Caceres v 1000 Dean, LLC
2019 NY Slip Op 33001(U)
October 3, 2019
Supreme Court, Kings County
Docket Number: 504666/2016
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS

Index No.: 504666/2016
Motion Date: 9-9-19

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RICARDO CACERES,

Plaintiff,

-against-

1000 DEAN, LLC,

Defendant.

---x

DECISION/ORDER

1000 DEAN, LLC,

Third-Party-Plaintiff,

-against-

BERGEN PROJECTS, LLC

Third-Party- Defendant.

---x

The following papers numbered 1 to 9 were read on this motion:

Papers:	**Numbered:**
Notices of Motions/Cross-Motion Affidavits/Affirmations/Exhibits/Memos of Law..................	1-3
Answering Affirmations/Affidavits/Exhibits/Memos of Law............	4-7
Reply Affirmations/Affidavits/Exhibits/Memos of Law....................	8-9
Other..	

Upon the foregoing papers, the motions are decided as follows:

In this action to recover damages for personal injuries, by notice of motion dated February 7, 2019, third-party defendant, BERGEN PROJECTS, LLC. ("Bergen"), moves pursuant to CPLR § 3212 for an order granting it summary judgment dismissing the third-party complaint. By separate notice of motion dated March 18, 2019, defendant/third-party

MS #07-XMD
MS #08-XMD
MS #09-XMG

plaintiff, 1000 DEAN LLC ("1000 DEAN"), moves pursuant to CPLR § 3212 for an order granting it summary judgment dismissing plaintiff's complaint and granting it summary judgment on its third-party claims for contractual and common law indemnification against Bergen. By notice of cross-motion dated July 2, 2019, the plaintiff, RICARDO CACERES, moves to amend his complaint to add a cause of action under Labor Law § 240[1]. The three motion are consolidated for disposition.,

Background:

The plaintiff commenced this action claiming that he suffered injuries on January 18, 2016, when he fell from a 10 foot A-frame ladder below while cleaning an exterior window of a restaurant. At the time of the accident, he was employed by third-party defendant Bergen, the entity who owned and operated the restaurant, and was working as a porter. Defendant 1000 DEAN owned the building. Plaintiff testified at his deposition that he was caused to fall because the bottom of the ladder slid on an accumulation of ice on the sidewalk. Plaintiff claims that the sidewalk was dry when he opened the ladder that day and that the ice formed sometime thereafter because someone, whom he identified as the superintendent of the building, hosed down the sidewalk when the outside temperature was below freezing.

The Motions:

The Court will first address plaintiff's motion to amend his complaint to allege a cause of action under Labor Law § 240(1). "In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading 'are to be freely granted unless the proposed amendment is palpably insufficient or

patently devoid of merit' " (*Myung Hwa Jang v. Mang,* 164 AD3d 803, 804, quoting *Lucido v. Mancuso,* 49 AD3d 220, 222; *see* CPLR 3025[b]; *US Bank N.A. v. Murillo,* 171 AD3d 984, 985). "Where this standard is met, no evidentiary showing of merit is required in a motion to amend the complaint under CPLR 3025(b)" (*US Bank N.A. v. Murillo,* 171 AD3d at 985–986; *see Lucido v. Mancuso,* 49 AD3d at 229). The determination to permit or deny amendment is committed to the sound discretion of the trial court (*see* CPLR 3025[b]; *Edenwald Contr. Co. v. City of New York,* 60 N.Y.2d 957, 959; *US Bank N.A. v. Murillo,* 171 AD3d at 986). Defendant and third-party defendant claim that plaintiff's proposed cause of action under Labor Law § 240(1) is patently devoid of merit. The Court disagrees.

Labor Law § 240(1) imposes a non-delegable duty and absolute liability upon owners and contractors for failing to provide safety devices necessary for workers subjected to elevation-related risks in circumstances specified by the statute (*see Rocovich v. Consolidated Edison Co.,* 78 N.Y.2d 509, 513, 577 N.Y.S.2d 219, 583 N.E.2d 932). To recover under the statute, a plaintiff must demonstrate that he or she was engaged in a covered activity —"the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure" (Labor Law § 240[1] (*emphasis added*); *see Panek v. County of Albany,* 99 N.Y.2d 452, 457, 758 N.Y.S.2d 267, 788 N.E.2d 616 [2003]) — and must have suffered an injury as "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 N.Y.3d 599, 603, 895 N.Y.S.2d 279, 922 N.E.2d 865).

Here, the plaintiff was engaged in the "cleaning" of a building at the time of the

accident. This, however, is not dispositive of whether Labor Law § 240[1] applies, since not all cleaning is covered by the statue. Aside from commercial window cleaning, which is a covered activity *(see Broggy v. Rockefeller Group, Inc.,* 8 N.Y.3d 675, 839 N.Y.S.2d 714, 870 N.E.2d 1144, *Swiderska v. New York Univ.*, 10 N.Y.3d 792, 886 N.E.2d 155, 155–56), "an activity cannot be characterized as "cleaning" under the statute, if the task: (1) is routine, in the sense that it is the type of job that occurs on a daily, weekly or other relatively-frequent and recurring basis as part of the ordinary maintenance and care of commercial premises; (2) requires neither specialized equipment or expertise, nor the unusual deployment of labor; (3) generally involves insignificant elevation risks comparable to those inherent in typical domestic or household cleaning; and (4) in light of the core purpose of Labor Law § 240(1) to protect construction workers, is unrelated to any ongoing construction, renovation, painting, alteration or repair project. (*Soto v. J. Crew Inc.*, 21 N.Y.3d 562, 568–69, 998 N.E.2d 1045, 1049" " Whether the activity is "cleaning" is an issue for the court to decide after reviewing all of the factors. The presence or absence of any one is not necessarily dispositive if, viewed in totality, the remaining considerations militate in favor of placing the task in one category or the other" (*id.*).

Even if the cleaning plaintiff was engaged in at the time of the accident is covered by Labor Law § 240[1], which remains to be seen, to prevail on his Labor Law § 240[1] claim, he must demonstrate that the cleaning of the window necessarily created "an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against" (*Broggy*, 8 N.Y.3d at 681, 839 N.Y.S.2d 714, 870 N.E.2d 1144). In *Broggy*, even though it was determined that the plaintiff was engaged in commercial window cleaning, an

activity encompassed of Labor Law § 240(1), the Court held that plaintiff's failure to demonstrate by admissible proof that the task he had been assigned necessarily created "an elevation-related risk of the kind that the safety devices listed in section 240(1) protect against", the case was properly dismissed. (*id.* at 681, 839 N.Y.S.2d 714, 870 N.E.2d 1144). The Court reasoned that although the plaintiff had fallen from a desk that he stood on while cleaning the window, since there was no indication in the record that the tools he had been supplied with (a squeegee and a wand) were not long enough to permit him to wash the window while standing on the floor. For this reason, the Court reasoned that the plaintiff failed to demonstrate that it was necessary for him to work at an elevated level to complete the task.

In the Court's view, whether plaintiff has a viable Labor Law § 240[1] claim, can not be determined based on the record presently before the Court. It can not be determined whether the plaintiff needed a ladder to clean the window or whether under *Soto*, he was engaged in cleaning within the meaning of the statute. Since it has not demonstrated that plaintiff's proposed Labor Law § 240[1] is patently devoid of merit, plaintiff's motion to amend the complaint to include a cause of action under Labor Law § 240[1] is **GRANTED**. The copy of amended complaint annexed to plaintiff's moving papers will be deemed served upon all parties upon service of a copy of this order. Defendant shall interpose an answer to the amended complaint within 30 days thereafter.

Inasmuch as the defendant and third-party plaintiff have not had the opportunity to fully question the plaintiff regarding his Labor Law § 240[1], the Court hereby directs that the plaintiff appear for a further deposition within 45 days of service of this order which

shall be limited to his Labor Law § 240[1] claim.

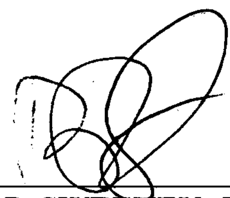
Third-party Defendant Bergen's motion for summary judgment dismissing the complaint and defendant/third-party plaintiff, 1000 DEAN's motion for summary judgment dismissing plaintiff's complaint and granting it summary judgment on its third-party claims for contractual and common law indemnification against Bergen are both **DENIED**, without prejudice, with leave granted to renew provided said motions to renew are made within 60 days following the completion of plaintiff's further deposition.

Accordingly, it is hereby

ORDERED that motions are decided as indicated above.

This constitutes the decision and order of the Court.

Dated: October 3, 2019



PETER P. SWEENEY, J.S.C.

HON. PETER P. SWEENEY, J.S.C

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