

Velez v Keystone Bldg. Corp.
2012 NY Slip Op 32390(U)
September 13, 2012
Supreme Court, New York County
Docket Number: 113157/09
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

LOUIS B. YORK
J.S.C.

PRESENT: _____
Justice

PART 2
INDEX NO. 113157/09
MOTION DATE 04
MOTION SEQ. NO. _____

Wilmer Velez,
The Keystone Building Corporation, et al.
and
third party action

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

SEP 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 9/13/12

Lvy, J.S.C.
LOUIS B. YORK

1. CHECK ONE: ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ☐ SETTLE ORDER ☐ SUBMIT ORDER
- ☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 2

-----X
Wilmer Velez,

Plaintiff,

Index
Number:

-against-

113157/2009

The Keystone Building Corporation,
108 Chambers, LLC, and Andrews
Building Corp.,

Defendants.

-----X
The Keystone Condominium s/h/a
Keystone Building Corporation
and Andrews Building Corp.,

Third-party plaintiffs,

-against-

West New York Restoration of
Ct, Inc.,

Third-party defendant.

-----X
Louis B. York, J.:

FILED

SEP 17 2012

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff moves for partial summary judgment on liability on his claim under Labor Law § 240 (1) (the Scaffold Law). The Keystone Building Corporation (Keystone) and Andrews Building Corp. (Andrews) cross-move for summary judgment dismissing plaintiff's Labor Law § 200 and common-law negligence claims against them and for summary judgment on contractual indemnity against West New York Restoration of Ct, Inc. (West NY). West NY cross-moves for summary judgment dismissing plaintiff's Scaffold Law claims and his Labor Law § 241 (6) claims and to dismiss the

[* 3]
third-party complaint against it.

Parties and Procedural Background

Plaintiff was a general laborer doing demolition work on a building (the Building) located at 38-44 Warren Street, New York, New York, which was undergoing facade repair work (the Project). On July 9, 2009, he was employed by West NY and he fell from a ladder.

Keystone was the owner of the Building and Andrews was the managing agent for the Building. On April 7, 2009, Keystone entered into a contract for facade work on the Building.

Plaintiff commenced this action by filing a summons and complaint on September 17, 2009. The action was discontinued against 108 Chambers, LLC by stipulation. On November 16, 2011, the court issued a compliance conference order setting a deadline to file a note of issue by December 16, 2011 and directing that summary judgment motions were to be made within 60 days of filing the note of issue. Plaintiff filed the note of issue on December 16, 2011 and made his motion for partial summary judgment on February 8, 2012. West NY cross-moved for summary judgment on February 17, 2012. Keystone and Andrews cross-moved for summary judgment on February 27, 2012.

While both cross motions were made a few days after the 60 day time frame, since the initial motion was timely made, the delay was minimal and no prejudice has been shown, the court

* 4]
exercises its discretion to consider the cross motions.

Parties' Allegations

Plaintiff alleges that, while he was working at the Building, he fell from a 20-foot extension ladder. The ladder was used to provide access from the ground to a sidewalk bridge that was used on the Project. He states that he had been doing demolition work at the Building for about two months and that he had previously used the Ladder to gain access to the sidewalk bridge so that he could perform his work. He asserts that he was performing demolition work with a co-worker, Daroisz Obidinski, as plaintiff was descending the ladder moved, causing him to lose his balance and fall.

Plaintiff states that the top of the Ladder was tied down with rope, that his foot did not slip and that his fall was due to the Ladder's moving. He further states that, due to his fall, his left foot hit a metal dumpster. He went to the St. Vincent's Hospital emergency room, and a fracture was discovered in his left foot, requiring three separate surgeries. He claims that he never received any equipment from Keystone or Andrews or any instructions from them as to how to perform his job. He seeks summary judgment on his L.L. \$240(1) Scaffold Law claim for his fall from the Ladder.

Keystone and Andrews contend that they had no control over the manner in which plaintiff performed his work, but rather that

plaintiff received his instruction from Kamil, West NY's foreman at the site. They state that the Ladder was stored every evening after work and that, when it was set up each morning by a West NY employee, it was tied on top to the sidewalk bridge by a rope to prevent it from moving. They further state that the Ladder had adjustable feet with rubber soles and was in good condition, that there was no debris on the Ladder's rungs and that, after the ladder was set up, adjusted and tied down, it would not move.

Keystone and Andrews also note that Obidinski had descended the Ladder a minute or two before plaintiff and he stated that it neither moved nor shook at that time and that it was tied up with rope. They also state that, in the St. Vincent's Hospital emergency room medical chart, plaintiff stated that he injured his "left foot when he slipped from [l]adder" and that in the workers compensation medical history questionnaire, plaintiff stated that he "slipped ... [while he] was going down the stairs" (Doris affirmation dated May 2, 2012, Exhibits 1, 2).

Keystone and Andrews also seek summary judgment on contractual indemnity against West NY pursuant to the Contract's indemnity provision.

West NY contends that the Ladder was properly secured and that the Ladder's feet had adjustable swivels to enable it to adjust to uneven ground. It asserts that the Contract's rider makes Keystone responsible for the sidewalk bridge. It also

asserts that Andrews's third-party action should be dismissed since Andrews was not a signatory to the Contract. Finally, it states that, since the Ladder was properly secured, plaintiff's L.L. §240(1) claim should be dismissed and his Labor Law § 241 (6) claim should also be dismissed as inapplicable to the facts of this case.

Labor Law § 200

Labor Law § 200 is a codification of common-law negligence and to be held liable, a party must have the authority to control the activity that caused the plaintiff's injury (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877-878 [1993]). There is no liability for an owner that exercises no supervisory control over the operation, where the purported defect or dangerous condition arose from the contractor's methods (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]).

Keystone and Andrews both state that they neither controlled nor supervised plaintiff's work, but rather that plaintiff was supervised by West NY's foreman, Kamil. Plaintiff has not presented any evidence controverting this aspect of Keystone and Andrews's cross motion, and since there is no evidentiary proof that they controlled the manner in which plaintiff performed the job, the portion of their cross motion that seeks to dismiss plaintiff's Labor Law § 200 and common-law negligence claims against them is granted (*Lombardi*, 80 NY2d at 295; *Augustyn v*

City of New York, 95 AD3d 683, 685 [1st Dept 2012]).

Labor Law § 240 (1)

Labor Law § 240 (1) provides, in pertinent part:

"All contractors and owners ... in the erection, demolition, repairing, altering, painting, cleaning or pointing 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 Law is to be liberally construed to accomplish its purpose, which is to protect workers against the special hazards and risks involved in elevation differentials, by placing responsibility for safety practices at building construction sites on owners and contractors (*Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 512-513 [1991]).

A plaintiff establishes entitlement to summary judgment on liability on a Labor Law § 240 (1) claim when he demonstrates that an unsecured ladder, on which he is standing, shifts and causes him to fall (*Hart v Turner Constr. Co.*, 30 AD3d 213 [1st Dept 2006]; *Montalvo v J. Petrocelli Constr., Inc.*, 8 AD3d 173 [1st Dept 2004]). Even if a plaintiff himself sets up the ladder, he is entitled to summary judgment if the ladder is unsecured and no other safety devices are provided (*Vega v Rotner Mgt. Corp.*, 40 AD3d 473 [1st Dept 2007]; *Velasco v Green-Wood*

Cemetery, 8 AD3d 88 [1st Dept 2004])). "To prevail on a motion for partial summary judgment on his cause of action under Section 240(1), the plaintiff must show both that the statute was violated and that the violation was a proximate cause of his injuries" (*Auriemma v Biltmore Theatre, LLC*, 82 AD3d 1, 9-10 [1st Dept 2011])).

Plaintiff asserts that, since the Ladder moved as he was descending, it failed to provide him with adequate protection and he is entitled to partial summary judgment on liability. Keystone, Andrews and West NY state that the Ladder was properly secured by being tied off at the top by rope to the sidewalk bridge and that immediately prior to the accident, plaintiff's co-worker Obidinski descended from the Ladder and it didn't move or shake. Additionally, they claim that plaintiff gave a different version of how the accident occurred, both at the St. Vincent's Hospital emergency room and in the workers compensation medical history questionnaire when he stated that he slipped.

This ambiguity created by plaintiff himself, as to whether the Ladder was properly secured, or whether it moved and whether plaintiff merely slipped precludes summary judgment since [w]here the evidence discloses different accounts of the accident, one pursuant to which defendants would be liable and another under which they would not, questions of fact exist making summary judgment is inappropriate" (*Ellerbe v Port Auth. of N.Y. & N.J.*,

91 AD3d 441, 442 [1st Dept 2012]; *Antenucci v Three Dogs, LLC*, 41 AD3d 205 [1st Dept 2007]). Plaintiff's motion for partial summary judgment on liability on his \$240(1) claim and the portion of West NY's cross motion that seeks to dismiss the \$240(1) Law claim are both denied.

Labor Law § 241 (6)

Labor Law § 241 provides:

"All contractors and owners and their agents ... when constructing or demolishing buildings or doing any excavating in connection therewith, shall comply with the following requirements:

[6] 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 [workers] ... [in accordance with rules promulgated by the Commissioner of Labor]."

A cause of action under Labor Law § 241 (6) must allege violation of a specific, rather than a general, safety standard set forth in the New York State Industrial Code, 12 NYCRR Title 12, (the Code) and that this violation was a proximate cause of the accident (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]).

Plaintiff has alleged violations in his supplemental bill of particulars for two sections of the Code: 23-1.21 (b) (4) (i) and (ii).

Code section 23-1.21 (b) (4) (i) provides in pertinent part

that:

"Any portable ladder used as a regular means of access between floors or other levels in any building or other structure shall be nailed or otherwise securely fastened in place."

Code section 23-1.21 (b) (4) (ii) provides that:

"All ladder footings shall be firm. Slippery surfaces and insecure objects such as bricks and boxes shall not be used as ladder footings."

Plaintiff withdrew his claim as to slippery surfaces (plaintiff EBT, at 50) and there is no evidence that the footings were not firm nor of any debris or insecure objects on the steps of the Ladder and, consequently, plaintiff's claim under 23-1.21 (b) (4) (ii) is dismissed.

Regarding Code section 23-1.21 (b) (4) (i), plaintiff has presented evidence that the Ladder was used regularly by West NY's workers to gain access to the sidewalk bridge so as to perform work on the Project (plaintiff EBT, at 21-22; Obidinski EBT, at 25). As noted above, whether the Ladder was adequately secured is a factual issue and, accordingly, the portion of West NY's cross motion that seeks summary judgment dismissing this claim is denied (*Ellerbe*, 91 AD3d at 442).

Contractual Provisions

The Contract has the following provisions:

§ 3.18 (the Indemnity Provision)

"To the fullest extent permitted by law, ... the Contractor shall indemnify and hold harmless the Owner ... and agents ... from and against claims, damages, losses and expenses ... arising out of or resulting from performance of the Work, ... but only to the extent caused by the negligent acts or omissions of the Contractor [or its employees]."

Rider

5. E

"...Owner will be responsible for the continued safe use of the sidewalk bridge/scaffolding/shoring."

Contractual Indemnity

"The right to contractual indemnification depends upon the specific language of the contract'" (*Lesisz v Salvation Army*, 40 AD3d 1050, 1051 [2d Dept 2007] [internal citation omitted]). Moreover, "a contract assuming [the duty to indemnify] must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed" (*Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 [1989]). A party's right to contractual indemnity "depends on the intent of the parties and the manner in which that intent is expressed in the contract" (*Suazo v Maple Ridge Assoc., L.L.C.*, 85 AD3d 459, 460 [1st Dept 2011]).

Reading the Indemnity Provision "according to the plain meaning of its terms" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]), it limits indemnification to "negligent acts or

omissions" by the Contractor, a subcontractor or anyone employed by them. In contractual indemnity, a party seeking to impose indemnity must show that it is free from negligence, but need not show that the proposed indemnitor is negligent, and must show that the indemnification provision applies (*Uluturk v City of New York*, 298 AD2d 233, 234 [1st Dept 2002]).

However, the court has dismissed plaintiff's claims under Labor Law § 200 and common-law negligence against Keystone and Andrews and, therefore, plaintiff's claims against them are based on their statutory status rather than any "active negligence." Andrews was the managing agent for the Building and it is covered by the Indemnity Provision as Keystone's agent. The Rider cannot immunize West NY against its own negligence. Its cross motion to dismiss the third-party complaint is, therefore, denied. Consequently, Keystone and Andrews's motion for summary judgment on contractual indemnity against West NY, which placed and secured the Ladder, is granted, conditioned upon a finding of negligence against it at trial.

Order

It is, therefore,

ORDERED that plaintiff's motion for partial summary judgment on his Labor Law § 240 (1) claim against the Keystone Building Corporation and Andrews Building Corp. is denied; and it is further

ORDERED that the portion of the cross motion of the Keystone Building Corporation and Andrews Building Corp. that seeks dismissal of plaintiff's Labor Law § 200 and common-law negligence claim against them is granted; and it is further

ORDERED that the portion of the cross motion of the Keystone Building Corporation and Andrews Building Corp. that seeks summary judgment on contractual indemnity against West New York Restoration of Ct, Inc. is granted, conditioned upon a finding of negligence against said party at trial; and it is further

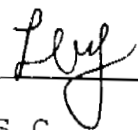
ORDERED that the portion of the cross motion of West New York Restoration of Ct, Inc. that seeks to dismiss plaintiff's claim under Labor Law § 240 (1) is denied; and it is further

ORDERED that the portion of the cross motion of West New York Restoration of Ct, Inc. that seeks to dismiss plaintiff's claim under Labor Law § 241 (6) is granted to the extent of dismissing plaintiff's claim under 12 NYCRR 23-1.21 (b) (4) (ii) and denied as to 12 NYCRR 23-1.21 (b) (4) (i); and it is further

ORDERED that the portion of the cross motion of West New York Restoration of Ct, Inc. that seeks to dismiss the third-party complaint is denied.

Dated: 9/13 / 2012

ENTER:


J.S.C.

FILED

SEP 17 2012

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