

<b>Medina v 75-76 Third Ave. Assets II, LLC</b>
2018 NY Slip Op 30090(U)
January 17, 2018
Supreme Court, New York County
Docket Number: 155699/13
Judge: Manuel J. Mendez
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ Justice PART 13

ERICK MEDINA a/k/a GUSTAVO AVILA, Plaintiff,

INDEX NO. 155699/13
MOTION DATE 12-06-2017
MOTION SEQ. NO. 006
MOTION CAL. NO.

-against-

75-76 THIRD AVENUE ASSETS II, LLC and DRYBAR HOLDINGS LLC, Defendants.

75-76 THIRD AVENUE ASSETS II, LLC and DRYBAR HOLDINGS LLC, Third-Party Plaintiffs,

-against-

CREATIVE INTERIORS PLUS INC., Third-Party Defendants.

The following papers, numbered 1 to 11 were read on this motion to/for Summary Judgment:

Table with 2 columns: Description of papers and PAPERS NUMBERED. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: Yes X No

Upon a reading of the foregoing cited papers, it is ordered that 75-76 Third Avenue Assets II, LLC's motion pursuant to CPLR §3212 seeking summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it, and granting summary judgment on 75-76 Third Avenue Assets II, LLC's claims for contractual indemnification, is granted as stated herein. The remainder of the relief sought is denied.

Plaintiff brought this Labor Law action for injuries sustained on August 24, 2012, when he fell through the first floor of the premises located at 209 East 76th Street, New York, N.Y. (hereinafter referred to as the premises). Plaintiff was working for third-party defendant Creative Interiors Plus, Inc. (hereinafter referred to as "CIP"), the general contractor for the project, during the remodeling of the space for a new Drybar location. Plaintiff alleges that while attempting to remove part of a wood and plywood floor supported by wooden beams (by hitting it with a pry-bar), the part of the floor he was standing on collapsed, causing him to fall approximately ten (10) feet through a basement room to a cement floor, and land on his back.

Plaintiff claims that no safety equipment was provided. Plaintiff alleges his work was only directed by his CIP co-worker, non-party Jeffrey Sanders. Defendant/third-party plaintiff 75-76 Third Avenue Assets II, LLC (hereinafter referred to individually as "75-76 Third Avenue") is the owner of the premises. Defendant/third-party plaintiff Drybar Holdings, LLC (hereinafter individually referred to as "Drybar") is the lessee of the premises.

The third-party action asserts claims against CIP for contribution, common law indemnification, contractual indemnification, and individually on behalf of 75-76 Third Avenue for breach of contract and failure to procure insurance.

75-76 Third Avenue's motion pursuant to CPLR §3212 seeks summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it, and granting summary judgment on 75-76 Third Avenue's claims for contractual indemnification asserted in the third-party complaint.

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

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

Plaintiff argues that there are no issues of fact and pursuant to Labor Law §240[1], the defendants are strictly liable for his injuries because they failed to provide proper and adequate safety devices to protect him from the foreseeable risk of injury from having the floor he was removing collapse under him. Plaintiff claims that the higher position relative to the basement created a gravity related risk of falling to the floor below as a result of the ongoing removal of the floor and no protective devices were provided.

Labor Law §240[1] applies to a gravity related risk of the type enumerated in the statute, upon proof that “plaintiff’s injuries result from an elevation related risk and the inadequacy of safety devices” (*Nicometi v. Vinyards of Freedomia*, 25 N.Y. 3d 90, 30 N.E. 3d 154, 7 N.Y.S. 3d 263 [2015]). Labor Law §240[1] applies to owners, contractors and their agents for any breach of statutory duty that proximately caused injury. An out of possession owner that has leased the premises is still liable regardless of whether the property is controlled by another entity or whether the owner had the means to protect the worker (*Sanatass v. Consolidated Investing Company, Inc.*, 100 N.Y. 3d 333, 887 N.E. 3d 1125, 858 N.Y.S. 2d 67 [2008]). The standard for liability under Labor Law §240[1] involving the collapse or failure of a permanent structure, is the presence of a foreseeable elevation related risk in light of the work being performed, such that safety devices should have been provided (*Vasquez v. Urbahn Associates, Inc.*, 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [1<sup>st</sup> Dept., 2010] citing to *Jones v. 414 Equities, LLC*, 57 A.D. 3d 65, 866 N.Y.S. 2d 165 [2008] and *Garcia v. Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 A.D. 3d 494, 980 N.Y.S. 2d 6 [1<sup>st</sup> Dept., 2014]).

75-76 Third Avenue’s argument that there is no liability under Labor Law §240[1] because the floor plaintiff stood on was a permanent structure and there was no foreseeable risk is unavailing. Plaintiff raised an issue of fact as to foreseeability of the floor collapse due to the condition of the permanent floor warranting denial to 75-76 Third Avenue of summary judgement on plaintiff’s Labor Law §240[1] claims.

Plaintiff has not opposed summary judgment sought by 75-76 Third Avenue on his Labor Law §240[2] and Labor Law §240[3] claims applying to a fall from a scaffold which did not happen in this action. 75-76 Third Avenue is entitled to summary judgment on the Labor Law §240[2] and Labor Law §240[3] claims.

Plaintiff’s Labor Law §241[6] claims regarding violations of Industrial Code sections 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5 cannot be maintained as they do not apply to the facts of this case. Plaintiff has raised issues of fact to maintain his Labor Law §241[6] claim under 12 N.Y.C.R.R. 23-1.7[b][1][iii] applying to hazardous openings and the use of safety equipment. Plaintiff’s argument that the effort to remove the entire floor he was working on created a hazardous opening that would only get worse, and the ten foot drop to the basement floor beneath warranted the safety devices stated in 12 N.Y.C.R.R. 23-1.7[b][1][iii], like a safety belt with an attached lifeline, is sufficient to raise an issue of fact.

Labor Law §200 applies to an existing dangerous defect on the premises requiring that the defendant had either actual or constructive notice of the unsafe condition that caused the accident (*Vasquez v. Urbahn Associates, Inc.*, 79 A.D. 3d 493, 918 N.Y.S. 2d 1 [1<sup>st</sup> Dept., 2010], *Mendoza v. Highpoint Assoc., IX, LLC*, 83 A.D. 3d 1, 919 N.Y.S. 2d 129 [1<sup>st</sup> Dept., 2011] and *Gory Neighborhood Partnership Housing Development Fund Co., Inc.*, 113 A.D. 3d 550, 979 N.Y.S. 2d 314 [1<sup>st</sup> Dept., 2014]). “The pertinent issue here is whether

there is any evidence that the owners had actual or constructive notice of any structural deficiency." A latent condition that is not visibly apparent is insufficient to establish constructive notice (*Lopez v. Dagan*, 98 A.D. 3d 436, 949 N.Y.S. 2d 671 [1<sup>st</sup> Dept., 2012]).

75-76 Third Avenue as an out of possession landlord has established that it did not have actual or constructive notice of any defect in the floor. Plaintiff's reference to a letter sent by CIP to Drybar's architects, Lacina-Heitler Architects, stating "CO#2 Replacement of existing floor joists and underlayment: Tues 8/14 structural integrity of the existing floor joists was found to be deficient," approximately nine days prior to the accident, does not raise an issue of fact as to whether 75-76 Third Avenue had constructive notice of an unsafe condition after the 8/14 inspection (Plaintiff's Opp. Exh. B). Plaintiff has not provided proof that the letter or the information in the letter was forwarded from Drybar to 75-76 Third Avenue.

The argument that it is unclear which floor is being referenced in the letter ignores deposition testimony on behalf of CIP that the project was to remodel the first level and basement of the premises leased to Drybar (See Cross-Mot. Exh. 14, p. 20). The argument that 75-76 Third Avenue had the plans for the work to be performed reviewed and approved, and that there were periodic visits by employees, also fails to raise an issue of fact because no proof was provided that the employees were able to observe any actual defect or that the plans revealed a latent defect.

Labor Law § 200 is also applied to the duty to maintain a safe construction site by the manner in which the work is performed (*Foley v. Consolidated Edison Co. of N.Y., Inc.*, 84 A.D. 3d 476, 923 N.Y.S. 2d 57 [1<sup>st</sup> Dept., 2011]). An implicit precondition to the duty to maintain a safe construction site is that the party charged must have authority, or exercise direct supervisory control over the activity that resulted in the injury. Mere directions as to the time and quality of the work, or general supervision and coordination of the work, is not enough to impose liability (*O'Sullivan v. IDI Const. Co., Inc.*, 28 A.D. 3d 225, 813 N.Y.S. 2d 373 [1<sup>st</sup> Dept. 2006] *aff'd* 7 N.Y. 3d 805, 855 N.E. 2d 1159, 822 N.Y.S. 2d 745 [2006] and *In re 91<sup>st</sup> Street Crane Collapse Litigation*, 133 A.D. 3d 478, 20 N.Y.S. 3d 24 [1<sup>st</sup> Dept. 2015]).

75-76 Third Avenue has established that it did not have authority to exercise direct supervision or control over the activity that is alleged to have resulted in plaintiff's injury. 75-76 Third Avenue's employees periodic visits do not amount to supervision and control of plaintiff's work.

Contractual indemnification involves the parties agreeing to shift liability from the owner to the contractor or other party that proximately caused plaintiff's injuries through negligence (*Picaso v. 345 East 73 Owners Corp.*, 101 A.D. 3d 511, 956 N.Y.S. 2d 27 [1<sup>st</sup> Dept., 2012]). 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 therefor (see *Mikelatos v. Theofilaktidis*, 105 A.D.3d 822, 962 N.Y.S.2d 693 [1<sup>st</sup>. Dept. 2013]; *Mak v. Silverstein Properties, Inc.*, 81 A.D.3d 520, 916 N.Y.S.2d 592 [1<sup>st</sup>. Dept. 2011]). Conditional summary judgment is granted on a claim of contractual indemnification to the extent each potentially liable party's negligence has yet to be determined (*Hughey v. RHM-88, LLC*, 77 A.D. 3d 520, 912 N.Y.S. 2d 175 [1<sup>st</sup> Dept., 2010]).

75-76 Third Avenue has established that it is not negligent under Labor Law §200 for common law negligence and entitled to summary judgment on the cross-claim for indemnification. 75-76 Third Avenue is entitled to conditional contractual indemnification from Drybar pursuant to paragraph 49.6 of the lease titled "Indemnification" (Mot. Exh. G). Drybar fails to raise an issue of fact on the claims that any defect in the floor was structural and exempt from indemnification under section 37.1 of the lease titled "Landlord's Obligation" which states in relevant part: "Tenant shall not be required to undertake any structural repair of the Demised Premises or the Building, or to repair defects or damage to the exterior of the Demised Premises, *except to the extent caused by the Tenant.*" (Emphasis Added) (Mot. Exh. G). Drybar has not shown that in demolishing the floor it did not cause the structural problem.

Accordingly, it is ORDERED that 75-76 Third Avenue Assets II, LLC's motion pursuant to CPLR §3212 seeking summary judgment dismissing plaintiff's complaint and all cross-claims asserted against it, and granting summary judgment on 75-76 Third Avenue Assets II, LLC's claims for contractual indemnification is granted as stated herein, and it is further,

ORDERED that 75-76 Third Avenue Assets II, LLC is granted summary judgment dismissing plaintiff's claims asserted pursuant to Labor Law §240[2] and Labor Law §240[3], and it is further,

ORDERED that plaintiff's claims asserted pursuant to Labor Law §240[2] and Labor Law §240[3] are severed and dismissed, and it is further,

ORDERED that 75-76 Third Avenue Assets II, LLC is granted summary judgment dismissing plaintiff's claims asserted pursuant to Labor Law §241[6] citing Industrial Code Violations 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5, and it is further,

ORDERED that the portion of the cause of action in the complaint asserted against 75-76 Third Avenue Assets II, LLC pursuant to Labor Law §241[6] citing Industrial Code Violations 12 N.Y.C.R.R. §§ 23-1.5, 23-1.6, 23-1.8, 23-1.15, 23-1.16, 23-1.17, 23-1.21, 23-1.22, 23-1.24, 23-1.32, 23-6.1, 23-6.2, 23-6.3, 23-7.1, 23-7.2, 23-7.3, 23-8.1, 23-8.2, 23-8.3, 23-8.4 and 23-8.5 are severed and dismissed, and it is further,

ORDERED that the remainder of the causes of action in the complaint asserted against 75-76 Third Avenue Assets II, LLC pursuant Labor Law §241[6] for violation of Industrial Code 12 N.Y.C.R.R. §§ 23-1.7[b][1][iii], remains in effect, and it is further,

ORDERED that 75-76 Third Avenue Assets II, LLC is granted summary judgment dismissing plaintiff's claims asserted pursuant to Labor Law § 200, and it is further,

ORDERED that the cause of action in the complaint asserted against 75-76 Third Avenue pursuant to Labor Law §200 is severed and dismissed, and it is further,

ORDERED that 75-76 Third Avenue is granted conditional summary judgment on the cross-claim for contractual indemnification asserted against Drybar Holdings Inc., and it is further,

ORDERED that the remainder of 75-76 Third Avenue's motion is denied.

ENTER:

MANUEL J. MENDEZ  
J.S.C.

  
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MANUEL J. MENDEZ,  
J.S.C.

Dated: January 17, 2018

Check one:  FINAL DISPOSITION      X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST       REFERENCE