

Davies v Simon Prop. Group Inc.

2016 NY Slip Op 33061(U)

November 28, 2016

Supreme Court, Nassau County

Docket Number: 601597/13

Judge: Jeffrey S. Brown

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AMENDED SHORT FORM ORDER

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU**

**P R E S E N T : HON. JEFFREY S. BROWN
JUSTICE**

-----X		TRIAL/IAS PART 15
GERALD DAVIES,	Plaintiff(s)	INDEX # 601597/13
-against-		Mot. Seq. 2, 3
SIMON PROPERTY GROUP INC., E.W. HOWELL CO., LLC, and RUTTURA CONSTRUCTION CO., INC.,	Defendant(s).	Mot. Date 8.10.15
		Submit Date 10.21.15

-----X	
E.W. HOWELL CO., LLC,	Third Party Plaintiff,
-against-	

ALLSTATE INTERIOR DEMOLITION CORPORATION,
Third Party Defendant.

-----X	
ALLSTATE INTERIOR DEMOLITION CORPORATION,	Second Third Party Plaintiff,
-against-	

-----X	
RUTTURA & SONS CONSTRUCTION CORP.,	Second Third Party Defendant.

The following papers were read on this motion:	Papers Numbered
Notice of Motion, Affidavits (Affirmations), Exhibits Annexed.....	1, 2
Answering Affidavit	3,4,5
Reply Affidavit.....	6,7

Motion by defendant Simon Property Group, Inc. (Simon) and defendant/third-party plaintiff E.W. Howell Co., LLC (Howell) for an order pursuant to CPLR 3212 dismissing the complaint and any and all cross-claims asserted against either of them and awarding summary judgment to Howell on its claim seeking contractual indemnity to include the costs of defense against third-party defendant Allstate Interior Demolition Corporation (Allstate) is determined as hereinafter provided (Mot. Seq. 2). Motion by defendant/second-third-party defendant Ruttura & Sons Construction Corp. (Ruttura) for an order pursuant to CPLR 3212 granting it summary judgment dismissing the amended complaint and Allstate's second-third party complaint asserted against Ruttura is determined as hereinafter provided (Mot. Seq. 3).

Plaintiff commenced this action to recover damages for personal injuries allegedly sustained on December 3, 2012. At the time of the accident, plaintiff was employed as a union laborer by Allstate and was working at the construction site located at the Walt Whitman Mall in Huntington Station, New York. Plaintiff alleges that he was injured while he was traversing a makeshift plywood ramp laid across trenches when the mini container or "buggy" tipped, causing him to fall in a hole which was approximately three feet deep.

The complaint advances causes of action based upon, *inter alia*, Labor Law §§ 200, 240(1) and 241(6).

On or about March 29, 2012, Howell, as contractor, entered into a contract with Walt Whitman Mall, LLC, as owner, for the project known as the Walt Whitman Mall 2002 expansion.

On or about March 29, 2012, Howell entered into a written subcontract with Allstate wherein Allstate agreed to complete the "General Requirements Selection Structure Demolition" work at the subject site. Simon was the manager or managing agent of the mall.

On or about May 7, 2012, Howell entered into a subcontract with Ruttura wherein Ruttura agreed to complete the following General Requirements:

Site construction performance requirements;
Earthwork;
Site clearing;
Erosion and sediment controls;
Water utilities;
Sanitary utility sewerage structures;
Storm drainage systems;
Warning and tracer tape;
Pavement subbase and base;
Concrete formwork;
Concrete reinforcement and embedded assemblies;

Cast-in-place concrete;
Cast-in-place concrete-site;
Curbing.”

Simon moves for summary judgment claiming that it neither owns nor manages the Walt Whitman Mall and, hence, is an improper defendant. In support thereof, Simon annexes a copy of the deed establishing that Walt Whitman Mall, LLC is the owner; and a copy of the management agreement between Walt Whitman Mall, Ltd. and the Mall’s manager, Simon Management Associates, LLC.

Simon and Howell seek summary judgment dismissing the complaint and all cross-claims on the following grounds:

- a. The plaintiff was not engaged in an activity involving an elevation risk;
- b. This is not the type of gravity related event to merit the application of Labor Law Section 240;
- c. The record contains no evidence of defective scaffolding, hoists, stays, ladders, slings, hangers, blocks, pulleys, braces, irons, or ropes, as is required for Labor Law Section 240 liability;
- d. The Industrial Code Sections cited in support of the Labor Law Section 241(6) claim are not applicable to the facts of this case, as the plaintiff was not on a runway or ramp;
- e. Howell did not supervise, direct, or control the plaintiffs work, having only general supervisory authority limited to the scope of its work, nor is there any proof that Howell had notice of a dangerous job site condition or an opportunity to correct same and, therefore, the Labor Law Section 200 claim in common-law negligence is inapplicable;
- f. Simon neither owns, manages nor controls the Walt Whitman Mall and did not contract for any of the work to be done on this project.
(¶ 6 of Andrew D. Polin’s Affirmatioin)

Howell seeks summary judgment on its claims against Allstate “based on the contractual indemnity and insurance provisions of the subcontract between Howell and Allstate, as well as the costs of defense, upon the grounds that Howell’s liability, if any, was solely vicarious and plaintiff’s alleged injuries arose directly out of Allstate’s work pursuant to its subcontract with Howell.” (*Id.*).

In support of their motion, Simon and Howell submit, *inter alia*, the deed executed by Retail Property Trust (grantor) and Walt Whitman Mall, LLC (grantee); the management agreement between Mall (owner) and Simon Management Associates, LLC (manager); the various pleadings; the bill of particulars; the agreement between Walt Whitman Mall, LLC (owner) and E.W. Howell Co., LLC (contractor); the subcontract dated March 29, 2012 between Howell and Allstate which lists Simon Property Group as owner; the transcript of testimony of Marcelo Borba, foreman for Allstate; the transcript of testimony of plaintiff; the transcript of testimony of Rick Rosetti, project superintendent at Howell; an incident report signed by plaintiff; and a copy of Industrial Code 12 NYCRR 23-1.22.

In sum, Simon and Howell contend that the subject accident does not fall within the purview of Labor Law § 240(1) as it is not a gravity-related incident and Industrial Code 12 NYCRR 23-1.22(b)(2)(3)(4) (structural runways, ramps and platforms) is inapplicable here.

In opposition, plaintiff argues that defendants' motion for summary judgment should be denied "as questions of fact exist as to how the accident occurred and thus to the defendants' liability to plaintiff arising under the common law and . . . Labor Law §§ 240(1) and 241(6)." (¶ 3 of Edward C. Chakmakian's Affirmation in Opposition).

At his examination before trial, plaintiff testified that he was "moving a mini full of concrete block to the truck" when the accident occurred. (Plaintiff's EBT, p. 31); "[t]hey had just pieces of plywood across the trenches that the plumbers had dug to put plumbing pipes in. And when we went onto the second one is warped and bent. So the cart went sideways, and I tried to grab it and it pulled me down into the hole with it"; the plywood "was just sitting across on dirt, so it was not completely level" and he would classify it as a "makeshift ramp" (*Id.* at p. 32); and "the plywood flexed and when it did . . . the cart started to roll sideways" (*Id.* at p. 34).

After his accident, plaintiff filled out an incident report wherein he stated "a mini [container] fell off [the] ramp and [I] tried to catch it and turned my knee." Doctor said just need anti-inflammatory and to see him in two weeks. Could go back to work."

Allstate does not oppose those portions of the motion by Howell and Simon which seek dismissal of plaintiff's Labor Law §§ 240(1) and 241(6) claims. Allstate does, however, oppose the branch of the motion by Howell and Simon which seeks dismissal of plaintiff's common-law negligence and Labor Law § 200 claim, and summary judgment on Howell's cross-claim for contractual indemnification.

In partial opposition to Howell's motion, Allstate relies upon the following: the transcript of testimony of plaintiff; the transcript of testimony of Marcelo Borba; the transcript of testimony of Rick Rosetti; and the transcript of testimony of Dominic Ruttura.

In support of its motion for summary judgment, Ruttura submits, *inter alia*, plaintiff's bill of particulars; the transcript of testimony of plaintiff; the transcript of testimony of Dominick

Ruttura, the President and sole owner of Ruttera; copy of the subcontract between Howell and Ruttura; and an affidavit of Dominick Ruttera.

In his affidavit, Mr. Ruttura states, in pertinent part, as follows:

“Ruttura did not do any water, sanitary utility sewage and/or storm pipe installations, repair, replacements, or maintenance in or about the area of building H or any building at the mall. Ruttura did not have any contract or agreement with any water sanitary utility sewage or storm line subcontractor at the project site.

Ruttura is not responsible for barricading or placing covers or placing planks or bridges over excavated site/trenches of other trades/subcontractors, including those made by ARA Plumbing or other water, sanitary or storm line subcontractor, at the building H work areas or any other area in the project site.

Ruttura has no responsibility for nor did it provide, install, inspect, maintain and repair, or cause to be provided, installed, inspected, maintained and repaired, any plywood or lumber used as ground surface or ‘ramp’ or ‘bridge’ over any trench at the project site.

Ruttura did not direct, supervise or control any aspect of the work of Howell, Allstate, ARA Plumbing or any other subcontractors hired by any of the latter.

Ruttura did not provide any means of egress and ingress to and from Allstate’s work area inside the building to their trucks outside the building.”

Allstate opposes Ruttura’s motion for summary judgment dismissing all claims asserted against it in the primary action and the second/third-party action. Allstate argues that Ruttura excavated the sidewalk and connected areas on which plaintiff was pushing his cart but Ruttura failed to provide a safe path for Allstate’s employees. Hence, Allstate concludes that an issue of fact exists as to whether Ruttera negligently excavated the sidewalk and surrounding areas and failed to enclose or provide a means of egress over the excavated area. Allstate relies upon *Nieves v L.G. Plumbing, Inc.*, 18 AD3d 276 [1st Dept 2005]) to support its contention.

Plaintiff’s opposition papers do not specifically address Ruttura’s motions.

Simon and Howell have not asserted any cross-claims against Ruttura.

On a motion for summary judgment, the moving party has the burden to establish “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” (*Voss v Netherlands Ins. Co.*, 22 NY2d 728 [2014], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). If the moving party meets this burden, the burden then shifts to the non-moving party to “establish the existence of material issues of fact which require a trial of the action” (*Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party’s papers (*Lee v Second Ave. Vil. Partners*, 100 AD3d 601 [2d Dept 2012], citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 852 [1985]). The motion court is required to accept the opponents’ contentions as true and resolve all inferences in the manner most favorable to opponents (*Giraldo v Twins Ambulette Serv., Inc.*, 96 AD3d 903 [2d Dept 2012]). Further, “[t]he courts function on a motion for summary judgment is ‘to determine whether material factual issues exist, not to resolve such issues (citations omitted)’” (*Ruiz v Griffin*, 71 AD3d 1112, 1115 [2d Dept 2010], quoting *Lopez v Beltre*, 59 AD3d 683, 685 [2d Dept 2009]).

Labor Law § 240(1), commonly called the scaffold law, “imposes absolute liability on building owners and contractors whose failure to ‘provide proper protection to workers employed on a construction site proximately causes injury to a worker’ ” (*Wilinski v 334 East 92nd Housing Development Fund. Corp.*, 18 NY3d 1, 6-7 [2011], quoting from *Misseritti v Mark IV Const. Co., Inc.*, 86 NY2d 487, 490 [1995]; see also *Fabrizi v 1095 Ave. of Americas, LLC*, 22 NY3d 658 [2014]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374 [2011]). “In order to prevail on a Labor Law § 240(1) cause of action, a plaintiff must establish that the statute was violated and that the violation was a proximate cause of his or her injuries” (*Rudnik v Brogor Realty Corp.*, 45 AD3d 828, 829 [2d Dept 2007]).

The objective of Labor Law § 240(1) is to “provide ‘exceptional protection’ for workers against the ‘special hazards’ which stem from a work site that is either elevated or positioned below the level where materials are hoisted or secured” (*Harrison v State of New York*, 88 AD3d 951 [2d Dept 2011], quoting *La Veglia v St. Francis Hosp.*, 78 AD3d 1123, 1126 [2010], quoting *Ross v Curtis-Palmer Hydro-Elec. Co.*, 81 NY2d 494, 501, 502 [1993]). “[N]ot every worker who falls at a construction site, and not every object that falls on a worker gives rise to the extraordinary protections of Labor Law § 240(1). Rather, liability is contingent upon the existence of a hazard contemplated in section 240(1) and the failure to use, or the inadequacy of a safety device of the kind enumerated therein” (*Narducci v Manhasset Bay Assoc.*, 96 NY2d 259, 267 [2001]; see *Gutman v City of New York*, 78 AD3d 886, 887 [2d Dept 2010]). Hence, “injuries arising from ‘routine workplace risks’ rather than from elevation differentials will not fall within the statute’s protection” (*Harrison v State of New York, supra*; *Runner v New York Stock Exch., Inc.*, 13 NY3d 599, 603 [2009]; see *Rocovich v Consolidated Edison Co.*, 78 NY2d 509, 513 [1991]). Rather, “the single decisive question is whether the [claimant’s] injuries were the direct consequence of a failure to provide adequate protection against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc., supra* at p. 603).

Here, all of the defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action to recover damages pursuant to Labor Law § 240(1) by submitting evidence demonstrating that the injuries resulted from a general hazard encountered at a construction site and were not “the direct consequence of a failure to provide” an adequate device of the sort enumerated in Labor Law § 240(1) (*Grygo v 1116 Kings Highway Realty, LLC*, 96 AD3d 1002 [2d Dept 2012]). Such devices are intended to protect “against a risk arising from a physically significant elevation differential” (*Runner v New York Stock Exch., Inc.*, *supra*; see *Narducci v Manhasset Bay Assoc.*, *supra*; *Rocovich v Consolidated Edison Co.*, *supra*). In opposition, plaintiff has not raised a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The alleged height differential on the subject sidewalk of three feet did not involve “a significant elevation differential.” “Labor Law §240(1) was designed to prevent those types of accidents in which the scaffold, hoist, stay, ladder or other protective device proved inadequate to shield the injured worker from harm directly flowing from the application of the force of gravity to an object or person.” (*Runner v New York Stock Exch., Inc.*, *supra*).

Next, Labor Law §241(6) “imposes a nondelegable duty of reasonable care upon owners and contractors to provide reasonable and adequate protection and safety to persons employed in, or lawfully frequenting, all areas in which construction, excavation or demolition work is being performed” (*Rizzuto v L.A. Wenger Contr. Co.*, 91 NY2d 343, 348 [1998] quoting Labor Law §241[6]).

With respect to Labor Law §241(6), a plaintiff must demonstrate that his injuries were proximately caused by a violation of an Industrial Code provision which mandates compliance with specific or concrete specifications (see, *Wilinski v 334 East 92nd Housing Development Fund Corp.*, *supra*; *St. Louis v Town of N. Elba*, 16 NY3d 411, 413-414 [2011]).

“Whether a regulation applies to a particular condition or a circumstance is a question of law for the court” (*Harrison v State of New York*, *supra*).

The cause of action pursuant to Labor Law §241(6) is predicated on 12 NYCRR 23-1.22(b)(2)(3)(4) which provides, in pertinent part, as follows:

(2) Runways and ramps constructed for the use of persons . . . shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such surface shall be substantially supported and braced. . . . Where planking is used it shall be laid close, butt jointed and securely nailed.

(3) Runways and ramps constructed for the use of wheelbarrows, power buggies, hand carts or hand trucks . . . shall be constructed of planking at least two inches thick full size or metal of equivalent strength. Such runways and ramps shall be substantially supported and braced. . . . Where

planking is used it shall be laid close, butt jointed and securely nailed. Such runways and ramps shall be provided with timber curbs at least two inches by eight inches full size, set on edge and placed parallel to, and secured to, the sides of such runways and ramps . . .

(4) Any runway or ramp constructed for the use of persons . . . which is located at, or extends to, a height of more than four feet above the ground, grade, floor or equivalent surface shall be provided with a safety railing. . .

Defendants established their *prima facie* entitlement to judgment as a matter of law dismissing the cause of action with evidence demonstrating that this section is inapplicable because the accident did not involve a ramp of the sort enumerated in 12 NYCRR 23-1.22(b)(2)(3)(4), and there is no viable Industrial Code rule or regulation that supports plaintiff's Labor Law 241(6) claim. (*see Grygo v 1116 Kings Highway Realty, LLC, supra*).

Relying upon his testimony and the non-party affidavit of witness Vito Speziale, plaintiff alleges that he has raised a question of fact as to whether plaintiff was traversing a "makeshift" ramp that was defective and in violation of 12 NYCRR 23-1.22(b)(2)(3)(4). This court disagrees. The plaintiff did not demonstrate an issue of fact as to whether the plywood placed on the ground specifically constituted a "ramp" as defined in 12 NYCRR 23-1.22(b)(2)(3)(4). Furthermore, an action may be predicated upon Labor Law 241(6) only where there has been a violation of a specific, detailed rule governing the conduct at issue. (*Ross v Curtis-Palmer Hydro-Elec Co*, 81 NY2d 494 [1993]). "[A]llegations such as plaintiff's, which rely on claimed failures to measure up to such general regulatory criteria as 'adequate,' 'effective' and 'proper,' are not sufficient to give rise to a triable claim for damages under Labor Law § 241(6)." (*Id.*) Plaintiff has not established that his injuries were proximately caused by a specific violation of an Industrial Code provision which mandates compliance with specific or concrete specifications. "Indeed, to permit plaintiff to use this broad, nonspecific regulatory standard as predicate for an action against a nonsupervising owner or general contractor under Labor Law 241(6) would seriously distort the scheme of liability for unsafe working conditions that has been developed in our case law." (*Id.*)

Finally, "Labor Law § 200 is a codification of the common-law duty of an owner or general contractor to provide workers with a safe place to work" (*Hartshorne v Pengat Technical Inspections, Inc.*, 112 AD3d 888 [2d Dept 2013]).

Where, as here a plaintiff's Labor Law § 200 claim is predicated upon "alleged . . . dangers in the methods . . . of the work" (*Harrison v State of New York, supra; Ortega v Puccia*, 57 AD3d 54, 61 [2d Dept 2008]), an owner or general contractor will be held liable only where it "had the authority to supervise or control the performance of the work" (*Austin v Consolidated Edison, Inc.*, 79 AD3d 682, 683-684 [Dept 2010] [internal quotation marks omitted]). However, "[t]he right to generally supervise the work, stop the contractor's work if a safety violation is

noted, or to ensure compliance with safety regulations and contract specifications is insufficient to impose liability under Labor Law § 200 or for common-law negligence' ” (*Austin v Consolidated Edison, Inc.*, *supra* at 684, quoting *Gasques v State of New York*, 59 AD3d 666 [2d Dept 2009]).

The record submitted indicates that there are two conflicting claims relating to plaintiff's accident. Plaintiff alleges that the accident occurred as he was pushing a mini container across plywood laid over such trench/hole. Simon/ Howell and Allstate claim that no trench/hole was involved in the accident and that the accident occurred as plaintiff was pushing the metal container across a plywood sheet laid flat on the ground.

Under the circumstances, neither Howell nor Ruttura have established their *prima facie* showing of entitlement on Labor Law § 200.

The branch of the motion by Howell and Simon seeking contractual indemnification is **denied**.

The right to contractual indemnification depends upon the specific language of the contract (*George v Marshalls of MA, Inc.*, 61 AD3d 925 [2d Dept 2009]; see *Bellefleur v Newark Beth Israel Med. Ctr.*, 66 AD3d 807 [2d Dept 2009]; *Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008]). “The promise to indemnify should not be found unless it can be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*George v Marshalls of MA, Inc.*, *supra* at 930; see *Hooper Assoc. v AGS Computers*, 74 NY2d 487 [1989]).

Even where there is indemnification provision is applicable, “a party seeking contractual indemnification must prove itself free from negligence, because to the extent its negligence contributed to the accident, it cannot be indemnified therefore” (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp.*, 58 AD3d 660, 662 [2d Dept 2008]; see General Obligations Law § 5-322.1).

GOL § 5-322.1 states in relevant part:

A covenant, promise, agreement or understanding in, or in connection with or collateral to a contract or agreement relative to the construction, alteration, repair or maintenance of a building, structure, appurtenances and appliances including moving demolition and excavating connection therewith, purporting to indemnify or hold harmless the promisee against liability for damage arising out of bodily injury to persons or damage to property contributed to, caused by or resulting from the negligence of the promisee, his agents, or employees, or indemnitee, whether such negligence be in whole or in part, is against public policy and is void and unenforceable.

A party seeking summary judgment on a contractual indemnification claim must first establish that its own negligence did not play a role in the underlying accident (*Cava Constr. Co., Inc. v Gealtec Remodeling Corp., supra* at 662). To obtain conditional relief on a claim for contractual indemnification, "the one seeking indemnity need only establish that it was free from any negligence and [may be] held liable solely by virtue of . . . statutory [or vicarious] liability" (*Jamindar v Uniondale Union Free School Dist., 90 AD3d 612, 616 [2d Dept 2011]*).

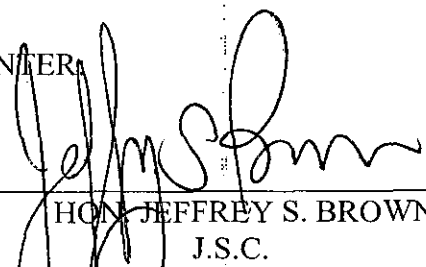
If there is a question of fact as to negligence, then "summary judgment for contractual indemnification must be denied as premature" (*Bellefleur v Newark Beth Israel Med. Ctr., supra* at 808-809; see *Jamindar v Uniondale Union Free School Dist., supra* at 616). Here, a question of fact exists as to whether Howell is liable under Labor Law § 200 and common-law negligence. Hence, Howell is not entitled to contractual indemnification.

In view of the foregoing, plaintiff's claims premised upon Labor Law §§ 240(1) and 241(6) are hereby dismissed as against Simon, Howell and Ruttura and the remaining claim based upon Labor Law § 200 is hereby severed and continued. The branch of Howell's motion which seeks contractual indemnification is denied.

This constitutes the decision and order of this court. All applications not specifically addressed herein are denied.

Dated: Mineola, New York
November 28, 2016

ENTERED
DEC 12 2016
NASSAU COUNTY
COUNTY CLERK'S OFFICE

ENTERED

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