Clauzel v Reliant Realty Servs. LLC
2020 NY Slip Op 33050(U)
September 3, 2020
Supreme Court, Kings County
Docket Number: 521599/2017
Judge: Reginald A. Boddie
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At an IAS Trial Term, Part 95 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at 360 Adams Street, Borough of Brooklyn, City and State of New York, on the 3rd day of September 2020.

PRESENT:
Honorable Reginald A. Boddie, JSC

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HENRI CLAUZEL,
Plaintiff,

Against

RELIANT REALTY SERVICES LLC, RENEWAL CONSTRUCTION SERVICES, LLC, MILL PLAIN PROPERTIES, LLC, NEWPORT GARDENS APARTMENTS, L.P., NEWPORT GARDENS DEVELOPERS, LLC, OMNI NEW YORK, LLC and ONLY NEWPORT GARDENS, LLC,
Defendants.

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RENEWAL CONSTRUCTION SERVICES, LLC,
Third-Party Plaintiff,

Against

REAL WINDOWS, LLC,
Third-Party Defendant.

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DECISION AND ORDER

Papers	Numbered
MS 3	Docs. # 36-55, 121-122, 124
MS 5	Docs. # 99-120, 123, 125

Upon the foregoing cited papers, the decision and order on above-cited motions is as follows:

Plaintiff commenced this action to recover for personal injuries allegedly suffered on December 15, 2016, when he fell down stairs at 877 Rockaway Avenue (premises). Plaintiff alleged negligence and violations of Labor Law §§ 200, 241 (6), 12 NYCRR §§ 23. 1.5-1.12 and 12 NYCRR §§ 23-1.7(d), 23-1.7(e), 23-1.7 (e) (1) (2), 23-1.7 (f).

On May 19, 2016, Newport Gardens Apartments, L.P. (Newport Apartments), identified in the contract as the owner of the premises, and Renewal Construction Services, LLC (Renewal), construction manager, entered into a contract for construction at the premises (Newport Gardens renovation). The contract was executed on behalf of Newport Apartments by Newport Gardens Apartments Developers, LLC (Newport Developers), as General Partner, ONY Newport Gardens Apartments, LLC (ONY), as member, OMNI New York, LLC (OMNI), as member, and Eugene Schneur, Managing Director. OMNI acquired the property some time in 2016, and Renewal agreed on the final scope of work with OMNI. Renewal entered into subcontracts for work including carpentry, flooring, painting, windows, roofing, and plumbing. It was part of Renewal's protocol to instruct their subcontractors to clean up debris at the end of the day. Junior Newton, OMNI's Super, testified that Renewal did not do a good job cleaning up after themselves each day.

At the time of the accident, plaintiff was employed at the premises by nonparty Cambridge Security Service Corp. (Cambridge) as a security officer. He alleged at approximately 5:55PM, he was approached by a construction worker and asked to open door #165 to the basement in order for that person to install a window. He alleged he was descending the exterior steps to the basement when he was caused to fall on debris such as sawdust, mud and sand left on the steps from the construction work being performed.

Reliant Realty Services, LLC (Reliant), Mill Plain Properties, LLC (Mill Plain), Newport Apartments, Newport Gardens Apartments Developers, LLC (Newport Developers), OMNI and ONY Newport Gardens Apartments, LLC (ONY) sought summary judgment (MS 3) pursuant to CPLR 3212 on their cross-claims for contractual and common law indemnification against

defendant/third-party plaintiff Renewal Construction Services, LLC, and for dismissal of plaintiff's Complaint and Renewal's cross-claims as against them.

Renewal opposed the portion of the motion seeking summary judgment on contractual indemnification against it. Renewal argued against contractual indemnity on behalf of all the movants on the grounds that the subject contract does not name any party other than Newport Apartments, the entity with whom Renewal entered into the contract, and thus, Mill Plain, Reliant Realty, Newport Developers, OMNI and ONY are not entitled to contractual indemnification. Renewal also argued movants ". . . offered nothing but pure speculation to assert that this accident was caused in whole, or in part, by any act or omission of Renewal . . ." and cannot prove that Renewal was negligent.

Renewal (MS 5), defendant and third-party plaintiff, filed an untimely cross-motion for dismissal of all claims and cross-claims against it pursuant to CPLR 3212 and CPLR 3211 (a). The relevant note of issue was filed November 12, 2019, and the Court, by the January 22, 2020 order of Justice Colon, denied an extension of time to file motions for summary judgment. Renewal argued its untimely motion should be considered as it is substantively the same as MS 3. To the extent relief sought in this untimely motion is not resolved in the foregoing decision, the motion is denied as untimely.

It is well settled that the protection afforded by Labor Law § 241 (6) extends only to employees who are engaged or involved in an activity integral to construction work (*e.g. Wolfe v KLR Mech., Inc.*, 35 AD3d 916, 918 [3d Dept 2006], [citations omitted]). At the time of the accident, plaintiff was descending the stairwell to unlock a door to grant basement access to a construction worker who was installing windows. Plaintiff's work did not involve "construction" or "excavation" work (Labor Law § 241 [6]; *see also*, 12 NYCRR 23-1.4 [b] [13]; *see Jock v Fein*,

80 NY2d 965, 968 [1992]). Thus, he was not engaged in an activity protected under Labor Law § 241 (6) and therefore would not be a member of the class of workers intended to be protected by Labor Law § 241 (6), which subjects contractors and owners to absolute strict liability (*see Wolfe*, 35 AD3d at 918; *see Jock*, 80 NY2d at 965). Accordingly, plaintiff's Labor Law § 241 (6) claim is dismissed.

Labor Law § 200 (1), which codifies the common-law duty of landowners and general contractors to provide a safe workplace, is not limited to construction workers (*e.g. Lombardi v Stout*, 80 N.Y.2d 290, 294; *see Wolfe*, 35 AD3d at 918; *see Jock*, 80 NY2d at 967). Where, as here, a person lawfully frequenting a worksite sustains injuries as a result of an unsafe or dangerous condition existing at a work site, rather than from the manner in which the work is being performed, the liability of a general contractor depends upon whether they had notice of the dangerous condition and control of the place where the injury occurred (*see* Labor Law § 200; *Wolfe*, 35 AD3d at 918 , citing *see Blysma v County of Saratoga*, 296 AD2d 637, 639 [2002]; *Ross v Curtis-Palmer Hydro-Elec. Co.*, 295 AD2d 723, 724 [2002], lv denied 98 NY2d 614 [2002]); *Riccio v Shaker Pine*, 262 AD2d 746, 748 [1999], *lv dismissed* 93 NY2d 1042 [1999]). While the conditions that allegedly caused the accident may have been created by the negligence of Renewal's subcontractor, neither the common law nor Labor Law § 200 makes Renewal, as general contractor, vicariously liable for the negligence of its subcontractors even where, as here, Renewal had a general contractual obligation to instruct the subcontractors to clean up at the end of the day (*see Burkoski v Structure Tone, Inc.*, 40 AD3d 378, 382-383 [1st Dept 2007], citing *O'Sullivan v. IDI Constr. Co.*, 28 AD3d 225, 226 [1st Dept 2006], *affd.* 7 NY3d 805 [2006]; *Torres v Morse Diesel Intl., Inc.*, 14 AD3d 401, 403 [2005]). Accordingly, summary judgment is granted insofar as plaintiff's causes of action for

negligence and violation of Labor Law § 200 are dismissed against Renewal (*Burkoski v Structure Tone, Inc.*, 40 AD3d at 382-383).

However, there is a question of fact as to owners' liability. According to Mr. Newton, OMNI's Super, the debris on the steps was a daily and ongoing condition during the construction project. He testified he worked from 7:00AM to 4:00PM, and every morning when he started work at 7:00AM, the steps would be a mess with debris including plaster and sawdust. He testified he would have porters employed by "Newport Gardens" clean the steps by sweeping and washing them down in the morning, but it did not make sense to clean and wash the steps again at the end of his shift because the construction workers were still working. Accordingly, there is a question of fact regarding the owners' liability for the condition which caused plaintiff's fall and summary judgment is denied.

Movants sought summary judgment for common law and contractual indemnification against Renewal on the grounds that they are free from liability and section 3.18 of the parties' contract requires Renewal to indemnify the owner for damages attributable to negligence of itself or its subcontractors. Movants argue accurately that section 3.18 requires Renewal to indemnify them for negligence, including that of its subcontractors. However, ". . . 'the predicate of common-law indemnity is vicarious liability without actual fault on the part of the proposed indemnitee, [therefore] it follows that a party who has itself actually participated to some degree in the wrongdoing cannot receive the benefit of the doctrine'" (*Konsky v Escada Hair Salon, Inc.*, 113 AD3d 656, 658[2d Dept 2014], citing *Henderson v Waldbaums*, 149 AD2d 461, 462 [2d Dept 1989], quoting *Trustees of Columbia Univ. v Mitchell/Giurgola Assoc.*, 109 AD2d 449, 453 [1st Dept 1985]). Here, there are questions of fact as to movants' liability for the condition of the premises where plaintiff's accident

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occurred. Accordingly, movants are granted summary judgment on their contractual indemnification claim against Renewal and denied summary judgment on their common law indemnification claim.

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