being pulled upward and then out toward the back. Chains attached from the lid to the gang box prevented the lid from swinging all the way back, but nothing prevented it from falling forward.

The gang box was opened approximately five or six times over the course of the workday by plaintiff, who had a key to it. The gang box was kept on the first floor, which plaintiff described as a "disaster." Plaintiff explained that over the course of the job, "everybody was moving their stuff closer and closer and on top of us, and we [] move[d] our gang boxes from different areas to where we had it previously..." A man named "Mike" communicated with plaintiff about moving Cross-Country's gang box, which was moved three or four times over the course of the project prior to plaintiff's accident. On the date of plaintiff's accident, he claimed that there was a gang box behind Cross-Country's which belonged to Spieler, and another one behind that.

With regard to the exact position of the gang boxes on the date of plaintiff's accident, plaintiff explained that Cross-Country's was moved into its position first because it was the closest. Shortly after that, Spieler's gang box was moved next to Cross-Country's.

On the date of the accident, plaintiff had already opened the gang box that day "definitely two or three times." Plaintiff personally opened it right before the accident. Plaintiff testified as follows about the events that followed after he opened it.

- Q. Then after opening it, let's take this step by step, what did you do next?
- A. I needed a small chipping gun. There was a big chipping gun on top of it. I remember that. So I grabbed the big chipping gun; I put that aside.
- Q. You put that to your right or to your left?
- A. To the left...; and then I went to get the big chipping gun, and then that's when the door came down on my hand.
- Q. And it came down on your left hand?
- A. My left hand.
- Q. You were moving the chipping gun or reaching for it with your right hand?
- A. Right.
- Q. And your left hand was where at that point, on the edge of the box?
- A. Right, exactly.

Q. Now, in doing that, Mr. Canty, did you touch the lid? I'm not talking about when it fell on you, before it fell? Did you in any way impact the lid of the box?

A. No.

Q. Do you know of anything else, anything that impacted the lid of the box? Did something fall on the box? Did someone come by and bump it? Are you aware of anything that impacted the lid of that box from the time that you opened it to the time that it fell onto your left hand?

A. I didn't see anybody from the electrician company open their gang box to knock it over on my hand. But when I lifted up the lid from the gang box, there was an electrician, a guy saying, "Are you all right?" I go, "yeah, yeah, yeah."

Q. So he was standing by his gang box?

A. He was standing by his gang box. But I never seen him opening it.

Q. Do you have any knowledge as what caused your gang box lid to fall on your hand?

A. No, the only thing that I could think of is that if he was opening his gang box, that he hit my gang box by mistake and it fell on my hand; and that's how, my door was slammed shut; but I didn't see that.

Q. Did you look at his gang box after the lid of your gang box fell?

A. Yeah, I did.

Q. Did you see whether his gang box was open or shut?

A. It was half open and half shut.

Q. Okay. Was he holding onto the lid?

A. Yeah, he was.

Plaintiff admitted that when he was bending over he was looking in the box. No one witnessed plaintiff's accident and plaintiff could not identify the person in the gang box next to Cross-Country's. Plaintiff testified that the unknown person was white with black hair, about five foot eight or nine and about two hundred pounds.

133 East was the owner of the premises upon which the Site was located. Lend Lease was the general contractor for the construction project at the Site. Spieler was a sub-contractor of Lend Lease hired to perform electrical work.

Spieler produced Laurence Bisso, its sub-foreman at the Site, for deposition. Bisso worked on the date of plaintiff's accident and claims that Spieler was never notified about said accident. Bisso testified that the first floor of the Site was a "tight" and "congested location on a daily basis." Bisso did not know whether Spieler's gang box was located next to Cross-Country's on or around the date of plaintiff's accident.

In his complaint, plaintiff asserts the following causes of action: negligence (first cause of action); violation of Labor Law § 200 (second cause of action); and violation of Labor Law § 241[6] (third cause of action). In its answer, 133 East has asserted a cross-claim against Spieler for contractual indemnification. Spieler asserted cross-claims against 133 East for contribution, common-law and contractual indemnification in its answer. According to his bill of particulars, plaintiff claims violations of 12 NYCRR 23-1.5 and 23-2.1.

Motion sequence numbers 002 and 003

The court will first consider the parties' arguments in connection with plaintiff's claims. In support of its motion, 133 East argues that it "had no involvement with the placement or utilization of gang boxes by various contractors." It maintains that there is no evidence of negligence against it, and therefore both the common law negligence and Labor Law § 200 claims must be dismissed. 133 East further contends that the Labor Law § 241[6] claim fails because the Industrial Code provisions cited by plaintiff are inapplicable.

Spieler argues that plaintiff's negligence claims against it must be dismissed because it did not owe plaintiff a duty nor, as sub-contractor, did it have any duty to manage, maintain or control the Site or monitor it for safety. Finally, Spieler maintains that assuming its employee caused the Cross-Country gang box lid to fall, that employee did not fail to exercise reasonable care and that plaintiff otherwise cannot prove that a Spieler employee did cause same to fall. Spieler takes issue with a Worker's Compensation C-2 Report which was prepared in connection with plaintiff's accident. The report, which has been provided to the court, as well as other worker's compensation documentation, makes no mention of a Spieler employee causing the lid of the Cross-County gang box to fall.

In opposition, both plaintiff and Spieler argue that 133 East has not met its burden on this motion because the motion is only supported by an attorney's affirmation and 133 East has not produced a witness for deposition. Plaintiff argues that 133 East did not address all of plaintiff's claims, to wit, defective/dangerous conditions on the premises in connection with the Labor Law § 200 claim. Finally, plaintiff contends that 133 East has not established that Industrial Code § 23-1.5 has not been violated.

In opposition to Spieler's motion, plaintiff argues that Spieler failed to eliminate all triable issues of fact as to whether one of its employees negligently opened its gang box lid thereby causing the accident.

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

Plaintiff's theory of negligence against Spieler is that its employee negligently caused Spieler's gang box to hit Cross-Country's gang box lid, causing that lid to fall onto plaintiff's hand. In order to state a negligence claim against Spieler, plaintiff must establish three elements: that Spieler owed him a duty, a breach of that duty, and that the breach was a proximate cause of plaintiff's injuries. Labor Law § 200 is the codification of the common law duty of owner's employers and general contractor's to provide workers with a reasonably safe place to work (*Comes v. New York State Elec. And Gas Corp.*, 82 NY2d 876 [1993]). Labor Law § 200 claims fall under two separate categories: dangerous or defective

premises conditions and injuries arising from the manner in which the work was performed (*Cappabianca v. Skanska USA Bldg. Inc.*, 99 AD3d 139 [1st Dept 2012]).

Labor Law § 241[6] imposes a non-delegable duty on all contractors and owners, in connection with construction or demolition of buildings or excavation work, to ensure that:

[a]ll areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The scope of the duty imposed by Labor Law § 241[6] is defined by the safety rules set forth in the Industrial Code (*Garcia v. 225 E. 57th Owners, Inc.*, 96 AD3d 88 [1st Dept 2012] citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494 [1993]).

At the outset, Spieler's motion must be granted, since plaintiff cannot demonstrate a *prima facie* case against it. Plaintiff does not know who he saw in the gang box next to Cross-Country's. Even if a jury credited plaintiff's testimony that the gang box next to Cross-Country's belonged to Spieler, a finding that the unknown person was a Spieler employee, and that this unknown person did something to cause Cross-Country's gang box to suddenly close would be speculative and unsupported by any admissible evidence. Plaintiff testified he didn't see the man open the gang box next to Cross-Country's and that he did not know what caused the gang box lid to close onto his hand. Plaintiff only speculated that it might be because the unknown man "hit" the Cross-Country gang box by mistake.

Even if plaintiff could get over the hurdle of demonstrating by admissible evidence his theory of liability against Spieler, Spieler did not owe plaintiff a legal duty as a matter of law. Whether a defendant owes a duty of care to a plaintiff is a question of law to be determined by the court (*Espinal v. Melville Snow Contrs.*, 98 NY2d 136 [2002]). Generally, contractual obligations do not give rise to a duty of care in favor of third-parties and plaintiff has not demonstrated an applicable exception to that rule. (*Id.*)

Accordingly, Spieler's motion for summary judgment dismissing plaintiff's complaint is granted.

The court now turns to 133 East's motion. Plaintiff's Labor Law § 200 claims against 133 East are premised on both the theory that his injury was caused by a dangerous premises condition and that the injury arose out of manner in which the work was performed. 133 East's motion must be denied as to the negligence and Labor Law § 200 claims since 133 East has failed to meet its burden of demonstrating, through admissible evidence, that it did not have notice of the dangerous condition or that it did not exercise supervision or control over the construction project at the Site. The attorney's affirmation submitted in support of the motion is wholly insufficient as Attorney Mann does not set forth any basis by which she could have personal knowledge of the claims she makes therein. In its reply, 133 East misplaces its burden by arguing that "[n]o issue of material fact has been raised regarding the total non-involvement of 133 East 79th Street, LLC, as the owner of the construction project. Indeed, the burden of establishing entitlement to judgment as a matter of law is upon the proponent of a motion for summary judgment. Only once that burden has been met does the burden shift to the opponent to raise a triable issue of fact.

Further, although Attorney Mann argues that an affirmation can be based upon "other available proof, such as depositions and written admissions," 133 East did not annex a single deposition transcript to its motion. For at least these reasons, 133 East has not met its burden in the first instance and its arguments with respect to the negligence and Labor Law § 200 claims are rejected.

As for the Labor Law § 241[6] claim, that claim must be dismissed as to 133 East as a matter of law. Plaintiff does not oppose 133 East's motion to the extent that they seek dismissal of the Labor Law § 241[6] claim premised upon a violation of 12 NYCRR 23-2.1. Therefore, that claim is dismissed.

As for the claimed violation of 12 NYCRR 23-1.5, which plaintiff clarifies in opposition pertains to section [c][3], that provision is too general to support a cause of action for violating Labor Law § 241[6] (*Kochman v. City of New York*, 110 AD3d 477 [1st Dept 2013]).

Accordingly, 133 East's motion for summary judgment dismissing plaintiff's claims is granted only to the extent that plaintiff's Labor Law § 241[6] claim against 133 East is hereby severed and dismissed.

The court now turns to the motions with respect to the cross-claims. 133 East has provided a copy of the contract between Lend Lease and Spieler for the construction project. Article 12 of the contract concerns indemnification and identifies 133 East as an indemnitee. Article 12 requires Spieler to defend, indemnify and save harmless the "owner" from an against claims attributable to bodily injury caused by, arising out of, or resulting from performance of work by Spieler. This branch of 133 East's motion must be denied based upon this court's finding that plaintiff cannot establish that the accident was caused by, arose out of or resulted from the performance of Spieler's work.

Spieler's motion for summary judgment on its cross-claims is granted to the extent that 133 East's cross-claim for contractual indemnification is severed and dismissed and the motion is otherwise denied as moot.

Motion sequence number 004

The court now turns to Lend Lease's motion to sever. The motion is granted to the extent that the third third-party action is hereby severed. Lend Lease was added to this case long after plaintiff filed note of issue. While Lend Lease may be represented by the same firm that represents 133 East, it is not united in interest with 133 East and should not be prejudiced by not being a party to this action and engaging in the ordinary course of pre-note discovery. Spieler cannot argue that it was unaware of any potential claims it had against Lend Lease until March 2017 when it commenced the third third-party action. Further, plaintiff would be unduly prejudiced if this case was further held up because Spieler elected to wait until nearly three months after note of issue was filed to commence the subject action. Finally, in light of this court's decision granting Spieler summary judgment dismissing plaintiff's claims, whether Spieler intends to prosecute the third third-party action is unclear.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that motion sequence number 002 is granted to the extent that plaintiff's Labor Law § 241[6] claim against 133 East is hereby severed and dismissed; and it is further

ORDERED that motion sequence 002 is otherwise denied; and it is further

ORDERED that motion sequence number 003 is granted to the extent that plaintiff's claims against Spieler as well as 133 East's cross-claim for contractual indemnification against Spieler are severed and dismissed; and it is further

ORDERED that the balance of motion sequence number 003 is denied as moot; and it is further

ORDERED that the third third-party action is hereby severed and the Spieler, the third third-party plaintiff, is directed to exchange its third third-party index number for a new index number without fee; and it is further

ORDERED that the County Clerk is directed to assign a new index number to the third third-party action. Spieler may then make a request for judicial intervention and upon obtaining same, the parties will thereafter be scheduled for a preliminary conference; and it is further

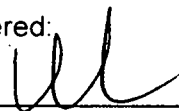
ORDERED that Lend Lease is directed to serve a copy of this order with notice of entry upon the Trial Support Office (Room 158) and the County Clerk (Room 141B) who are hereby directed to mark the court's records to reflect the severance from the main action of the third third-party action.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated:

8/17/17
New York, New York

So Ordered:


Hon. Lynn R. Kotler, J.S.C.