

Raniolo v Rabadi

2020 NY Slip Op 35236(U)

August 12, 2020

Supreme Court, Suffolk County

Docket Number: Index No. 615055-16

Judge: Vincent J. Martorana

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SHORT FORM ORDER

INDEX No. 615055-16

CAL. No. 19-02108OT

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 23 - SUFFOLK COUNTY

PRESENT:

Hon. VINCENT J. MARTORANA
Justice of the Supreme Court

MOTION DATE 2-27-20 (001)

MOTION DATE 3-19-20 (002)

MOTION DATE 3-26-20 (003)

MOTION DATE 3-20-20 (004)

ADJ. DATE 6-11-20

Mot. Seq. # 001 - Mot D #003 - MotD

002 - MG #004 - MotD

-----X
DOROTHY RANIOLO,

Plaintiff,

- against -

MAZAN RABADI, PAMELA RABADI, CEDAR
KNOLLS, INC., WESTCHESTER MODULAR
HOMES, INC., and ABC CORPORATION,

Defendant.
-----X

WESTCHESTER MODULAR HOMES, INC.,

Third-Party Plaintiff,

- against -

OVERTON'S CONSTRUCTION, INC.,

Third-Party Defendant.
-----X

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The Court, on its own motion and for the purpose of correcting a scrivener's error, hereby recalls and vacates its order dated July 15, 2020, and issues the following order in its place and stead:

Upon the following papers read on these motions for summary judgment: Notice of Motion/ Order to Show Cause and supporting papers by defendants Mazan Rabadi and Pamela Rabadi, dated January 24, 2020; Notice of Motion/ Order to Show Cause and supporting papers by third-party defendant Overton's Construction, Inc., dated February 14, 2020; Notice of Motion/ Order to Show Cause and supporting papers by defendant Cedar Knolls, Inc., dated February 20, 2020; Notice of Motion/ Order to Show Cause and supporting papers by defendant Westchester Modular Homes, Inc., dated February 21, 2020; Answering Affidavits and supporting papers by defendant Cedar Knolls, Inc., dated February 24, 2020 and May 27, 2020; Answering Affidavits and supporting papers by plaintiff, dated May 27, 2020; Answering Affidavits and supporting papers by defendant Westchester Modular Homes, Inc., dated May 28, 2020; Replying Affidavits and supporting papers by defendant Cedar Knolls, Inc., dated June 2, 2020; Replying Affidavits and supporting papers by defendants Mazan Rabadi and Pamela Rabadi, dated June 10, 2020; Replying Affidavits and supporting papers by defendant Westchester Modular Homes, Inc., dated June 10, 2020; Other Memorandum of Law; ~~(and after hearing counsel in support and opposed to the motion)~~ it is,

ORDERED that motion (001) by defendants Mazan Rabadi and Pamela Rabadi, the motion (002) by third-party defendant Overton's Construction, Inc., the motion (003) by defendant Cedar Knolls, Inc., and motion (004) by defendant Westchester Modular Homes, Inc. are consolidated for the purpose of this determination; and it is further

ORDERED that the motion (001) by defendants Mazan Rabadi and Pamela Rabadi for summary judgment dismissing the complaint and cross claims against them, and for summary judgment on their claims against defendant Cedar Knolls, Inc. for contractual indemnification and breach of contract for failure to procure insurance is granted in part and denied in part; and it is

ORDERED that the motion (002) by third-party defendant Overton's Construction, Inc. for summary judgment dismissing the third-party complaint against it is granted; and it is

ORDERED that the motion (003) by defendant Cedar Knolls, Inc. for summary judgment dismissing the complaint and all cross claims against it is granted in part and denied in part; and it is

ORDERED that the motion (004) by defendant Westchester Modular Homes, Inc. for, inter alia, summary judgment dismissing the complaint and all cross claims against it, and for summary judgment on its claims against Cedar Knolls, Inc. for common law and contractual indemnification and breach of contract for failure to procure insurance is granted in part and denied in part.

Plaintiff commenced this action for alleged injuries arising from an accident which occurred on September 9, 2015, at the premises located at 50 Romana Drive, Hampton Bays, New York. On the date of the accident, a modular home was under construction at the subject premises, which is owned by defendants Mazan and Pamela Rabadi. Defendant Cedar Knolls, Inc. ("Cedar Knolls") was the general contractor for the construction project. Defendant Westchester Modular Homes, Inc. ("Westchester Modular") manufactured the modular components of the home, and third-party defendant Overton's Construction, Inc. ("Overton's") bolted the modular components together and secured them to the foundation. Plaintiff alleges that, while she was walking her dog on the evening of the accident, her dog pulled the leash from her hand and ran onto the subject premises. Plaintiff further claims that, while chasing her dog, she entered the construction site and stepped onto a piece of plywood lying on the ground, which "tipped," causing her to lose her balance and fall to the ground, sustaining injury. In her complaint, plaintiff asserted claims against the defendants for negligence, as well as for violations of Labor Law sections 200 and 241(6).

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Defendants Mazan Rabadi and Pamela Rabadi move for summary judgment dismissing plaintiff's claims and all cross claims and counterclaims against them. The Rabadis also move for summary judgment with respect to their cross claims against defendant Cedar Knolls for contractual indemnification and breach of contract for failure to procure insurance. In support of their motion, the Rabadis submit copies of the pleadings, the deposition transcripts of the parties, and a copy of their contract with Cedar Knolls.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]; *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 165 NYS2d 498 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316 [1985]). Once such proof has been offered, the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must offer evidence in admissible form, and must "show facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]; *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to 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]).

The branch of the Rabadis motion for summary judgment requesting dismissal of the claims and cross claims against them is granted. With respect to plaintiff's claims under Labor Law §§ 200 and 241 (6), the evidence submitted by the Rabadis, including plaintiff's deposition testimony, establishes that "plaintiff is not a member of the class of persons intended to be protected by those provisions of the Labor Law" (*Morales v 569 Myrtle Ave., LLC*, 17 AD3d 418, 420, 793 NYS2d 145 [2d Dept 2005]). In opposition to the Rabadis' motion, plaintiff failed to present any evidence raising a triable issue of fact with regard to the applicability of the Labor Law to the instant action. Rather, plaintiff concedes that Labor Law §§ 200 and 241 (6) are not applicable herein. Accordingly, plaintiff's claims against the Rabadis under Labor Law §§ 200 and 241 (6) are dismissed (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 487 NYS2d 316; *Morales v 569 Myrtle Ave., LLC, supra*).

The Rabadis have also established prima facie entitlement to summary judgment with respect to plaintiff's claims against them under common law negligence. "A property owner is not liable in negligence unless he or she created the allegedly dangerous condition or had actual or constructive notice of its existence" (*Winby v Kustas*, 7 AD3d 615, 615, 775 NYS2d 906 [2d Dept 2004]; *see also Labella v Willis Seafood*, 296 AD2d 382, 744 NYS2d 504 [2d Dept 2002]). The evidence submitted in support of the Rabadis' motion established that they did not create, or have actual or constructive notice of any alleged dangerous condition at the premises. Pamela Rabadi testified that she and her husband hired Cedar Knolls to construct the subject premises for her family's use as a vacation home. During the construction, she visited the premises for approximately 1½ hours on the date that the modular units were delivered, which was approximately one week prior to plaintiff's accident. She further testified that she did not observe any pieces of plywood on the ground on that date, nor did she receive any complaints regarding the alleged condition prior to the date of plaintiff's accident. Mazan Rabadi testified that he never visited the premises during the construction of the home, and that he was unaware of any complaints regarding the subject property prior to plaintiff's accident. The testimony of the Rabadis establishes that they did not have prior notice of the condition which allegedly caused plaintiff's accident. In opposition to the Rabadis prima facie showing of entitlement to summary judgment, plaintiff failed to raise an issue of fact (*see Zuckerman v City of New York, supra; Labella v Willis Seafood, supra*). Accordingly, plaintiff's claims against the Rabadis under common law negligence, as well as the cross claims against them, are dismissed.

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The branch of the Rabadis' motion for summary judgment against Cedar Knolls with respect to their claims for contractual indemnification and breach of contract for failure to procure insurance is denied. The construction agreement between the Rabadis and Cedar Knolls required Cedar Knolls to obtain and maintain comprehensive general liability insurance with combined limits of at least \$1,000,000. Nothing in the agreement obligated Cedar Knolls to procure insurance naming the Rabadis as additional insureds. Thus, the Rabadis have failed to establish entitlement to summary judgment with respect to their claims against Cedar Knolls for breach of contract (*see Winegrad v New York Univ. Med. Ctr., supra; Morales v 569 Myrtle Ave., LLC, supra*).

The indemnification provision in the agreement between the Rabadis and Cedar Knolls requires Cedar Knolls to indemnify and hold harmless the Rabadis from, inter alia, liability and claims "resulting from, arising out of, or occurring in connection with the execution of the work" by Cedar Knolls. The deposition testimony of plaintiff, as well as Howard Kipnes of Cedar Knolls, establishes that there was no construction work ongoing at the time of the accident. In addition, questions of fact are present regarding the alleged condition on which plaintiff lost her balance, and whether such condition arose out of, or in connection with, the execution of Cedar Knolls' work at the premises. In this regard, plaintiff testified that the piece of plywood was lying on the ground toward the center of the house under construction, and that although it appeared flat, the plywood "tipped" when she stepped onto it, causing her to lose her balance and fall. Kipnes testified that the modular units were delivered and installed at the premises on September 3, 2015, and that he was present at the site for the entire day. Kipnes further testified that the ground was level at the site, and that all debris was stacked into neat piles at the end of the day. Kipnes did not return to the site until September 10, 2015, the day after plaintiff's accident. However, his employee, Ubel, worked alone at the site on September 8, 2015, at which time he cleaned up debris and removed piles of debris to the dumpster. No one worked at the site on September 9, 2015, the date of the accident. Kipnes testified that when he returned to the site on September 10, 2015, there was no debris on the ground. Kipnes also testified that Cedar Knolls did not purchase plywood for use at the site.

In light of the questions of fact regarding the presence of the plywood on which plaintiff allegedly fell, and whether plaintiff's accident arose out of Cedar Knolls' execution of its work at the premises, the Rabadis have failed to establish prima facie entitlement to summary judgment with respect to their claim for contractual indemnification against Cedar Knolls (*see Winegrad v New York Univ. Med. Ctr., supra*). Accordingly, the branch of the motion by Mazan and Pamela Rabadi for summary judgment dismissing plaintiff's claims against them under Labor Law §§ 200, 241 (6), and common law negligence, as well as all cross claims, is granted, and the motion is otherwise denied.

Third-party defendant Overton's moves for summary judgment dismissing the third-party claims by Westchester Modular for common law indemnification and contribution, contractual indemnification and breach of contract. With regard to Westchester Modular's claims for contractual indemnification and breach of contract, Overton's argues that it did not have any contract with Westchester Modular with regard to the work at the subject premises. Rather, Overton's contracted with non-party Westchester Modular Home Erectors, Inc. ("Erectors"), the company which delivered the modular units, to assemble the modular home units onto the foundation at the subject premises. With regard to the third-party claims for common law indemnification and contribution, Overton's argues that it did not owe a duty to plaintiff, and that there is no evidence that Overton's work caused or contributed to plaintiff's accident. In support of its motion, Overton's submits, inter alia, its agreement with Erectors, and the deposition testimony of Kevin Overton, its owner. Overton testified that he and four of his workers "set" the modular units on the foundation of the premises on September 3, 2015, the day they were delivered. He returned with two workers the next day to finish the roof. He further testified that he did not observe any pieces of plywood on the ground at the premises during the time that Overton's performed its work at the site.

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Third-party plaintiff Westchester Modular does not oppose the branch of Overton's motion for dismissal of the third-party claims for contractual indemnification and breach of contract. As such, those causes of action are deemed abandoned, and the third-party claims against Overton's for contractual indemnification and breach of contract are dismissed (*see Rodriguez v Dormitory Auth. of the State of New York*, 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]). The branch of Overton's motion for summary judgment dismissing the third-party claims for common law indemnification and contribution is also granted. Overton's established its prima facie entitlement to summary judgment with respect to those claims by submitting evidence demonstrating that it did not owe a duty of care to plaintiff (*see Espinal v Melville Snow Contrs.*, 98 NY2d 136, 140, 746 NYS2d 120, 123 [2002]; *Nealy v Pavarini-McGovern, LLC*, 135 AD3d 917, 919, 24 NYS3d 372 [2d Dept 2016]). In opposition to Overton's motion, Westchester Modular failed to offer any evidence creating an issue of fact with regard to whether Overton's created the alleged dangerous condition, thereby "launching a force of harm" which proximately caused the accident, or otherwise owed a duty of care to the plaintiff (*see Espinal v Melville Snow Contrs.*, *supra*, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]).

Defendant Cedar Knolls moves for summary judgment dismissing plaintiff's claims under Labor Law §§ 200 and 241 (6), and common law negligence, as well as for dismissal of all cross claims against it. With regard to plaintiff's claims under Labor Law §§ 200 and 241 (6), Cedar Knolls correctly argues that plaintiff is not a member of the class of persons intended to be protected under those provisions of the Labor Law (*see Morales v 569 Myrtle Ave., LLC, supra*). In addition, as plaintiff has not opposed the dismissal of her claims under Labor Law §§ 200 and 241 (6), those causes of action are deemed abandoned (*see Rodriguez v Dormitory Auth. of the State of New York, supra; Kronick v L.P. Thebault Co., Inc., supra*).

However, with regard to plaintiff's claims against Cedar Knolls under common law negligence, the evidence submitted in support of defendant's motion fails to eliminate questions of fact regarding Cedar Knolls' notice of the alleged dangerous condition. As discussed above, plaintiff testified that she lost her balance and fell after stepping onto a piece of plywood lying on the ground at the construction site. The construction agreement between Cedar Knolls and the Rabadis states that Cedar Knolls' scope of work included "removal of all construction debris." Howard Kipnes, the president of Cedar Knolls, testified that his employee, Ubel, was present at the site on the day prior to plaintiff's accident, for the purpose of cleaning up the site and removing the piles of debris to the dumpster. Kipnes further testified that he was present at the site on the morning following plaintiff's accident, and that he did not observe any debris on the ground at that time. There was no affidavit or deposition testimony by Ubel submitted in support of Cedar Knolls' motion. In light of the issues of fact regarding the presence of the piece of plywood in the area where plaintiff fell, and Cedar Knolls' notice of same, Cedar Knolls' motion for summary judgment with respect to plaintiff's claims under common law negligence is denied (*see Alvarez v Prospect Hosp., supra; Winegrad v New York Univ. Med. Ctr., supra*). In addition, the evidence reveals issues of fact regarding the plywood on which plaintiff allegedly fell, and whether its alleged presence constituted a dangerous condition (*see Chafoulis v 240 E. 55th St. Tenants Corp.*, 141 AD2d 207, 553 NYS2d 440 [1st Dept 1988]). Contrary to defendant's contention, the open and obvious nature of the hole does not preclude a finding of liability against Cedar Knolls, but is relevant to the issue of plaintiff's comparative negligence (*see Westbrook v WR Activities-Cabrera Markets*, 5 AD3d 69, 72-73, 773 NYS2d 38 [1st Dept 2004]; *Cupo v Karfunkel*, 1 AD3d 48, 49, 767 NYS2d 40 [2d Dept 2003]).

The branches of Cedar Knolls's motion for summary judgment with respect to the cross claims by Westchester Modular for common law and contractual indemnification are denied. The indemnification provision contained in the agreement between Westchester Modular and Cedar Knolls required Cedar Knolls to indemnify Westchester Modular from any loss "arising out of [Cedar Knolls'] operation provided for under this Agreement."

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The deposition testimony of the parties, submitted in support of Cedar Knolls' motion, reveals issues of fact regarding the presence of plywood in the area where plaintiff fell, and whether the alleged condition arose out of Cedar Knolls' "operation" under the agreement. In light of said issues of fact, Cedar Knolls has failed to establish prima facie entitlement to summary judgment with respect to Westchester Modular's claims against it for contractual or common law indemnification (*see Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]).

The branch of Cedar Knolls' motion for summary judgment with respect to the cross claims against it by Westchester Modular for breach of contract is denied. Cedar Knolls did not submit a copy of its insurance policy for the subject time period in support of its motion for summary judgment. Thus, Cedar Knolls failed to meet its prima facie burden by submitting evidence establishing that it complied with its contractual obligation to procure commercial general liability insurance naming Westchester Modular as an additional insured (*see Alvarez v Prospect Hosp.*, *supra*).

Defendant Westchester Modular moves for summary judgment dismissing plaintiff's claims, as well as all cross claims against it, and for summary judgment with respect to its claims against Cedar Knolls for common law and contractual indemnification, and breach of contract for failure to procure insurance. As noted above, plaintiff is not a member of the class of persons intended to be protected under Labor Law §§ 200 and 241 (6) (*see Morales v 569 Myrtle Ave., LLC*, *supra*). In addition, plaintiff has not opposed the dismissal of her claims under Labor Law §§ 200 and 241 (6), and those causes of action are deemed abandoned (*see Rodriguez v Dormitory Auth. of the State of New York*, *supra*; *Kronick v L.P. Thebault Co., Inc.*, *supra*). Accordingly, the branch of Westchester Modular's motion for summary judgment dismissing plaintiff's claims against it under Labor Law §§ 200 and 241 (6) is granted.

The branch of Westchester Modular's motion for summary judgment dismissing plaintiff's claims against it under common law negligence is also granted. The evidence submitted by Westchester Modular, including the deposition testimony of the parties, establishes that it did not owe a duty to plaintiff. Michael Heiney of Westchester Modular testified that Westchester Modular manufactured the modular home units pursuant to a builder sales agreement with Cedar Knolls. The units were delivered to the subject premises by Erectors, and Overton's assembled the units onto the foundation. Heiney further testified that he was present at the subject premises on September 3, 2015, the day the modular units were delivered to the site, and that he did not notice anything out of place on that date. In opposition to Westchester Modular's motion, plaintiff failed to offer any evidence creating an issue of fact with regard to whether Westchester Modular created the alleged dangerous condition, thereby "launching a force of harm" which proximately caused the accident, or otherwise owed a duty of care to the plaintiff (*see Espinal v Melville Snow Contrs.*, *supra*, *Zuckerman v City of New York*, 49 NY2d 557, 427 NYS2d 595 [1980]). Accordingly, plaintiff's claims against Westchester Modular under common law negligence, as well as all cross claims against it, are dismissed.

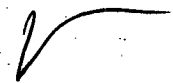
The branch of Westchester Modular's motion for summary judgment against Cedar Knolls with respect to its claim for breach of contract for failure to procure insurance is denied. In support of its claim for breach of contract, Westchester Modular failed to demonstrate, prima facie, that Cedar Knolls failed to comply with the contractual obligations requiring that it procure the requisite insurance coverage for the relevant time period (*see Marquez v L&M Dev. Partners, Inc.*, 141 AD3d 694, 701, 35 NYS3d 700 [2d Dept 2016]). The branch of Westchester Modular's motion for summary judgment against Cedar Knolls with respect to its claim for contractual indemnification is also denied. The indemnification provision contained in the agreement between Westchester Modular and Cedar Knolls required Cedar Knolls to indemnify Westchester Modular from any loss "arising out of [Cedar Knolls'] operation provided for under this Agreement." As discussed above, the deposition testimony of the parties reveals issues of fact regarding the presence of plywood in the area where plaintiff fell, and whether the

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alleged condition arose out of Cedar Knolls' "operation" under the agreement. In light of said issues of fact, Westchester Modular has failed to establish prima facie entitlement to summary judgment on its claims against Cedar Knolls for contractual or common law indemnification (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 508 NYS2d 923 [1986]). The branch of Westchester Modular's motion for summary judgment with respect to its third-party claims against Overton's is also denied. As discussed above, Overton's established prima facie entitlement to summary judgment dismissing the third-party claims by Westchester Modular, through its submission of evidence establishing that it did not enter any contract with Westchester Modular, and that it did not breach any duty of care to the plaintiff.

Accordingly, the branches of defendants Mazan and Pamela Rabadi's motion for summary judgment dismissing plaintiff's claims against them under Labor Law §§ 200, 241 (6) and common law negligence, as well as all cross claims, are granted, and the motion is otherwise denied. The motion of third-party defendant Overton's for summary judgment dismissing the third-party claims against it is granted. The branch of the motion by defendant Cedar Knolls for summary judgment dismissing plaintiff's claims against it under Labor Law §§ 200 and 241 (6) is granted and the motion is otherwise denied. The branches of the motion by defendant Westchester Modular for summary judgment dismissing plaintiff's claims against it under Labor Law §§ 200, 241 (6) and common law negligence, as well as all cross claims against it, are granted, and the motion is otherwise denied.

Dated: Riverhead, New York
August 12, 2020



VINCENT J. MARTORANA, J.S.C.

_____ FINAL DISPOSITION X NON-FINAL DISPOSITION