Carrillo v 457-467 Atl. LLC
2018 NY Slip Op 34007(U)
March 9, 2018
Supreme Court, Kings County
Docket Number: 500402/11
Judge: Karen B. Rothenberg
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: TRIAL TERM PART 35 x
MIGUEL CARRILLO,

Plaintiff, Index No: 500402/11

-against-

DECISION AND ORDER

457-467 ATLANTIC LLC, DOSHI DIAGNOSTIC IMAGING SERVICES, P.C., CONCEPT TO COMPLETION PARTNERS, INC., ION BRODSKY, VAN BRODY, STAND UP MANAGEMENT LLC and HAIJAR ELAYYAN,

Defendants,
x
DOSHI DIAGNOSTIC IMAGING SERVICES, P.C. and STAND UP MANAGEMENT LLC s/h/a STAND UP MANAGEMENT LLC,

Third-Party Plaintiffs,

-against-

UNIVERSAL SHIELDING CORP.,

Third-Party Defendant.
x

Recitation as required by CPLR 2219(a), of the papers considered in this motions for summary judgment.

Papers	Numbered
Order to Show Cause/Motion and Affidavits Annexed.	1; 4
Cross-motion and affidavits annexed...........................	
Answering Affidavits..	2; 5, 6
Reply Papers..	3; 7
Memoranda of law..	

Upon the foregoing cited papers, the Decision/Order on this motion:

In this action to recover damages for personal injuries, plaintiff Miguel Carrillo [Carillo] moves for an order pursuant to CPLR 3212 granting him summary judgment on his causes of action under Labor Law §§240(1) and 241(6). In addition, third-Party defendant Universal Shielding [Universal] moves for summary judgment dismissing the third-party complaint for contribution, common-law indemnity, contractual indemnity and for breach of contract to procure insurance coverage.

On January 25, 2011, Carillo, a laborer employed by defendant Concept to Completion Partners, Inc., was injured while working on a renovation/remodeling project located at 457-467 Atlantic Avenue, Brooklyn. The commercial space was to be used as a radiology center by defendant Doshi Diagnostic Imaging Services, P.C. [Doshi] and owned by defendant Stand Up Management [Stand Up]. The injury occurred when a bundle of metal MRI shielding fell onto Carillo's right foot and ankle when he, his manager "Yuri" and his co-worker "Jay" attempted to move the shielding away from the wall it was leaned up against. Right before the accident Yuri had instructed both Carillo and Jay to move the bundle as it was in the way of where a proposed wall needed to be framed. While Jay was pushing one end and Yuri was pulling the other, Carillo was standing in the middle acting as a counterweight. Yuri and Jay feeling that the shielding was too heavy stepped away from the bundle and it fell onto Carillo's right foot and ankle. Carillo described the shielding as being the size of sheetrock, measuring 48 inches high by 96 inches wide and the bundle as being approximately 4 inches thick, but did not know its weight. The metal bundle of MRI shielding had been delivered several days earlier by Universal, who had contracted with Doshi to manufacture, deliver and install the shielding in the walls surrounding the MRI machines at the radiology center.

<u>Carillo's Labor law §240(1) claim</u>

Labor Law § 240(1) "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 E. 92nd Hous. Dev. Fund Corp.*, 18 NY3d 1, 7 [2011]). "Whether a plaintiff is entitled to recovery under Labor Law § 240(1) requires a determination of whether the injury sustained is the type of elevation-related hazard to which the statute applies" (*Wilinksi* at 7).

Contrary to Doshi and Stand Up's argument, the fact that Carillo and the falling object were at the same level does not bar application of Labor Law §240(1) (*see Wilinski,* 18 NY3d 1*; Natoli v City of New York*, 148 AD3d 489 [1st Dept 2017]) In falling object cases, the crucial inquiry is "whether the harm flows directly from the application of the force of gravity to the object" (*Runner v New York Stock Exchange, Inc.*, 13 NY3d 599, 604 [2009]). Although liability will not attach where a falling oject descends a de minimis distance, the weight of the falling object and the amount of force it is capable of generating must be taken into account (*see Harris v City of New York*, 83

AD3d 104 [1st Dept 2011]).

Here, as it is unclear whether the bundle of metal shields were comprised of the lighter 45-gauge silicon steel type weighing between 120 and 150 pounds or the heavier, RF shielding, weighing approximately 2000 pounds, a triable issue of fact exists as the bundle's weight, and, therefore whether a safety device was required under the statute (*see Natoli v City of New York*, 148 AD2d 489 [1st Dept 2017]).

Lastly, although Doshi and Stand Up argue that the metal bundle would not have fallen had Carillo and his co-workers not attempted to move it, had instead separated the bundle and carried each metal shield individually, or had asked Universal to move the shields, a plaintiff cannot be the sole proximate cause of his/her injury where the evidence show, as in the instant matter, that at the time of injury, the plaintiff was acting pursuant to the directions of his/her supervisor (*see Pichardo v Aurora Contrs. Inc.*, 29 AD3d 879 [2d Dept 2006]).

Accordingly, Carrillo's motion for summary judgment under Labor Law §240(1) is denied.

Carillo's Labor Law §241(6) claim

Labor Law § 241(6) imposes on owners and contractors a nondelegable duty 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" (*Lopez v. New York City Dept. of Envtl. Protection*, 123 AD2d 982, 983 [2d Dept 2015]). In order to state a claim under Labor Law §241(6), a plaintiff must allege a violation of a specific and applicable provision of the Industrial Code (*D'Elia v City of New York*, 81 AD3d 682, 684 [2d Dept 2011]).

Here, Carillo's Labor Law §241(6) claim is predicated upon an alleged violation of Industrial Code Section 23-2.1(a)(1) relating to the proper and safe storage of building materials, a sufficiently specific safety provision (*see Randazzo v Consolidated Edison Co. of New York,* 271 AD2d 667 [2d Dept 2000]). Despite Doshi and Stand Up's argument to the contrary, the fact that the accident did not happen in a passageway, walkway, stairway or other thoroughfare, does not preclude the applicability of the code provision (*see Rodriguez v DRLD Development, Corp.*, 109 AD3d 409 [1st Dept 2013]). However, as there are conflicting expert affidavits as to whether the bundle was stored in a "safe and orderly manner", a triable issue of fact is raised precluding summary judgment for Carrillo (*see Id.*; *Castillo v 3440 LLC*, 46 AD3d 382 [1st Dept 2007])

Accordingly, Carrillo's motion for summary judgment under Labor Law §241(6) is denied.

Universal's cross-motion for summary judgment dismissing the third-party claims.

That portion of Universal's motion for summary judgment dismissing the third-party claims against it for common-law indemnification and contribution is denied as it fails to make a *prima facie* showing that it was free from negligence in the happening of this accident (*see Smith v Cardella Trucking Co., Inc*., 108 AD3d 613 [2d Dept 2013]).

On the other hand, in regard to the contractual indemnification claim, Universal demonstrates its entitlement to summary judgment by establishing, *prima facie*, that its work proposal contained no agreement to indemnify and/or to procure insurance for the benefit of another party (*see Poalacin v Mall Properties*, Inc., 155 AD3d 900 [2d Dept 2017]). The deposition transcript of Universal's witness Michael Bryan Newman as well as the work proposal authenticated during his deposition and marked as an exhibit, is admissible. Although the executed transcript is not submitted, Universal's papers include a letter addressed to opposing counsel indicating that Mr. Newman's transcript was executed and provided to opposing counsel. Even if such transcript was never executed, Doshi and Stand Up's own papers demonstrate that their counsel provided the deponent with the transcript for signature more than 60 days before its use in this cross-motion (see CPLR 3116[a]).

Accordingly, Universal's motion for summary judgment dismissing the third-party claims for contractual indemnification and for breach of contract to procure insurance is granted.

This constitutes the decision/order of the court.

Dated: March 9, 2018

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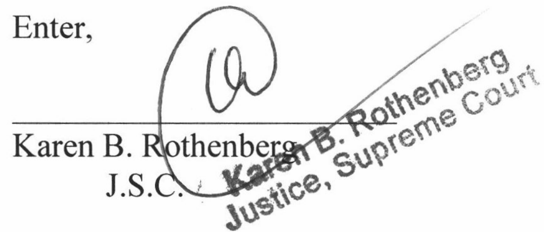

Karen B. Rothenberg
J.S.C.

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