Mandart v MBI Group
2017 NY Slip Op 32139(U)
October 4, 2017
Supreme Court, Suffolk County
Docket Number: 26654/12
Judge: Paul J. Baisley, Jr.

Short Form Order

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART XXXVI SUFFOLK COUNTY

PRESENT:
HON. PAUL J. BAISLEY, JR., J.S.C.

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DOUGLAS MANDART and KAREN MANDART,

Plaintiffs,

-against-

MBI GROUP, MBI CONSTRUCTION INC., LIRO CONSTRUCTORS, INC., IWEISS INC., MANHATTAN BUSINESS INTERIORS, INC., LIRO PROGRAMS AND CONSTRUCTION MANAGEMENT, P.C., and IWEISS AND SONS, INC.,

Defendants.

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INDEX NO.: 26654/12
CALENDAR NO.: 201601350OT
MOTION DATE: 4/6/17
MOTION SEQ. NO.: 008 MG; 009 MG; 011 MOT D; 012 MD

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Upon the following papers numbered 1 to 76 read on these motions for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 25, 16 -34 ; Notice of Cross Motion and supporting papers 35 - 41, 42 - 47 ; Answering Affidavits and supporting papers 48 - 64, 65 - 66 ; Replying Affidavits and supporting papers 67 - 68, 69 - 70, 71 - 72, 73 - 74, 75 - 76 ; Other Memorandum of Law ; it is,

ORDERED that the following motions and cross-motions are consolidated for the purposes of this determination; and it is further

ORDERED that the motion (motion sequence no. 008) of defendant Iweiss Inc., for summary judgment dismissing the complaint and cross claims against it and its affiliates named in this action is granted; and it is further

ORDERED that the motion (motion sequence no. 009) of Manhattan Business Interiors, Inc. for summary judgment dismissing the complaint and cross claims against it and its affiliates named in this action is granted; and it is further

ORDERED that the cross-motions (motion sequence nos. 010 and 011) of defendant Liro Constructors, Inc. for, *inter alia*, summary judgment dismissing the complaint against it are granted to the extent indicated herein and are otherwise denied.

This is an action to recover damages for personal injuries allegedly sustained by plaintiff Douglas Mandart on October 31, 2011, while he was working in the backstage area of the Queens College Goldstein Theatre, located in Queens, New York. Plaintiff, who was investigating a water leak, allegedly was injured when he stumbled over pieces of wood lying on the ground and stepped into the permanent opening of the theater's paint frame, a device used to raise and lower theatrical backdrops. At the time of the accident, plaintiff, a senior janitorial superintendent for the college, was employed by the owner of the premises, City University of New York ("CUNY"). Defendant Manhattan Business Interiors, Inc. ("MBI") was hired by CUNY to perform various construction related services on the Queens College campus, including making certain renovations to the Goldstein Theatre. MBI then hired defendant Iweiss Inc. ("Iweiss") as a subcontractor to replace the theater's motorized rigging system. Defendant Liro Constructors, Inc. ("Liro") allegedly served as the construction manager for the project. Plaintiff commenced three separate actions against the abovementioned defendants and some of their affiliates. Action No. 1, entitled *Douglas Mandart and Karen Mandart against MBI Group, MBI Construction Inc., LiRo Constructors, Inc., and IWeiss Inc.*, was filed under Index Number 12-26654. Action No. 2, entitled *Douglas Mandart and Karen Mandart against Manhattan Business Interiors, Inc.*, was filed under Index Number 13-01351. Action No. 3, entitled *Douglas Mandart and Karen Mandart v LiRo Programs and Construction Management, P.C. and IWeiss and Sons, Inc.*, was filed under Index Number 13-09287. The complaints alleged causes of action against the defendants based on common law negligence and violations of Labor Law §§ 200, 240(1), and 241(6). The complaints also asserted derivative claims on behalf of plaintiff's wife, Karen Mandart, for damages related to loss of services and the payment of medical expenses.

Defendants joined the respective actions against them and asserted various defenses and cross claims against each other. By order dated November 22, 2013, the court (PASTORESSA, J.), finding that a previous complaint containing identical claims against Iweiss already existed, granted Iweiss' motion for summary judgment dismissing the complaint filed against it under Index Number 13-09287. The complaint filed under Index Number 12-26654, which also named Iweiss as a defendant, was nevertheless continued against it. Subsequently, all three actions were transferred to the Calendar Control Part. Thereafter, the Court (GAZZILLO, J.), by order dated October 2, 2014, granted an unopposed motion by plaintiff seeking consolidation of all three separate actions under index number 12-26654. A note of issue for the consolidated action was filed on July 28, 2016.

Iweiss now moves for summary judgment in its favor dismissing the complaint and cross claims against it on the grounds that plaintiff, who was not involved in any activity covered by the statute at the time of his accident, is not entitled to the protections of Labor Law §§240(1) and 241(6). Additionally, Iweiss argues that it cannot be held liable for plaintiff's injuries under the common law or Labor Law §200 since it did not control the means and methods of plaintiff's work, and it neither created nor had actual or constructive notice of the alleged dangerous condition that caused the accident. Alternatively, Iweiss argues that even if plaintiff's work is covered by the statute, his claims under Labor Law §§240(1) and 2416) must be dismissed as a matter of law, since he did not sustain his injuries as a result of any elevation related hazard, and he failed to cite the violations of any specific applicable sections of the New York Industrial Code in support of his Labor Law §241(6) claim.

MBI moves for summary judgment dismissing the complaint and any cross claims against it on a similar basis, adding, *inter alia*, that plaintiff was engaged in mere routine maintenance on behalf of the college when the accident occurred, and that it did not owe plaintiff any proprietary or contractual duty to guard against dangerous conditions on the theater's premises. MBI further argues that the cross claims against it must be dismissed as it established that it neither caused nor contributed to plaintiff's accident, and that the accident did not arise out of the work it performed during the renovation project.

Adopting the arguments and exhibits set forth in Iweiss' motion, Liro cross-moves for summary judgment dismissing the complaint against it. Liro further requests, should the court refuse to dismiss plaintiff's claims against it, that it be granted conditional summary judgment on its cross claims for contractual indemnification against MBI. Liro also submitted an additional motion which seeks the identical relief requested in its previous motion. Plaintiff only opposes the branches of defendants' motions seeking dismissal of his common law negligence and Labor Law §§ 200 and 241 (6) claims, arguing that he should be afforded the protections of the statute since he served as CUNY's onsite construction liaison, he was injured during the course of an inspection of the theater conducted by him and defendants' representatives, and his work was integral and necessary to the renovation project. Plaintiff further asserts that he states an actionable claim under Labor Law §241 (6), based on alleged violations of sections 23-1.7(e) (1), 23-1.7(e) (2), and 23-1.7(b) (1) (i) of the New York Industrial Code.

Initially, the court notes that plaintiff failed to state an actionable claim under Labor Law §240(1) since his accident, which occurred as a result of a ground level tripping hazard, was not among the type of perils that the statute was designed to prevent (*see Spence v Island Estates at Mt. Sinai II, LLC*, 79 AD3d 936, 914 NYS2d 203 [2d Dept 2010]; *Favreau v Barnett & Barnett, LLC*, 47 AD3d 996, 849 NYS2d 691 [3d Dept 2008]). Further, by failing to address the branches of the motions by MBI and Iweiss for summary judgment dismissing the Labor Law §240(1) claim, plaintiff is deemed to have abandoned it (*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]). Therefore, the court grants the unopposed branches of the motions by MBI and Iweiss for summary judgment dismissing plaintiff's Labor Law §240(1) claim.

As to the branches of the motions of MBI and Iweiss for summary judgment dismissing plaintiff's Labor Law §241(6) claim, "'[t]he critical inquiry in determining coverage under the [Labor Law] is 'what type of work the plaintiff was performing at the time of injury'" (*Panek v County of Albany*, 99 NY2d 452, 457, 758 NYS2d 267 [2003], *quoting Joblon v Solow*, 91 NY2d 457, 465, 672 NYS2d 286 [1998]). Coverage under Labor Law § 241(6) is withheld where the alleged injury occurred outside the context of a construction, demolition or excavation project (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 101, 752 NYS2d 581 [2002]), or where such work, though incidental or necessary, precedes the commencement of such project (*see Jones v Village of Dannemora*, 27 AD3d 844, 811 NYS2d 186 [3d Dept 2006]; *Adair v Bestek Light. & Staging Corp.*, 298 AD2d 153, 748 NYS2d 362 [1st Dept 2002]). Moreover, "the question of whether inspection work falls within the purview of . . . Labor Law § 241 (6) 'must be determined on a case-by-case basis, depending on the context of the work'" (*Nelson v Sweet Assocs.*, 15 AD3d 714, 715, 788 NYS2d 705 [3d Dept 2005],

quoting Prats v Port Auth. of N.Y. & N.J., 100 NY2d 878, 883, 768 NYS2d 178 [2003]). "An employee will be deemed covered by the statute when the employee performs, for example, inspections that are on-going and contemporaneous with other work on a construction project pursuant to a single contract, other tasks that are enumerated by the statute, and work for a contractor engaged to provide services enumerated by the statute" (*Nelson v Sweet Assocs.*, *supra* at 715). Thus, a plaintiff's inspection work cannot be brought within the scope of the Labor Law §241(6) by merely deeming it 'integral or necessary' to an ongoing renovation or construction project (*see Martinez v City of New York*, 93 NY2d 322, 326, 690 NYS2d 524 [1999]). Rather, to come within the purview of the statutory protections of Labor Law §241(6), a plaintiff injured while performing an inspection must have been retained by a contractor to carry out an activity enumerated under the statute, or permitted or suffered to carry out such work by the owner of the premises, and he must have participated in the activity during the specific project and at the same site where the injury occurred (*see Prats v Port Auth. of N.Y. & N.J.*, *supra* at 883; *Martinez v City of New York*, *supra*; *Nelson v Sweet Assocs.*, *supra*; *Petermann v Ampal Realty Corp.*, 288 AD2d 54, 733 NYS2d 9 [1st Dept 2001]).

Here, MBI and Iweiss established, *prima facie*, that plaintiff is not entitled to the protections of Labor Law §241(6), as he was neither employed by a contractor retained to perform a covered activity, nor was he permitted or suffered by CUNY to carry out such an activity in relation to the subject renovation project. Further, the activity in which plaintiff was engaged at the time of his accident, namely, his inspection of a water leak, was consistent with the type of routine maintenance he would be expected to carry out as a janitorial superintendent rather than the type of construction work enumerated in the statute (*see Martinez v City of New York*, *supra*; *Nelson v Sweet Assocs.*, *supra*; *Adams v Pfizer, Inc.*, 293 AD2d 291, 740 NYS2d 315 [1st Dept 2002]; *Yong Ju Kim v Herbert Constr. Co.*, 275 AD2d 709, 713 NYS2d 190 [2d Dept 2000]). Although plaintiff contends that he attended progress meetings and performed inspections that were "ongoing and contemporaneous" with the renovation project, it is undisputed that as the college's janitorial superintendent, he was neither hired by a contractor to perform any of the covered activities nor permitted or suffered to perform such activities for the purpose of furthering the renovation project in question. Indeed, plaintiff testified that his primary responsibility during the project was to ensure that the operation of the school and the activities of the students and staff were not disrupted, and that he had, during the course of ensuring ordinary maintenance of the theater, conducted previous inspections of leaks in the backstage area of the building.

As to the branches of the motions by MBI and Iweiss for dismissal of plaintiff's common law negligence and Labor Law §200 claims, the protection provided by Labor Law §200 codifies the common-law duty of an owner or employer to provide employees a safe place to work (*see Jock v Fien*, 80 NY2d 965, 590 NYS2d 878 [1992]). It applies to owners, contractors, or their agents (*see Russin v Louis N. Picciano & Son*, 54 NY2d 311, 445 NYS2d 127 [1981]) who exercise control or supervision over the work, or who created an allegedly dangerous condition or had actual or constructive notice of it (*see Lombardi v Stout*, 80 NY2d 290, 590 NYS2d 55 [1992]). Where, as in this case, a premises condition is at issue, an owner or contractor may be held liable for a violation of Labor Law §200 if they either created the dangerous condition that caused the accident, or if they had actual or constructive notice of the condition (*see Kuffour v Whitestone Const. Corp.*, 94 AD3d

706, 941 NYS2d 653 [2d Dept 2012]; *Azad v 270 Realty Corp.*, 46 AD3d 728, 730, 848 NYS2d 688 [2d Dept 2007]). "To establish constructive notice, the plaintiff must show that the dangerous condition was visible and apparent and had existed for a sufficient time before the accident to permit the defendants' employees to discover and remedy it. The general awareness that a dangerous condition may be present is legally insufficient to constitute notice of the particular condition that caused the plaintiff's injury" (*Welles v New York City Housing Authority*, 284 AD2d 327, 328, 725 NYS2d 385 [2d Dept 2001]).

MBI and Iweiss established their *prima facie* entitlement to dismissal of plaintiff's common law negligence and Labor Law §200 claims by submitting evidence that they neither created the alleged dangerous condition, nor had actual or constructive notice of its existence (*see Rodriguez v Dormitory Auth. of the State of N.Y.*, 104 AD3d 529, 962 NYS2d 102 [1st Dept 2013]; *Gray v City of New York*, 87 AD3d 679, 928 NYS2d 759 [2d Dept 2011] *compare Dowd v City of New York*, 40 AD3d 908, 837 NYS2d 668 [2d Dept 2007]). Significantly, MBI's project manager testified that MBI had not commenced any work in the area of the backstage where plaintiff tripped and fell, and that he had no prior knowledge of the paint frame or pieces of wood over which plaintiff tripped. Similarly, Iweiss submitted the deposition testimony of its senior project manager, who stated that the work performed in the theater by Iweiss was done on a metal rigging structure near the ceiling of the theatre toward the front of the stage. Indeed, plaintiff testified that while contractors were working in the lobby and performing landscaping work on the outside, none of them were performing any work, either on the day he fell or during the preceding week, in the specific area backstage where the accident occurred. Additionally, plaintiff could not identify which, if any, of the contractors were responsible for leaving the wood debris over which he tripped in the backstage area.

In opposition, plaintiff failed to raise a triable issue warranting denial of the motions (*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]). As mentioned above, plaintiff failed to oppose the branches of the motions seeking dismissal of his cause of action under Labor Law §240(1). Moreover, the cases cited by plaintiff in support of his contention that his inspection of the water leak was a covered activity under Labor Law §241(6) are distinguishable, because they involve workers who, unlike plaintiff, were hired to perform, manage, or participate in a covered activity during the project in question, and their roles in carrying out those activities involved more than mere observation or routine maintenance (*see Prats v Port Auth. of N.Y. & N.J.*, *supra*; *DeSimone v City of New York*, 121 AD3d 420, 993 NYS2d 551 [1st Dept 2014]; *Dubin v S. DiFazio & Sons Constr., Inc.*, *supra*; *McNeill v LaSalle Partners*, 52 AD3d 407, 861 NYS2d 15 [1st Dept 2008]). Plaintiff's assertion that either MBI or Iweiss may have created the dangerous condition or have constructive notice of its existence because they were doing work in and around the theater, or because they were aware of generalized concerns regarding the failure to remove construction debris from unspecified work areas, is based on sheer speculation, and, therefore, is insufficient to raise a triable issue (*see Welles v New York City Housing Authority*, *supra*; *Canning v Barneys N.Y.*, 289 AD2d 32, 33, 734 NYS2d 116 [1st Dept 2001]; *Mitchell v New York Univ.*, 12 AD3d 200, 201, 784 NYS2d 104 [1st Dept 2004]). Accordingly, the branch of the motions by defendants Manhattan Business Interiors, Inc. and Iweiss Inc. for summary judgment dismissing the complaint against them is granted.

Inasmuch as MBI and Iweiss have also demonstrated that they played no part in causing or augmenting plaintiff's injuries, and that they neither had actual nor constructive notice of the alleged dangerous condition, the branches of their motions for summary judgment dismissing the indemnification and contribution cross claims against them also are granted (*see McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 929 NYS2d 556 [2011]; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, 71 NY2d 599, 528 NYS2d 516 [1988]; *Torres v LPE Land Dev. & Constr.*, 54 AD3d 668, 863 NYS2d 477 [2d Dept 2008]; *Delahaye v Saint Anns School*, 40 AD3d 679, 836 NYS2d 233 [2d Dept 2007]).

Turning to the motions by Liro for, *inter alia*, summary judgment dismissing the complaint against it, the court notes that the motion, designated as sequence no. 012, is denied in its entirety, as it is untimely and inexplicably duplicative of Liro's former motion designated as sequence no. 011. The branch of Liro's remaining motion which seeks summary judgment dismissing plaintiff's Labor Law §§240(1) and 241(6) claims is denied as moot, as it has already been determined herein that plaintiff failed, as a matter of law, to state viable claims under those sections of the statute. The court further denies the branch of Liro's remaining motion which seeks dismissal of plaintiff's common law negligence and Labor Law §200 claims against it, as it is undisputed that the motion was made after the deadline to make a motion for summary judgment had passed, Liro failed to demonstrate good cause for the delay, and the motion was made against a nonmoving party (*see* CPLR 3212 [a]; *Brill v City of New York*, 2 NY3d 648,781 NYS2d 261 [2004]; *Sanchez v Metro Bldrs. Corp.*, 136 AD3d 783, 25 NYS3d 274 [2d Dept 2016]).

Although Liro's motion sequence no. 011 is undisputedly untimely, the court will nevertheless entertain the branch of the cross motion which seeks summary judgment on its contractual indemnification cross claim against MBI, as the cross motion seeks relief nearly identical to relief sought in MBI's timely motion (*see Reutzel v Hunter Yes, Inc.*, 135 AD3d 1123, 25 NYS3d 370 [2d Dept 2016]; *McCallister v 200 Park, L.P.*, 92 AD3d 927, 939 NYS2d 538 [2d Dept 2012]; *Darras v Romans*, 85 AD3d 710, 925 NYS2d 140 [2d Dept 2011]). Liro's application for summary judgment on its contractual indemnification cross claim against MBI is denied. Where, as in this case, the court has already determined that MBI did not cause or augment plaintiff's injuries, such that plaintiff's accident could not be said to have arisen out of MBI's work, Liro's contractual indemnification provision has not been triggered (*see McCarthy v Turner Constr., Inc.*, *supra*; *Nassau Roofing & Sheet Metal Co. v Facilities Dev. Corp.*, *supra*; *Staron v Decker Assoc., LLC*, 135 AD3d 846, 23 NYS3d 361 [2d Dept 2016]; *Loiek v 1133 Fifth Ave. Corp.*, 46 AD3d 766, 848 NYS2d 333 [2d Dept 2007]).

Dated: October 4, 2017

HON. PAUL J. BAISLEY, JR.

J.S.C.