

Foto v Elad Props.
2010 NY Slip Op 31541(U)
June 14, 2010
Supreme Court, New York County
Docket Number: 110279/07
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN

PART 57

Index Number : 110279/2007
FOTO, KRISTAQ
 VS.
ELAD PROPERTIES
 SEQUENCE NUMBER : 002
 PARTIAL SUMMARY JUDGMENT

INDEX NO. 110279/07
 MOTION DATE _____
 MOTION SEQ. NO. 002
 MOTION CAL. NO. _____

this motion is for summary judgment

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
 Answering Affidavits — Exhibits _____
 Replying Affidavits _____

PAPERS NUMBERED
1
2, 3
4

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER**

FILED
 JUN 21 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____ FOR THE FOLLOWING REASON(S):

Dated: 6-14-10

M S Friedman
MARCY S. FRIEDMAN
 NON-FINAL DISPOSITION

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
 Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x
 KRISTAQ FOTO and ENTELA FOTO,

Plaintiff(s),

Index No.: 110279/07

- against -

DECISION/ORDER

ELAD PROPERTIES, et al.,

Defendant(s).

_____ x

This is a Labor Law Action in which plaintiff alleges he was injured by an electrical explosion while dismantling an electrical box at a construction site on 21st Street in Manhattan. Plaintiff, defendants El-Ad Properties NY, LLC and El Ad-York Avenue, Inc. (collectively El Ad), defendants A.J.S. Project Management, Inc. (AJS), and Matrix Construction, LLC (Matrix), and defendant Consolidated Edison of New York, Inc. each move for summary judgment.

Plaintiff Kristaq Foto moves for partial summary judgment as to liability on his Labor Law § 241(6) claim. It is well settled that Section 241(6) requires owners and contractors and their agents “ ‘to provide reasonable and adequate protection and safety’ for workers and to comply with the specific safety rules and regulations promulgated by the Commissioner of the Department of Labor.” (Ross v Curtis-Palmer Hydro-Elec. Co., 81 NY2d 494, 501-502 [1993].)

It is undisputed that none of the defendants directed that electric power be shut down before plaintiff performed his work. Nor did defendants provide plaintiff with any protective gear. Plaintiff thus makes a prima facie showing that the owner’s and general contractor’s violation of Industrial Code provisions 12 NYCRR 23-1.13(b)(2-5) was a proximate cause of

plaintiff's injuries. (See Lorefice v Reckson Operating Partnership, L.P., 269 AD2d 572 [2d Dept 2000].) In opposition, defendant/owner El Ad contends that plaintiff was comparatively negligent. In support of this contention, El Ad relies on plaintiff's testimony that there were temporary lights and temporary power outlets in the room where plaintiff was working at the time of the accident. (See P.'s Dep. at 49-51.) This testimony fails to raise a triable issue of fact as to whether plaintiff knew or should have known that the electrical box he was demolishing had live power feeding into it, given the unrebutted testimony that plaintiff understood the power to be turned off, and that no one warned plaintiff of the possibility that there might be live power. (See P.'s Dep. at 56-57, 64-65. See generally Pichardo v Urban Renaissance Collaboration Ltd. Partnership, 51 AD3d 472 [1st Dept 2008].)

As to defendant El Ad's motion, the branches seeking dismissal of plaintiff's claim under Labor Law 240(1) and for dismissal of the complaint as against defendant El Ad-York Avenue, Inc. are unopposed and will be granted. The branch of El Ad's motion seeking dismissal of plaintiff's claims under Labor Law 200 and for common law negligence should also be granted. Plaintiff's submission of evidence showing El Ad's presence at the work site is insufficient to raise a triable issue of fact as to whether El Ad supervised or controlled the work. (See Geonie v QD & P NY Ltd., 50 AD3d 444 [1st Dept 2008] [general contractor].) The branch of El Ad's motion for judgment on its failure to procure insurance claim is granted without opposition. The branch to dismiss the cross-claims against it for indemnification is also granted.

El Ad's motion also seeks summary judgment on its contractual indemnification claim against defendants AJS and Matrix. Matrix acknowledges that it was the general contractor for the project, and denies that AJS was involved in any way in the project. However, there is an

ambiguity in the contract documents. The contract with El Ad was signed “AJS Management, a New York corporation, d/b/a Matrix Construction.” (See AJS’ Motion, Ex. E.) In contrast, the contract with third-party defendant U.S. Electric Corp., plaintiff’s employer, was signed “Matrix Construction d/b/a AJS Project Management.” (Id., Ex. D.) A triable issue of fact thus exists as to AJS’ obligation to indemnify El Ad. However, El Ad is entitled to summary judgment on its contractual indemnification claim against Matrix, as Matrix admits it was a contracting party. In addition, there is no evidence in this record that El Ad was negligent and, thus, its liability is purely vicarious. Moreover, there is no dispute that El Ad’s contract, paragraph 18.1, provided indemnification for all injuries arising out of the general contractor’s work. (See Quinonez v Manhattan Ford, Lincoln-Mercury, Inc., 62 AD2d 495 [1st Dept 2009].) To the extent that the indemnification provision indemnifies El Ad for its own negligence, it is still enforceable in the absence of any evidence showing that El Ad was negligent. (See id.)

The motion of defendant AJS for summary judgment dismissing the complaint against it on the grounds that it is an improper party is denied. As held above, triable issues of fact exist as to whether AJS was a contracting or performing party.

The motion of Consolidated Edison Company of New York, Inc. for summary judgment dismissing the complaint and all cross-claims against is unopposed and will be granted.

Accordingly, it is hereby ORDERED that the motion of Consolidated Edison is granted to the extent that the complaint and all cross-claims are dismissed as against it, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff’s motion is granted to the extent that plaintiff is awarded judgment as to liability on its claim under Labor Law § 241(6) against defendants El Ad and Matrix, with an assessment of damages to be held at trial, or after any other disposition of the

action; and it is further

ORDERED that the motion of defendant AJS is denied; and it further

ORDERED that the motion of defendant El Ad is granted to the extent that it is hereby

ORDERED that plaintiff's Labor Law §§ 200 and 240(1) claims, and his claim for common law negligence, and all cross-claims against El Ad are dismissed; and it is further

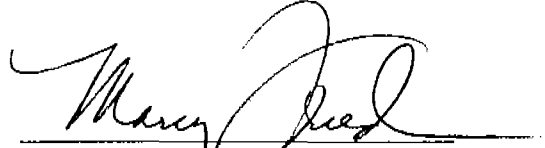
ORDERED that defendant El Ad is awarded judgment against defendant Matrix as to liability on its cross-claim against Matrix for contractual indemnification; and it is further

ORDERED that defendant El Ad is awarded judgment against defendant Matrix as to liability on its cross-claim against Matrix for failure to procure insurance; and it is further

ORDERED that an assessment on damages shall be held at the time of trial, or after any other disposition of the underlying action.

This constitutes the decision and order of the court.

Dated: New York, New York
June 14, 2010



MARCY FRIEDMAN, J.S.C.

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