

King v Durst Org. Inc.
2020 NY Slip Op 31185(U)
May 1, 2020
Supreme Court, New York County
Docket Number: 160786/2015
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42

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BRENDAN KING and DEENA KING,

Index No. 160786/2015
DECISION AND ORDER

Plaintiffs,

v

THE DURST ORGANIZATION INC. and
GOTHAM CONSTRUCTION COMPANY LLC

MOT SEQ 003, 004

Defendants.

-----X
THE DURST ORGANIZATION INC. and
GOTHAM CONSTRUCTION COMPANY LLC

Plaintiffs,

-against-

CFS STEEL COMPANY and RE-STEEL SUPPLY
COMPANY, INC.

Defendants.

-----X
NANCY M. BANNON, J.:

I. INTRODUCTION

In this personal injury action, plaintiff Brendan King (King), an iron worker, seeks to recover damages under Labor Law §§ 200, 240(1), and 241(6) for injuries sustained by plaintiff when an allegedly improperly fastened bundle of rebar fell onto him at a construction site. Third-party defendants CFS Steel Company (CFS) and Re-Steel Supply Company, Inc. (Re-Steel) move

for summary judgment pursuant to CPLR 3212 against defendants/third-party plaintiffs The Durst Organization, Inc. (Durst) and Gotham Construction Company LLC (Gotham) on their claims for breach of contract, common law indemnification, and common law contribution (SEQ 003). Durst and Gotham also move for summary judgment pursuant to CPLR 3212 seeking to dismiss King's claims as against them, or in the alternative, for summary judgment on the common law indemnification and contribution claims (SEQ 004). King cross-moves for summary judgment on the issue of liability as against Durst and Gotham (SEQ 004). The third-party defendant's motion is granted in part. The defendants' motion granted in part. The plaintiff's cross-motion is denied.

II. BACKGROUND

The plaintiff, Brendan King, was assigned to work at a construction project at 855 Sixth Avenue, New York, New York, developing a high-rise building with retail space and residential units. King was employed by non-party Cross Country Construction, Inc., a subcontractor to construction manager Gotham, during the project, and bent rebar for the project. On the day of the accident, December 8, 2014, a two-to-three ton bundle of rebar was lifted and placed next to a bending machine that King was using. The rebar was packaged such that there was a 'master

bundle' that holds all of the rebar and is held together with a tie, and within the master bundle the rebar is held together in a series of mini-bundles that are held together by either 9 gauge wire or a lighter 16 gauge wire depending on the amount of rebar in the mini-bundle. King used a bolt-cutter to cut through the main tie, at which point six or seven pieces of 12' long rebar came loose from the bundle, hitting King in the chest, and pushing him to the ground. King claims that the rebar had never rolled off like that prior to the accident and opined that it was either a failure to fasten a mini-bundle or the use of a lighter gauge wire to fasten the mini-bundle that caused the accident.

III. DISCUSSION

A. Summary Judgment Standard

On a motion for summary judgment, the moving party must make a *prima facie* showing of its entitlement to judgment as a matter of law by submitting evidentiary proof in admissible form sufficient to establish the absence of any material, triable issues of fact. See CPLR 3212(b); Jacobsen v New York City Health & Hosps. Corp., 22 NY3d 824, 833 (2014); Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If the movant fails to meet this burden and establish its claim or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law (see Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Zuckerman v

City of New York, supra; O'Halloran v City of New York, 78 AD3d 536 [1st Dept. 2010]), the motion must be denied regardless of the sufficiency of the opposing papers. See Winegrad v New York University Medical Center, supra; O'Halloran v City of New York, supra; Giaquinto v Town of Hempstead, 106 AD3d 1049 (2nd Dept. 2013). This is because "'summary judgment is a drastic remedy, the procedural equivalent of a trial. It should not be granted if there is any doubt about the issue.'" Bronx-Lebanon Hosp. Ctr. v Mount Eden Ctr., 161 AD2d at 480 (1st Dept. 1990) quoting Nesbitt v Nimmich, 34 AD2d 958, 959 (2nd Dept. 1970).

B. Third-Party Defendants' Motion For Summary Judgment

As a preliminary matter, the third-party defendants move for summary judgment on the third cause of action for breach of contract because there is no contract between the third-party defendants and Durst or Gotham. In response, counsel for Durst and Gotham concede that discovery has not produced a contract and thus they do not oppose the motion with respect to the third cause of action.

In support of the remaining portion of their motion, seeking to dismiss the first and second causes of action for common law indemnification and contribution, the third-party defendants submit, *inter alia*, the deposition of Gopaul Edward, the operations manager of CFS Steel, describing their procedures for

tying the rebar and spot-checking bundles to ensure that they are properly loaded, the shipping procedures for the underlying project, the plaintiff's deposition describing his uncertainty as to whether the tie around the bundle could have been broken post-delivery, the deposition of Richard Agresta, the former superintendent for Gotham on the construction project where the plaintiff was injured, describing the steel yard at the time of the project was open and accessible to all trades. These submissions fail to establish the absence of an issue of triable fact.

To establish a claim for common law indemnification, a party must show that (1) it has been held vicariously liable without proof of any negligence or actual supervision on its part, and (2) the proposed indemnitor was either negligent or exercised actual supervision or control over the injury-producing work. See Naughton v City of New York, 94 AD3d 1 (1st Dept. 2012).

Moreover, contribution is available where two or more tortfeasors combined to cause an injury and is determined in accordance with the relative culpability of each such person. Children's Corner Learning Ctr. v A. Miranda Contracting Corp., 64 AD3d 318 (1st Dept. 2009). As such, in order to prevail on its motion for summary judgement, the third-party defendants must establish, *prima facie*, that they were not negligent.

The third-party defendants argue that all bundles are tied prior to being shipped to various construction sites, there is no evidence to the contrary, and there had never been any complaints about the rebar before. This fails to establish the absence of negligence, as the third-party defendants fail to demonstrate that they did not improperly bundle the rebar in the instant case, either by failing to tie a mini-bundle or improperly tying a mini-bundle. Thus, the third-party defendant's motion for summary judgment is granted only to the extent that the third cause of action for breach of contract is dismissed.

C. The Defendants' Motion For Summary Judgment

Durst and Gotham move for summary judgment pursuant to CPLR 3212 seeking to dismiss King's negligence claims under Labor Law §§ 200, 240(1), and 241(6), or in the alternative, for summary judgment on the common law indemnification and contribution claims against the third-party defendants.

Durst argues that the labor law claims alleged by the plaintiff are inapplicable as to it, as it was not the owner of the building at the time of the accident. In support Durst submits, *inter alia*, the contract manager agreement between Gotham and 855 MRU LLC, dated November 1, 2014, wherein 855 MRU LLC is represented to be, and signs as, the owner of the building at 855 Sixth Avenue, New York, New York.

Labor Law §§ 240 and 241 only apply to "contractors and owners and their agents." Similarly, Labor Law § 200, codified a landowners' and general contractors' common-law duty to maintain a safe workspace. See Ross v Curtis-Palmer Hydro-Electric Co., 81 NY2d 494 (1993). While King alleges in his complaint that Durst was the owner of the building, he does not address Durst's submissions to the contrary in his reply papers, nor does he argue elsewhere that Durst is actually the owner of the building.

Moreover, the agency relationship for the purposes of the aforementioned statutes has been held to arise only when work is delegated to a third party who obtains the authority to supervise and control the job, and amongst Durst's submissions is the deposition transcript of Richard Agresta, the superintendent of Gotham, stating that Durst did not have authority to supervise and control the job. See Blake v Neighborhood Hous. Servs. Of N.Y. Cty. Inc., 1 NY3d 280 (2003). As such, Durst has established that it is not an owner, contractor, or an agent thereof and the plaintiffs' claims under Labor Law §§ 200, 240, and 241 are dismissed as against Durst.

Turning to Gotham, it argues that King's claim under Labor Law § 240(1) must be dismissed because the alleged accident did not implicate an elevation related risk or the failure of a safety device.

"Labor Law § 240(1) imposes on owners, general contractors and their agents a nondelegable duty to provide safety devices to protect against elevation-related hazards on construction sites, and they will be absolutely liable for any violation that results in injury regardless of whether they supervised or controlled the work." Ragubir v Gibraltar Mgt. Co., Inc., 146 AD3d 563, 564 (1st Dept. 2017).

The statute places a duty to protect against the "special hazards" that arise from gravity-related risk, (Ross v Curtis-Palmer Hydro-Electric, 81 NY2d 494 [1993]), with the dispositive inquiry being "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" (Willinski v 334 East 92nd Housing Development Fund Corp., 18 NY3d 1 [2011]). There is no defined height requirement, the distance that an object falls must only be more than *de minimis*, (see Marerro v 2075 Holding Co., 106 AD3d 408 [1st Dept. 2013]), and the weight of a falling object may be taken into consideration when determining whether there was a significant elevation differential (see Id.; Kempisty v 246 Spring Street, LLC, 92 AD3d 474 [1st Dept. 2012]; Fontaine v Juniper Associates, 67 AD3d 608 [1st Dept. 2009]). In support of its motion, Gotham submits, *inter alia*, excerpts of King's first deposition which states that as soon as he used the bolt cutter to cut through the

main wire holding together the bundle, the rebar fell out toward his chest knocking him backward. Gotham argues that these submissions show that King was not injured by an elevation-related hazard, as the rebar fell out towards him and hit him in the chest, and that there was not a failure to provide King with an adequate safety device, as he was unpacking the rebar.

In response, King cites to both his first and second deposition transcripts in which he describes the height of the rebar on top of the 'horse' (a three-to-four foot high wooden bench) on which it was placed at the time of the accident as being taller than him, and describes the lack, or insufficiency, of the ties on the mini-bundles at the time of the accident. These submissions raise triable issues of fact as to whether the height differential was more than *de minimis*, and whether Gotham was required to provide adequate protection against the risk of falling rebar, whether by ensuring that the mini-bundles were properly secured or through some other safety device, particularly in light of the weight of the rebar and the danger associated with severing the main tie to the master bundle.

Gotham further moves to dismiss King's claims under Labor Law § 241(6), arguing that the plaintiff has failed to show a violation of the New York State Industrial Code, as required. See Misicki v Caradonna, 12 NY3d 511 (2009). Although King cites a litany of code violations in his complaint, the only violation

discussed in his moving papers is the violation of Industrial Code 23-2.1(a) (1) which states: "[a]ll building materials shall be stored in a safe and orderly manner." Although King alleges that improper storage of the bundle could have led to the accident, the defendants are correct in that material in use at the time of an accident does not implicate a violation of 23-2.1(a) (1) as the material is not being stored. See Waitkus v Metro Housing Partners, 50 AD3d 260 (1st Dept. 2008). Therefore, summary judgment on this theory of liability is proper.

Furthermore, King does not address his Labor Law § 200 claim in his moving papers, let alone advance any argument as to how Durst or Gotham, is liable thereunder, and as such, those claims are deemed withdrawn.

Inasmuch as Gotham and Durst move, in the alternative, for summary judgment on their claims for common law indemnification and contribution, the court notes that, as discussed above, there is a triable issue of fact regarding whether the third-party defendants improperly bundled the rebar, as well as a triable issue of fact regarding whether Gotham may be liable under Labor Law § 240(1). As such, Gotham cannot establish that the third-party defendants were negligent nor can it establish that it was without fault, and therefore unconditionally entitled to indemnification.

However, Gotham is entitled to conditional summary judgment on the issues of common-law indemnification and contribution, to

the extent that the third-party defendants may be found negligent in the instant action. See Burton v CW Equities, LLC, 97 AD3d 462 (1st Dept. 2012); Hughey v RHM-88, LLC, 77 AD3d 520 (1st Dept. 2010).

D. The Plaintiffs' Cross-Motion

King's cross-motion for summary judgment on the issue of liability as against Durst and Gotham is denied. As discussed above, there is a triable issue of fact as to whether the height from which the rebar fell onto King was sufficient to implicate Labor Law § 240(1), and whether there was a need for additional safety measures to protect King from such a height differential.

IV. CONCLUSION

The third-party defendant's motion for summary judgment on the defendants' claims for common-law indemnification, contribution, and breach of contract is granted only to the extent that the claim for breach of contract is dismissed. Durst and Gotham's motion for summary judgment against the plaintiffs' claims under Labor Law §§ 200, 240(1) and 241(6) is granted to the extent that the complaint is dismissed as against Durst, and the claims under § 200 and 241(6) are dismissed as against Gotham. The branch of Gotham's motion for summary judgment on its claims for common-law indemnification and contribution, in the alternative, is conditionally granted to the extent that the

third-party defendants may be found negligent. The plaintiffs' motion for summary judgment on the issue of liability is denied, as there are triable issues of fact as to whether whether the height from which the rebar fell onto King was sufficient to implicate Labor Law § 240(1), and whether there was a need for additional safety measures to protect King from such a height differential.

Accordingly, it is,

ORDERED that the motion by third-party defendants CFS Steel Company and Re-Steel Supply Company, Inc. for summary judgment dismissing the first, second, and third causes of action against it is granted to the extent that the third cause of action for breach of contract is dismissed, without opposition, and the motion is otherwise denied; and it is further,

ORDERED that the branch of the motion by defendants the Durst Organization, Inc. and Gotham Construction Company LLC for summary judgment dismissing the complaint as against them is granted to the extent that the complaint is dismissed as against the Durst Organization, Inc., and the claims under Labor Law §§ 200 and 241(6) are dismissed as against Gotham Construction Company LLC; and it is further,

ORDERED that the branch of the motion by defendants the Durst Organization, Inc. and Gotham Construction Company LLC for

summary judgment on their second and third causes of action as against the third-party defendants CFS Steel Company and Re-Steel Supply Company, Inc. is conditionally granted to the extent that CFS Steel Company and Re-Steel Supply Company, Inc. are found to have been negligent; and it is further,

ORDERED that the plaintiff's motion for partial summary judgment on the issue of liability as against the Durst Organization, Inc. and Gotham Construction Company LLC is denied.

This constitutes the Decision and Order of the Court.

Dated: May 1, 2020



NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON