

Mezzasalma v 7 World Trade Co.

2011 NY Slip Op 32903(U)

October 31, 2011

Supreme Court, New York County

Docket Number: 102848/2008

Judge: Saliann Scarpulla

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

PRESENT: _____
Justice

PART 11

Index Number : 102848/2008
MEZZASALMA, NUNZIO
vs.
7 WORLD TRADE
SEQUENCE NUMBER : 002
DISMISS

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

n this motion to/for _____

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

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

decided per the memorandum decision dated 10/31/2011
which disposes of motion sequence(s) no. 002 and 003

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 10/31/11

Saliann Scarpulla
SALIANN SCARPULLA *S.C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

-----X
NUNZIO MEZZASALMA,

Plaintiff,

Index No: 102848/08
Motion Seq. Nos. 002 and
003

-against-

DECISION AND ORDER

7 WORLD TRADE COMPANY, MOODY'S
CORPORATION, STRUCTURE TONE
CORPORATION and SILVERSTEIN
PROPERTIES, INC.,

Defendants.

-----X
7 WORLD TRADE COMPANY, SILVERSTEIN
PROPERTIES, INC., STRUCTURE TONE, INC.
and MOODY'S CORPORATION,

Third-Party Index No.:
590687/09

Third-Party Plaintiffs,

-against-

ALLRAN ELECTRICAL CORP.,

Third-Party Defendant.

-----X
HON. SALIANN SCARPULLA, J.S.C.:

FILED

NOV 02 2011

NEW YORK
COUNTY CLERK'S OFFICE

In a case involving a journeyman electrician who tripped and fell over a wooden plank, defendants/third-party plaintiffs 7 World Trade Company ("7 WTC"), Silverstein Properties, Inc. ("Silverstein"), Structure Tone Corporation ("Structure Tone") and Moody's Corporation ("Moody's") (collectively, "defendants") move, pursuant to CPLR

3212, for summary judgment dismissing all claims and cross claims as against them, and for attorneys' fees from third-party defendant Allran Electric of N.Y., LLC, s/h/a Allran Electrical Corp. ("Allran"); alternatively, defendants move for partial summary judgment as to their claim against third-party defendant Allran for contractual indemnification (Motion Seq. No. 003). Allran also moves for summary judgment dismissing plaintiff's complaint, and to dismiss the third-party complaint (Motion Seq. No. 002). Motion Seq. Nos. 002 and 003 are consolidated for disposition.

Background

On the morning of May 21, 2007, Nunzio Mezzasalma (Mezzasalma" or "plaintiff") was installing electrical fixtures in a room on the 11th floor of a newly constructed building located at 7 World Trade Center in lower Manhattan. Around 8:30 A.M., he left the room, and went to another area of the 11th floor to pick up materials needed for his work. Plaintiff gathered the materials into a box, and, on his way back, tripped after making a right turn just beyond the elevator lobby. At his deposition, plaintiff described noticing what had tripped him after he fell:

Q: What was it?

A: It looked to me to be the elevator planking that they had in the elevator corridor there. They must have stored it there or it was piled loosely right at that point.

Q: Can you describe the planking for me?

A: It looked like cut pieces of plywood strips, maybe, I don't know, a few feet long, a few, you know, two foot wide. And it had some other beams and stuff there, also, with studs, wood studs.

Q: When you say wood studs –

- A: There was some solid planking there, too, like maybe ten-foot, twelve-foot pieces. I'm not sure of the length, but planking.
- Q: This would be planking that you would see used on a scaffold?
- A: Yeah. That type, yeah. It was piled in there.
- Q: Ten to twelve feet lengths, roughly?
- A: Roughly, yeah.
- Q: How wide?
- A: Maybe eight inches.
- Q: Now, this planking that you observed after you fell, was it stacked in some manner?
- A: Not the one I fell on. The one I fell on was loose on the floor. Then there was some on that concrete wall there that was like either knocked down or stored in that area, right in that area there, right around that corner.

Plaintiff alleges that the fall injured his neck, back, knee, elbow and wrist. On February 22, 2008, he filed a complaint, and on February 24, 2010, he filed an amended complaint, each alleging that defendants are liable to him under Labor Law §§ 200 and 241 (6). Defendants, on April 26, 2010, filed a third-party complaint against Allran alleging that, pursuant to its agreement with Structure Tone, Allran must provide indemnification, defense, and attorneys' fees for defendants in this action, that Allran is liable to defendants under the principles of common-law indemnification, and that Allran is liable to defendants for failing to procure insurance.

Discussion

“Summary judgment must be granted if the proponent makes ‘a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,’ and the opponent fails to rebut that showing.” *Brandy B. v. Eden Cent. School Dist.*, 15 N.Y.3d 297, 302 (2010)

(quoting *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). However, if the moving party fails to make a prima facie showing, the court must deny the motion, “regardless of the sufficiency of the opposing papers.” *Smalls v. AJI Indus., Inc.*, 10 N.Y.3d 733, 735 (2008) (quoting *Alvarez*, 68 N.Y.2d at 324) (emphasis in original).

I. Labor Law § 200 and Common-Law Negligence

Labor Law § 200 is a codification of the common-law duty imposed upon an owner or contractor to provide construction workers with a safe place to work. See *Comes v. New York State Elec. and Gas Corp.*, 82 N.Y.2d 876 (1993). “Cases involving Labor Law § 200 fall into two broad categories: namely, those where workers are injured as a result of dangerous or defective premises conditions at a work site, and those involving the manner in which the work is performed.” *Ortega v. Puccia*, 57 A.D.3d 54, 61 (2d Dep’t 2008).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, “liability cannot be imposed on [a defendant] . . . unless it is shown that it exercised some supervisory control over the work.” *Hughes v. Tishman Constr. Corp.*, 40 A.D.3d 305, 306 (1st Dept 2007). “General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or contractor] controlled *the manner in which the plaintiff performed his or her work*, i.e., how the injury-producing work was performed.” *Id.*

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor “is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice.” *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D.3d 1, 9 (1st Dept 2011) (internal quotation marks and citation omitted). *See also Minorczyk v. Dormitory Auth. of the State of N.Y.*, 74 A.D.3d 675 (1st Dept 2010). In this circumstance, “whether [it] controlled or directed the manner of plaintiff’s work is irrelevant to the Labor Law § 200 and common-law negligence claims” *Seda v. Epstein*, 72 A.D.3d 455, 455 (1st Dept 2010).

Defendants argue that plaintiff’s Labor Law § 200 and common-law negligence claims must be dismissed, as defendants did not control plaintiff’s work and had no notice of the loose plywood that caused plaintiff’s accident. In order to establish that Structure Tone, the general contractor, did not have control over plaintiff’s work, defendants submit, among other things, the deposition of Michael Morro (“Morro”), Allran’s foreman on the project. Morro, plaintiff’s direct supervisor, testified at his deposition that no one from Structure Tone ever told any Allran employees how to do their work, or provided any Allran employees with materials. Morro also testified that he never saw any representative of the building owner, 7 WTC, at the work site.

As to the issue of notice, defendants submit the deposition testimony of plaintiff, who stated that he did not see the wood plank that tripped him, or any of the wood left in that area, prior to his accident. Additionally, defendants submit the deposition of Ben Mullen ("Mullen"), Structure Tone's superintendent. Mullen testified that, around the time of plaintiff's accident, there were temporary ramps on the 11th floor that allowed for the transfer of materials from the elevator floor, which was recessed, to the main floor, but that he did not know who built the ramps. He also testified that he could not recall any complaints involving wooden planks near the elevator lobby.

Plaintiff argues, initially, that Structure Tone had supervisory control, as it coordinated the work, and safety, of all trades on the project. However, this type of general control is insufficient to show the supervisory control necessary for a general contractor to be liable for an accident caused by the method, manner, or materials of plaintiff's work.

Alternatively, plaintiff argues that Structure Tone had constructive notice of the dangerous condition consisting of planks of wood near the elevator lobby by virtue of the nightly cleaning done by Structure Tone employees. However, plaintiff does not submit any evidence that would indicate the length of time that the planks were left out. Without an indication of how long the condition existed, plaintiff cannot establish that Structure Tone should have discovered the condition, as "[c]onstructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to

afford a defendant an opportunity to discover and remedy the condition.” *Ross v. Betty G. Reader Revocable Trust*, 86 A.D.3d 419, 421 (1st Dept 2011). Thus, plaintiff fails to rebut defendants’ prima facie showing that they had no notice of the planks.

As plaintiff fails to rebut defendants’ prima facie showing that they had no supervisory control over plaintiff’s work, and no notice of the dangerous condition that caused plaintiff’s accident, the branch of defendants’ motion that seeks dismissal of plaintiff’s Labor Law § 200 and common-law negligence claims must be granted.

II. Labor Law § 241 (6)

Labor Law § 241 (6) provides:

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.

It is well settled that this statute 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 N.Y.2d 494, 501-502 (1993) (quoting Labor Law § 241(6)). While this duty is nondelegable and exists even in the absence of control or supervision of the worksite, *Rizzuto v. L.A. Wenger Contr. Co.*, 91 N.Y.2d 343, 348-349 (1998), “comparative negligence remains a cognizable

affirmative defense to a section 241 (6) cause of action.” *St. Louis v. Town of N. Elba*, 16 N.Y.3d 411, 414 (2011).

In order to maintain a viable claim under Labor Law § 241 (6), the plaintiff must allege a violation of a provision of the Industrial Code that mandates compliance with “concrete specifications,” as opposed to a provision that “establish[es] general safety standards.” *Ross*, 81 N.Y.2d at 505. “The former gives rise to a nondelegable duty, while the latter do not.” *Ross*, 81 N.Y.2d at 505. *See also Misicki v. Caradonna*, 12 N.Y.3d 511, 515 (2009).

As to determining whether a particular provision of the Industrial Code is applicable, the Court of Appeals recently noted, in *St. Louis*, that the Code “should be sensibly interpreted and applied to effectuate its purpose of protecting construction laborers against hazards in the workplace.” *St. Louis*, 16 N.Y.3d at 416.

Plaintiff argues that defendants violated the following provisions of the Industrial Code: 12 NYCRR 23-1.5, 12 NYCRR 23-2.1 (a) (1), and 12 NYCRR 23-1.7 (e). Section 12 NYCRR 23-1.5, entitled “General Responsibility of Employers,” is insufficiently specific, and “is thus incapable of supporting a Labor Law § 241 (6) claim.” *Timmons v. Barrett Paving Materials, Inc.*, 83 A.D.3d 1473, 1475 (4th Dept 2011)(internal quotation marks and citation omitted). *See also Meslin v. New York Post*, 30 A.D.3d 309, 310 (1st Dept 2006).

12 NYCRR 23-2.1 (a) (1) provides that “[a]ll building materials shall be stored in a safe and orderly manner. Material piles shall be stable under all conditions and so located that they do not obstruct any passageway, walkway, stairway or other thoroughfare.” Defendants argue that this provision is inapplicable, as plaintiffs’ accident took place in an open area, rather than a passageway or thoroughfare.

12 NYCRR 23-1.7 (e) (1) provides, in relevant part, that “[a]ll passageways shall be kept free from accumulations of dirt and debris and from any other obstructions or conditions which could cause tripping.” Once again, defendants argue that this provision is not applicable, as plaintiff tripped in an open area, rather than a passageway. Allran, the third-party defendant, joins in this argument. Plaintiff, on the other hand, contends that his deposition transcript makes clear that he tripped in a passageway. 12 NYCRR 23-1.7 (e) (2) provides, in relevant part, that “[t]he parts of floors, platforms and similar areas where persons work or pass shall be kept free from accumulations of dirt and debris and from scattered tools and materials . . . insofar as may be consistent with the work being performed.” Defendants argue that this provision is not applicable, as plaintiff tripped on a piece of wood, rather than debris, or scattered tools and materials.

Initially, 12 NYCRR 23-2.1 (a) (1), and both subdivisions of 12 NYCRR 23-1.7 (e), are each sufficiently specific to serve as a predicate to liability for Labor Law § 241 (6). *See, e.g., Militello v. 45 W. 36th St. Realty Corp.*, 15 A.D.3d 158, 159-160 (1st Dept 2005). Defendants make a prima facie showing that 12 NYCRR 23-2.1 (a) (1) and 12

NYCRR 23-1.7 (e) (1) are not applicable, as plaintiff testified that his accident occurred in an “open area.” *See Militello*, 15 A.D.3d at 159-160 (finding 12 NYCRR 23-2.1 inapplicable where plaintiff was allegedly injured by radiators scattered “in the middle of the room” he was working in, “since the area in which plaintiff was injured was not a passageway”); *Rajkumar v. Budd Contr. Corp.*, 77 AD3d 595, 595 (1st Dept 2010) (“[p]laintiff described the main lobby in which his accident occurred as a big open space, and we conclude that such an area would not fit within the term of “[p]assageway,” as set forth in subdivision (e) (1)”).

However, defendants fail to make a prima showing that 12 NYCRR 23-1.7 (e) (2) is inapplicable, as the fact that plaintiff tripped on a piece of wood plainly does not exclude the possibility that he tripped on debris or scattered materials in an area where workers pass. *See e.g. Boss v. Integral Constr. Corp.*, 249 A.D.2d 214, 215 (1st Dept 1998) (NYCRR 23-1.7 (e) (2) applicable where plaintiff tripped over a piece of sheetrock). An area may be a “working area” within the meaning of NYCRR 23-1.7 (e) (2) even if it is not the area where the plaintiff was working, but rather an area where workers regularly pass. *Smith v. Hines GS Props., Inc.*, 29 A.D.3d 433 (1st Dept 2006). Moreover, defendants fail to show that the wood plaintiff tripped over was an integral part of the work being performed, or that it was not left out as a result of work performed on the project. *See Orino v. 2 Gold, LLC*, 63 A.D.3d 541 (1st Dept 2009); *Mendoza*, 83 AD3d at 12.

As defendants fail to make a prima facie showing that NYCRR 23-1.7 (e) (2) is inapplicable, the branch of defendants' motion that seeks dismissal of plaintiff's Labor Law § 241 (6) claim must be denied. As Allran also fails to make a prima facie showing as to NYCRR 23-1.7 (e) (2), arguing broadly that NYCRR 23-1.7 is inapplicable because plaintiff's accident did not take place in a passageway, the branch of Allran's motion that seeks dismissal of plaintiff's Labor Law § 241 (6) claim also must be denied.

III. Labor Law § 240 (1)

While plaintiff's amended complaint makes no mention of Labor Law § 240 (1), defendants and third-party defendant Allran both argue that plaintiff's claim under this section should be dismissed. Plaintiff does not oppose or address this branch of either motion. Defendants and Allran are correct to the extent that, if plaintiff had a Labor Law § 240 (1) claim, it would not be viable, as plaintiff's accident did not involve "a physically significant elevation differential." *Runner v. New York Stock Exch., Inc.*, 13 N.Y.3d 599, 603 (2009).

IV. Indemnification

The agreement between Structure Tone and Allran, a purchase order, contains the following indemnification clause:

To the full extent permitted by Law, [Allran] will indemnify and hold harmless Structure Tone [] and Owner, their officers, directors, agents and employees from and against any and all claims, suits, liens, judgments, damages, losses and expenses including reasonable legal fees and costs, arising in whole or in part and in any manner from the acts, omissions, breach or default of [Allran], its . . . employees and subcontractors, in

13] .

connection with the performance of any work by [Allran] pursuant to this Purchase Order and/or related Proceed Order. [Allran] will defend and bear all costs of defending any actions or proceedings brought against [Structure Tone] and/or Owner, their officers, directors, agents and employees, arising in whole or in part out of any such acts, omission, breach or default.

“A contract that provides for indemnification will be enforced as long as the intent to assume such a role is sufficiently clear and unambiguous.” *Bradley v. Earl B. Feiden, Inc.*, 8 N.Y.3d 265, 274 (2007) (internal quotation marks and citation omitted).

Allran argues that the indemnification clause in its contract with Structure Tone was not triggered by this action because plaintiff’s accident did not arise out of its work on the project. It contends that plaintiff’s accident arose out of the installation of a wooden elevator ramp at the edge of the elevator lobby on the 11th floor, its removal, and cleanup work carried out by Structure Tone. Because Allran had nothing to do with any of these functions, Allran reasons, plaintiff’s accident did not arise out of its work.

In a different context, the Court of Appeals has held that the term “arising out of” means “originating from, incident to, or having connection with,” and that “the focus of the inquiry is not on the precise cause of the accident but the general nature of the operation in the course of which the injury was sustained.” *Regal Constr. Corp. v. National Union Fire Ins. Co. of Pittsburgh, PA*, 15 N.Y.3d 34, 38 (2010) (interpreting the phrase in the context of an additional insured clause) (internal quotation marks and citation omitted). This broad interpretation is consistent with the way courts have construed the phrase in the context of indemnification clauses. *See Urbina v. 26 Ct. St.*

Assoc., LLC, 46 A.D.3d 268, 273 (1st Dept 2007) (in order for a claim to “arise out” of a party’s work, there must be a showing that “a particular act or omission in the performance of such work was causally related to the accident”) (internal citation and quotation marks omitted); *Torres v. Morse Diesel Intl., Inc.*, 14 A.D.3d 401, 403 (1st Dept 2005).

Here, Allran was hired by Structure Tone to perform electrical installations at the building owned by 7 WTC. Plaintiff, Allran’s employee, was injured while transporting materials he needed to perform that work from one part of the job site to another. Thus, his injury has a clear connection to the work Allran was hired to do, and this action arises out of that work. Moreover, the indemnification clause clearly includes an intent to encompass reasonable litigation costs and attorneys’ fees. *See Quinonez v. Manhattan Ford, Lincoln-Mercury, Inc.*, 62 A.D.3d 495, 497 (1st Dept 2009).

Allran also argues that defendants are not entitled to summary judgment on the issue of contractual indemnification, as there are questions of fact as to whether Structure Tone negligently caused plaintiff’s accident. However, as discussed above in connection with plaintiff’s Labor Law § 200 and common-law negligence claims, Structure Tone has established as a matter of law that it was not negligent with regard to plaintiff’s accident. Finally, Allran argues that the indemnification clause is not triggered, Because Allran was not negligent. However, the indemnification clause plainly does not require negligence on Allran’s part.

Thus, Structure Tone, the general contractor, and 7 WTC, the building owner, are entitled to partial summary judgment on their third-party claim for contractual indemnification. Under the indemnification clause, 7 WTC's agents are also entitled to indemnification. As defendants have made no showing that Silverstein and Moody's are 7 WTC's agents, they are not entitled to partial summary judgment on their claim for contractual indemnification from Allran.

In accordance with the foregoing it is

ORDERED that the motion by defendants/third-party plaintiffs 7 World Trade Company, Silverstein Properties, Inc., Structure Tone Corporation and Moody's Corporation's motion (Motion Seq. No. 003) is decided as follows:

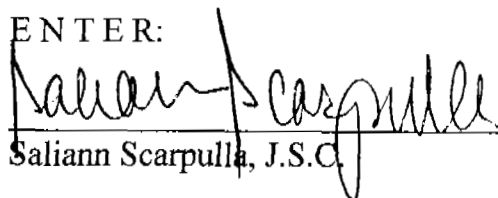
- (1) the branch of the motion that seeks summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claim is granted;
- (2) the branch that seeks summary judgment dismissing plaintiff Nunzio Mezzasalma's Labor Law § 241 (6) claim is denied; and
- (3) the branch that seeks partial summary judgment as to defendants' third-party claim for contractual indemnification against third-party defendant Allran Electric of N.Y., LLC, s/h/a Allran Electrical Corp. is granted as to defendants/third-party plaintiffs 7 World Trade Company and Structure Tone Corporation, and denied as to defendants/third-party plaintiffs Silverstein Properties, Inc. and Moody's Corporation; and it is further

ORDERED that third-party defendant Allran Electric of N.Y., LLC, s/h/a Allran Electrical Corp.'s motion (Motion Seq. No. 002) for summary judgment dismissing plaintiff's complaint, or, in the alternative, dismissing the third-party complaint, is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York
October 31, 2011

ENTER:


Saliann Scarpulla, J.S.C.

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