

Zieba v 343 Main St. Assoc.
2018 NY Slip Op 30702(U)
April 17, 2018
Supreme Court, New York County
Docket Number: 158999/2013
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 37

-----X
JERZY ZIEBA,

Plaintiff,

- against -

Index Number: 158999/2013

Motion Seq. Numbers: 002, 003, 004

Decision and Order

343 MAIN STREET ASSOCIATES; 345 MAIN STREET
ASSOCIATES, INC.; NATIONAL RETAIL
CONSTRUCTION GROUP, LLC; PB 102, LLC d/b/a
PURE BARRE (a/k/a) PB OPCO, LLC d/b/a PURE
BARRE; and WJ PARTNERS, LLC,

Defendants.

-----X
345 MAIN STREET ASSOCIATES, LLC,

Third-Party Plaintiff,

- against -

JOHN ROONEY CONSTRUCTION, INC.,

Third-Party Defendant.

-----X
PURE BARRE FRANCHISING, LLC; and WJ
PARTNERS,

Second Third-Party Plaintiffs,

- against -

JOHN ROONEY CONSTRUCTION, INC.,

Second Third-Party Defendant.

-----X
345 MAIN STREET ASSOCIATES, LLC,

Third Third-Party Plaintiff,

- against -

PB 1021, LLC; PB 1012, LLC d/b/a PURE BARRE; PB
1021 d/b/a PB1012 LOCO d/b/a PURE BARRE; PB
HOLDCO, LLC; PURE BARRE FRANCHISING, LLC;
and WJ PARTNERS,

Third Third-Party Defendants.

-----X
Arthur F. Engoron, Justice

In compliance with CPLR 2219(a), this Court states that the following papers, numbered 1 to 11, were used on (a) plaintiff's motion for partial summary judgment; (b) defendant JR Construction's motion for summary judgment; and (c) defendants 345, Pure Barre, and WJ's motion for summary judgment:

Papers Numbered:

Plaintiff's Motion for Partial Summary Judgment (Motion Seq. 002)

Notice of Motion - Affirmation - Exhibits 1

Defendants 345, Pure Barre & WJ's Affirmation in Opposition - Exhibits	2
Defendant JR Construction's Affirmation in Opposition	3
Reply Affirmation to 345, Pure Barre & WJ's Opposition	4
Reply Affirmation to JR Construction's Opposition	5

Defendant JR Construction's Motion for Summary Judgment (Motion Seq. 003)

Notice of Motion - Affirmation - Exhibits	6
Defendant National's Affirmation in Opposition - Exhibits	7
Reply Affirmation	8

Defendants 345, Pure Barre & WJ's Motion for Summary Judgment (Motion Seq. 004)

Notice of Motion - Affirmation - Exhibits	9
Plaintiff's Affirmation in Opposition	10
Reply Affirmation	11

Background

In this Labor Law construction accident action, plaintiff, Jerzy Zieba, alleges that on September 13, 2013, he was injured while performing construction work at 345 Main Street, Huntington, NY ("Premises") owned and managed by defendant 345 Main Street Associates, LLC ("the Owner"). On the date of the accident, the Premises was leased by defendants WJ Partners, LLC ("WJ") and Pure Barre Franchising, LLC and its affiliates (collectively with "WJ," "Pure Barre"). At some date prior to the accident, the Owner and Pure Barre retained defendant National Retail Construction Group, LLC ("National") as general contractor of an interior demolition project located on the Premises ("Project"). Pursuant to a subcontract dated September 28, 2013 ("Subcontract"), National retained third-party defendant John Rooney Construction, Inc. ("JR Construction") as a subcontractor for the Project. The Subcontract contains an indemnity agreement that states that JR Construction "agrees to indemnify and hold harmless [National] from any and all liability arising from work to be performed on [the Project]." On the date of the accident, plaintiff was employed by JR Construction as a laborer, and during the course of his work, he fell from an eight-foot A-frame ladder ("the Ladder"). Plaintiff alleges that defendants were negligent because the Ladder was a defective and inadequate device and failed to provide him with the proper protection to prevent him from falling.

On or about October 1, 2013, plaintiff commenced this action to recover for his personal injuries as a result of the accident. On or about November 11, 2013, defendant Pure Barre filed its answer. On or about November 26, 2013, the Owner filed its answer with cross-claims against co-defendants for common law indemnification, common law negligence, contractual indemnification, and failure to procure additional insurance. On or about February 10, 2014, defendant National filed its answer with cross-claims against co-defendants for contractual and common law indemnification. On October 16, 2014, the Owner commenced a third-party action against JR Construction; on November 6, 2015, Pure Barre commenced a second third-party action against JR Construction; and on February 10, 2016, the Owner commenced a third third-party action against Pure Barre. Following pre-trial proceedings and the completion of discovery, plaintiff filed a note of issue on May 27, 2016.

On June 20, 2016, the Owner and Pure Barre moved to vacate the Note of Issue and to: (1) compel plaintiff to respond to their outstanding discovery demands; (2) compel plaintiff to provide fresh HIPAA compliant authorizations; and (3) compel plaintiff to appear for a physical examination with a cardiologist. By Decision and Order dated July 25, 2016, this Court denied defendants' request to vacate the Note of Issue, as defendants' discovery requests had long since been satisfied (almost two years before the aforementioned Decision and Order was issued). The Court also found that defendants' failure to timely schedule an examination with a cardiologist did not justify vacatur of the Note of Issue.

The Instant Motions

Plaintiff now moves, pursuant to CPLR 3212, for partial summary judgment, pursuant to Labor Law § 240(1), against defendants. Defendants oppose the motion arguing, *inter alia*: (1) that plaintiff was the sole proximate cause of the accident, because he chose not to use alternative safety devices available at the Premises, and used the Ladder in an improper manner; (2) that even if the Ladder were defective, they did not have notice of it; and (3) that they did not direct, supervise, instruct, and/or control plaintiff or his work.

JR Construction now moves, pursuant to CPLR 3212, for summary judgment, arguing that, absent contractual indemnification, no liability can be found against it as plaintiff's employer, as Section 11 of the Workers Compensation Law ("WCL") precludes such recovery. JR Construction further argues that because the Subcontract was not executed until September 28, 2013, nine days post-accident, no binding contractual indemnification agreement was in effect at the time of the accident. National submits an opposition, arguing that the Subcontract's indemnification section does enforce liability against JR Construction because the Subcontract states that the work was to commence on September 11, 2013, two days prior to the accident, and plaintiff's performance thereunder on September 13, 2013 demonstrates that the Subcontract was in effect at the time of the accident. Plaintiff, the Owner, and Pure Barre do not oppose the motion.

The Owner and Pure Barre now move, pursuant to CPLR 3212, for summary judgment, seeking (1) to dismiss plaintiff's complaint and all cross-claims against them with prejudice; and (2) for summary judgment in their favor, as to their cross-claims against co-defendants for contractual and common law indemnification, including attorney's fees, expenses, and costs and disbursements.

Discussion

I. Plaintiff's Motion for Partial Summary Judgment on Labor Law § 240(1) Granted

A court may grant summary judgment where there is no genuine issue of material fact, and the moving party has made a prima facie showing of entitlement to a judgment as a matter of law. See Alvarez v Prospect Hosp., 68 NY2d 320, 324 (1986); see generally American Sav. Bank v Imperato, 159 AD2d 444, 444 (1st Dept 1990) ("The presentation of a shadowy semblance of an issue is insufficient to defeat summary judgment"). The moving party's burden is to tender sufficient evidence to demonstrate the absence of any material issue of fact. See Ayotte v Gervasio, 81 NY2d 1062 (1993). Once this initial burden has been met, the burden then shifts to the party opposing the motion to submit evidentiary proof sufficient to create material issues of fact requiring a trial; mere conclusions and unsubstantiated allegations are insufficient. See Zuckerman v City of New York, 49 NY2d 557, 562 (1980).

In order for plaintiff to recover under Labor Law § 240(1), he must have been engaged in one of the statutorily enumerated activities, which are limited to the erecting, demolishing, repairing, altering, painting, cleaning, or pointing of a building or structure. See Panek v County of Albany, 99 NY2d 452, 457 (2003) ("The critical inquiry in determining coverage under the statute is 'what type of work the plaintiff was performing at the time of injury'"). This section imposes absolute liability on owners, contractors, and their agents for any breach of the statutory duty that proximately causes plaintiff's injury. Id. ("the purpose of the statute is to protect workers by placing ultimate responsibility for safety practices on owners and contractors instead of on workers themselves"). Liability under this statute is imposed only when plaintiff's injuries involve or result from an elevation-related hazard or risk. See Melber v 6333 Main St., Inc., 91 NY2d 759, 763 (1998) ("[Labor Law § 240(1) is] limited to such specific gravity-related accidents as falling from a height or being struck by a falling object that was improperly hoisted or inadequately secured").

Defendants' argument that plaintiff was the sole proximate cause of his accident is unavailing. By virtue of his exposure to the risks inherent in an elevated work site and his involvement in the demolition, etc., of a building or structure, plaintiff is within the class of persons protected by the scaffold law. See Gordon v Eastern Ry. Supply, 82 NY2d 555, 559 (1993) ("section 240(1) imposes absolute liability on owners, contractors and their agents for any breach of the statutory duty which has proximately caused injury. The duty imposed is nondelegable and an owner is liable for a violation of the section even though the job was performed by an independent contractor over which it exercised no supervision or control") (internal citations omitted); see also Dwyer v Central Park Studios, Inc., 98 AD3d 882, 883 (1st Dept 2012) ("The undisputed evidence established that plaintiff was injured when he fell from an unsecured ladder that collapsed, which is sufficient to make out a prima facie case on the section 240(1) claim"). Additionally, defendants' argument that plaintiff was a recalcitrant worker is unavailing; there is no evidence that plaintiff disobeyed an immediate and specific instruction not to use the Ladder or to use a different safety device altogether. See Gordon v Eastern Ry. Supply, 82 NY2d at 563 ("The [recalcitrant worker] defense requires a showing that the injured worker refused to use the safety devices that were provided by the owner or employer"); see also DeRose v Bloomingdale's Inc., 120 AD3d 41, 47 (1st Dept 2014) ("The Labor Law, recognizing the realities of construction and demolition work, does not require a worker to demand an adequate safety device by challenging his or her supervisor's instructions and withstanding hostile behavior. To place that burden on employees would effectively eviscerate the protections that the legislature put in place. Indeed, workers would

be placed in an nearly impossible position if they were required to demand adequate safety devices from their employers or the owners of buildings on which they work"). Additionally, it is undisputed that plaintiff fell from the Ladder, which is consistently defined by case law as a gravity-related accident.

Accordingly, plaintiff's request for partial summary judgment on Labor Law § 240(1) is hereby granted.

II. JR Construction's Motion for Summary Judgment Denied

Although JR Construction is correct in arguing that, pursuant to WCL § 11, employers are precluded from liability as joint tortfeasors, a third party may still recover against an employer pursuant to contract. See Rodrigues v N & S Building Contr., Inc., 5NY3d 427, 430 (2005) (WCL § 11 "prohibits third-party indemnification or contribution claims against employers, except where the employee sustained a 'grave injury,' or the claim is based upon a provision in a written contract entered into prior to the accident or occurrence by which the employer had expressly agreed to contribution to or indemnification of the claimant or person asserting the cause of action for the type of loss suffered") (internal quotations omitted). Here, plaintiff does not allege a "grave injury," but pursuant to the Subcontract, JR Construction and National executed an indemnity agreement; the sole dispute is whether said indemnity agreement was in effect prior to plaintiff's accident. Although, as JR Construction points out, the Subcontract was not executed until after plaintiff's accident, all of the essential terms thereof were agreed to prior to the Project's commencement, including the indemnity agreement. Moreover, the Subcontract states that JR Construction's work was to start on September 11, 2013, and the parties do not dispute that plaintiff performed construction work on September 13, 2013, the date of his accident, which raises questions of fact as to whether the Subcontract was in effect at the time of the accident, and whether the parties intended to be bound by it. See Moyano v Gertz Plaza Acquisition, LLC, 110 AD3d 612, 612 (1st Dept 2013) ("Although third-party plaintiffs did not produce a written, executed contract covering their [agreement] with third-party defendant at the time plaintiff ... was injured, they submitted copies of unsigned contracts and evidence that raises issues of fact whether the parties intended to be bound by [an agreement] and whether the agreement contained indemnity and additional insured provisions"); see generally Flores v Lower E. Side Serv. Ctr., Inc., 4 NY3d 363, 370 (2005) ("the issue of whether or when an indemnification agreement came into being in the absence of a signed document will present a question of fact to be resolved by the trier of fact").

Accordingly, JR Construction's motion for summary judgment is hereby denied.

III. The Owner and Pure Barre's Motion for Summary Judgment on Labor Law § 241(6) Granted

Labor Law § 241(6) is meant to "protect workers engaged in duties connected to the inherently hazardous work of construction, excavation, or demolition." See Nagel v D & R Realty Corp., 99 NY2d 98, 101 (2002). The complaint must be premised upon sufficiently specific New York State Industrial Code ("Industrial Code") sections in order to substantiate a finding of liability under the statute. See Ross v Curtis-Palmer Hydro-Elec. Co., *supra* at 502 ("plaintiff's Labor Law § 241(6) claim must fail because of the inadequacy of his allegations regarding the regulations defendants purportedly breached"); Ferrero v Best Modular Homes, Inc., 33 AD3d 847, 851 (2d Dept 2006) ("plaintiff must demonstrate that his or her injuries were proximately caused by a violation of an Industrial Code provision which sets forth specific safety standards . . . In addition, the provision must be applicable to the facts of the case"). Furthermore, plaintiff's comparative negligence is a defense to a Labor Law § 241(6) claim. See Zimmer v Chemung County Performing Arts, Inc., 65 NY2d 513, 521 (1985) ("[Labor Law 241(6)] cannot rise to the level of negligence as a matter of law [because] contributory negligence was, and comparative negligence now is, a defense to [such] an action").

Defendants argue that the Industrial Code sections to which plaintiff cites are not sufficiently specific to give rise to a triable claim. The Court agrees. See Martinez v 342 Prop. LLC, 128 AD3d 408, 409 (1st Dept 2015) ("motion court properly granted defendants' motion for summary judgment dismissing plaintiff's Labor Law § 241(6) cause of action, because the provisions of the Industrial Code relied on by plaintiff . . . are either not sufficiently specific to give rise to a triable claim . . . or are inapplicable to the facts of this case"); see also Rizzuto v L.A. Wenger Contr. Co., Inc., 91 NY2d 343 (1998) (even if provision of Industrial Code is found to have been violated, such violation is not conclusive on question of negligence). For example, plaintiff alleges that defendants violated Section 23-1.7(d) of the Industrial Code, which directs employers to remove any "foreign substance which may cause slippery footing"; plaintiff does not allege that there was a slippery substance on the Ladder that caused his fall, rendering this section wholly inapplicable.

Plaintiff also alleges that defendants violated various OSHA regulations because they failed to provide a safe and healthful workplace. However, plaintiff's reliance upon any OSHA violations is misplaced, as its regulations and standards are not laws and cannot be used to establish a violation of the aforementioned statute. See Schiulaz v Arnell Constr. Corp., 261 AD2d 247, 248 (1st Dept 1999) ("The alleged violations of OSHA standards cited by plaintiffs do not provide a basis for liability under Labor Law 241(6)").

Accordingly, plaintiff's Labor Law § 241(6) claim is dismissed as a matter of law.

IV. The Owner and Pure Barre's Motion for Summary Judgment on Labor Law § 200 Denied

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," and such cases generally fall into two broad categories: namely, those where workers are injured as a result of the means and method in which the work is performed, and those resulting from dangerous or defective premise conditions at a work site. See Mitchell v New York Univ., 12 AD3d 200, 200 (1st Dept 2004). It is well-settled law that "where an existing defect or dangerous condition caused the injury, liability attaches if the owner or general contractor created the condition or had actual or constructive notice of it." See Cappabianca v Skanska USA Bldg. Inc., 99 AD3d 139, 143 (1st Dept 2012). Where the injury was caused by the means and method of the work, including the equipment used, the owner or general contractor is liable if it actually exercised supervisory control over the injury-producing work. See Lombardi v Stout, 80 NY2d 290, 295 (1992) ("where the alleged defect or dangerous condition arises from the contractor's methods and the owner exercises no supervisory control over the operation, no liability attaches to the owner under the common law or under section 200 of the Labor Law").

Questions of fact remain as to (1) whether defendants had actual or constructive notice of the allegedly dangerous condition that caused the accident; and (2) whether defendants controlled the means and methods of plaintiff's work. In the event that defendants are found to have had notice of the defect, a factfinder could reasonably conclude that defendants were negligent. As such, even if defendants did not supervise or control the manner in which plaintiff worked, defendants may still be liable to plaintiff if they had actual or constructive notice of the alleged defect. Likewise, defendants' contractual and common law indemnification claims cannot be determined until the aforementioned questions of fact have been resolved by a factfinder. See Urban v No. 5 Times Square Dev., LLC, 62 AD3d 553, 557 (1st Dept 2009) ("factual issues as to constructive notice and negligence exist that preclude summary judgment on contractual indemnification and common law indemnification at this juncture"); see also Stallone v Plaza Constr. Corp., 95 AD3d 633, 633 (1st Dept 2012) ("Since [defendant] has not been found free from negligence, we reject its contention that all cross claims against it for contribution or indemnification should be dismissed").

Accordingly, questions of fact remain as to plaintiff's Labor Law § 200 claim, as well as the Owner and Pure Barre's cross-claims against National for contractual and common law indemnification, which cannot be dismissed by way of summary judgment.

Conclusion

Plaintiff Jerzy Zieba's motion for summary judgment is granted to the extent that this Court finds defendants liable under the scaffold law; defendants 345 Main Street Associates, LLC, PB 102, LLC, Pure Barre Franchising, LLC, and WJ Partners, LLC's request to dismiss plaintiff's Labor Law § 241(6) claim is granted; defendants 345 Main Street Associates, LLC, PB 102, LLC, Pure Barre Franchising, LLC, and WJ Partners, LLC's request to dismiss plaintiff's Labor Law § 200 claim is denied; and the requests for summary judgment on various defendants' cross-claims for contractual and common law indemnification is denied. The clerk is hereby directed to enter judgment accordingly.

The parties are to proceed to trial on plaintiff's common law negligence (Labor Law § 200) claim and on the various parties' contractual and common law indemnification claims.

Dated: April 17, 2018



Arthur F. Engoron, J.S.C.