Argentina v 681 Fifth Ave., LLC
2013 NY Slip Op 32295(U)
September 23, 2013
Supreme Court, New York County
Docket Number: 110447/2009
Judge: Eileen A. Rakower
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[* 1] SCANNED ON 9/27/2013

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

HON. EILEEN A. RAKOWER

PART 15

Index Number : 110447/2009

ARGENTINA, RICHARD

VS

681 FIFTH AVENUE

Sequence Number : 002

SUMMARY JUDGMENT

INDEX NO. ____

MOTION DATE ____

MOTION SEQ. NO. (2) 3

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

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits	No(s). 1, 2
Answering Affidavits — Exhibits	No(s). 3, 4, 5
Replying Affidavits	No(s). 6, 7, 8

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

DECIDED IN ACCORDANCE WITH ACCOMPANYING DECISION / ORDER

FILED

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/23/13

HON. EILEEN A. RAKOWER

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

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
PRESENT: Hon. EILEEN A. RAKOWER PART 15
Justice

RICHARD ARGENTINA AND JACQUELINE ARGENTINA,

Plaintiffs,

- v -

681 FIFTH AVENUE, LLC AND SKYLINE WINDOWS, LLC

Defendants.

INDEX NO. 110447/2009

MOTION DATE ______

MOTION SEQ. NO. 2, 3

MOTION CAL. NO. ______

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answer — Affidavits — Exhibits	3, 4, 5,
Replying Affidavits	6, 7, 8

Cross-Motion: X Yes No

Richard Argentina and his wife Jacqueline Argentina ("Plaintiffs") bring this action for personal injuries allegedly sustained by Richard Argentina on June 25, 2009, at 681 Fifth Avenue, New York, New York, ("the premises") at approximately 1 p.m. as he was moving windows to a dumpster. Defendant Skyline Windows, LLC ("Skyline") now moves for summary judgment pursuant to CPLR §3212, to dismiss Plaintiff's complaint as to Skyline, and to dismiss Co-Defendant 681 Fifth Avenue, LLC's ("681 Fifth Avenue") claim against Skyline for indemnification. Plaintiffs oppose Skyline's motion.

681 Fifth Avenue also moves for summary judgment pursuant to CPLR §3212, to dismiss Plaintiff's complaint and all cross-claims, or in the alternative, for an Order granting 681 Fifth Avenue's motion for a conditional Order of contractual and or common law indemnification from Skyline. Plaintiff states that it "withdraws all claims against the owner, 681 Fifth Avenue, LLC." Skyline opposes 681 Fifth Avenue's motion.

FILED

SEP 27 2013

COUNTY CLERK'S OFFICE
NEW YORK

681 Fifth Avenue is the owner of the premises. JT Magen & Co., Inc. ("JT Magen") is the general contractor that was hired by 681 Fifth Avenue to perform construction work on the premises. At the time of the accident, Mr. Argentina was employed as a laborer for JT Magen. Skyline is a window installation company that was hired by 681 Fifth Avenue to remove windows on the premises.

At the time of the accident, 681 Fifth Avenue was in the process of renovating the premises. Plaintiff alleges that he was moving windows that had been removed by Skyline to the dumpster when he was:

> caused to sustain serious and severe injuries as a result of window glass with jagged edges, loss frames [sic] panels being cut, stocked and placed in a dangerous and hazardous manner; defendants allowed glass with jagged edges, lose frames [sic], lose glass [sic] to be and remain in the area causing dangerous and hazardous conditions to laborers that were to remove same; defendants further failed to ensure that the work was not performed in a dangerous and hazardous manner; defendants further failed to properly stock-pile, materials in a safe and orderly manner; defendants further failed to secure materials against slippage or collapse; further failed to place safe-guards on material; further failed to follow customary procedures utilized in the field; further failed to stack materials in the manner designated by the general contractor; further violated Sections §200, §240 and §241(6) of the Labor Laws of the State of New York, Rule 23 of the Industrial Code of the State of New York, specifically but not limited to 23-1.5, 23-1.7, 23-2.1, 23-2.10, 23-1.11, 23-1.32, 23-1.33, 23-2.1, 23-3.1, 23-3.2, 23-3.33, Article 1926 of O.S.H.A.

Plaintiff's bill of particulars asserts that "the occurrences aforesaid were caused solely and wholly [sic] by reason of negligence, carelessness and recklessness of defendants, their contractors, agents and employees who were negligent in the ownership, operation, management and control of the aforesaid premises."

In support of its motion, Skyline provides: the pleadings; Plaintiff's bill of particulars; the deposition testimony of Richard Argentina; the deposition testimony of Mario Bellino, a supervisor for Skyline Windows; the March 17,

2008 contract between 681 Fifth and Skyline for Skyline to replace the windows at the premises; the deposition testimony of Stacey Hoyt the Comptroller for Metropole Realty Advisors, which is a real estate investment company that represent 681 Fifth Avenue LLC; and the Note of Issue filed on February 13, 2013.

In opposition, Plaintiff attaches: the deposition testimony of Plaintiff Richard Argentina; the deposition testimony of Mario Bellino, a supervisor for Skyline; the deposition testimony of Eugene Davis, Plaintiff's supervisor at JT Magen; the deposition testimony of Richard Johnston the field superintendent for JT Magen; and the deposition testimony of George Washington Palmer, who is employed by Skyline in removing windows.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970], *Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

On the date of the accident, Mr. Argentina arrived at work at 6:30 a.m. and was to work until 3:30 p.m. As a laborer, Mr. Argentina did "general construction, cleanup, clean the stairwells, throwing out the windows, cleaning up after the trades." Mr. Argentina and his supervisor, Eugene Davis, had been working at 681 Fifth for two weeks prior to the accident.

Skyline was removing old windows from their frames on the 10th floor and replacing them with new windows on the date of the accident. Mr. Argentina and Mr. Davis were then tasked with throwing out the old windows and debris. The windows were large, commercial, metal-framed windows, with wire in the glass that formed a pattern. They measured approximately eight feet tall and four feet wide.

When Mr. Argentina arrived on the 10th floor that afternoon, he noticed that windows that Skyline had removed were broken. He states at his deposition:

> Well, prior to the incident, we were removing the window. The window in the front of the building, they were taken out in one piece. They would stack them up and myself and Eugene would put them on an A-frame, wheel them out, put them in a dumpster. On this day, for whatever reason, the window, they [Skyline] were removing the windows on the side of the building. For whatever reason, they couldn't get them out in one piece. They cut the windows and broke the glass, left them on the side, and we had to remove them.

More specifically, Mr. Argentina observed roughly two windows with jagged edges, that had been cut leaning against the wall. They were split in pieces. He also observed broken glass on the floor.

Owen McGolf and Richie Johnson, were both field superintendent for JT Magen & Co. As a field superintendent, Mr. McGolf and Mr. Johnson were on site managers whose duties were to oversee construction work and JT Magen & Co.'s subcontractors. Mr. Davis indicates that Mr. McGolf instructed him about a week prior to the accident, that he would be cleaning up the 10th floor area. Mr. Davis states that on the day of the accident, he received instructions from Mr. Johnston to move windows and clean up the area on the 10th floor.

Plaintiff indicates that when he arrived on the 10th floor, he noticed that the windows that had been removed by Skyline were broken. He spoke with Mr. Davis about the broken windows. He asserts that Mr. Davis "went and told the super[intendent] that the windows were broken, that there was glass on the floor." Mr. Davis told Plaintiff that Mr. Johnston responded to "put them in a container. .. We have to get them off the floor. The owner is coming, we need the floor clean." Plaintiff also states that Mr. Johnston said to "be careful, Don't use the A-frame. Put them in a dumpster."

Mr. Argentina states that he put on a pair of gloves and began lifting and placing the broken glass into a bin. He was injured while moving the first window he picked up. The portion of the window involved in Plaintiff's accident measured four feet wide and weighed approximately 20 to 30 pounds. Mr.

Argentina describes this first window as "basically, sharp edges up and down, jagged. Almost like if you looked into a shark's mouth, how shark's teeth go, up and down."

Mr. Argentina explains how he moved the window:

> Q. How did you hold on?
> A. On both sides.
> Q. And the top portion, was that the jagged portion?
> A. Yes.
> Q. So you got both sides, you're moving into a position so that Eugene can help you?
> A. Yes.
> Q. What was your intention, to leave it down, standing up?
> A. Leave it standing up, have Eugene grab the other side, and put it in the dumpster.
> Q. So you would grab one side that has the frame up, he would grab the other side, you lift it and place it in the dumpster?
> A. Yes.

Mr. Argentina states that he moved the window "a couple of feet" about a foot off the ground, when he cut his hand. He indicates:

> A. Well I lifted the window and I turned. I walked two feet with it. I went to put it done [sic] and the glass fell out – a piece– not the whole glass, a chuck [sic] of it fell out and sliced my hand.

The glass cut into the top of his left thumb causing him to bleed. The Skyline employees who were standing right there when the accident occurred, came over to Plaintiff and wrapped his hand. Mr. Davis was "maybe, five, ten feet" from Plaintiff when he was injured.

About an hour after the accident, Mr. Argentina arrived at NYU hospital where glass was removed from his finger and his finger was stitched up. After an MRI, Mr. Argentina was informed that his tendon had been cut and that he would need to return for surgery on his thumb. About two or three days later, surgery was performed on Mr. Argentina's thumb. Mr. Argentina states that after his surgery

he experienced"excruciating" pain in his finger, and still experiences pain to this day.

Labor Law §240

Skyline moves for dismissal of Plaintiffs' Labor Law§ 240 claim. Labor Law §240 protects employees engaged "in the erection, demolition, repairing, altering, painting, cleaning or pointing of a building or structure." However, it is only applicable to work performed at heights or where the work itself involves risks related to differentials in elevation. (*Masullo v. City of New York*, 253 AD3d 541 [2nd Dept 1998]).

Mr. Argentina performed all of his work while standing on the ground on the 10th floor. Nowhere in his deposition testimony or in the pleadings is Mr. Argentina described as exposed to a gravity-related risk. Thus Labor Law §240 is not applicable and all claims pursuant to this section are dismissed.

Labor Law §200

Skyline moves to dismiss the Labor Law §200 cause of action alleged by Plaintiff. "Liability against a subcontractor based upon a claimed violation of Labor Law §200– which codifies the common-law duty of an owner or general contractor to provide a safe workplace– requires a showing that authority was conferred on the subcontractor to supervise and control the activity which produced the injury." (*See, Rice v. City of Cortland*, 262 AD2d 770, 691 NYS2d 616 [3rd Dept 1999]; *see also, Comes v. NYS Elec. & Gas Corp.*, 82 NY2d 876 [1993]).

The evidence presented demonstrates that the injury-producing activity in which Plaintiff was engaged at the time of the accident was the movement of old windows to the dumpster, which was at J&T Magen's direction and under its control. This activity was not delegated to Skyline, nor was it part of Skyline's contractual duties. In fact, Section IIA of the contract between Skyline and 681 Fifth Avenue lists as an exclusion from the work to be provided by Skyline, disposal of the existing windows. This section specifically provides that debris are to be placed in a central location on each floor and that the JT Magen, the general contractor, would arrange for proper removal and disposal.

Plaintiff testified that it was Mr. Davis, an employee of JT Magen, and Mr. Davis's supervisor, who directed his work and told him what to do. Furthermore, the fact that plaintiff was injured in the course of moving windows that had been removed by Skyline, did not constitute authorization for Skyline to supervise, direct or control this activity or plaintiff's work. (*See, Walsch v. Sweet Assocs.*, 172 AD2d 111 [3rd Dept 1991]). Based on the foregoing, Skyline's motion for summary judgment is granted as to the Labor Law §200 claim.

Labor Law §241(6)

Skyline also moves to dismiss Plaintiff's cause of action based on Labor Law §241(6). To succeed on Labor Law §241(6) claim, a Plaintiff must plead and prove that specific provisions were not complied with, and that such failures were the proximate cause of Plaintiff's accident. (*Ross v. Curtis-Palmer Hydro Electric*, 81 NY2d 494, 601 NYS2d 49 [1993]). "In order to establish a violation of Labor Law §241(6), the underlying statute or rule that the violation of Labor Law §241(6) is premised upon, must be one that mandates concrete specifications rather than a general safety standard." (*DiPalma v. Metropolitan Transportation Authority*, 872 NYS2d 690 [1st Dept 2008]). A Defendant is thus entitled to summary judgment, dismissing a §241(6) cause of action where the cited regulation does not mandate concrete specifications, or where it is not applicable to Plaintiff's accident.

Plaintiff alleges that Defendants violated Rule 23 of the Industrial Code of the State of New York, "specifically, but not limited to 23-1.5, 23-1.7, 23-2.1, 23-2.10, 23-1.11, 23-1.32, 23-1.33, 23-3.1, 23-3.2, 23-3.33" and "Article 1926 of O.S.H.A."

Section 23-1.5 is entitled "General Responsibility of Employers." The courts have consistently held that this section merely "establishes a general safety standard". A cause of action to recover damages based on an alleged violation of Section 23-1.5 is therefore, not sufficiently specific to support a cause of action under the statute. (*Mouta v. Essex Mkt. Dev. LLC*, 103 AD3d 505 [1st Dept 2013]).

Plaintiff also alleges a violation of Section 23-1.7, which applies to overhead hazards, falling hazards, drowning, slipping, tripping hazards, vertical

passages, air-contaminated or oxygen deficient work areas and corrosive substances. None of these are applicable to the facts herein. Thus there is no basis for imposing liability pursuant to Section 23-1.7.

Plaintiff further asserts that Defendants have violated Section 23-2.1. The First Department has held that the generalized language of 23-2.1 cannot support a Labor Law §241(6) claim. (*See, La Veglia v. St. Francis Hosp.*, 912 N.Y.S.2d 611 [2d Dept 2010]).

Section 23.1.11 is inapplicable as it concerns lumber and nail fastenings, and Plaintiffs provide no evidence that this is applicable.

Plaintiff alleges a violation of 23 1-.32 entitled Imminent Danger-Notice, Warning and Avoidance. This section is inapplicable as its application is predicated on prior issuance of a violation. (*Mancini v. Pedra Construction*, 293 AD2d 453, 740 NYS2d 387 [2nd Dept 2002]). There is no evidence of such violation having been issued herein.

Section 23-1-.33 applies to persons passing by construction, demolition or excavation operations, not employees or workers on a construction site. As such, it is inapplicable.

Furthermore, the entire subpart 23-3 relates to the demolition of a building or structure. The work being performed here does not involve the demolition of a building, but rather the renovation and the replacement of windows, and therefore these sections are inapplicable.

Negligence

To establish a prima facie case of negligence, a plaintiff must demonstrate: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, (3) injury proximately resulting therefrom. (*See, Akins v. Glen Falls City School Dist.*, 53 NY2d 325, 441 NYS2d 644, 424 NE2d 531 [1981]). "Because a finding of negligence must be based on the breach of a duty, a threshold question in tort cases is whether the alleged tortfeasor owed a duty of care to the injured party." (*See, Espinal v. Melville Snow Contrs.*, 98 N.Y.2d 136, 746 N.Y.S.2d 120, 773 N.E.2d 485 [2002]). "Absent such a duty, there can be no liability." (*See, Kimbar*

v. Estis, 1 N.Y.2d 399, 135 N.E.2d 708, 153 NYS2d 197 [1956]).

In support of its assertion that it owed no duty to Mr. Argentina, Skyline annexes its contract with 681 Fifth Avenue. Paragraph 4.1 of the contract provides:

> Unless specifically stated otherwise in Section IIA... [JT Magen & Co.] shall pick up and 'center pile' scrap and waste materials resulting from [Skyline's] Work in an area designated by [681 Fifth Ave] on a daily basis (to be removed by others).

Section IIA lists as an exclusion from the work to be provided by Skyline, disposal of the existing windows. This section specifically provides that debris are to be placed in a central location on each floor and that the JT Magen & Co., the general contractor, would arrange for proper removal and disposal.

It is clear that JT Magen & Co.'s job was to remove the window debris. The glass was open and obvious and JT Magen & Co. controlled the manner in which they moved it.

Wherefore, it is hereby,

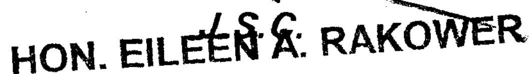
ORDERED that Skyline Windows, LLC's motion for summary judgment is granted and all claims are dismissed as to Skyline Windows, LLC; and it is further,

ORDERED that all claims asserted by Richard Argentina and Jacqueline Argentina against 681 Fifth Avenue LLC are withdrawn; and it is further,

ORDERED that the Clerk is directed to enter judgment dismissing this case in its entirety.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: September 23, 2013



HON. EILEEN A. RAKOWER J.S.C.

FILED

SEP 27 2013

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