

Martinez v 281 Broadway Holdings, LLC

2017 NY Slip Op 33214(U)

February 16, 2017

Supreme Court, Kings County

Docket Number: 3684/11

Judge: Wayne P. Saitta

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At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 16th day of February, 2017.

P R E S E N T:

HON. WAYNE P. SAITTA,

Justice.

-----X

HILARIO MARTINEZ,

Plaintiff,

- against -

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281 BROADWAY HOLDINGS, LLC, PAVARINI
MCGOVERN, LLC, S.J. ELECTRIC INC.,
CORPORATE ELECTRIC GROUP, INC. AND STAR
DELTA ELECTRIC, LLC,

Defendants.

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The following papers numbered 1 to 17 read herein:

	<u>Papers Numbered</u>
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>1-2, 3-6, 7-9</u>
Opposing Affidavits (Affirmations) _____	<u>10, 11, 12, 13, 14,</u>
Reply Affidavits (Affirmations) _____	<u>15, 16, 17</u>
_____ Affidavit (Affirmation) _____	_____
Other Papers _____	_____

Upon the foregoing papers, defendant S.J. Electric Inc. (SJE) moves, pursuant to CPLR 2221 (d), for leave to reargue the motions for summary judgment decided in the court's order dated June 24, 2016 (the prior order). Upon the granting of such leave, SJE seeks an order vacating/re-settling or otherwise clarifying the order to reflect that the court

did not award plaintiff Hilario Martinez (plaintiff) summary judgment against SJE under his Labor Law § 200 and common-law negligence claims. Defendants 281 Broadway Holdings, LLC (281 Broadway) and Pavarini McGovern, LLC (Pavarini) cross-move for an order resettling the prior order and granting them summary judgment under their contractual indemnification cross claims against SJE. Plaintiff cross-moves for an order confirming that the prior order resolved all issues of liability and remanding the case for trial on the issue of damages only.

Background Facts And Procedural History

On December 23, 2010, plaintiff sustained various injuries during the construction of a new building located at 56 Reade Street in Manhattan (the building). Prior to the accident, 281 Broadway, which owned the building, hired Pavarini to serve as the general contractor on the construction project. Thereafter, Pavarini hired various subcontractors including non-party DiFama Concrete, Inc. (DiFama), which was responsible for performing concrete work. This work included constructing plywood casting forms into which rebar was laid and concrete was poured so as to form the floors of the building. DiFama was also responsible for stripping and removing these forms after the concrete had cured.

Pavarini also hired SJE to perform electrical work. This work included laying electrical “BX cable” in the casting forms before the concrete was poured. After the concrete was poured and the plywood forms stripped from the cured concrete, SJE installed temporary lighting on the newly constructed floors and coiled the loose BX cable which hung from the

new ceiling to the floor below. According to SJE's superintendent, Anthony Rappa, the cable was coiled in order to prevent it from being damaged and to prevent workers from tripping over loose wires. Ultimately, the BX cables were used as part of the installation of electrical junction boxes on the floors of the building.

At the time of the accident, plaintiff was employed by DiFama as a laborer and was working on the 20th floor of the building. In particular, plaintiff was assigned the task of stripping the plywood casing forms from concrete which had been poured the previous day. The accident occurred as plaintiff was carrying a form panel measuring approximately three feet by eight feet on his right shoulder. In particular, as he walked, his right foot became intertwined with loose electrical cables, which caused him to trip and fall. According to plaintiff's affidavit, the cables in question hung down from the ceiling and were "scattered five or six feet on the floor." Plaintiff further states in his affidavit that he was unable to see the wires prior to the accident because his view was blocked by the panel he carried on his shoulder.

By summons and complaint dated February 11, 2011, plaintiff commenced the instant action against 281 Broadway, Pavarini, and SJE alleging violations of Labor Law §§ 241 (6), 200, as well common-law negligence. Thereafter, the defendants joined issue and interposed answers. In their answer, 281 Broadway and Pavarini interposed a cross claim against SJE seeking contractual indemnification.

Prior Motions and Order

After the completion of discovery and filing of the note of issue, plaintiff moved for partial summary judgment against 281 Broadway and Pavarini under his Labor Law § 241 (6) cause of action. In so moving, plaintiff contended that his accident was caused by a violation of 12 NYCRR 23-1.7 (e) (2) and that, as the respective owner and general contractor on the construction project, 281 Broadway and Pavarini were liable for this violation as a matter of law. At the same time, SJE moved for summary judgment dismissing plaintiff's Labor Law § 241 (6) claim against all defendants. In this regard, SJE contended that there was no violation of 23-1.7 (e) (1) inasmuch as the cables which caused plaintiff to trip and fall were integral to the work being carried out.¹ SJE also moved for summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claim against it. In particular, SJE argued that it was not subject to liability under these claims inasmuch as it did not direct, supervise, or control plaintiff's work. As a final matter, 281 Broadway and Pavarini cross-moved for summary judgment on their contractual indemnification cross claim against SJE. However, this cross motion was denied as untimely it was made more than 60 days after the filing of the note of issue.

¹Notably, SJE's summary judgment motion did not seek dismissal of plaintiff's Labor Law § 241 (6) claim against it based upon the argument that, as an electrical subcontractor which did not exercise any control over the concrete work performed by plaintiff's employer DiFama, SJE was not subject to liability under the statute (*see e.g., Russin v Louis N. Picciano & Son*, 54 NY2d 311 [1981]; *Lombardo v Tag Ct. Sq., LLC*, 126 AD3d 949, 950 [2015])

In the prior order, the court denied SJE's motion to dismiss plaintiff's Labor Law 241 (6) cause of action and awarded plaintiff summary judgment against 281 Broadway and Pavarini under this claim to the extent that plaintiff relied upon a violation of 12 NYCRR 23-1.7 (e) (1). In so ruling, the court rejected SJE's argument that the cables which caused him to fall were integral to the work. Specifically, the court noted that the cables presented a tripping hazard inasmuch as they were not coiled and lying across the floor. The court further noted that it would not have been inconsistent with the work to have coiled the cables prior to connecting them to the junction boxes rather than leaving them lying on the floor.

The court also denied that branch of SJE's motion which sought summary judgment dismissing plaintiff's Labor Law § 200/common-law negligence claim against it. In so ruling, the court rejected SJE's argument that it was not liable inasmuch as it had no authority to control plaintiff's work. In this regard, the court noted that there was evidence that SJE created the tripping hazard. In particular, the court stated:

“Also the argument that [SJE] did not have notice of the dangerous condition is unavailing as its employees created the dangerous condition. By failing to coil the wires in a manner so as to ensure the wires were off of the floor where the other workers were removing wood forms from the slab, [SJE] created the tripping hazard which caused Plaintiff to fall. Having failed to demonstrate that the wires were not lying on the floor or that its workers did not create the dangerous condition, [SJE] did not make a prima facie showing of entitlement to summary judgment on Plaintiff's Labor Law 200 claim.”

Thereafter, in the decretal paragraph, the court specifically denied SJE's motion for summary judgment dismissing plaintiff's Labor Law §§ 241 (6) and 200 causes of action and granted

plaintiff's motion for summary judgment on his Labor Law § 241 (6) claim against 281 Broadway and Pavarini. Notably, the court did not award plaintiff summary judgment under his Labor Law § 200 claim against SJE in the decretal paragraph.

Subsequent Events

After the prior order was issued and entered, the parties were directed to appear in the Jury Coordinating Part on June 24, 2016 for jury selection. Prior to jury selection, plaintiff took the position that the prior order determined, as a matter of law, that SJE created the dangerous condition that caused the accident and that, in effect, the court had awarded him summary judgment against SJE under his Labor Law § 200/common-law negligence cause of action. Accordingly, plaintiff maintained that the issue of liability had been settled and the sole issue before the jury was damages. Thereafter, SJE filed the instant motion seeking to stay the proceeding and seeking to reargue, resettle, or otherwise clarify the prior order with respect to its liability under plaintiff's Labor Law § 200/common-law negligence claim. In particular, SJE argued that the prior order merely denied its motion to dismiss this claim against it and did not award plaintiff summary judgment under this cause of action. Plaintiff then cross-moved to vacate the stay and for an order confirming that the only remaining trial issue concerned damages. Finally, 281 Broadway and Pavarini jointly moved for an order "resettling" the prior order with respect to the issue of their right to contractual indemnity and the right to a defense from SJE and for an order awarding them contractual indemnity against

SJE. Pavarini and 281 Broadway also cross-moved for summary judgment dismissing plaintiff's Labor Law § 200 claim against them.

On October 20, 2016, the motions were returnable before the court. After oral argument, the parties entered into a so-ordered stipulation in which they agreed that: (1) 281 Broadway and Pavarini's cross motion for contractual indemnity against SJE were to be decided by the court²; (2) plaintiff's cross motion for summary judgment against SJE based upon the prior order and principles of law of the case and res judicata were to be decided by the court; (3) 281 Broadway and Pavarini's cross motion to dismiss plaintiff's common-law negligence and Labor Law §200 claims was withdrawn; and (4) SJE's motion to reargue and reconsider the prior order was to be decided by the court. The remaining branches of the parties' respective motions are now before the court.

Plaintiff's Labor Law § 200/Common-Law Negligence Claim Against SJE

In support of its motion for an order ruling that the prior order did not award plaintiff summary judgment against it under Labor Law § 200, SJE initially notes that plaintiff did not move for such relief in his prior motion. SJE further contends that there are factual issues regarding whether or not it created the dangerous condition which would preclude awarding plaintiff summary judgment under Labor Law § 200. Specifically, SJE notes that Mr. Rappa

²The court notes that parties may stipulate to waive the timely filing requirement set forth in CPLR 3212, although courts are not required to accept such stipulations (*Bennett v St. John's Home*, 128 AD3d 1428 [2015], *affd* 26 NY3d 1033 [2015] [wherein the Court of Appeals affirmed the Appellate Division's ruling on summary judgment but did not reach the issue of the timeliness of the motion under CPLR 3212(a)]).

as well as its foreman, Steve Hicks, testified that SJE coiled the cables hanging from the ceiling. Accordingly, SJE contends that it is for the jury to determine whether or not it was responsible for the loose cables that caused plaintiff to trip. SJE also argues that there is a question of fact as to whether plaintiff's comparative negligence contributed to the accident inasmuch as the loose wires were an open and obvious condition which plaintiff failed to observe.³

In opposition to SJE's motion, and in support of his own cross motion for an order confirming that the prior order determined that SJE was negligent and otherwise violated Labor Law § 200, plaintiff contends that the court already ruled in the prior order that SJE created the dangerous condition that caused the accident. Plaintiff further maintains that the court based its ruling upon the uncontroverted evidence that SJE installed the cable that caused him to trip and fall. In addition, plaintiff maintains that the court necessarily determined that he was free from comparative negligence inasmuch as it awarded him summary judgment under his Labor Law § 241 (6) cause of action. Under the circumstances, plaintiff maintains that the only issue remaining to be determined by the jury is the damages that he sustained in the accident. Pavarini and 281 Broadway also oppose SJE's motion and argue that the court has already determined that SJE created the dangerous condition that

³In a reply affirmation, SJE also raises the argument that the court overlooked applicable facts and law in failing to consider the C-2 report, which states that plaintiff fell when the panel caught the cable wire rather than tripping over the cables. However, it was improper to raise this argument for the first time in reply papers. In any event, the C-2 report is inadmissible since it was not signed by plaintiff and the source of the statement contained in the report is not identified (*Taylor v One Bryant Park, LLC*, 94 AD3d 415 [2012]).

caused the accident and, therefore, SJE was negligent and violated Labor Law § 200 as a matter of law.

Labor Law § 200 is merely a codification of the common-law duty placed upon owners and contractors to provide employees with a safe place to work (*Kim v Herbert Constr. Co.*, 275 AD2d 709, 712 [2000]). Liability for causes of action sounding in common-law negligence and for violations of Labor Law § 200 is limited to those who exercise control or supervision over the plaintiff's work, or who have actual or constructive notice of the unsafe condition that caused the underlying accident (*Bradley v Morgan Stanley & Co., Inc.*, 21 AD3d 866, 868 [2005]; *Aranda v Park East Constr.*, 4 AD3d 315 [2004]; *Akins v Baker*, 247 AD2d 562, 563 [1998]). Specifically, “[w]here a premises condition is at issue, property owners may be held liable for a violation of Labor Law § 200 if the owner either created the dangerous condition that caused the accident or had actual or constructive notice of the dangerous condition that caused the accident” (*Ortega v Puccia*, 57 AD3d 54, 61 [2008]). However, only owners, general contractors, and statutory agents who have the authority to supervise the injured plaintiff's work are subject to liability under Labor Law § 200. Stated otherwise, a subcontractor or equipment supplier who is not an owner, general contractor or agent is not subject to liability under Labor Law § 200 even if its negligence may have proximately caused the accident (*Lombardo v Tag Court Square, LLC*, 126 AD3d 949, 950 [2015]; *Poracki v St. Mary's R.C. Church*, 82 AD3d 1192, 1195 [2011]; *Tomyuk*

v Junefield Assoc., 57 AD3d 518, 521-522 [2008]). In such cases, a plaintiff's sole remedy against a subcontractor or supplier is a claim sounding in common-law negligence.

Initially, as a technical matter, plaintiff's claim against SJE can only be based upon common-law negligence (as opposed to Labor Law § 200) inasmuch as SJE and DiFama were unrelated subcontractors on the project. In particular, as an electrical subcontractor, SJE had no authority or control over the concrete work performed by plaintiff and his DiFama co-workers.⁴ Turning to the merits of plaintiff's negligence claim against SJE, there is no merit to SJE's argument that the court overlooked the issue of plaintiff's alleged comparative negligence in the prior order. In this regard, it is true that a plaintiff's failure to take heed of an open and obvious dangerous condition generally raises issues of fact regarding his or her comparative negligence (*Cupo v Karfunkel*, 1 AD3d 48 [2003]). However, here, plaintiff stated in his affidavit that he was unable to observe the cables on the floor due to the fact that his view was obstructed by the large piece of plywood he was carrying on his shoulder at the time of the accident. SJE has failed to point to any evidence which conflicts with plaintiff's explanation for failing to observe the cable. Consequently, there is no issue of fact regarding plaintiff's comparative negligence.

Also without merit is SJE's claim that the court overlooked evidence in previously stating that SJE created the loose cable condition that caused plaintiff to fall. In this regard,

⁴As a practical matter, plaintiff's Labor Law § 200 claim is superfluous to his common-law negligence claim since the issue of liability as well as damages are the same under both claims.

SJE relies upon the deposition testimony of its two witnesses Mr. Rappa and Mr. Hicks that SJE coiled the BX cable hanging from the ceiling after the concrete was poured. However, this argument overlooks that fact that both Mr. Rappa and Mr. Hicks testified that SJE did not coil the cable until *after* the plywood forms had been stripped by DiFama's workers. This was the very stripping work that plaintiff was performing at the time of the accident. Thus, it is clear from the testimony of SJE's own deposition witnesses that, at the time of the accident, the loose cables had not yet been coiled by SJE.

However, notwithstanding the fact that SJE created the tripping condition, under the facts of this case, it cannot be said as a matter of law, that SJE breached a duty to plaintiff or was otherwise negligent. In particular, during his deposition, Mr. Hicks testified that the sequence in which SJE carried out its work (i.e. coiling the cable after DiFama stripped the plywood forms) was determined by the general contractor Pavarini. When questioned regarding the possibility of coiling the cable prior to stripping the forms, Mr. Hicks testified: "[we] couldn't go prior to the stripping of the floor because technically that's DiFama's floor until it's stripped and cleaned. Then they hand it over to Pavarini." Similarly, Mr. Rappa testified that "I can't coil them or else they can't take the wood down. So, they have to hand. They take the wood down and then we coil them up." Thus, according to SJE's witnesses, its failure to coil the cables prior to the performance of the stripping work was not caused by any negligence on its part. Rather, this was a deliberate coordination of the labor/sequencing decision made by the general contractor in overall control of the job site. Under the

circumstances, there are issues of fact regarding SJE's control and authority with respect to when the cables were coiled which preclude awarding plaintiff summary judgment against it under his common-law negligence claim.

Contractual Indemnification Claims Against SJE

Turning to 281 Broadway and Pavarini's cross motion for contractual indemnification against SJE, the cross movants base their motion upon an indemnification clause in the contract between Pavarini and SJE. This clause provides in pertinent part that:

"To the greatest extent permitted by law . . . [SJE] shall indemnify, defend, save and hold [281 Broadway and Pavarini] . . . harmless from and against all liability, damage, loss, claims, demands and actions of any nature whatsoever which arise out of or are connected with, or are claimed to arise out of or be connected with: (1) The performance of work by [SJE], or any act or omission of [SJE]."

According to Pavarini and 281 Broadway, this clause requires that SJE indemnify them for any liability they face as a result of plaintiff's claims inasmuch as the accident clearly arose out of the work performed by SJE. In this regard, Pavarini and 281 Broadway note that the court has already determined that plaintiff tripped and fell over loose cables installed by SJE. Pavarini and 281 Broadway further contend that there is no evidence that the accident was caused by any negligence on their part.

In opposition to Pavarini and 281 Broadway's cross motion, SJE maintains that there are issues of fact as to whether or not it was negligent, and therefore, Pavarini and 281 Broadway are not entitled to summary judgment on their contractual indemnification claim.

Alternatively, SJE argues that the indemnification clause was not triggered inasmuch as the accident did not arise out of its work. Finally, SJE notes that there are issues of fact as to whether Pavarini was negligent inasmuch as it had a duty to inspect the building to ensure that no dangerous or defective conditions were present.

“When a party is under no legal duty to indemnify, a contract assuming that obligation must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed” (*Hooper Assocs v AGS Computers*, 74 NY2d 487, 491 [1989]). “The right to contractual indemnification depends upon the specific language of the contract” (*Sherry v Wal-Mart Stores E., L.P.*, 67 AD3d 992, 994 [2009], quoting *George v Marshalls of MA, Inc.*, 61 AD3d 925, 930 [2009]). “The intent to indemnify must be clearly implied from the language and purpose of the entire agreement and the surrounding circumstances” (*M&V Concrete Contr. Corp. v Modica*, 76 AD3d 614 [2010]). Further, because a party may not be indemnified for its own negligence, a party seeking summary judgment under a contractual indemnification claim must demonstrate that the underlying accident was not caused by any negligence on its part (*Rodriguez v Flushing Town CTR III, L.P.*, 133 AD3d 647, 647-648 [2015], citing General Obligations Law § 5-22.1).

As an initial matter, there is no merit to SJE’s argument that Pavarini and 281 Broadway’s cross motion for contractual indemnification must be denied because there is an issue of fact as to whether SJE was negligent. In this regard, under the plain language of the clause, the SJE’s obligation to indemnify is triggered when an injury arises out of its work,

not when an injury arises out of SJE's negligence. Further, contrary to SJE's claim, plaintiff's injury clearly arose out of and was otherwise connected with SJE's work inasmuch as he tripped over loose BX cable that was installed by SJE. However, there is merit to SJE's argument that there are issues of fact regarding Pavarini's own negligence which precludes awarding summary judgment on its contractual indemnification claim. In particular, as previously noted, Mr. Hicks testified that the sequence in which SJE carried out its work, including coiling the cable after DiFama stripped the plywood forms, was determined by Pavarini. Thus, there is evidence that Pavarini was aware of and responsible for the fact that the cables were not coiled at the time plaintiff and his DiFama co-workers performed their stripping work. Accordingly, Pavarini's branch of the cross motion for contractual indemnification against SJE is denied.

Turning to the owner 281 Broadway's branch of the cross motion for contractual indemnification against SJE, it is clear that 281 Broadway did not create the dangerous condition that caused the accident. Moreover, there is no evidence that 281 Broadway had notice of the condition prior to the accident. To the contrary, John Jendras, who was the owner's representative at the job site, testified that he was last on the 20th floor of the building the week prior to the accident and had no recollection regarding cables hanging from the ceiling. Under the circumstances, 281 Broadway is entitled to summary judgment under its contractual indemnification claim against SJE inasmuch as the accident arose out of SJE's work and the accident was not caused by any negligence on 281 Broadway's part.

WHEREFORE, Defendant SJE's motion to re-argue/vacate/clarify the prior order of the Court dated June 24, 2016, is granted to the extent of holding that Plaintiff was not comparatively negligent, and finding there is an issue of fact as to whether Defendant SJE was negligent which must be resolved by the trier of fact; Plaintiff's cross motion for an order confirming that the only issue for trial is one of damages is denied; Defendant PAVARINI's cross motion summary judgement on its claim for contractual indemnification against Defendant SJE is denied; and Defendant 281 BROADWAY's cross motion summary judgement on its claim for contractual indemnification against Defendant SJE is granted, and it is hereby

ORDERED, that Defendant 281 BROADWAY HOLDINGS, LLC, is granted summary judgment, as to liability, on its cross claim for contractual indemnification against Defendant SJ ELECTRIC INC.

This constitutes the decision and order of the Court.



JSC **HON. WAYNE P. SAITTA**
J.S.C.

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FILED

