

Gibbs v Rochdale Vil., Inc.

2019 NY Slip Op 30584(U)

March 7, 2019

Supreme Court, Suffolk County

Docket Number: 13-1546

Judge: Joseph Farneti

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INDEX No. 13-1546
CAL. No. 17-00017OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 37 - SUFFOLK COUNTY

PRESENT:

Hon. JOSEPH FARNETI
Acting Justice of the Supreme Court

MOTION DATE 4-13-17 (001)
MOTION DATE 5-25-17 (002 & 003)
ADJ. DATE 4-5-18
Mot. Seq. # 001 - MD # 003 - MotD
002 - MD

-----X
ALBERT GIBBS, JR.,

Plaintiff,

- against -

ROCHDALE VILLAGE, INC., GREAT BAY
CONTRACTING, INC. and KONE INC.,

Defendants.

BLOCK, O'TOOLE & MURPHY
Attorney for Plaintiff
1 Pennsylvania Plaza, Suite 5315
New York New York 10119

MIRANDA SAMBURSKY SLONE, LLP
Attorney for Defendant/Second Third-Party
Plaintiff Great Bay Contracting, Inc.
240 Mineola Blvd.
Mineola, New York 11501

-----X
KONE INC., and ROCHDALE VILLAGE, INC.,

Third-Party Plaintiffs,

- against -

ENDURANCE AMERICAN SPECIALTY INS.
CO., ENDURANCE AMERICAN INS. CO.,
ENDURANCE SERVICES LIMITED and
MERCHANTS MUTUAL INS. CO.,

Third-Party Defendants.

ANSA ASSUNCAO, LLP
Attorney for Defendant/Third-Party Plaintiff/
Second Third-Party Plaintiffs Kone and
Rochdale Village
707 Westchester Avenue, Suite 309
White Plains, New York 10604

BAXTER SMITH TASSAN & SHAPIRO
Attorney for Second Third-Party Defendant
Suffolk Plate Glass Co.
99 North Broadway
Hicksville, New York 11801

-----X
ROCHDALE VILLAGE, INC., GREAT BAY
CONTRACTING, INC. and KONE INC.,

Second Third-Party Plaintiffs,

- against -

SUFFOLK PLATE GLASS CO., INC.,

Second Third-Party Defendant.
-----X

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Upon the following papers numbered 1 to 76 read on this motion for summary judgment ; Notice of Motion/ Order to Show Cause and supporting papers 1 - 19; 20 - 40; 41 - 66 ; Notice of Cross Motion and supporting papers ; Answering Affidavits and supporting papers 67 - 68; 69 - 71; 72 - 73 ; Replying Affidavits and supporting papers 74 - 76 ; Other ; it is,

ORDERED that the motion (# 001) by third-party defendant Merchants Mutual Ins. Co. and second third-party defendant Suffolk Plate Glass Co., Inc., the cross motion (#002) by plaintiff Albert J. Gibbs, Jr., and the motion (#003) by defendants/second third-party plaintiffs Rochdale Village, Inc., Great Bay Contracting, Inc. and Kone, Inc., are consolidated for the purposes of this decision; and it is further

ORDERED that the motion (# 001) by third-party defendant Merchants Mutual Ins. Co. and second third-party defendant Suffolk Plate Glass Co., Inc., for summary judgment in their favor is denied; and it is further

ORDERED that the cross motion (# 002) by plaintiff Albert J Gibbs, Jr., for summary judgment in his favor is denied; and it is further

ORDERED that the motion (# 003) by defendants/second third-party plaintiffs Rochdale Village, Inc., Great Bay Contracting, Inc. and Kone, Inc for summary judgment in their favor is determined as follows.

Plaintiff Albert J. Gibbs, Jr., commenced this action to recover damages for personal injuries allegedly sustained on March 14, 2012, when he fell from a ladder while performing work in the elevator shaft of commercial premises owned by defendant/third-party plaintiff Rochdale Village, Inc. ("Rochdale"), located on 169-65 137th Avenue Jamaica, New York. Rochdale entered into a contract with defendant/third-party plaintiff Kone, Inc. ("Kone") for construction work which included the installation of an elevator. Kone subcontracted with defendant/second third-party plaintiff Great Bay Contracting Inc. ("Great Bay") for the installation of the elevator shaft, and Great Bay subcontracted with third-party defendant Suffolk Plate Glass ("Suffolk Plate"), plaintiff's employer, for the installation of glass and aluminum panels for the elevator shaft.

The complaint alleges causes of actions against Rochdale, Great Bay and Kone based upon violations of Labor Law §§ 200, 240 (1), and 241 (6). Kone and Rochdale asserted a third-party action against third-party defendants Endurance American Specialty Ins. Co., Endurance American Ins. Co., Endurance Services Limited and Merchants Mutual Ins. Co. for a declaration that third-party defendants owe them a duty to defend and for indemnity. Rochdale, Great Bay and Kone asserted a second third-party action against Suffolk Plate for breach of contract, indemnification, and contribution.

Merchants Mutual and Suffolk Plate move for summary judgment dismissing the third-party complaint and the second third-party complaint, arguing that the subcontractor rider, which includes language relating to indemnity, was not executed until after the subject accident occurred. In support of their motion, they submit copies of the pleadings, transcripts of the parties' deposition testimony, the subcontractor agreement rider between Suffolk Plate and Great Bay, and the insurance policy.

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Plaintiff cross-moves for summary judgment in his favor, arguing that Rochdale, Great Bay and Kone are subject to liability as they directed and controlled the work at issue. He further argues that defendants failed to provide him with proper protection for his work and that he was not a recalcitrant worker. In support of his motion, plaintiff submits, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, an affidavit of Dion Cooper, an employee of Kone, and an expert affidavit of Herbert Heller, Jr., an engineer. Merchants Mutual and Suffolk Plate oppose plaintiff's motion, arguing that triable issues of fact remain as to how the accident occurred and whether plaintiff's own actions were the proximate cause of the accident.

Rochdale, Great Bay, and Kone (hereinafter referred to as "the Rochdale defendants") move for summary judgment dismissing the complaint and second third-party complaint against them. With regard to the complaint, they argue that they did not direct or supervise plaintiff's work and that plaintiff failed to properly use the subject ladder. As to the second third-party complaint, they contend that Suffolk Glass agreed in a rider to indemnify the defendants. In support of their motion, they submit, among other things, copies of the pleadings, transcripts of the parties' deposition testimony, the subcontract agreement rider, the certificate of insurance, affidavits of Catherine Bongiorno and Barbara Caruso, employees of Great Bay, and an invoice from Suffolk Plate.

Merchants Mutual Ins. and Suffolk Plate opposes the portion of this motion which seeks summary judgment as to the issue of contractual indemnification against Suffolk Plate, arguing that the evidence establishes that the indemnification agreement was not signed at the time of plaintiff's accident. Plaintiff opposes the motion, arguing that defendants failure to provide the appropriate elevation device was a proximate cause of the accident.

Plaintiff testified that at the time of the accident, he was employed by Suffolk Plate as a glazer and that the project that he was working on involved the installation of a new elevator system. He testified that at the work site, tools and equipment were provided which included several A-frame ladders in various sizes and a hydraulic lift. He testified that on the day of the accident, he was peeling protective plastic from the corners of the elevator shaft, and that he used a hydraulic lift and the safety harness which was provided. He testified that he also used a 6-foot, A-frame ladder to peel the protective plastic for areas where the hydraulic lift did not fit. Plaintiff testified that to remove the protective plastic from the back left corner of the elevator shaft, he had to use the A-frame ladder in a closed position as there was not enough space to open the ladder to reach that section. He testified that while he was standing on the ladder, it slid out, causing him to fall. He testified that prior to the accident, he did not think there was an extension ladder available and that he did not inquire. He further testified that he did not ask his co-worker to assist him when he climbed up the ladder.

On a motion for summary judgment the movant bears the initial burden and must tender evidence sufficient to eliminate all material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once the movant meets this burden, the burden then shifts to the opposing party to demonstrate that there are material issues of fact; mere conclusions and unsubstantiated allegations are insufficient to raise any triable issues of fact (*see Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]; *Perez v Grace Episcopal Church*, 6 AD3d 596, 774 NYS2d 785 [2004]). As the court's function on such a motion is to determine whether issues of fact exist, not to

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resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (*see Roth v Barreto*, 289 AD2d 557, 735 NYS2d 197 [2d Dept 2001]; *O'Neill v Town of Fishkill*, 134 AD2d 487, 521 NYS2d 272 [2d Dept 1987]).

Initially, the Court grants the unopposed branch of the motion by the Rochdale defendants seeking dismissal of plaintiff's Labor Law §§ 200 and 241 (6) claims. Inasmuch as plaintiff failed to oppose these branches of the motion seeking their dismissal, the Court deems those claims abandoned (*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]).

As to the branch of the Rochdale defendants' motion to dismiss plaintiff's Labor Law § 240 (1), that section of the statute imposes absolute liability upon owners and contractors who fail to provide or erect safety devices necessary to give proper protection to workers exposed to elevation-related hazards (*see Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 577 NYS2d 219 [1991]). The statute creates a duty that is nondelegable, and owners are held strictly liable for any breach of the statute even if "the job was performed by an independent contractor over which they exercised no supervision or control" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 515, 577 NYS2d 219 [1991]; *see also Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 601 NYS2d 49 [1993]; *Zimmer v Chemung County Performing Arts*, 65 NY2d 513, 518, 493 NYS2d 102 [1985]). The statute is "to be construed liberally to accomplish its legislative purpose which is the 'protection of persons in gaining access to or working at sites where elevation poses a risk'" (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 514, 577 NYS2d 219 [1991]). "The single decisive question in determining whether Labor Law § 240 (1) is applicable is whether the plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential" (*Runner v New York Stock Exch. Inc.*, 13 NY3d 599, 603, 895 NYS2d 279 [2009]; *see Wilinski v 334 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1,10, 935 NYS2d 551 [2011]).

Here, contrary to the Rochdale defendants' assertion, they failed to establish that plaintiff misused the ladder and that his conduct was the sole proximate cause of the subject accident. It is not disputed that plaintiff used a closed A-frame ladder and leaned it against a metal handrail to reach and pull down protective plastic from an elevator shaft. However, plaintiff's decision to use the A-frame ladder in a closed position is "not a per se reason to declare him the sole proximate cause of an accident" (*Noor v City of New York*, 130 AD3d 536, 540, 15 NYS3d 13 [1st Dept 2015]; *see Gillett v City of New York*, 165 AD3d 1064, 85 NYS3d 210 [2d Dept 2018]; *Rico-Castro v Do & Co N.Y. Catering, Inc.*, 60 AD3d 749, 874 NYS2d 576 [2d Dept 2009]). Moreover, plaintiff's failure to ask his co-worker to hold the ladder while he worked also did not constitute the sole proximate cause of the accident, since a co-worker "is not a safety device contemplated by the statute." (*McCarthy v Turner Constr., Inc.*, 52 AD3d 333, 334, 859, NYS2d 648 [1st Dept 2008]; *see Noor v City of New York, supra*). Furthermore, while plaintiff testified at his deposition that he used a hydraulic lift with a safety harness to reach certain areas, he stated that he was unable to use the lift to reach a section of the shaft which is why he used an A-frame ladder. He also explained that he could not use the A-frame ladder in the open position to reach the section of the protective plastic due to the location of a metal handrail. Thus, a triable issue of fact exists as to whether the Rochdale defendants provided adequate safety devices to protect workers from elevation-related injuries (*see Tavaréz v Weissman*, 297 AD2d 245, 747 NYS2d 424 [1st Dept 2002]).

Accordingly, the branch of the Rochdale defendants' motion for summary judgment dismissing the complaint against them is denied.

As the Court determined that a triable issue of fact exists as to whether there were adequate safety devices available at the subject work site, plaintiff's motion for summary judgment in his favor is also denied (*see Burhmaster v CRM Rental Mgt.m Inc.*, 166 AD3d 1130, 86 NYS3d 322 [3d Dept 2018]; *Ball v Cascade Tissue Group-N.Y., Inc.*, 36 AD3d 1187, 828 NYS2d 686 [3d Dept 2007]). Here, plaintiff's own deposition testimony raises an issue of fact as to whether the Rochdale defendants provided him with adequate safety devices. Plaintiff testified that there were several A-frame ladders in various sizes and a hydraulic lift with a harness. While he testified that he did not think there was an extension ladder available, he did not inquire with anyone at the work site to determine whether there was one. Moreover, while plaintiff testified that the hydraulic lift to reach the section that he was working on nor could not use the A-frame ladder in the open position, there still remains an issue of fact as to whether such devices could have been used. Finally, while plaintiff submits an expert affidavit which states that the A-frame ladder provided to plaintiff was inadequate and that alternative devices should have been provided, the expert is conclusory as he did not visit the work site and relies on plaintiff's deposition testimony.

As to the branch of the motion by the Rochdale defendants for summary judgment in their favor as to the third-party complaint and the second third-party complaint, a party generally will not have a viable claim for contractual indemnification against another where the contract between them is executed after the alleged loss (*see Beckford v City of New York*, 261 AD2d 158, 689 NYS2d 98 [1st Dept 1999]). Although an indemnification agreement executed after an accident has occurred may be applied retroactively where it is established as a matter of law that the parties intended the contract to apply from an earlier date (*see Lafleur v MLB Industries, Inc.*, 52 AD3d 1087, 861 NYS2d 803 [3d Dept 2008]; *Quality King Distribs., Inc. v E & M ES, Inc.*, 36 AD3d 780, 827 NYS2d 700 [2d Dept 2007]), indemnity contracts are to be strictly construed to avoid reading into them duties which the parties did not intend to be assumed (*see Great Northern Ins. Co. v Interior Constr. Corp.*, 7 NY3d 412, 823 NYS2d 765 [2006]; *Tonking v Port Auth.*, 3 NY3d 486, 787 NYS2d 708 [2004]; *Hooper Associates, Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491, 549 NYS2d 365 [1989]).

Furthermore, "a contract may be valid even if it is not signed by the party to be charged, provided its subject matter does not implicate a statute – such as the statute of frauds (General Obligations Law § 5-701) – that imposes such a requirement" (*Flores v Lower E. Side Serv. Ctr., Inc.*, 4 NY3d 363, 368, 795 NYS2d 491 [2005]; *Priceless Custom Homes, Inc. v O'Neill*, 104 AD3d 664, 960 NYS2d 455 [2d Dept 2013]). "[A]n unsigned contract may be enforceable, provided there is objective evidence establishing that the parties intended to be bound" (*Flores v Lower E. Side Serv. Ctr., Inc.*, *supra* at 369; *see Geha v 55 Orchard St., LLC*, 29 AD3d 735, 736, 815 NYS2d 253 [2d Dept 2006]). "In determining whether the parties entered into a contractual agreement and what were its terms, it is necessary to look ... to the objective manifestations of the intent of the parties as gathered by their expressed words and deeds" (*Flores v Lower E. Side Serv. Ctr., Inc.*, *supra* at 368, quoting *Brown Bros. Elec. Contrs. v Beam Constr. Corp.*, 41 NY2d 397, 399, 393 NYS2d 350 [1977]; *see Minelli Constr. Co., Inc. v Volmar Constr., Inc.*, 82 AD3d 720, 721, 917 NYS2d 687 [2d Dept 2011]).

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The adduced evidence raises issues of fact as to whether the agreement is enforceable against Suffolk Plate and Merchants Mutual. Here, it is undisputed that the subcontractor rider agreement, which includes language relating to indemnification, was not executed until after the subject accident. The Rochdale defendants submit a phone bill purportedly showing that the agreement was faxed to Suffolk Plate on February 14, 2012, prior to the accident, and a certificate of insurance obtained by Suffolk Plate on February 15, 2012, which names Great Bay Contracting as the certificate holder. However, the bookkeeper employed by Suffolk Plate, Eileen Cowdell, testified at her deposition that she did not receive the agreement prior to the subject accident and the owner of Suffolk Plate, Salvatore Azzuariti testified that he was not asked to sign the agreement by Great Bay Contractor until after the accident. In view of the foregoing, the Rochdale defendants are not entitled to summary judgment on their contractual indemnification claims.

As the Court determined that a triable issue fact exists as to whether the agreement is enforceable, the motion by Suffolk Plate and Merchants Mutual for summary judgment dismissing the third-party complaint and the second third-party complaint is also denied. While Suffolk Plate and Merchants Mutual is correct in their contention that the certificate of insurance is not conclusive proof of coverage or a contract, this evidence does raise a issue of fact as to whether they intended to be bound by the agreement.

Dated: March 7, 2019



Hon. Joseph Farneti
Acting Justice Supreme Court

 FINAL DISPOSITION X NON-FINAL DISPOSITION