

Restrepo v Yonkers Racing Corp., Inc.

2011 NY Slip Op 32162(U)

July 28, 2011

Supreme Court, New York County

Docket Number: 117421/2005

Judge: Paul Wooten

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. PAUL WOOTEN
Justice

PART 7

ANDRES RESTREPO,

Plaintiff,

INDEX NO. 117421/2005

-against-

MOTION DATE _____

**YONKERS RACING CORPORATION, INC.,
TISHMAN CONSTRUCTION CORPORATION
OF NEW YORK, YRL ASSOCIATES, L.P.,
and RUANAIDH ASSOCIATES,**

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

Respondents.

The following papers were read on this motion for partial summary judgment by plaintiff and motion for summary judgment by defendant Tishman Construction Corporation of New York, and the cross motion for summary judgment by defendants Yonkers Racing Corporation, Inc., YRL Associates, L.P., and Ruanaidh Associates.

Notice of Motion / Petition — Affidavits — Exhibits ...

PAPERS NUMBERED

1

Answering Affidavits — Exhibits (Memo) / Cross Motion to Dismiss _____

2, 3, 4

Reply Affidavits — Exhibits (Memo) _____

5

Cross-Motion: Yes No

FILED

AUG - 8 2011

COUNTY CLERK'S OFFICE
NEW YORK

Motion sequences 002 and 003 are consolidated for disposition.

The instant motions arise from a personal injury action ~~NEW YORK~~ the plaintiff alleges that, on August 8, 2005, he sustained serious injuries while working at the Yonkers Raceway construction site, located at 810 Yonkers Ave., Yonkers, NY, owned by defendant YRL Associates, L.P. ("YRL"). At the time of the subject incident, plaintiff was employed as an asbestos handler by non-party ETS Contracting, Inc. ("ETS"). Plaintiff alleges that, while he was removing asbestos from the area above the first floor of the subject building, he fell through a hole in the floor of the ceiling area, and fell about twelve feet to the floor below.

Apparently, the subject hole in the floor of the first floor ceiling was covered by an access door or hatch door, and the subject injury occurred when this hatch door opened while the plaintiff was above it.

Defendant Tishman Construction Corporation of New York ("Tishman") was retained as a construction manager at the subject construction site. Plaintiff maintains in its motion papers that defendants Yonkers Racing Corporation, Inc. ("Yonkers") and Ruanaidh Associates ("Ruanaidh") were agents of the owner.¹ Plaintiff's amended complaint² alleges causes of action sounding in common law negligence and based upon violations of Labor Law §§ 200, 240(1), and 241(6).

Plaintiff's Motion for Summary Judgment - Motion Sequence 002

Plaintiff now makes a motion for summary judgment on its cause of action based on Labor Law § 240(1), also known as the Scaffold Law, as against Yonkers, YRL, and Ruanaidh (collectively, the "Owner Defendants"). Plaintiff argues that it has satisfied all elements of a Scaffold Law cause of action, because: 1) Yonkers is the owner of the subject construction site, and YRL and Ruanaidh are its agents; 2) the work being performed by the plaintiff is a covered activity under the Scaffold Law; 3) the plaintiff was a worker intended to be protected by the Scaffold Law statute; 4) plaintiff was exposed to an elevation related risk directly resulting in injury; and 5) plaintiff was not provided with any safety devices.

In opposition, the Owner Defendants contend that plaintiff's fall was not gravity related,

¹ Plaintiff does not cite any support for this statement. None of the supporting or answering affidavits before the Court otherwise address the role of these defendants.

² The exhibits attached to plaintiff's motion papers are untabbed, in violation of the Court's rules regarding submission of motion papers, and two exhibits, designated "E" and "F," are missing. One of those exhibits, designated "F," is plaintiff's amended complaint, and its absence is a significant defect that may be considered grounds for automatic denial of plaintiff's motion. However, the Court in this case declines to *sua sponte* deny plaintiff's motion for what appears to be law office error.

in the sense that he was standing on a floor, and not an elevated platform, at the time of the subject incident. The Owner Defendants concede that "[i]t is undisputed that at the time of the accident plaintiff was standing in a ceiling area and fell through a hatch door" (Owner Defendant's Affirmation in Support of Cross-Motion at ¶8). Falling through a hatch door, the Owner Defendants argue, is not a gravity related hazard within the meaning of the Scaffold Law, and the plaintiff's work did not require the use of safety devices. The Owner Defendants further argue that the plaintiff failed to identify a defective condition or equipment, as a hatch door is not a safety device within the meaning of the Scaffold Law. The Owner Defendants also argue that plaintiff was the sole proximate cause of his own injury. In reply, plaintiff notes that he does not allege that the hatch door was a safety device and plaintiff fell due to the failure of that safety device, but rather that plaintiff was not provided with any safety devices and fell through a hole in the floor.

Owner Defendants' Cross-Motion for Summary Judgment

The Owner Defendants make a cross motion for summary judgment seeking dismissal of plaintiff's common law negligence and Labor Law §§ 200, 240(1), and 241(6) causes of action, and to strike the affidavit of a non-party witness, Ricardo Ceballos. The Owner Defendants first assert that the Scaffold Law does not apply, for the reasons already stated above. Regarding common law negligence and Labor Law § 200, the Owner Defendants argue that they are entitled to summary judgment because they did not supervise or control plaintiff's work, and also were not on notice of any dangerous condition. As to Labor Law § 241(6), the Owner Defendants contend that: Industrial Code § 1.5 is not specific enough to sustain a § 241(6) claim; Industrial Code § 1.7 is generally either inapplicable or not specific; Industrial Code § 1.7(b)(1) does not apply because a hatch door is not a "hazardous opening"; Industrial Code § 1.30 was adhered to, as plaintiff testified that there was sufficient lighting; and OSHA

regulations cannot sustain a Labor Law § 241(6) claim. Lastly, the Owner Defendants contend that the affidavit of Ricardo Ceballos should not be considered, as they were only put on notice of plaintiff's intent to call Ceballos as a witness approximately two years after the Ceballos affidavit was created. By the time the Owner Defendants received such notice, Ceballos had moved from the address provided by plaintiff, and the Owner Defendants could not locate him.

Plaintiff opposes the cross-motion as to the Scaffold Law cause of action, but does not oppose as to the common law negligence and Labor Law § 200 causes of action. Regarding the cross motion as to the Labor Law § 241(6) claim, plaintiff contends that summary judgment should not only be denied to the Owner Defendants, but granted to plaintiff, as plaintiff did fall through a hazardous opening within the meaning of Industrial Code § 1.7(b)(1). Finally, plaintiff contends that the portion of the cross motion seeking to strike the Ceballos Affidavit is moot, as the Owner Defendants have already conceded that plaintiff fell from a ceiling area through a hatch door.

Tishman's Motion for Summary Judgment - Motion Sequence 003

Tishman makes a second motion seeking contractual indemnification from Yonkers. Tishman notes that the Construction Management Agreement between Tishman and Yonkers required Yonkers to directly contract for asbestos work, to defend, indemnify, and hold Tishman harmless for all claims resulting from asbestos removal, to have Tishman named as an additional insured on the asbestos contractor's insurance policies, and to require the asbestos contractor to defend, indemnify, and hold Tishman harmless in connection with the asbestos contractor's work (Construction Management Agreement, Tishman's Affirmation in Support, Exhibit L at § 8.01). The Construction Management Agreement further required Tishman to defend, indemnify, and hold Tishman harmless from all claims except for those arising from Tishman's negligence or willful misconduct (*id* at § 10.01). Tishman also cites to several

deposition transcripts to establish that it had no supervisory control over the asbestos abatement work, did not have stop work authority over same, and did not yet have any access to the location where such work was being performed.

In opposition, the Owner Defendants note that Yonkers contracted directly with ETS separate from the Construction Management Agreement. As the Construction Management Agreement did not cover the asbestos abatement work, the Owner Defendants argue that the indemnification clauses therein do not apply to the claims arising from the subject injury. The Owner Defendants further contend that Tishman had not yet begun work on the project, and therefore the contractual indemnification provisions did not yet apply.

Standards

Summary Judgment

"The proponent of a summary judgment motion [pursuant to CPLR § 3212] 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" (*Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006]). The burden then shifts to the opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 228, 228 [1st Dept 2006]).

Scaffold Law

The Scaffold Law, Labor Law § 240(1), provides that contractors and owners "furnish or erect, or cause to be furnished or erected for the erection . . . of a building or structure, 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." "[T]he purpose of the strict liability statute is to protect construction workers not from routine workplace risks, but from the pronounced risks arising from construction worksite elevation differentials" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 603 [2009]). The Scaffold Law's protection applies to workers utilizing hoisting or scaffolding devices as well as those who erect or demolish those devices (*Metus v Ladies Mile Inc.*, 51 AD3d 537, 538 [1st Dept 2008], citing *Kyle v City of New York*, 268 AD2d 192, 197 [1st Dept 2000], *lv denied* 97 NY2d 608 [2002]). Where a Scaffold Law violation exists, the injured worker's contributory negligence is not considered in determining liability, unless the worker's conduct was the sole proximate cause of the incident (*see Blake v Neighborhood Housing Servs. of New York City, Inc.*, 1 NY3d 280, 290 [2003]; *Cody v State of New York*, 52 AD3d 930, 931 [3d Dept 2008]).

In a Scaffold Law case, "the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential" (*Runner*, 13 NY3d at 603). A plaintiff need not show which safety device would have prevented his injury (*see Cody*, 52 AD3d at 931; *Noble v AMCC Corp.*, 277 AD2d 20, 21 [1st Dept 2000]). To prevail, the plaintiff must show that a violation of Labor Law § 240(1) proximately caused a foreseeable injury (*Buckley v Columbia Grammar and Preparatory*, 44 AD3d 263 [1st Dept 2007]). "[T]o prevail on a Labor Law § 240(1) claim based on an injury resulting from the failure of a completed and permanent building structure, the plaintiff must show that the failure of the structure in question was a foreseeable risk of the task he was performing, creating a need for protective devices of the kind enumerated in the statute" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 10-11 [1st Dept 2011] [internal quotation marks omitted]).

Common Law Negligence and Labor Law § 200

To prevail on a common law negligence cause of action, plaintiff must show that defendant breached a duty of care owed to plaintiff, and that such breach proximately caused plaintiff's injury. At construction sites, owners and general contractors have a duty of care to provide site workers with a safe place to work; Labor Law § 200 is a codification of the latter duty of care (*see Cruz v Toscano*, 269 AD2d 122, 122 [1st Dept 2000]). At a construction site, both common law and Labor Law § 200 negligence are limited to parties who exercise supervision or control over the work out of which the injury arises, and also create or have actual or constructive notice of the unsafe condition that causes the injury (*see Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]; *Colon v Lehrer, McGovern & Bovis, Inc.*, 259 AD2d 417, 419 [1st Dept 1999]). Regarding construction site owners, "[i]t is settled law that where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law" (*Lombardi v Stout*, 80 NY2d 290 [1992]).

Labor Law § 241(6)

Labor Law § 241(6) imposes a nondelegable duty upon owners and contractors to provide reasonable and adequate protection and safety to workers engaged in the inherently dangerous work of construction, excavation, or demolition (*see Rizzuto v L.A. Wenger Contr. Co., Inc.*, 91 NY2d 343, 348 [1998]). "In order to state a claim under Labor Law § 241(6), a plaintiff must identify a specific Industrial Code provision mandating compliance with concrete specifications" (*Reilly v Newtreen Associates*, 303 AD2d 214, 218 [1st Dept 2003], citing *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 505 [1993]). To prevail on a motion for summary

judgment on a Labor Law § 241(6) claim, the movant must show that there are no triable issues of fact as to the violation of that Industrial Code provision.

Contractual Indemnification

A party seeking to impose contractual indemnification must show that it is free from negligence and that the indemnification provision applies; the negligence of the proposed indemnitor is "a non-issue and irrelevant" (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]; citing *Correia v Professional Data Mgt.*, 259 AD2d 60, 65 [1st Dept 1999] [contractual indemnification does not require showing that proposed indemnitor is negligent, but common law indemnification does require such a showing]). "Entitlement to full contractual indemnification requires a clear expression or implication, from the language and purpose of the agreement as well as the surrounding facts and circumstances, of an intention to indemnify" (*Martins v Little 40 Worth Assoc., Inc.*, 72 AD3d 483 [1st Dept 2010]).

Discussion

Plaintiff's Motion for Partial Summary Judgment

The question presented is whether a hatch door in the floor of a ceiling area triggers the Scaffold Law. In their opposition, the Owner Defendants cite case law holding that an escape hatch set in the floor of an elevator roof is not a Scaffold Law safety device. Specifically, the Owner Defendants cite *Bonura v KWK Assoc.* (2 AD3d 207 [1st Dept 2003]), *Rodgers v 72nd Street Assoc.* (269 AD2d 258 [1st Dept 2000]), and *Gabbamonte v 16-20 W. 19th St.* (14 AD2d 518 [1st Dept 1961]). In each of the three cases cited, the First Department affirmed the trial court's ruling that the Scaffold Law was not applicable where a plaintiff falls through an elevator escape hatch door.

Plaintiff argues that it nevertheless meets its prima facie burden. Plaintiff alleges that he fell through a hole in the floor of the ceiling area because of the hatch door's failure. Because the hatch door cannot be considered a safety device, and plaintiff was not provided with any other devices to protect against falling through the hole covered by the hatch door, the Scaffold Law was violated.

The Court disagrees with this argument, as a *res ipsa loquitur* argument is insufficient here. While there was an opening in the floor where plaintiff was working, the opening was covered by a hatch door, and plaintiff fell because the hatch door opened beneath him. The hatch door was a pre-existing building structure, so plaintiff must meet the standard of "show[ing] that the failure of the structure in question was a foreseeable risk of the task he was performing, creating a need for protective devices of the kind enumerated in the statute" (*Mendoza*, 83 AD3d at 10-11 [1st Dept 2011] [internal quotation marks omitted]). Plaintiff has not made this showing, and upon the facts in the record the Court cannot make a determination, as a matter of law, as to whether the hatch door opening under the plaintiff was a foreseeable risk of plaintiff's task. Furthermore, defendant has raised the defense of sole proximate cause, which under the circumstances is a triable issue of fact. The Court therefore denies plaintiff's motion for summary judgment.

Owner Defendants' Cross Motion for Summary Judgment

The Owner Defendants seek summary judgment on plaintiffs causes of action for common law negligence and Labor Law §§ 200, 240(1), and 241(6). The portion of the motion seeking summary judgment on the Labor Law § 240(1) Scaffold Law cause of action must be denied, as the moving defendants failed to make a prima facie showing of entitlement to summary judgment.

The primary argument raised by the Owner Defendants in support of the Scaffold Law

portion of its cross-motion is that an elevator escape hatch is not a safety device. While the Court agrees that the hatch door here should similarly not be considered a safety device, the Scaffold Law can be violated not only where a required safety device fails, but also where safety devices are necessary but not provided. The question of whether a hatch door is a safety device has no relevance as to whether a safety device was required, thereby triggering the Scaffold Law, and that question is therefore not dispositive under the currently applicable Scaffold Law standards (*see Runner*, 13 NY3d at 603 ["the single decisive question is whether plaintiff's injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant height differential"]). It is also irrelevant that plaintiff did not identify a safety device that was defective or that should have been provided (*see Noble*, 277 AD2d at 21).

The Owner Defendants also raise the issue of sole proximate cause, arguing that summary judgment is warranted by that defense. However, sole proximate cause is not an appropriate basis for a summary judgment motion under the facts presented. Summary judgment is therefore denied as to the Scaffold Law claim.

Regarding plaintiff's common law and Labor Law § 200 statutory negligence causes of action, the Owner Defendants have made a prima facie showing of entitlement to summary judgment. Tishman had no supervisory control over the work from which the subject injury arose, and also did not create or have notice of the allegedly dangerous condition. Plaintiff has not proffered any argument in response to this prima facie showing, and summary judgment is therefore granted on this cause of action.

As to plaintiff's Labor Law § 241(6) cause of action, the Court notes that, with the exception of Industrial Code § 1.7(b)(1), none of the other allegedly violated regulatory code sections are both sufficiently specific to support a § 241(6) claim and also applicable to the facts presented. However, summary judgment on this cause of action should not be granted to

the Owner Defendants, as plaintiff's opposition rebuts the moving defendants' prima facie showing as to Industrial Code § 1.7(b)(1). Plaintiff's opposition as to that regulation notes that the hole covered by the hatch door was a "hazardous opening" within the meaning of that regulation. The regulation does not define "hazardous opening," but is nevertheless sufficiently specific to support a § 241(6) claim, and the question of whether the opening at issue is "hazardous" under the statute is a question of law that is inappropriate for a jury (*Messina v City of New York*, 300 AD2d 121, 123-24 [1st Dept 2002]; see, e.g., *Toukara v Fernicola*, 80 AD3d 470, 471 [1st Dept 2011]). The First Department has defined the term "hazardous opening" generally to mean "an opening large enough for a person to fit into," and has also explicitly rejected the interpretation of the regulation that limits "hazardous opening" to openings at least fifteen feet deep (*Salazar v Novalex Contracting Corp.*, 72 AD3d 418, 422-23 [1st Dept 2010]). As it is not disputed that plaintiff fell through the subject opening, the Court believes that the evidence indicates that the subject opening qualifies as a hazardous opening within the meaning of the relevant regulation.

In its opposition to the cross motion, plaintiff requests summary judgment on the Labor Law § 241(6) cause of action be granted instead to plaintiff (see CPLR § 3212 [summary judgment may be granted to a non-movant]). However, the subject opening was in fact covered by the hatch door. If the hatch door qualifies as a "substantial cover fastened in place," pursuant to Industrial Code § 1.7(b)(1), then the regulation was not violated regardless of whether the subject opening was a hazardous opening. On this point, plaintiff makes a *res ipsa loquitor* argument that "[h]ad the cover called for in the statute [sic] been in place [or] had the hatch door been securely fastened . . . the plaintiff's fall would not have occurred" (Plaintiff's Affirmation in Opposition at ¶ 50). This argument is insufficient. Plaintiff points to no evidence regarding whether the hatch door was a sufficient cover under the circumstances or whether the hatch door was securely fastened. This question of fact therefore remains for a jury.

Regarding the Ceballos affidavit, plaintiff's failure to notice defendants of the existence and contact information of Ceballos for a substantial period of time, by which time the contact information for Ceballos was no longer accurate and he could not be located, prejudices the defendant herein. The Ceballos affidavit was therefore not considered in rendering this decision.

Tishman's Motion for Summary Judgment

To prevail on its summary judgment motion to compel contractual indemnity, Tishman must show that it was free from negligence and that the indemnification provision applied to the subject incident. Tishman made a prima facie showing of entitlement to summary judgment by showing that it had no role in connection with the asbestos work, and that the indemnification provisions contained in the Construction Management Agreement were applicable.

In opposition to this prima facie showing, the Owner Defendants effectively concede that Tishman was free from negligence, by contending that Tishman's work was not to begin in any given area until asbestos abatement had been completed there. The Owner Defendants instead argued that, even though the Construction Management Agreement explicitly stated that the Owner Defendants were to defend, indemnify, and hold Tishman harmless for any claims arising from asbestos removal, that the indemnification provision does not apply because the asbestos removal work was outside the scope of the Construction Management Agreement.

The Court disagrees with the Owner Defendants. The parties to the Construction Management Agreement unambiguously agreed that Yonkers would defend, indemnify, and hold Tishman harmless for any claims arising from the asbestos abatement work. Tishman's work did not include the asbestos removal work from which the subject injury arose, but that is irrelevant to the validity of the unambiguous indemnification provision in the Construction

Management Agreement. Tishman's complete lack of connection to the asbestos removal work underscores its right to indemnification, rather than preventing it.

The parties' remaining arguments have been considered and found unavailing. For the above reasons and upon the foregoing papers, it is therefore,

ORDERED, that the plaintiff's motion for summary judgment is denied; and it is further,

ORDERED, that the cross-motion by defendants Yonkers Racing Corporation, Inc., YRL Associates, L.P., and Ruanaidh Associates is granted as to plaintiff's causes of action for common law and Labor Law § 200 statutory negligence, and is otherwise denied; and it is further,

ORDERED, that the motion by defendant Tishman Construction Corporation of New York for contractual indemnification from defendant Yonkers Racing Corporation, Inc. is hereby granted in its entirety; and it is further,

ORDERED, that the pre-trial conference currently scheduled to be held in Part 7 (60 Centre Street, Room 341) on August 24, 2011, is hereby adjourned to September 14, 2011, 11:00 AM.

This constitutes the Decision and Order of the Court.

Dated: July 28, 2011

Enter:

[Handwritten signature]
Paul Wooten, J.S.C.

FILED
AUG - 8 2011
COUNTY CLERK'S OFFICE
NEW YORK

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE