[* 1]

SUPREME COURT OF THE STATE OF NEW YORK

PRESENT: JEFFREY K. OING J.S.C. Justice

PART 48

Index Number : 105940/2008
STALLONE, MICHAEL V.
vs.
PLAZA CONSTRUCTION
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO.
MOTION DATE
MOTION SEQ. NO.
MOTION CAL. NO.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... on this motion to/for

PAPERS NUMBERED

Answering Affidavits — Exhibits

Replying Affidavits

Cross-Motion: ☒ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed decision & order of the court

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/9/11

JEFFREY K. OING J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 48
----------x

MICHAEL V. STALLONE and
MICHELLE STALLONE,

Plaintiffs,

-against-

PLAZA CONSTRUCTION CORP., 17TH and 10TH ASSOCIATES, LLC, THE RELATED COMPANIES L.P., THE RELATED COMPANIES, INC., ABINGTON PROPERTIES, TACONIC INVESTMENT PARTNER, LLC, and LIVINGSTON ELECTRICAL ASSOCIATES, INC.,

Defendants.

----------x

Index No.: 105940/08

Mot. Seq. Nos. 002 and 003

Decision and Order

JEFFREY K. OING, J.:

Plaintiffs, Michael V. Stallone and his wife, Michelle Stallone, move, pursuant to CPLR 3212, for partial summary judgment on the issue of liability on their Labor Law § 240[1] claim against defendants, Plaza Construction Corp. ("Plaza") and 17th and 10th Associates, LLC ("17th and 10th Associates").

Defendant, Livingston Electrical Associates, Inc. ("Livingston"), moves, pursuant to CPLR 3212, to dismiss the complaint, and all cross-claims for contribution and indemnification.

Defendant Plaza, The Related Companies, L.P., The Related Companies, Inc., 17th and 10th Associates, and Taconic Investment Partners, LLC (collectively the "Plaza Defendants"), cross-move, pursuant to CPLR 3212, to dismiss the complaint, or, in the

alternative, for summary judgment against Livingston on their contractual indemnification claim.

Background

Plaza, as general contractor and construction manager, subcontracted Cross Country, plaintiff's employer and a non-party, to oversee the structural concrete portion of the Caledonia High Rise Condominiums Project at 450 17th Street, Manhattan ("Caledonia Project"). The premises of the Caledonia Project are owned by 17th and 10th Associates. Cross Country rented, assembled, and operated the tower crane at the Caledonia Project. Stallone worked as a tower crane maintenance man for Cross Country at the Caledonia Project. Stallone's daily responsibilities included climbing the tower crane to the cab to ensure that the crane functioned safely and properly.

Plaza also subcontracted Livingston to provide electricity for lighting and heating in the tower crane cab. After Livingston ran the electricity, Stallone installed a halogen spotlight to the outside of the cab, illuminating the exterior decks of the tower crane. Cross Country also installed one additional ceramic heater inside the cab.

On February 6, 2007, Stallone climbed the fixed ladder of the tower crane at approximately 5:20 a.m. When Stallone reached the cab, there was no heat or lights inside. Stallone called John Nogueira ("Nogueira"), another Cross Country employee, to

inform him that there was no electricity in the cab. After speaking with the foreman, Nogueira called back Stallone and told him to come down since the work day was not starting until 7:00 a.m.

Stallone testified that he exited the tower crane cab, stepped onto a small platform, and went down two small steps to the rabella. Stallone descended a round steel rung ladder with flat bar rungs and 1-inch side railings that needed to be approached from the side. Stallone placed his foot on the first rung and slipped and fell, hit his back on the steel deck, and fell approximately 15 to 20 feet.

After falling, Stallone waited approximately five to ten minutes and descended another 14 feet, where he reported the incident to Nogueira. John Livingston, a Caledonia Project foreman, completed a supervisor's report documenting the fall (the "C-2 report"). The C-2 report reflected that Stallone slipped and fell approximately 13 feet to the tower platform while climbing down the ladder. The day after the accident, and for approximately three months thereafter, Stallone continued to work on the Caledonia Project. Stallone allegedly sustained injuries leaving his left arm useless. He ultimately underwent surgery for the alleged injuries.

Discussion

Labor Law § 200

Section 200 imposes an absolute duty on owners, general contractors, and their agents to protect the health and safety of employees:

> All places to be so constructed equipped, arranged, operated and conducted as to provide reasonable and adequate protection to the lives, health and safety of all persons employed therein or lawfully frequenting such places. All machinery, equipment, and devices in such places shall be so placed, operated, guarded, and lighted as to provide reasonable and adequate protection to all such persons.

It is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place (Comes v. New York State Elec. & Gas Corp., 82 NY2d 876, 877 [1993]).

Livingston's argument that it was not an owner or general contractor is persuasive. Section 200 is limited in scope, and addresses the duty of care to be exercised on a work site by owners and general contractors, and in the rare instance by parties who have the authority to control or supervise and effectively stand in the shoes of an owner or contractor.

At the beginning of the Caledonia Project, Livingston ran a power line to the top of the tower crane to provide electricity to the cab. Livingston maintains that it did not know about the spotlight, nor was it aware of the second heater in the cab

(Livingston Moving Papers, Ex. C). Livingston contends that because it did not control plaintiff's work it did not have a duty to provide plaintiff with fall protection devices. That contention has merit given the fact that there is no evidence in the record that Livingston was conferred authority to be construed as an agent of Plaza or 17th and 10th Associates.

While Livingston prevails under the narrowly defined section 200, there is a factual issue as to whether Livingston's contractual obligation to run electricity to the tower crane cab and the resulting power outage on the date of the alleged accident created an unreasonable risk to plaintiff and, therefore, proximately caused plaintiff's injuries under the common law negligence theory. Under these circumstances, the threshold issue to be resolved is notice of the inadequate light condition.

Here, plaintiff testified at his EBT that there were prior instances when the cab lacked power.

Q: Other than on the date of the accident, were there any other days when you climbed the ladder to the upper platform and the halogen light was not lit?

A: Yes.

Q: How many days did that happen?

A: It was a common occurrence. One to two times a week.

...

Q: On the first occasion when you climbed to the top of the hoist and the electricity was not on and the light was not lit, what did you do?

A: I called on the telephone down to John Noguara.

Q: What did you say to John?

A: "Please find an electrician and find out what is going on, I have no power up here."

Q: After you spoke to John and you said that, what happened next?

A: He found an electrician and they reset the breaker. The breaker was blown.

...

Q: At any time before or after the accident did you make any complaints at those meetings that you attended several times a week, complaints about the light going out?

A: I believe it was mentioned.

Q: Do you know who mentioned it?

A: I believe it was me.

Q: When you mentioned it, did anybody respond to you?

A: I don't believe so.

Q: How many times did you mention it?

A: I don't know for sure. I think I might have mentioned it once or twice.

...

Q: Did you ever have a conversation with [John Livingston] about the problem you were having with the circuit breakers blowing at the crane?

A: I think I did, but I really honestly don't recall.

(Stallone EBT, at pp. 119, 120, 182).

Livingston points out, however, that the C-2 report does not mention that plaintiff fell because of inadequate lighting. Also, the contract with Plaza required Livingston to provide electricity only to the tower crane and not to the ladders or platforms. Thus, Livingston argues that the crane company was responsible for lighting the ladders and platform, and, further, Livingston was not responsible for running power to the cranes or ladder.

Daniel Livingston, Livingston's president, gave the following EBT testimony:

> Q: Were you aware at any time during this construction work on 450 West 17th Street that the operators of the tower crane were also using ceramic heaters within the cab to keep warm?
>
> A: No.
>
> Q: Were you aware that they had installed a spotlight or an artificial light on the cab itself in order to illuminate he cab and the mechanical platform?
>
> A: No.
>
> ...
>
> Q: At any time during the construction that occurred on this premises 450 West 17th Street, did you become aware of electricity not being available in the morning to the tower crane because of a circuit breaker problem?
>
> A: No.
>
> Q: Did anyone complain to you, either from Plaza Construction or anyone else on the work site, with

respect to a loss of electricity at any time at the tower crane?

A: No

Q: Did anyone complain to you at any time during this job construction with respect to an inability to have a lit tower crane platform?

A: No.

...

Q: And are you aware of any occasions at the site, at any time prior to February 2007, when any of the circuit breakers tripped because of those reasons and had to be reset?

A: Oh, it's a common occurrence.

Q: When you say "a common occurrence," at this site -

A: At all sites.

Q: And does that include the site that is the subject of this case?

A: Yes.

Q: When you say "it's a common occurrence," how common is it on a daily, weekly or monthly basis?

A: Daily basis. It's supposed to; it's doing its job.

(Livingston EBT at pp. 21-22, 23, 27).

Clearly, plaintiff's and Mr. Livingston's conflicting EBT testimony raises a material question of fact regarding whether Livingston had notice of the condition.

Accordingly, that branch of Livingston's motion for summary judgment is granted to the extent of dismissing the Labor Law § 200 claims.

Plaza asserts that it did not exercise supervision or control over the plaintiff's work, and that it lacked notice of any unsafe condition involving the tower crane or the affixed ladder. As such, Plaza contends it is not liable under Labor Law § 200.

The record demonstrates that Plaza is the contractor who worked on site and that it oversaw the day-to-day operations. Furthermore, Plaza's reliance on February 3 - 7, 2007 log book pages to demonstrate that no issues were noted is misplaced. A review of those logs fails to show a contradiction with plaintiff's or Nogeuiera's EBT testimony that there were instances where they complained about the lack of electricity in the cab at the top of the tower crane cab. Rather, the log book pages merely highlight that there remains a question of fact as to whether Plaza had notice of the occurring power outages (Plaza Cross-Motion, Ex. D). Further, although the record shows that other Cross Country employees used fall protection on the worksite, the fact of the matter is that there were no fall protection mechanisms available to plaintiff or other crane operators while ascending to or descending from the tower crane cab. Indeed, Plaza's presence and oversight creates a question of fact as to whether there was constructive notice of the electrical issues, as well as the fact that plaintiff and other crane operators did not have adequate safety devices.

Accordingly, that branch of Plaza's motion for summary judgment to dismiss the Labor Law § 200 claim is denied.

Summary judgment is granted to 17th and 10th Associates under the accepted rule that the common law duty triggered by Labor Law § 200 requires that the party charged with the responsibility must have authority to control the activity bringing about the injury (Comes v. New York State Electric Gas Corp., 82 NY2d at 877). Here, the record demonstrates that 17th and 10th Associates contracted with Plaza to oversee and control as general contractors of the Caledonia Project, and that it did not control the construction activity.

Accordingly, 17th and 10th Associates's cross-motion for summary judgment dismissing the section 200 claim is granted.

Labor Law § 240

The Plaza Defendants' argument that section 240[1] is inapplicable because the facts involve a fixed ladder on a tower crane is unavailing. To begin, ladders are specifically included within the statute's reach. In any event, section 240[1] applies because the ladder from which plaintiff fell was the only means to access the cab, the location from which plaintiff performed his work (Spiteri v. Chatwal Hotels, 247 AD2d 297, 299 [1st Dept 1998]).

Section 240[1] mandates that scaffolding and other devices be provided for employees:

> All contractors and owners and their agents...in the erection, demolition, repairing, altering....of a building or structure shall furnish or erect, or cause to be furnished or erected for the performance of such labor, scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, ropes, and other devices which shall be so constructed, placed and operated as to give proper protection to a person so employed.

This section applies when there is an inherent risk in the job because of the relative elevation at which the task is performed (Racovich v. Consolidated Edison Co., 78 NY2d 509, 514 [1991]). The legislative intent was to protect workers by placing the ultimate responsibility for safety practices at construction sites on the owner and general contractor, rather than on the workers who are rarely in the position to protect themselves (Zimmer v. Chemung, 65 NY2d 513, 520 [1985]). Furthermore, the legislative intent of this statute is to be construed liberally (Id. at 521). Thus, strict liability is imposed on an owner or contractor who neglects to provide safety devices for workers at a worksite under section 240[1], and the absence of the safety devices is a proximate cause of plaintiff's injury (Id. at 519).

To establish a prima facie case for a violation under section 240[1], a plaintiff need not demonstrate that the manner in which the accident happened or the injuries occurred was foreseeable. Instead, a plaintiff's demonstration that the risk of some injury from defendants' conduct was foreseeable is sufficient (Vasquez v. Urbahn Associates Inc., 2010 NY Slip Op

9076 [1st Dept 2010]). Thus, the issue is whether the work being performed by plaintiff subjected him to a foreseeable gravity-related hazard such that safety devices should have been provided. Here, Louis Fedele's EBT testimony and the conflicting expert affidavits of Dr. Daniel Paine and Dr. Steven R. Arndt raise triable issues of fact as to whether the fall prevention mechanisms were necessary.

Accordingly, the Plaza Defendants' motion to dismiss the Labor Law § 240[1] claim is denied.

With respect to Livingston, no agency liability attaches where an owner or contractor does not delegate the authority to supervise or control the job (Russin v. Picciano & Sons, 254 NY2d 311 [1981]). The record demonstrates that Livingston was the subcontractor, that it lacked the duty of an owner or general contractor, and that, critically, it was not authorized to supervise or control plaintiff's work.

Accordingly, Livingston's motion to dismiss the section 240[1] claim is granted, and it is dismissed against it.

For these same reasons, plaintiff's motion for summary judgment on his section 240[1] claim is denied.

Labor Law § 241

Section 241 provides that:

> All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with a

> number of requirements [including] all areas in which construction, excavation or demolition work is being performed shall be so constructed, shored, equipped, guarded, arranged, operated and conducted as to provide reasonable and adequate protection and safety to the persons employed therein or lawfully frequenting such places.

The principle is well settled that there can be no liability under section 241[6] absent a demonstration that there was a breach of a particular regulation containing specific standards (Ryder v. Mount Loretto Nursing Home, Inc., 290 AD2d 892 [3d Dept 2002]). Here, the record demonstrates that plaintiff has set forth specific Industrial Code violations.

Accordingly, Livingston's motion and the Plaza Defendants' cross-motion for summary judgment dismissing the section 241[6] claim is denied.

Indemnification/Contribution

In light of the foregoing determination, those branches of defendants' motion and cross-motion for summary judgment dismissing the relevant cross-claims are denied.

ORDERED that plaintiff's motion for summary judgment on his section 240[1] claim is denied; and it is further

ORDERED that that branch of Livingston's motion for summary judgment is granted to the extent of dismissing the Labor Law §§ 200 and 240[1] claims, and those claims are hereby dismissed; the remaining branches of the motion are denied; it is further

ORDERED that that branch of Plaza Defendants' motion for summary judgment to dismiss the Labor Law §§ 200, 240[1] and 241[6] claims is denied; and it is further

ORDERED that that branch of 17th and 10th Associates's cross-motion for summary judgment dismissing the Labor Law § 200 claim is granted, and the remaining branches are denied.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/9/11

HON. JEFFREY K. OING, J.S.C.

JEFFREY K. OING
J.S.C.