SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 63
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Jan Karwowski,

Plaintiff,

-against-

1407 Broadway Real Estate, LLC
and The Cayre Group, Ltd.,

Defendants.
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The Cayre Group, Ltd.,

Third-Party Plaintiff,

-against-

Xcel Interior Contracting, Inc.,

Third-Party Defendant.
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Index No.: 153277/2012
Motion Date: April 20, 2016
Motion Seq. No.: 003

DECISION AND ORDER

Third-Party
Action Index No.: 595174/2014

For Plaintiff:
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For Defendant The Cayre Group, Ltd.:
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The following papers were read on this motion for summary judgment:

Affirmation in support of motion....1
Affirmation in opposition....2
Affirmation in support of cross-motion and in partial opposition to co-defendant's motion....3
Reply affirmation in further support....4
Affirmation in opposition to cross-motion....5

Ellen M. Coin, J.:

The Cayre Group, Ltd. (Cayre) moves pursuant to CPLR 3212 for summary judgment dismissing plaintiff's complaint, together with the cross-claims of 1407 Broadway Realty Group,

LLC (1407 Broadway). 1407 Broadway cross-moves for summary judgment in its favor and against Cayre on the issue of contractual indemnity.

Facts

Plaintiff alleges that on July 1, 2011, he was working as a carpenter for Xcel Interior Contracting, Inc. (Xcel) on the renovation of a showroom and adjoining bathroom (the Project) on the 42nd floor of a building located at 1407 Broadway, New York, New York (the Building) (Affirmation of Thomas Annunziato in opposition to summary judgment, dated January 22, 2016, Ex. 1: Affidavit of Jan Karwowski, dated January 22, 2016, [Plaintiff Aff.] at ¶¶ 1-4; Affirmation of David Weiser, Esq. in support of summary judgment, dated November 18, 2015, [Weiser Aff.], Ex. B [Plaintiff Tr.] at 12:7-10; 20:7-18; 31:5-18). Non-party Estate of Sol Goldman owns the Building and leases it to Abraham Kamber & Company, which provides an operating lease to 1407 Broadway (Affirmation of Robert C. Baxter in support of cross-motion, dated January 25, 2016, [Baxter Aff.] at ¶ 12). As of the date of the accident, 1407 Broadway leased the 41st and 42nd floors of the Building to Cayre (the Lease), an apparel importer and wholesaler. Cayre executed the Lease in its former name, Cayset Fashions, Ltd. (Weiser Aff. at Ex. F). Cayre hired a number of companies for the Project "[u]nder an oral contract," including Xcel (Weiser Aff. at Ex. E [O'Brien Tr.], 15:5-21:21).

On July 1, 2011, plaintiff was cutting 11" by 14" sheets of plywood, using a table saw, as part of his work on the Project (Plaintiff Aff. at ¶¶ 5, 7-8). While the location of the Project was on the 42nd floor of the Building, he worked off-site in a storage and equipment area on the 16th floor of the Building, which Xcel had been using for at least 10 years (Plaintiff Tr. at 21:2-9; 23:3-24:23). As he was cutting a plywood sheet, the plywood jammed against the edge of an

obstructing table that was normally level with the saw (*id.* at 42:19-21; 47:13-48:17). Plaintiff

pushed the plywood sheet, causing his left thumb to come in contact with the blade, which had no guard (*id.* at 44:2-10). As a result, the tendons, nerve and tissue of his left thumb suffered permanent damage, rendering plaintiff unable to work as a carpenter and making his everyday household activities difficult even after surgery and rehabilitation (*id.* at 69:21-72:5; 84:20-85:14; 126:13-129:24). Plaintiff testified that the saw that caused his injury belonged to Xcel and that he received instructions on how to perform his work solely from his supervisors at Xcel (Plaintiff Tr. at 30:25-31:3; 37:15-18; 133:24-134:6). In his complaint, plaintiff asserts violations of Labor Law § 241 (6) and Labor Law § 200, as well as common-law negligence (Baxter Aff. at Ex. C [Amended Complaint], ¶¶ 40, 42, 46).[1]

Meghan McDonald, assistant to the Building's property manager at the time of the accident, testified that Xcel did work for the Building and various tenants (Weiser Aff. at Ex. D [McDonald Tr.], 18:16-23; 53:20-54:15). She was unaware of Xcel's use of the 16th floor space and did not know about the Cayre Group's renovation "[o]ther than it being in the building" (*id.* at 38:2-40:25; 49:6-19). She did not know of plaintiff until served with the summons in this case (*id.* at 14:16-19:25).

Diane O'Brien, Cayre's corporate controller on the date of the accident, testified that she had paid invoices submitted by Xcel for work done on the Project and that she had searched for, but not found, a written contract between Cayre and Xcel (O'Brien Tr. at 6:9-7:8; 63:8-66:23). At first, O'Brien testified that she was not aware of any "rules concerning construction" in the Building, but once shown "a list of approved contractors for 1407 Broadway," she recognized the name of an Xcel employee and asserted that "[t]here's only certain contractors that are allowed to work in the building" (*id.* at 80:22-83:11). O'Brien recalled that Cayre was

[1] By order dated January 20, 2015, the court granted a default judgment in the third-party action in favor of Cayre and against Xcel on the issue of liability.

reimbursed for the renovation according to the terms of its lease with 1407 Broadway (*id.* at 71:19-25). She further averred that Cayre did not supervise Xcel's work on, or provide materials for, the Project (*id.* at 14:20-15:4).

Analysis

A party seeking summary judgment "must make 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...[f]ailure to make such prima facie showing requires a denial of the motion" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the movant makes such a showing, the opposing party must produce "evidentiary proof in admissible form" sufficient to raise a triable issue of material fact in order to prevail (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

In deciding a motion for summary judgment, a court must draw all reasonable inferences in favor of the nonmoving party and deny the motion if there is any genuine issue of material fact (*Branham v Loews Orpheum Cinemas, Inc.*, 8 NY3d 931, 932 [2007]; *Dauman Displays v Masturzo*, 168 AD2d 204, 205 [1st Dept 1990], *lv dismissed* 77 NY2d 939 [1991]). "Where different conclusions can reasonably be drawn from the evidence, the motion should be denied" (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 555 [1992]).

In opposition to Cayre's motion for summary judgment, plaintiff contends that Cayre's reliance on unsworn deposition transcripts compels denial of the motion (Affirmation of Thomas C. Annunziato, Esq. in opposition to summary judgment, dated January 22, 2016, [Annunziato Aff.] at ¶4). However, Cayre provided plaintiff and O'Brien with notice and an opportunity to review their deposition transcripts pursuant to CPLR 3116 (a) (Reply Affirmation of David Weiser, Esq. in further support for summary judgment, Feb. 2, 2016, [Weiser Reply Aff.] at Ex.

A). O'Brien submitted a signed transcript on file with the Court (*id.* at Ex. C). Plaintiff's time to review his transcript has expired, and now it "may be used as fully as though signed" (CPLR 3116 [a]). Thus, Cayre has submitted sufficient evidence for purposes of a CPLR 3212 motion (*see Franco v. Rolling Frito-Lay Sales, Ltd.*, 103 AD3d 543, 543 [1st Dept 2013]).

Labor Law § 241 (6) Claim Against Cayre

Labor Law § 241 provides in relevant part:

> "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:
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> ***
>
> "(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]."

To state a prima facie case under Labor Law § 241 (6), a plaintiff must allege that a specific safety standard set forth in the New York State Industrial Code (12 NYCRR Part 23) was violated and that the violation was a proximate cause of plaintiff's injury (*Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501-505 [1993]). Additionally, "section 241 (6) [only] covers industrial accidents that occur in the context of construction, demolition and excavation" (*Nagel v D & R Realty Corp.*, 99 NY2d 98, 103 [2002]; *Moreira v Ponzo*, 131 AD3d 1025, 1027 [2d Dept 2015]; *Flores v ERC Holding LLC*, 87 AD3d 419, 420 [1st Dept 2011]).

Cayre asserts that Labor Law § 241 (6) is inapplicable to this case because plaintiff's injury did not occur at the site of the Project (Weiser Aff. at ¶¶ 3, 7-9). Labor Law § 241(6) does not apply to "fabricating and transporting materials to be used in connection with ongoing work at a construction site" (*Flores v ERC Holding, LLC*, 87 AD3d at 420; *Davis v Wind-Sun Constr.*,

Inc., 70 AD3d 1383, 1383 [4th Dept 2010]; *Solly v Tam Ceramics, Inc.*, 258 AD2d 914 [4th Dept 1999]).

It is undisputed that the Project was the renovation of Cayre's showroom on the 42nd floor of the Building and that plaintiff's accident happened on the 16th floor of the Building. Plaintiff had worked at Xcel's facility on the 16th floor for approximately 10 years (Plaintiff Tr. at 135:10-15). The area was a permanent workshop controlled by Xcel, not a temporary staging area ancillary to the Project and controlled by Cayre (*compare Davis v Wind-Sun Constr., Inc.*, 70 AD3d 1383, 1383 [4th Dept 2010] *with Shields v GE*, 3 AD3d 715, 717 [3d Dept 2004]). Therefore, the portion of Cayre's motion that seeks dismissal of plaintiff's claims against it under Labor Law § 241 (6) must be granted.

Labor Law § 200 Claim Against Cayre

Labor Law § 200 codifies the common law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). An owner may be held liable under Labor Law § 200 when it has "actual or constructive notice of the hazardous condition" that caused a plaintiff's injury (*Garcia v DPA Wallace Ave. I, LLC*, 101 AD3d 415, 417 [1st Dept 2012]; *see also Rajkumar v Budd Contr. Corp.*, 77 AD3d 595, 596 [1st Dept 2010]). When a claim against an owner originates from the means and methods by which the injury-producing work was performed, a plaintiff must also show that the owner "exercise[d]... supervisory control over the operation" (*Lombardi v Stout*, 80 NY2d 290, 295 [1992]; *Cahill v Triborough Bridge & Tunnel Auth.*, 31 AD3d 347, 350-351 [1st Dept 2006]). "An implicit precondition to [the duty under Labor Law § 200] to provide a safe place to work is that the party charged with that responsibility have the authority to control the activity bringing about the injury to enable it to

avoid or correct an unsafe condition" (*Russin v Louis N. Picciano & Son*, 54 NY2d 311, 317 [1981]; *Fiorentino v Atlas Park LLC*, 95 AD3d 424, 426 [1st Dept 2012]).

Plaintiff's accident arose out of the "means and methods" of his work. Cayre has presented sufficient evidence that it did not supervise the manner in which plaintiff performed his work on the Project (O'Brien Tr. at 15:16-25, 36:22-25). Additionally, plaintiff stated that he took his instructions only from his supervisors at Xcel (Plaintiff Tr. at 30:22-31:3, 139:15-140:2). Because Cayre did not supervise plaintiff's work, the Labor Law § 200 and common-law negligence claims against Cayre must be dismissed (*Russin*, 54 NY2d at 317; *see also Lombardi*, 80 NY2d at 295).

1407 Broadway's Cross-Motion

Upon a motion for summary judgment, the Court may search the record of the case and award summary judgment to a nonmoving party where the facts are undisputed (CPLR 3212 [b]; *Merritt Hill Vineyards, Inc. v Windy Heights Vineyard, Inc.*, 61 NY2d 106, 111 [1984]). As the Court has determined that Section 241 (6) does not apply to plaintiff's accident, plaintiff's Labor Law § 241 (6) claim must be dismissed as against 1407 Broadway as well. Likewise, plaintiff's claims of common law and Labor Law § 200 negligence against 1407 Broadway cannot be sustained. Deposition testimony establishes that 1407 Broadway did not supervise or control plaintiff's work and that plaintiff took orders only from Xcel employees (Plaintiff Tr. at 27:7-16; 12:19-13:5; 133:24-134:3; 139:15-18). The building management did not closely monitor construction contracted for by a tenant, both in general and on this particular project (McDonald Aff. at 29:23-31:17). Although 1407 Broadway may have reimbursed Cayre for the Project, any reimbursements were based on invoices submitted by contractors such as Xcel and do not reflect contemporaneous supervision of the work.

This grant of summary judgment and consequent dismissal of all causes of action against 1407 Broadway render its indemnification cross-claims moot. Cayre's cross-claims for indemnification against 1407 Broadway and for breach of contract for failure to procure insurance are also rendered moot.

Accordingly, it is hereby

ORDERED that the motion of defendant The Cayre Group, Ltd. pursuant to CPLR 3212 for summary judgment dismissing plaintiff's claims against it is granted, and the same are dismissed with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that upon searching the record pursuant to CPLR 3212 (b), the Court grants summary judgment dismissing the complaint as against defendant 1407 Broadway Realty, LLC, with costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that the cross-motion of defendant 1407 Broadway Realty, LLC for summary judgment on its cross-claim for contractual indemnification is denied as moot; and it is further

ORDERED that the cross-claims as between both defendants are dismissed as moot; and it is further

ORDERED that the third-party action is severed and shall continue; and it is further

ORDERED that the Clerk of the Court shall enter judgment accordingly.

This constitutes the decision and order of the Court.

DATED: 8/9/16

ENTER:

Ellen M. Coin, A.J.S.C.