

Hernandez v 490 Fulton Owner, LLC
2017 NY Slip Op 33227(U)
March 22, 2017
Supreme Court, Queens County
Docket Number: 700510-2012
Judge: Frederick D.R. Sampson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE FREDERICK D.R. SAMPSON IA Part 31
Justice

JUAN HERNANDEZ, x Index
Number 700510 2012
Plaintiff,
-against- Motion
Date September 19, 2016

490 Fulton Owner, LLC and
TJN CORP., Motion Seq. Nos. 6&7
Defendants.

490 FULTON OWNER, LLC, x
Third-Party Plaintiff,

-against-
LONG ISLAND UNIVERSITY,
Third-Party Defendant.

TJN CORP., x
Second Third Party Plaintiff

-against-
GLAVAN CONSTRUCTION CORP.,
Second Third-Party Defendant.

490 FULTON OWNER, LLC, x
Third-Third Party Plaintiff,

FILED

APR 10 2017

COUNTY CLERK
QUEENS COUNTY

-against-

GLAVAN CONSTRUCTION CORP.,

Third-Third Party Defendant.

X

The following papers numbered 1 to 12 read on this motion by third-party defendant Long Island University (1) for an award of partial summary judgment dismissing the first, second and third causes of action asserted against it in the third-party complaint and (2) to dismiss the fourth cause of action asserted in the third-party complaint, pursuant to CPLR 3211 (a) (1), on documentary evidence grounds and a separate motion by defendant/third-party plaintiff 490 Fulton Owner LLC (Fulton Owner) for an award of summary judgment in its favor on its third-party claim against third-party defendant Long Island University for contractual indemnification and to dismiss the plaintiff's common law negligence and Labor Law §200 claims against it.

Papers
Numbered

Notices of Motion - Affidavits - Exhibits.....1-6
Answering Affidavits - Exhibits.....7-8
Reply Affidavits.....9-12

Upon the foregoing papers it is ordered that the motions are determined as follows:

The plaintiff commenced this action to recover damages for personal injuries he allegedly sustained, on June 10, 2011, when a metal plumbing pipe at a Long Island University student dormitory construction site where he was working fell and struck him on the head.

At the time of the accident the plaintiff was an employee of nonparty Galavan Painting. According to the complaint, defendant/third party plaintiff Fulton Owner owned the premises where the accident occurred. Defendant TJN Corp. was the defendant owner's general contractor in charge of coordinating the construction project and hiring subcontractors to perform the work at the subject premises. The plaintiff's employer was retained by defendant TJN Corp to perform painting and sheetrocking work at the site. In his complaint against defendants Fulton Owner and TJN Corp. the plaintiff seeks damages for common law negligence as well as

violations of Labor Law 200 and 241(6) and section 23-1.7(a) of the Industrial Code.

In its third-party complaint against third-party defendant Long Island University, Fulton Owner asserts four causes of action seeking damages for common law indemnity, contribution, contractual indemnity and breach of contract to procure insurance, respectively.

Fulton Owner LLC seeks an award of summary judgment dismissing the plaintiff's common law negligence and Labor Law §200 claims against it on the ground that it was not negligent, did not supervise or control the plaintiff's work, and did not have notice or cause the alleged dangerous condition. It also seeks summary judgment in its favor on its third-party claim against third-party defendant Long Island University for contractual indemnification. Long Island University seeks summary judgment dismissing the causes of action for common law indemnification, contribution and contractual indemnity on liability grounds and dismissal of the failure to procure insurance claim against it on documentary evidence grounds.

In support of summary judgment the parties submit, among other things, copies of the transcripts of the parties' examination before trial testimony. According to the plaintiff's examination before trial testimony, he was employed by second third-party defendant Galavan Construction Corp. and installing sheetrock in a bathroom at the subject premises when a large new metal plumbing pipe fell from the ceiling and struck him on the head. His hard hat cracked as a result of the impact and he was reportedly knocked out or fainted for a period of five to ten minutes in the immediate aftermath of the impact. His body came in contact with the tub when he fell. The plaintiff states that although he was not given any protective equipment to perform his work, at the time of the accident he was wearing a hard hat that he had provided for himself. While he worked at the subject job site, the plaintiff received instructions exclusively from his employer Galavan Construction Corp. and employer's on site supervisor.

Mr. Jack Braha testified upon examination before trial on behalf of his employers, who are owners of defendant Fulton Owner. According to Mr. Braha, Fulton Owner was the owner of the premises where the accident occurred. Pursuant to a lease agreement, it leased three floors of the subject premises to third-party defendant Long Island University, which was engaged in renovating the premises for use as a dormitory when the incident occurred.

Mr. Ivan Turkalj testified on behalf of defendant TJN Corporation (TJN). Mr. Turkalj is a licensed plumber and Vice-President of the defendant company, which is owned by his wife. TJN Corporation is a general contractor and also performs plumbing and mechanical work. In April 2011, it entered into a contract with the defendant owner of the building to build a dormitory on three floors of the building. According to Mr. Turkalj, he subcontracted with Galavan Construction to install sheetrock and paint on the third floor of the premises. TJN also had plumbers working at the site. According to Mr. Turkalj, when plumbing pipes are installed they are first placed in a hanger to hold the weight of the pipe then soldered in place. Mr. Turkalj indicated that he was at the site daily and that third-party defendant LIU had a safety inspector David Fuller conduct weekly on-site safety meetings there.

Mr. Michael Eng testified on behalf of Long Island University as its health and safety manager. His responsibilities included providing oversight of select construction projects for the university. He confirmed that Long Island University was a lessee of the property which was owned by 490 Fulton Owner. His involvement in the subject project was limited to the selection of a site safety manager for the project. According to Mr. Ng., Total Safety Consulting was chosen for that task. In addition, LIU employee David Fuller was responsible for making sure deliveries got into the building on time and attend meetings there. Mr. Ng was not responsible for attending safety meetings and did not know whether any LIU employees were responsible to do so.

In an affidavit submitted in support of LIU's motion for summary judgment, Mr. Ng avers that LIU did not direct, supervise or control the means or methods of construction at 490 Fulton Street for the subject project. He also states that defendant TJN Corporation bore such responsibility, which included the plumbing work as well as the work performed by plaintiff's employer Galavan Construction Corp.

First, the court will address those branches of defendant/third-party plaintiff Fulton Owner's motion for summary judgment which seeks dismissal of the plaintiff's common law negligence and Labor Law § 200 claims against it.

It is well-settled that liability for negligence at a work site will attach pursuant to common law or under Labor Law §200 if the plaintiff's injuries were sustained as a result of a dangerous condition at the work site and only if

the owner, contractor or agent exercised supervision and control over the work performed at the site or had actual or constructive notice of the dangerous condition. (*Pirotta v EklecCo*, 292 AD2d 362 [2002]; *Kobeszko v Lyden Realty Investors*, 289 AD2d 535 [2001]; *Giambalvo v Chemical Bank*, 260 AD2d 432 [1999]). Based upon this standard and the evidence presented by the defendant owner, which includes the plaintiff's testimony upon examination before trial that the moving defendants did not exercise supervisory control over him or otherwise direct the means and method of his work, the defendants have established that summary judgment dismissing the plaintiff's common law negligence and Labor Law § 200 claims against Fulton Owner is appropriate. In opposition, the plaintiff fails to raise a triable issue of fact (see generally *Alvarez v Prospect Hospital*, 65 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Accordingly, those branches of defendant/third-party plaintiff Fulton Owner's motion which seek summary judgment dismissing the plaintiff's common law negligence and Labor Law §200 claims against it are granted.

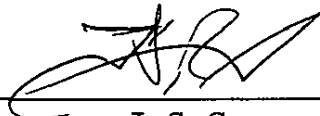
The court now turns to those branches of third-party defendant Long Island University's motion which seek summary dismissal of Fulton Owner's first and second causes of action against it, respectively, for common law indemnity and contribution. In view of the uncontroverted evidence that Long Island University was not actively negligent in that played no role in engaging, directing or supervising the contractors or workers involved in the subject renovation project, Long Island University's request for summary judgment dismissing Fulton Owner's claims for common law indemnity and contribution against it is granted and those claim are hereby dismissed (see, *Nasuro v. PI Associates, LLC*, 49 AD3d 82 [2008]).

Inasmuch as third-party defendant Long Island University has demonstrated that it obtained general liability insurance coverage naming Fulton Owner as an additional insured through its submission of a copy of the subject additional insured endorsement effective May 17, 2011, that branch of Long Island University's motion which seeks to dismiss the fourth cause of action contained in Fulton Owner's third-party claim against it on documentary evidence grounds for failing to procure insurance is granted and the claim is hereby dismissed (CPLR 3211(a) [1]).

Further, since there are additional Labor Law claims that have yet to be resolved for which Long Island University may be liable pursuant to its lease agreement, that branch of Long Island University's motion which seeks dismissal of Fulton Owner's third-party claim against it for contractual indemnification is denied as premature (cf., *Kings Park Industries, Inc. v. Affiliated Agency, Inc.* 22 AD3d 466 [2005]; see generally, *Castano v Zee-Jay Realty*, 55 AD 3d 770 [2008] (citations omitted)).

The motions are in all other respects denied.

Dated: March 22, 2017



J.S.C.

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