

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D33619
C/kmb

_____AD3d_____

Argued - December 12, 2011

DANIEL D. ANGIOLILLO, J.P.
PLUMMER E. LOTT
LEONARD B. AUSTIN
JEFFREY A. COHEN, JJ.

2010-10962

DECISION & ORDER

Brian Fritz, plaintiff-respondent, v Sports Authority, et al., defendants third-party plaintiffs-appellants, C&G Developers, Inc., defendant second third-party plaintiff-appellant, NLS Company, defendant-appellant; Shannon Construction of Long Island, et al., defendants third-party defendants-respondents, Giaquinto Masonry, Inc., third-party defendant/second third-party defendant-respondent.

(Index No. 37922/07)

Churbuck Calabria Jones & Materazo, P.C., Hicksville, N.Y. (Joseph A. Materazo of counsel), for defendants third-party plaintiffs-appellants, defendant second third-party plaintiff-appellant, and defendant-appellant.

Laurence A. Silverman, Huntington, N.Y., for plaintiff-respondent.

Wade Clark Mulcahy, New York, N.Y. (Edward Lomena of counsel), for defendant third-party defendant-respondent Shannon Construction of Long Island.

Mulholland, Minion, Duffy, Davey, McNiff & Beyrer, Williston Park, N.Y. (John A. Beyrer and Brian Davey of counsel), for defendant third-party defendant-respondent Roland's Electric, Inc.

Segal McCambridge Singer & Mahoney, Ltd., New York, N.Y. (Simon Lee, Christian H. Gannon, and Theodore M. Eder of counsel), for third-party defendant/second third-party defendant-respondent.

In an action to recover damages for personal injuries, the defendants third-party plaintiffs, Sports Authority and Sons Riverhead, LLC, the defendant second third-party plaintiff, C&G Developers, Inc., and the defendant NLS Company appeal, as limited by their brief, from so much of an order of the Supreme Court, Suffolk County (Whelan, J.), dated September 8, 2010, as denied that branch of their motion which was for summary judgment dismissing so much of the plaintiff's cause of action pursuant to Labor Law § 241(6) insofar as asserted against them as was predicated upon alleged violations of 12 NYCRR 23-1.30 and 23-9.8(e), denied that branch of their motion which was for summary judgment on the third-party cause of action of Sports Authority and Sons Riverhead, LLC, for contractual indemnification against the defendant third-party defendant Roland's Electric, Inc., and the second third-party cause of action of C&G Developers, Inc., against the third-party defendant/second third-party defendant, Giaquinto Masonry, Inc., for contractual indemnification and denied that branch of their motion which was for summary judgment on the third-party cause of action of Sports Authority and Sons Riverhead, LLC, for common law indemnification against the defendants third-party defendants, Shannon Construction of Long Island and Roland's Electric, Inc.

ORDERED that the order is affirmed insofar as appealed from, with one bill of costs.

The Supreme Court properly denied that branch of the motion of the defendants third-party plaintiffs, Sports Authority and Sons Riverhead, LLC, the defendant second third-party plaintiff, C&G Developers, Inc., and the defendant NLS Company (hereinafter collectively the appellants) which was for summary judgment dismissing so much of the plaintiff's cause of action pursuant to Labor Law § 241(6) insofar as asserted against them as was predicated upon alleged violations of 12 NYCRR §§ 23-1.30 and 23-9.8(e). The appellants failed to make a prima facie showing that the lighting at the job site sufficiently complied with the requirements of 12 NYCRR 23-1.30 or that the operating surface at the job site sufficiently complied with the requirements of 12 NYCRR 23-9.8(e). Since the appellants failed to establish their entitlement to judgment as a matter of law, their motion for summary judgment was properly denied to the extent the plaintiff's Labor Law § 241(6) cause of action was predicated upon violations of these Industrial Code provisions (*see Lucas v KD Dev. Constr. Corp.*, 300 AD2d 634, 635; *Sorisi v Nineteen N.Y. Props.*, 264 AD2d 835). Since the appellants failed to meet their prima facie burden, we need not review the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851).

The Supreme Court properly denied that branch of the appellants' motion which was for summary judgment on the third-party cause of action by Sports Authority and Sons Riverhead, LLC (hereinafter together Sports), against the third-party defendant Roland's Electric, Inc. (hereinafter Roland's), for contractual indemnification and on the second third-party cause of action asserted by C&G Developer's, Inc., against the third-party defendant/second third-party defendant-respondent Giaquinto Masonry, Inc., for contractual indemnification, as there are triable issues of fact as to whose negligence, if anyone's, caused the plaintiff's accident (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d 519, 524; *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930; *Chun v Ecco III Enters.*, 268 AD2d 454, 454-455). Under these circumstances, it is premature to reach the issue of contractual indemnification (*see Erickson v Cross Ready Mix, Inc.*, 75 AD3d at 524; *George v Marshalls of MA, Inc.*, 61 AD3d at 930; *Chun v Ecco III Enters.*, 268 AD2d at 454-455).

Similarly, the Supreme Court properly denied that branch of the appellants' motion which was for summary judgment on Sports's third-party cause of action against Shannon Construction of Long Island and Roland's for common law indemnification, as the appellants failed to demonstrate, as a matter of law, that Sports was not negligent. Since the appellants failed to meet their prima facie burden, we need not review the sufficiency of the plaintiff's opposition papers (*see Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851). Under these circumstances, it is also premature to reach the issue of common law indemnification (*see e.g. Martinez v City of New York*, 73 AD3d 993, 999).

ANGIOLILLO, J.P., LOTT, AUSTIN and COHEN, JJ., concur.

ENTER:


Aprilanne Agostino
Clerk of the Court