

Flores v Saint Illuminator's Armenian Apostolic, Church in N.Y. City
2018 NY Slip Op 32454(U)
October 1, 2018
Supreme Court, New York County
Docket Number: 161614/15
Judge: Carol R. Edmead
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

-----X
SEFERINO FLORES,

Plaintiff,

-against-

SAINT ILLUMINATOR'S ARMENIAN APOSTALIC,
CHURCH IN NEW YORK CITY,

Defendants.

-----X
SAINT ILLUMINATOR'S ARMENIAN APOSTALIC,
CHURCH IN NEW YORK CITY,

Third-party Plaintiff,

-against-

CASPAR & GAMBINI ENTERPRISES, CORP.,

Third-party Defendant.

-----X
CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendant/third-party plaintiff Saint Illuminator's Armenian Apostolic¹ Church in New York City (Saint Illuminator) moves, pursuant to CPLR 3212, for summary judgment dismissing plaintiff Seferino Flores's (Plaintiff, or Flores) Complaint. Additionally, Saint Illuminator moves for summary judgment on its third-party claims against third-party defendant Caspar & Gambini Enterprises, Corp. (Caspar & Gambini). Plaintiff cross-moves for partial summary judgment against Saint Illuminator on his Labor Law § 240 (1) claim.

¹ This appears to be a misspelling of "Apostolic," but the official caption reflects it, and the parties, even Saint Illuminator itself, repeats the misspelling in their papers.

BACKGROUND

Plaintiff alleges that, on August 31, 2015, he was injured while working at Saint Illuminator's church, located 221 East 27th in Manhattan. That he was working in the church is not in dispute. Who he was working for, on the other hand, is a matter of controversy between the parties. Flores himself claims that he was working for Caspar & Gambini.

Saint Illuminator hired Caspar & Gambini to do the subject work at the church. The work included building a new concrete landing, constructing a new dome roof trim, and doing interior finishes (Saint Illuminator/Caspar & Gambini agreement at 1-2, NYSCEF doc No. 41). Caspar & Gambini did not hire subcontractors and all sides agree that it was doing work in the church on the day of plaintiff's accident. Nevertheless, Caspar & Gambini contends that Plaintiff was not working for it. How Plaintiff ended up standing on a ladder placed on top of a scaffold in the church is a matter of dispute.

Plaintiff testified that his involvement in the work arose when his brother-in-law, nonparty Luis Popoca (Popoca), called to offer him the work opportunity and Plaintiff accepted (Plaintiff's tr at 13, NYSCEF doc Nos. 45, 59, 89). Popoca has not been deposed, but he has provided an affidavit, in which he states that he was employed by Casper & Gambini on the date of the accident (Popoca aff, ¶ 2, NYSCEF doc No. 63). Popoca states further that he only knew his boss as "Adam," and that he began working on the project, prior to August 31, 2015, when "Adam ... asked me to perform painting on a newly sheet rocked ceiling of the entrance" to the subject church (*id.*, ¶ 2). As to Flores's involvement on the project, Popoca states that he asked his boss if he could bring Flores, as he needed assistance, and that "Adam told me that I could do so and the company would pay [Plaintiff] \$100 per day for his work, which was expected to

last a couple, or a few, days (*id.*, ¶ 4). “Adam” was known to Plaintiff only as “the owner,” and Plaintiff testified that: “[Popoca] asked the owner if I could work, and he said ‘Yes.’”

This is a good place to pause from Plaintiff and Popoca’s account, and pick a differing version offered by “Adam.” First, “Adam” appears to be the same person who signed the Saint Illuminator agreement as “Adams Stevens.” However, at his deposition he testified that his actual name is Adams Iazbek (Iazbek), and that “Adams Stevens” is a nickname he uses based on his middle name being Stevens (Iazbek tr at 6, NYSCEF doc No. 49 at 6). In any event, Iazbek testified that he was the manager of Casper & Gambini, rather than the owner (*id.* at 7).² denies having acceded to a request that Plaintiff work for Casper & Gambini.

As to the work, Iazbek’s testimony is consistent with that of Plaintiff and Popoca as to the substance of it: he testified that it involved painting the ceiling of the newly reconstructed entrance to the church (*id.* at 19-20). As to whether Iazbek authorized Plaintiff to work on the project, he testified as follows:

Q: Did you instruct [Popoca] to bring anybody with him to assist him in painting?

A: Absolutely not.

Q: Did [Popoca] have authority to, on his own, bring somebody with him to help him paint?

A: No.

(*id.* at 26).

However Plaintiff got to the church, he engaged in sanding, in preparation of painting, once he got there. First, he and Popoca put together a metal, one-platform scaffold that was approximately seven feet high (Plaintiff’s tr, 31, 21-23, NYSCEF doc Nos. 45). The scaffold

² He testified that he understood Casper & Gambini to be owned by Georgette Nacoun, although he was somewhat unsure of that fact, as well as the spelling of her name (Iazbek tr at 7).

would not reach the ceiling area that Flores was to sand, so he placed an approximately 8-foot ladder atop the scaffold (*id.* 23-26).

Plaintiff was alone atop the ladder, atop the scaffold, sanding the ceiling, when the “scaffold moved backwards and the ladder moved forward” (*id.* at 39). This motion, which Flores believes was caused by his “weight and sanding” bucked him off the ladder, and he, along with the ladder, fell to the ground (*id.* at 39-40, 82). After the fall, Flores testified that he tried to stand up: “I wanted to stand up, because I was afraid. With all of my strength, I wanted to get up, but my body fell again. And then I waited for strength and then I got up” (*id.* at 39). At his deposition, Flores expressed the embarrassment mixed with pain that often follows a fall: “When I fell, I was nervous and at the same time, I was ashamed. And I cleaned everything that fell. Even though my body was in pain” (*id.* at 44).

Flores filed his complaint on November 11, 2015, alleging that Saint Illuminator was liable for his injuries under Labor Law §§ 240 (1), 241 (6), as well as under Labor Law § 200 and common-law negligence. Saint Illuminator filed its third-party complaint against Casper & Gambini on May 2, 2016, alleging four causes of action. The first cause of action against Casper & Gambini is for common-law negligence and contribution, the second cause of action is for contractual indemnification, the third is for attorney’s fees, and the fourth cause of action is for breach of contract for failure to procure insurance.

In its motion for summary judgment, Saint Illuminator makes a single argument as to Labor Law §§ 240 (1) and 241 (6): that Flores was not a “worker” as that word is construed under the Labor Law. As to Labor Law § 200 and common-law negligence, however, Saint Illuminator makes arguments specific to those claims, in addition to “worker” argument. Plaintiff, in his opposition, explicitly abandons his Labor Law § 200 and common-law

negligence claims. Accordingly, the branch of Saint Illuminator's motion seeking dismissal of those claims is, at the outset, granted.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Of course, if the opponent raises an issue of fact in the opposing, the court must deny the motion (*see Carroll v Radonigi*, 105 AD3d 493 [1st Dept 2013]). Moreover, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "*regardless of the sufficiency of the opposing papers*" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Plaintiff's Status Under the Labor Law

As a threshold to Labor Law liability, the court must first address the question of whether Flores was a "worker" as that term is construed under the statute. Under the "Definitions" section of the Labor Law "Employee" as "a mechanic, workingman or laborer working for another for hire" (Labor Law § 2 [5]). Subsection 7 of the "Definitions" section provides that "[e]mployed includes permitted or suffered to work."

Saint Illuminator argues that Plaintiff was not authorized to work at the church, as Casper & Gambini did not hire or retain him to work in the church. In support of its position that Flores was not "worker" under the Labor Law, Saint Illuminator cites to *Mordkofsky v V.C.V. Dev. Corp.* (76 NY2d 573 [1990]) and *Yearke v Zarcone* (57 AD2d 457 [4th Dept 1977]). In *Mordkofsky*, the plaintiff argued "that sections 200 and 241 protect members of the general

public as well as workers” (76 NY2d at 576). However, the Court of Appeals held that “a plaintiff must demonstrate that he was both permitted or suffered to work on a building or structure and that he was hired by someone, be it owner, contractor or their agent” (*id.* at 576-577 [internal quotation marks and citation omitted]).

Yeark, the Fourth Department case, held that the plaintiff was not entitled to the protections of the Labor Law because he was a “volunteer” rather than a worker, as “[h]e was not assigned to work there by his employer, he did not perform any physical activity there, and neither he nor his employer receive[d] remuneration ... for his advice” (57 AD2d at 460-461). Plaintiff, in opposition, cites to more recent cases, such as *Vera v Low Income Mktg. Corp.* (145 AD3d 509 [1st Dept 2016]) and *Bruce v 182 Main St. Realty Corp.* (83 AD3d 433 [1st Dept 2011]).

In *Vera*, the First Department determined that the plaintiff was an employee under the Labor Law even though the Workers’ Compensation Board had made the opposite conclusion (145 AD3d at 510). *Vera* attributed the differing results to the “different statutory definitions of ‘employment’ under in the Labor Law and the Workers’ Compensation Law,” and held that the plaintiff could not “be characterized as a ‘volunteer’” (*id.*). In *Bruce*, the First Department encountered conflicting testimony as to the hiring of the plaintiff and held that “the evidence creates a question of fact as to who hired plaintiff and on whose behalf” (83 AD3d at 437).

The present case is factually similar to *Bruce*. If a jury credits the testimony of Iazbeck, that Popoca had no authority to bring his brother-in-law to the Saint Illuminator project, then Plaintiff is not an employee under the Labor Law and is not covered. However, if a jury credits the testimony of Popoca and Plaintiff that Iazbek authorized his work at the church, then

Plaintiff, as someone who was permitted or suffered to work, would be covered as an employee under the Labor Law.

Saint Illuminator's lone argument for dismissal of Plaintiff's Labor Law Labor Law §§ 240 (1) and 241 (6) claims is that Plaintiff is not a covered employee under the Labor Law.³ As there is a question of fact as to Plaintiff's employment status, the branch of Saint Illuminator's motion seeking dismissal of these Labor Law claims must be denied. That same question of fact also precludes a grant of partial summary to plaintiff on his section 240 (1) claim against Saint Illuminator. Accordingly, Plaintiff's cross motion must also be denied.

II. Saint Illuminator's Cross Claims Against Casper & Gambini

Saint Illuminator moves for summary judgment on all of its four third-party claims against Casper & Gambini. Initially, the application for summary judgment on the claims for common-law indemnification and contribution can be denied, as there has been no finding of negligence as against Casper & Gambini. The court will examine the application for summary judgment on the two other claims--contractual indemnification and breach of contract for failure to procure insurance--in more detail.

A. Contractual Indemnification

Generally, "[a] contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous" (*Bradley v Earl B. Feiden, Inc.*, 8 NY3d 265, 274 [2007] [internal quotation marks and citations omitted]). The agreement between Saint Illuminator and Casper & Gambini consists of an estimate attached to a signed rider. The rider contains the following indemnification provision:

"Contractor hereby agrees to the fullest extent permitted by law, to assume the entire responsibility and liability for and defense of and to pay and indemnify

³ Casper & Gambini also makes this argument in their affirmation in opposition to Plaintiff's cross motion and in partial support, partial opposition to Saint Illuminator's motion (NYSCEF doc No. 82).

“Owner against any loss, cost, expense, liability or damage and will hold Owner harmless from and pay any loss, cost, expense, liability or damage (including, without limitation, judgments, reasonable attorney's fees, court costs and the cost of appellate proceedings), which Owner incurs because of injury to or death of any person or on account of damage to property, including loss of use thereof, or because of any other claim arising out of or in connection with, or as a consequence of the performance of the Work, the violation of any Applicable Laws, including, without limitation, any environmental laws, regulations, statutes or ordinances, the existence of any hazardous substances and/or any acts or omissions of Contractor or any of its officers, directors, employees, agents, subcontractors or anyone who is directly or indirectly employed by Contractor except, and then only to the extent such injuries to person or damage to property are solely due to any negligence, acts or omissions of Owner, its employees or agents”

(Saint Illuminator/Casper & Gambini agreement, Rider, ¶ 2, NYSCEF doc No. 41).

Saint Illuminator argues that this broad, “arising out of” indemnification provision is triggered because Plaintiff’s accident arose out of Casper & Gambini’s work. Casper & Gambini argues that the provision is not triggered because Plaintiff was not authorized to perform the work he was performing.

The question of whether Plaintiff is employee under the Labor Law does not alter the contractual indemnification analysis. That is, regardless of Plaintiff’s employment status he was, inarguably, carrying out Casper & Gambini’s obligation, under the Saint Illuminator/Casper & Gambini agreement, by sanding the church ceiling in anticipation of painting. Thus, provision is triggered, as the Plaintiff’s accident arose out of Casper & Gambini’s work, whether or not he was induced to participate in that work by Iazbek or by Popoca alone. Accordingly, Saint Illuminator is entitled to contractual indemnification from Casper & Gambini, including reasonable attorney’s fees, as attorney’s fees are clearly provided for by the indemnification provision.

B. Breach of Contract for Failure to Procure Insurance

Paragraph 3, subsection h of the rider in the Saint Illuminator/Casper & Gambini agreement provides, in relevant part:

“Contractor shall at all times carry (i) Workmen's Compensation Insurance in statutory amounts and coverage as required by laws of the State of New York and Employer's Liability Insurance in the amount of \$100,000 per occurrence or statutory amounts, whichever is higher; (ii) Commercial General Liability Insurance in the amount of \$2,000,000, including Building/Operations, Elevator, Products, Completed Operations and Contractual Coverage, Independent Contractor's Liability, Broad Form Property Damage and Personal Injury... (iv) Contractual Liability Coverage naming Owner ...”

On December 4, 2015, Saint Illuminator sent Casper & Gambini a letter asking it to “notify your insurer and your counsel” of the present action (NYSCEF doc No. 50). On May 20, 2016, Casper & Gambini’s insurer, American Claims Service, Inc., (ACS) sent it a declination of coverage letter, stating, among other things, that ACS’s “Policy number LO35011698 was issued to Casper & Gambini Enterprises Corp., effective October 21, 2014 to October 21, 2015” (NYSCEF doc No. 51). Saint Illuminator does not argue that the occurrence limit for this policy was insufficient under the terms of its agreement with Casper & Gambini.

Instead, it argues that: “[t]he basis of the declination was the claim by plaintiff that plaintiff was an ‘employee’ of CASPER & GAMBINI and that the insuring agreement contained an exclusion of injury to employees, contractors, and employees of contractors” (NYSCEF doc No. 37, ¶50 at 2). Saint Illuminator does not point to any specific portion of ACS’s declination letter, which continues for 14 pages. In any event, Saint Illuminator concludes that, as ACS has not provided coverage, “it is apparent” that Casper & Gambini “has failed to procure the necessary insurance,” and it is entitled to summary judgment.

“A party seeking summary judgment based on an alleged failure to procure insurance naming that party as an additional insured must demonstrate that a contract provision required

that such insurance be procured and that the provision was not complied with" (*DiBuono v Abbey, LLC*, 83 AD3d 650, 652 [2d Dept 2011]). Here, Saint Illuminator fails to make a *prima facie* showing of entitlement to judgment on this issue, as its arguments are conclusory and fail to identify a specific provision that Casper & Gambini breached. As it fails to make such a showing, the branch of Saint Illuminator's motion that seeks summary judgment on its claim for breach of contract for failure to procure insurance must be denied.

CONCLUSION

Accordingly, it is

ORDERED that defendant/third-party plaintiff Saint Illuminator's Armenian Apostolic Church in New York City (Saint Illuminator) motion for summary judgment is resolved as follows:

- the branch seeking dismissal of Plaintiff's Labor Law § 200 and common-law negligence claims is granted;
- the branch seeking summary judgment on its third-party claim for contractual indemnity, including reasonable attorney's fees, against third-party defendant Casper & Gambini (Casper & Gambini) is granted;
- the remainder of the motion is denied;

and it is further

ORDERED that Plaintiff's cross motion for summary judgment as to liability on his Labor Law § 240 (1) claim is denied; and it is further

ORDERED that counsel for Saint Illuminator serve a copy of this order, along with
notice of entry, on all parties within 20 days of entry.

ENTER:

A handwritten signature in black ink, appearing to read 'CAROL R. EDMEAD', written over a horizontal line.

Hon. CAROL R. EDMEAD, JSC

HON. CAROL R. EDMEAD
J.S.C.