Green v Flock Free Bird Control Sys. & Servs., LLC
2020 NY Slip Op 30596(U)
January 7, 2020
Supreme Court, Queens County
Docket Number: 709940-2016
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

ALVIN GREEN, x

Plaintiff,

-against-

FLOCK FREE BIRD CONTROL SYSTEMS AND SERVICES, LLC, TD BANK, NA, WDP ENTERPRISES AT FARMINGDALE, LLC, and TERMINIX INTERNATIONAL COMPANY, LP,

Defendant.
x

FLOCK FREE BIRD CONTROL SYSTEMS AND SERVICES, LLC,

Third-Party Plaintiff,

-against-

MAINTAIN X, LLC,

Third-Party Defendant.
x

TD BANK, NA,

Second Third-Party Plaintiffs,

-against-

TERMINIX INTERNATIONAL COMPANY, LP,

Index
Number 709940 - 2016
Motion
Dates September 5, 2019

Motion Seq. No. 5-8

Second Third-Party Defendant.
_____x

TD BANK, NA,

Third Third-Party Plaintiffs,

-against-

CBRE, INC and CBRE GWS LLC,

Third Third-Party Defendant.
_____x

FLOCK FREE BIRD CONTROL SYSTEMS AND SERVICES, LLC,

Fourth Third-Party Plaintiffs,

-against-

SUNBELT RENTALS, INC,

Fourth Third-Party Defendant.
_____x

The following numbered papers read on the motion by the plaintiff Alvin Green (Green), seeking summary judgment pursuant to CPLR 3212 for liability under Labor Law §§ 240 (1), and 241 (6), against defendant Flock Free Bird Control Systems (Flock Free), codefendant TD Bank, NA (TD Bank), codefendant WDP Enterprises at Farmingdale LLC, (WDP), and codefendant Terminix International Company, LP, (Terminix), and on the separate motion by defendant TD Bank, joined by codefendants WDP and Terminix for summary judgment dismissing plaintiff's complaint, and on the separate motion by defendant Flock Free seeking summary judgment dismissing plaintiff's complaint and dismissing all cross claims against it, and on the separate motion by third third party defendant CBRE, Inc., seeking dismissal of the third third-party complaint as against it, or seeking severance from the main action, or vacatur of the plaintiff's note of issue so that CBRE may conduct its own discovery in its defense.

	Papers Numbered
Notices of Motion - Affs - Ex	102-123;132-145;146-171;204-217
Answering Affs - Memorandum - Ex.....	177-178;179-186;187-194;195-197 219-226
Reply Affs	198-202; 203;227

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

This action arises from the personal injuries sustained by the plaintiff, an employee of third party defendant Maintain X LLC, (Maintain), hired by defendant Flock Free, which in turn was hired by codefendant Terminix, the general contractor of codefendant TD Bank, lessee of the building owned by codefendant WPD. Maintain was subcontracted by Flock Free to replace and install a new bird control system.

At the outset, the defendants position that only the subcontractor Maintain is liable as it was the party who supplied the ladder is obsolete. *Bruto v George Herman and Associates, Inc.*, 47 NY2d 941 [1979] involved an accident that occurred in 1966, and was decided pursuant to the Labor Law prior to the amendments made in 1969, which placed full responsibility and strict liability upon owners, general contractors and their agents for the specified covered activities, involving the types of related risks, particularly work at a height. (*See Gordon v Eastern Ry. Supply, Inc.*, 82 NY 2d 555 [1993].) The duty imposed provides for absolute liability on owners, contractors and their agents for any breach of this statutory duty which proximately causes injury regardless of whether or not the owner, general contractor, or agent exercised supervision or control. (*See Rocovich v Consolidated Edison Co.*,78 NY2d 509 [1991].)

In their further defense, TD Bank and the other codefendants characterize the nature of the work performed by the plaintiff as normal maintenance and therefore not within the statutorily covered activities within the purview of Labor Law §§ 240 (1), or 241 (6). In addition, the defendants assert that the plaintiff was the sole proximate cause of his injuries, as he allegedly misused the ladder causing his own injuries. In its own separate motion, CBRE claims that it does not owe contractual or common law indemnification to TD Bank, claiming TD Bank did not meet its condition precedent to provide 30 days' notice after receiving a claim, and instead provided notice for the first time after 3 years had elapsed. Furthermore, WDP claims it is exempt from the provisions of the Labor Law as an out of possession landlord.

Labor Law § 240 (1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder, ropes or other protective device proved inadequate to protect a worker from harm directly flowing from the application of the force of gravity to an object or person. (*See Ross v Curtis-Palmer Hydro-Electric Co.,* 81 NY2d 494 [1993].) This statute imposes a nondelegable duty upon owners, contractors, or their agents to provide appropriate safety devices for the protection of workers against risks inherent in elevated work sites. (*See McCarthy v Turner Constr., Inc.,* 17 NY3d 369 [2011]; *Caiazzo v Mark Joseph Contr., Inc.,* 119 AD3d 718 [2d Dept 2014].) The covered activities include the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or a structure. (*See Goodwin v Dix Hills Jewish Center,* 144 AD3d 744 [2d Dept 2016].) Within the definition of "altering", is work which makes a significant physical change to the configuration or composition of the building or structure. (*See Sanatass v Consolidated Investing Co, Inc.,* 10 NY3d 333 [2008]; *LaGuidice v Sleepy's Inc.,* 67 AD3d 969 [2d Dept 2009].) "Altering", applies to both Labor Law §§ 240 [1] and 241 [6]. (*See Joblon v Solow,* 91 NY2d 457 [1998].)

Liability pursuant to Labor Law §§ 200, 240(1) or 241 (6) may not be imposed upon a subcontractor who had no control over the work performed by the plaintiff. (*See Russin v Louis N. Picciano & Son,* 54 NY2d 311 [1981]; *Giovanniello v E.W. Howell, Co., LLC,* 104 AD3d 812 [2d Dept 2013].) However, a party is deemed to be an agent of an owner or general contractor under the Labor Law when it has the right to exercise authority or control to enable it to avoid or correct the unsafe condition. (*See Cabrera v Arrow Steel Window Corp.,* 163 AD3d 758 [2d Dept 2018].) The determinative factor is whether the subcontractor had the right to exercise such authority or control not whether it actually exercised such right. (*Id.*) Although the defendant may meet its prima facie burden by demonstrating that the plaintiff was the sole proximate cause of his injuries, (*See Blake v Neighborhood Housing Services of New York City, Inc.,* 1 NY3d 280 [2003]), it is well settled that where it is shown that there was an absence of any appropriate safety device which was a cause to plaintiff's injuries, the plaintiff can not be considered to be the sole proximate cause. (*See Id.; Gallagher v New York Post,* 14 NY3d 83 [2010].) There is no consideration given to contributory or comparative negligence with regard to Labor Law § 240 (1) and even if the plaintiff is partially negligent, liability will be found against the owner, general contractor or agent. (*See Barreto v Metropolitan Transp. Auth.,* 25 NY3d 426 [2015]; *Rapalo v MJRB Kings Highway Realty LLC*, 163 AD3d 1023 [2d Dept 2018].)

In support of his motion, plaintiff submitted, among other things, a copy of the pleadings, his attorney's affirmation, a copy of his deposition, a copy of the deposition of Rodney McKenzie, (McKenzie), his co-worker with Maintain on the subject project, a copy of the deposition of Everold Gustavus, (Gustavus), president of Maintain, a copy of the deposition of Andre Matis, (Matis), regional facilities manager for defendant TD Bank, a

copy of the deposition of Donovan Kearney, (Kearney), service manager of co-defendant Terminix, a copy of the proposal submitted to Terminix by Flock Free, a copy of the "Indemnification and Hold Harmless Agreement" between Flock Free and Maintain, a copy of the "close out" correspondence and invoice Flock Free sent to Terminix, including pictures, and a copy of the deposition of Paul Rosario, (Rosario), owner of Flock Free. In opposition and in support of its own motion for summary judgment TD bank, WDP, and Terminix,submitted, inter alia, the same depositions, the contract between TD Bank and Terminix, and the affidavit of Walter Morris, (Morris), manager of WDP. Flock Free submitted, among other things, the same depositions, and a copy of a proposal between it and Terminix.

It is undisputed that WDP, as owner of the premises, entered into a lease with TD Bank, who had the right to, and did in fact, contract with the general contractor Terminix. As such, both parties fall within the definition in the scaffold law as "owners and their agents", (*See Rizo v 165 Eileen Way, LLC,* 169 AD3d 943 [2d Dept 2019]; *Allan v DHL Exp. (USA), Inc.,* 99 AD3d 828 [2d Dept 2012]), and are thereby subject to the strict liability imposed by Labor Law §§ 240 [1] and 241 [6]. (*See Sanatass,* 10 NY3d 333; *Gordon,* 82 NY2d 555; *Seferovic v Atlantic Real Estate Holdings, LLC,* 127 AD3d 1058 [2d Dept 2015].) In addition, Terminix, as the general contractor of the project, was the statutory agent of the owner, and as such, subject to the same strict liability provisions of Labor Law §§ 240 (1) and 241 (6). (*See Rizzuto v L.A. Wenger Contracting Co., Inc.* 91 NY2d 343 [1998].) With regard to Flock Free, the plaintiff has submitted sufficient evidence to demonstrate that Flock Free was a subcontractor of Terminix. Flock Free described itself as such in its "Indemnification and Hold Harmless Agreement" between it and Maintain. In further support, Kearney described the proposal submitted by Flock Free to be the "contract" between Terminix and Flock Free. The work performed and payments with regard to this work were made pursuant to the contract. Included in the contract were labor, and the boom lift expenses. The "close out" correspondence between Flock Free and Terminix, memorialized their contractual relationship, describing work performed by "its technicians". Kearney further testified that he was not going to be on site whatsoever, as the work was being performed at night after business hours, leaving the full responsibility for the job with Flock Free. As such, Flock Free had the right to supervise and control the work and the worksite, acted as an agent of the general contractor and therefore is within the ambit of strict liability. (*See Walls v Turner Constr. Co.,* 4 NY3d 861 [2005]; *Cabrera,* 163 AD3d 758; *Van Blerkom v America Painting, LLC,* 120 AD32d 660 [2d Dept 2014].)

As to the issue of whether the activities engaged in by the plaintiff were "covered activities" within Labor Law §§ 240 (1) and 241 (6), at his deposition, the plaintiff stated, that while working from a height, he was required to measure, drill into the exterior walls and attach netting with screws and anchors on the outside of the building, drill additional screws

into the exterior, in order to attach and install solar devices to provide low voltage to special tape that was measured and affixed to the outer walls of the building,from the roof down to the ground. Additionally, the exterior was power washed, and certain types of special paint was applied. Furthermore, the plaintiff's submissions included a copy of Kearney's deposition in which he stated that the work to be performed by the plaintiff was new to Terminix, and so unique, that Terminix had to hire Maintain, a subcontractor that specialized in this type of bird control system, who then proceeded to train Terminix employees on how to do these tasks. (*See Collymore v 1895 WWA, LLC,* 113 AD3d 720 [2d Dept 2014].) These activities are not routine maintenance, and fall within the definition of "altering" in the Labor Law. (*See Sanatass,* 10 NY3d 333.) The proposal Flock Free submitted to Terminix, corroborated the plaintiff's description of the work.

According to Flock Free's proposal, a boom lift had been present on the first two days of the project and had been inexplicably taken away on the third day, the day of the accident, leaving the plaintiff with only the ladder his employer Maintain had stored on the truck. The ladder was a 24 foot straight ladder, that needed to be leaned up against the building, and properly secured to the building, or steadied by another person at the bottom as required by the Industrial Code. However, the plaintiff further stated, there was no place to attach the ladder, and as he only had a two man crew, McKenzie was needed on the roof of the building to prepare and hand down materials for the plaintiff to affix to the building walls. As such, no anchoring, no steadying, and no harnesses could be utilized, and the ladder had to be leaned agaist the building standing on dirt.

Highlighting the dangerous conditions, Gustavus testified in his deposition that the job required two lifts, and that he considered the use of a ladder to be unsafe as there were many angles to the building. He further elaborated that he had required these lifts as necessary components to perform the job, memorialized in an email to Flock Free. The need for the boom lift was further supported by the testimony of Kearney, who also stated that he believed that without the two lifts, the job would be unsafe. Listed in the invoice submitted as evidence, is the rental by Flock Free of a 45' boom lift. Rosario also emphasized in his deposition that the work required this boom lift, and that a ladder would not be safe to use on such a project.

The plaintiff has met his prima facie burden to show that under the circumstances, the ladder was not an appropriate safety device as required by Labor Law § 240 (1), and that the inexplicable absence of an appropriate safety device, was a proximate cause of plaintiff's fall and resultant injuries. (*See Blake,* 1 NY3d 280.) Although it may be argued that the manner in which plaintiff used the ladder may be a proximate cause of his injuries, in the absence of an appropriate safety device, he can not be considered to be the sole proximate cause of the accident. (*See Gallagher,* 14 NY3d 83.) In opposition to plaintiff's motion for summary

judgment, the defendants TD Bank, WDP, Terminix and Flock Free have not submitted sufficient evidence to raise triable issues of fact to rebut plaintiff's prima facie showing as to Labor Law § 240 (1). (*See Winegrad v New York Univ. Med. Ctr.,* 64 NY2d 851 [1985].)

With regard to plaintiff's claim pursuant to Labor Law § 241 (6), Industrial Code 12 NYCRR § 23-1.21 (b) (4) (iv), states in its pertinent part:

"...When work is being performed from rungs higher than 10 feet above the ladder footing, mechanical means for securing the upper end of such ladder against side slip are required and the lower end of such ladder shall be held in place by a person unless such lower end is tied to a secure anchorage or safety feet are used."

Clearly from the evidence submitted, the ladder was not properly secured pursuant to this provision. Along with the failure to provide an adequate safety device, the failure to adhere to the provisions in the Industrial Code was a proximate cause of the accident. Although § 241 (6) permits consideration of contributory or comparative negligence on the part of the plaintiff for damages purposes, the plaintiff need not demonstrate his freedom from comparative fault in order to be granted judgment as to liability. (*See Rodriguez v City of New York,* 31 NY3d 312 [2018]; *Ortega v Roman Catholic Diocese of Brooklyn,* –AD3d–, 2019 NY Slip Op 09013 [2d Dept 2019].)

With regard to the defendants' motion for summary judgment as to plaintiff's claims pursuant to Labor Law § 200 and common law negligence, the defendants TD Bank, WDP and Terminix have demonstrated that they did not have actual supervision or control over the workplace, (*See Ortega v Puccia,* 57 AD3d 54 [2d Dept 2008]), and as to TD Bank and WDP, had no actual knowledge that Maintain was even Flock Free's subcontractor. Maintain conducted its activities in the night time hours well after the normal business day at the bank. Therefore, the plaintiff's claims under Labor Law § 200 and common law negligence are dismissed as to the defendants TD Bank, WDP, and Terminix. As there still remain unresolved questions of fact regarding how and in what manner Flock Free exercised any supervision and control over the plaintiff's work, summary judgment is denied to Flock Free.

Turning to the separate motion by CBRE to dismiss the third party complaint against it by defendant TD Bank based upon a contractual indemnification provision, when interpreting a contract, the court must read it as a whole in order to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized. (*See Gutierrez v State,* 58 AD3d 805 [2d Dept 2009].) The right to contractual indemnification depends upon the specific language of the contract. (*See Moss v McDonald's Corp,* 34 AD3d 656 [2d Dept 2006].) In doing so, section

15.1 of the contract between TD Bank and CBRE, entitled "Service Provider's Indemnity", states, in its pertinent part:

> "Notwithstanding any other provision hereof, the Service Provider agrees to indemnify and hold the Bank and its Affiliates and their respective directors, officers and employees harmless from and against any and all third party claims, or demands, causes of action, Losses, damages, fines, penalties, liabilities, costs and expenses, including reasonable attorney's fees and court costs which may be suffered or incurred by the Bank or its affiliates arising out of or as a result of or relating in any manner whatsoever to:
>
> (b) any injury to persons (including injuries resulting in death) or loss of or damage to property of others to the extent that such may be or be alleged to be caused by or suffered as a result of or in connection with negligence, wilful misconduct, breach of the Service Provider's obligations under this Agreement or other fault by the Service Provider or any of its personnel, save and except to the extent caused or materially contributed to, by, or arising out of any act, omission, action, inaction, activity or negligence of the Bank, or its agents, employees or others for whom the Bank is in law responsible, that (I) are in breach of this Agreement, or (ii) which constitute negligence, gross negligence or wilful misconduct; "

From the language of the contract, it can be ascertained that the parties intended that particularly with regard to third party claims of injury to a person, CBRE shall indemnify the third party plaintiff TD Bank for any losses, damages, costs and expenses, including reasonable attorneys' fees for injuries resulting only from its own negligence or fault in its performance under the contract. In order for this clause to be in effect, there must be some showing that the injuries sustained by the plaintiff were caused, at least in part, by some negligence or fault on the part of CBRE. *(See McCarthy v Turner Const., Inc.,* 17 NY3d 369 [2011].) As stated earlier, based on the evidence submitted, the defendant TD Bank has successfully shown that neither it, nor any of its agents, including CBRE, had authority to supervise or control the manner in which the work was performed by the plaintiff. (*See Ortega,* 57 AD3d 54.) Since the causes of action alleged against TD Bank by the plaintiff for violations of Labor Law § 200 and common law negligence have been dismissed, there is no

active negligence attributable to the defendant TD Bank or its agent, third party defendant CBRE. Any liability on TD Bank's part is strictly statutory, or passive, by virtue of its status as net lessee of the premises/workplace. With the finding that there is no active negligence or fault on the part of itself or its agent, the contractual indemnification provision has not been triggered. (*See Moss,* 34 AD3d 656.) In opposition, TD Bank has failed to raise a triable issue of fact. (*See Zuckerman v City of New York,* 49 NY2d 557 [1980].) Having so found, it is unnecessary to consider whether the inordinate and unexplained delay of 3 years in seeking indemnification violated a 30 days' notice provision in the contract, which CBRE contended was a condition precedent.

Accordingly, the plaintiff's motion for summary judgment is granted as to Labor Law §§ 240 (1), and 241 (6) as against defendants WDP, TD Bank, Terminix and Flock Free. The motion for summary judgment by the defendants WDP, TD Bank and Terminix is granted only to the extent of dismissing plaintiff's Labor Law § 200 and common law negligence claims against them, and denied in all other respects. The summary judgment motion by CBRE seeking dismissal of TD Bank's third party complaint against it is granted in all respects. The motion for summary judgment by Flock Free is denied in all respects.

Dated: January 7, 2020

J.S.C

FILED
JAN 23 2020
COUNTY CLERK
QUEENS COUNTY