Cutaia v Board of Mgrs. of the 160/170 Varick St. Condominium
2019 NY Slip Op 30316(U)
February 11, 2019
Supreme Court, New York County
Docket Number: 155334/12
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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MICHAEL CUTAIA,

Plaintiff,

-against-

THE BOARD OF MANAGERS OF THEJ 160/170 VARICK STREET CONDOMINIUM, THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK, MICHILLI CONSTRUCTION, INC., MICHILLI INC. and PATRIOT ELECTRIC GROUP,

Defendants.

---X

MICHILLI CONSTRUCTION, INC. and MICHILLI INC.,

Third-party Plaintiffs,

-against-

A+ INSTALLATIONS CORP.,

Third-party Defendant.

---X

160/170 VARICK STREET CONDOMINIUM, IMPROPERLY NAMED AS BOARD OF MANAGERS OF THE 160/170 VARICK STREET CONDOMINIUM and THE RECTOR, CHURCH WARDENS AND VESTRYMEN OF TRINITY CHURCH IN THE CITY OF NEW YORK,

Second Third-party Plaintiffs,

-against-

THE TRAVELERS COMPANIES, INC. d/b/a TRAVELERS INSURANCE COMPANY,

Second Third-party Defendants.

---X

Index No. 155334/12
Motion Seq. No. 011, 012, and 013

DECISION AND ORDER

---X
THE BOARD OF MANAGERS OF THE 160/170
VARICK STREET CONDOMINIUM, THE RECTOR,
CHURCH-WARDENS, VESTRYMEN OF TRINITY
CHURCH IN THE CITY OF NEW YORK, MICHILLI
CONSTRUCTION, INC. and MICHILLI INC.,

Third Third-party Plaintiffs,

-against-

ATLAS-ACON ELECTRIC SERVICE CORPORATION,

Third Third-party Defendant.
---X
---X
THE BOARD OF MANAGERS OF THE 160/170
VARICK STREET CONDOMINIUM, THE RECTOR,
CHURCH-WARDENS, VESTRYMEN OF TRINITY
CHURCH IN THE CITY OF NEW YORK, and
MICHILLI CONSTRUCTION, INC.,

Fourth Third-party Plaintiffs,

-against-

FIRST QUALITY MAINTENANCE II, LLC and
ALEXANDER WOLF & SON,

Fourth Third-party Defendants.
---X

CAROL R. EDMEAD, J.S.C.:

In a Labor Law action, defendants/third-party plaintiffs The Rector, Church-Wardens, Vestrymen of Trinity Church in the City of New York (Trinity Church), Michilli Construction, Inc. and Michilli, Inc. (collectively, Trinity Church and Michilli) move, pursuant to CPLR 3212, for summary judgment dismissing the Labor Law § 200 and common-law negligence claims as against them, as well as all claims for contribution, common-law indemnification and contractual indemnification as against them; Trinity and Michilli also seek summary judgment on their claims for contractual indemnification and breach of contract for failure to procure insurance

against third third-party defendant Atlas-Acon Electric Service Corporation (Altas-Acon); finally, Trinity and Michilli also seek an order, pursuant to CPLR 3126, dismissing the answer and all counterclaims of Atlas-Acon (motion seq. No. 011). Third-party defendant A+ Installations Corp. (A+ Installations) moves for summary judgment dismissing the third-party complaint (motion seq. No. 012). Atlas-Acon moves for summary judgment dismissing the third third-party complaint, and for summary judgment on its counterclaims for common-law indemnification against Trinity Church and Michilli (motion seq. No. 013).

BACKGROUND

On March 26, 2012 plaintiff Michael Cutaia (Cutaia or Plaintiff), a plumbing mechanic, was performing work at a 12-story building, located at 160-170 Varick Street in lower Manhattan, that is owned by Trinity Church. Michilli, a construction company, was a tenant in a space on the 11th floor of the building and it was performing a build-out renovation to prepare the space as its corporate office. Michilli itself served as the general contractor on the project. Michilli hired A+ Installations, who employed plaintiff at the time, to install plumbing pipes for the space.

On the day of his accident, plaintiff had been asked to move the location of sinks in the men's bathroom from one location, where they had already been installed, to another (plaintiff's April 2016 tr at 104, NYSCEF doc No. 379). To accomplish this, plaintiff had to shut down the water lines, drain them, and cut and reroute the pipes in the ceiling which led to the sinks (*id.* at 110). Immediately prior to his accident, plaintiff was attempting to cut a pipe in the ceiling in order to add a T-joint, so that he could redirect the pipes toward the new sinks. To reach the pipe, plaintiff used an A-frame ladder. However, the ladder, in an open position did not place plaintiff high enough to do his work:

> "I picked up the ladder. Originally, I tried to – I opened the ladder and I was trying to position it where I could get to the pipe that I was working on but I couldn't. So I had to fold the ladder and lean it up against the wall and that's what I did"

(*id.* at 133).

Plaintiff stood on the second rung from the top of the ladder to perform his work and shortly after cutting the pipe and attaching a T-joint, he received an electrical shock:

> "What happened was I put the T on the right side. I grabbed the right side of the pipe, then I went to grab the left side of pipe to push it. When I grabbed the left side of the pipe, that is when I got electrocuted"

(plaintiff's December 2016 deposition at 376, NYSCEF doc No. 380).

The next thing plaintiff remembers is being on the ground (NYSCEF doc No. 379 at 150). Plaintiff crawled out of the bathroom and screamed for help (*id.* at 151). As to his condition at that time, plaintiff testified: "My face was bleeding, my fingers were bleeding, my side was bleeding" (*id.* at 152). Joseph Renna (Renna), Michilli's project manager on the subject build-out, who came to plaintiff's aid, testified that, after plaintiff was in an ambulance, he went into the bathroom where plaintiff had been working (Renna tr at 47, NYSCEF doc No. 382). Renna observed that "in the ceiling there was a yellow wire that was missing a cap" in the vicinity where plaintiff was working and Renna attributed plaintiff's electrical shock to this condition.

Plaintiff filed the complaint in this action on August 9, 2012, alleging that defendants are liable under Labor Law §§ 240 (1) and 241 (6), as well as Labor Law § 200 and common-law negligence. The court, by decision dated August 3, 2018 (August 2018 decision) has already granted partial summary judgment to Plaintiff as to liability on his Labor Law section 241 (6) claim against Trinity and Michilli (*see* NYSCEF doc

Nos. 289 and 290). The August 2018 decision denied Plaintiff's application for partial summary judgment as to liability on his Labor Law section 240 (1) claim (*id.*).

DISCUSSION

"Summary judgment must be granted if the proponent makes '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,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Trinity Church and Michilli's Application for Summary Judgment

Common-law Negligence and Labor Law § 200

Labor Law § 200 "is a codification of the common-law duty imposed upon an owner or general contractor to provide construction site workers with a safe place to work" (*Comes v New York State Elec. & Gas Corp.*, 82 NY2d 876, 877 [1993]). Cases under Labor Law § 200 fall into two broad categories: those involving injury caused by a dangerous or defective condition at the worksite, and those caused by the manner or method by which the work is performed (*Urban v No. 5 Times Sq. Dev., LLC*, 62 AD3d 553, 556 [1st Dept 2009]).

Where the alleged failure to provide a safe workplace arises from the methods or materials used by the injured worker, "liability cannot be imposed on [a defendant] unless it is shown that it exercised some supervisory control over the work" (*Hughes v Tishman Constr. Corp.*, 40 AD3d 305, 306 [1st Dept 2007]). "General supervisory authority is insufficient to constitute supervisory control; it must be demonstrated that the [owner or] contractor controlled

the manner in which the plaintiff performed his or her work, i.e., how the injury-producing work was performed" (*id.*).

In contrast, where the defect arises from a dangerous condition on the work site, instead of the methods or materials used by plaintiff and his employer, an owner or contractor "is liable under Labor Law § 200 when [it] created the dangerous condition causing an injury or when [it] failed to remedy a dangerous or defective condition of which [it] had actual or constructive notice" (*Mendoza v Highpoint Assoc., IX, LLC*, 83 AD3d 1, 9 [1st Dept 2011] [internal quotation marks and citation omitted]; *see also Minorczyk v Dormitory Auth. of the State of N.Y.*, 74 AD3d 675, 675 [1st Dept 2010]). In the dangerous-condition context, "whether [a defendant] controlled or directed the manner of plaintiff's work is irrelevant to the Labor Law § 200 and common-law negligence claims . . ." (*Seda v Epstein*, 72 AD3d 455, 455 [1st Dept 2010]).

Trinity Chuch and Michilli argue that Plaintiff's Labor Law § 200 claims against them should be dismissed, as they did not have control over the means and methods of Plaintiff's work and did not have notice of the alleged dangerous condition. As this case arises from a dangerous condition -- an electrified pipe -- only the second argument is relevant here.

However, Trinity Church and Michilli fail to make a *prima facie* showing that they did not have constructive notice of the dangerous condition. That is, their moving papers fail to state when the premises were last inspected (*see Jahn v. SH Entertainment, LLC*, 117 A.D.3d 473, 473 [1st Dept 2014] [holding the defendant owner's affidavit "was insufficient to establish a lack of constructive notice as a matter of law because he did not state how often he inspected the floor or that he or defendant's employees inspected the accident location prior to the accident"]; *see also Pereira v New Sch.*, 148 AD3d 410, 412-413 [holding that the defendants were not entitled to summary judgment dismissing the plaintiff's section 200 and common-law negligence claims, as

"defendants failed to establish that they lacked constructive notice ... since they submitted no evidence of the cleaning schedule for the work site or when the site had last been inspected before the accident"). Accordingly, the branch of Trinity Church and Michilli's motion seeking summary judgement on Plaintiff's Labor Law § 200 and common-law negligence claims must be dismissed. As a corollary, Trinity Church and Michilli's application for summary judgment dismissing all cross claims for contribution and common-law negligence as against them must be denied (*see Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] [contribution requires a showing of active negligence]; *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 374, 375 [2011] [common-law negligence requires a showing of common-law negligence]).

Contractual Indemnification Claims Against Atlas-Acon

Pursuant to a purchase order between Atlas-Acon and fourth third-party defendant Alexander Wolf & Son (AWS),[1] Atlas-Acon agreed to provide: "All electrical disconnects, strip all panels, [t]emporary light & power," and to "[s]afe-off all conditions" on the subject project (NYSCEF doc No. 327). The agreement contains an indemnification clause which provides:

> "To the fullest extent permitted by law the Contractor shall defend, indemnify, and hold harmless ... [Trinity Church and Michilli] ... from and against liabilities, penalties, losses, damages, expenses, claims, causes of action, suits, judgments, lien and encumbrances, including reasonable attorneys' fees, litigation costs and disbursements incurred, arising out of, in connection with, or resulting from the performance of the Work, negligence, acts or omission of [Atlas-Acon, or] anyone directly or indirectly employed by them or anyone for whose acts they may be liable"

(*id.*).

This provision calls for "arising out of" liability that does not require a showing of negligence. Although the word "negligence" is used in the clause, it is part of a disjunctive list which makes clear that the provision may be triggered in the absence of negligence. However, as

[1] The fourth third-party action was severed by an order dated May 15, 2018 (NYSCEF doc No. 358).

Trinity Church and Michilli are not, as discussed above, entitled to summary dismissal of the Labor Law § 200 and common-law negligence claims as against them, their application for contractual indemnification against Atlas-Acon is premature (*Hurley v Best Buy Stores, L.P.*, 57 AD3d 239 [1st Dept 2008] [holding that an application for summary judgment on contractual indemnification was premature even though the subject indemnification clause was triggered]). Accordingly, the branch of Trinity Church and Michilli's motion that seeks summary judgment on their contractual indemnification claims against Atlas-Acon must be denied.

Breach of Contract for Failure to Procure Insurance

Trinity Church and Michilli also seek summary judgment on their claim for breach of contract for failure to procure insurance against Atlas-Acon. The agreement between AWS and Atlas-Acon provided that Atlas-Acon was to procure insurance on behalf of Trinity Church and Michilli, as owner and tenant of the subject property (NYSCEF doc No. 327).

However, Trinity Church and Michilli do not make a showing that Atlas-Acon breached this obligation. Moreover, Atlas-Acon submits an insurance policy, in effect when Plaintiff's accident occurred, from United States Fire Insurance Company (NYSCEF doc No. 400). The policy contains an additional insured endorsement which provides: "any person or organization to whom the Named Insured has agreed by written contract to provide coverage, but only with respect to operations performed by or on behalf of the Named Insured and only with respect to occurrences subsequent to the making of such contract" (*id.*).

As Trinity and Michilli have failed to make a *prima facie* showing that Atlas-Acon is liable to them for breach of contract for failure to procure insurance, and as Atlas-Acon has made a showing that it procured additional insured coverage, the branch of Trinity and Michilli's

motion seeking summary judgment on their breach of contract claims against Atlas-Acon is denied.

Trinity and Michilli Application Discovery Penalties

Here, Trinity and Michilli seek an order dismissing the answer and all counterclaims of third third-party defendant Atlas-Acon. Trinity and Michilli allege that Atlas-Acon failed to respond to a Notice for Discovery & Inspection (D&I) dated May 31, 2018. The court "so-ordered" a discovery stipulation, dated June 26, 2018, between the parties in which Atlas-Acon was directed to respond to the May 2018 D&I within 30 days. Atlas-Acon did not comply with this directive. The court issued a discovery order on August 7, 2018 which directed Atlas-Acon to provide a response to the May 2018 D&I. In its moving papers, Trinity and Michilli averred that Atlas-Acon once again did not comply with the court's order.

In opposition, Atlas-Acon argues that it should not be subject to penalties from the court, as it finally provided a response, dated November 30, 2018, after Trinity and Michilli filed its motion (NYSCEF doc No. 425). The response offers boilerplate objections and states that it does not have any of the discovery sought by Trinity and Michilli. Trinity and Michilli highlight the rote nature of this belated response by noting that Atlas-Acon denied having an insurance policy that it attaches to its opposition papers (NYSCEF doc No. 422).

CPLR 3126 provides that courts may penalize parties that do not comply with discovery orders. The Court of Appeals, highlighting the importance of the provision, has held that "[i]f the credibility of court orders and the integrity of our judicial system are to be maintained, a litigant cannot ignore court orders with impunity" and that a court may, under appropriate circumstances, fashion sanctions, including "dismissal of an action" pursuant to the statute (*Kihl v Pfeffer*, 94 NY2d 118, 123 [1999]). Courts generally look for repeated failures to comply,

which show deliberate bad faith, before resorting to such drastic remedies (*see Estate of Yaron Ungar v Palestinian Auth.*, 44 AD3d 176 [1st Dept 2007]).

Here, Atlas-Acon's failure to comply with two court orders is not remedied by boilerplate response that it finally provided in opposition to Trinity Church and Michilli's motion. While the court declines to strike Atlas-Acon's answer at this time, Atlas-Acon is directed to provide a detailed response to the D&I within 20 days of receipt of a copy of this order. To the extent that the sought-after discovery is not within their possession, Atlas-Acon is to provide a *Jackson* affidavit as to the scope of its search each outstanding item of discovery (*see Jackson v New York*, 185 AD2d 768 [1st Dept 1992]. Failure to comply with this directive will result in an order, pursuant to CPLR 3126, striking Atlas-Acon's answer and all counterclaims to the third third-party complaint.

II. A+ Installations' Application for Summary Judgment

A+ was Plaintiff's employer at the time of the accident. Apparently, A+ was working without a contract, doing some of its work for free, as a favor to Michilli at the time of the accident (*see* deposition tr of Michilli's Joseph Renna at 146, NYSCEF doc No. 363). First, Michilli's claims for contractual indemnification and breach of contract for failure to procure insurance against A+ Installations are dismissed as there was no contract for the subject work at the time of Plaintiff's accident. Second, all claims for common-law indemnification and contribution against A+ Installations are dismissed, as Plaintiff did not receive "grave injuries," as that term is interpreted by the section 11 of the Workers' Compensation Law (*see generally Rubeis v Aqua*, 3 NY3d 408 [2004]). As there is no basis for liability against A+ Installations, its motion seeking dismissal the third-party complaint and all claims against it is granted.

III. Atlas-Acon's Application for Summary Judgment

Despite not having any Labor Law claims brought against it, Atlas-Acon spends considerable time in its papers arguing against Plaintiff's various Labor Law claims. In any event, Atlas-Acon seeks dismissal of the third third-party complaint and for summary judgment on its counterclaims for common-law indemnification against Trinity Church and Michilli.

Contractual Indemnification

Atlas-Acon argues that Trinity Church and Michilli's claims for contractual indemnification against it should be dismissed, as it was not negligent in Plaintiff's accident. As discussed above, in connection with Trinity Church and Michilli's application for summary judgment on the same claims, the indemnification provision in the agreement between AWS and Atlas-Acon did not require a showing of negligence. Thus, Atlas-Acon's argument that the claims should be dismissed, as it was not negligent, fail to make a *prima facie* showing of entitlement to judgment. Accordingly, the branch of Atlas-Acon's motion seeking dismissal of Trinity Church and Michilli's claims for contractual negligence is denied.

Contribution and Common-Law Indemnity

As discussed above, claim for contribution and common-law indemnity require a showing of actual wrongdoing. Here, Atlas-Acon again argues that it was not negligent in Plaintiff's accident. In support, Atlas-Acon submits an affidavit from Gregory Nolan (Nolan) (NYSCEF doc No. 399). Nolan opines that "the temporary electrical installation that was allegedly done by Atlas-Acon was performed in a manner compliant with the governing code" (*id.*, ¶ 6).

More specifically, Nolan states that "exposed cap wire splices are acceptable for temporary construction electrical circuit installations" under NYC Electrical Code, Article 519.4

(g) (*id.*, ¶ 5). The code allows for such temporary exposure, Nolan opines, "because these circuits should be inspected and maintained on a frequent basis after they are installed" (*id.*). Nolan notes that Plaintiff's accident took place after Atlas-Acon had finished its work on the subject job (*id.*, ¶ 6). Thus, shifting focus away from Atas-Acon's work, Nolan opines that "the likely cause" of the dangerous electrification condition, "was the failure to inspect and maintain the electrical installation during ongoing construction activities, which could have altered or dislodged the electrical installation during the months after Atlas-Acon left the building" (*id.*).

Here, Nolan's reference to the electrical code does not absolve Atlas-Acon of possible liability. The provision relied on merely states that capped wire splices may be left exposed during electrical installation work; it does not state that those splices may be left unprotected when that temporary work is completed. Nolan's own opinion points to a question of fact as to whether Atlas-Acon left the wires unprotected or if the protections somehow became dislodged at some subsequent point during the renovations. Such testimony is not the basis of entitlement to summary judgment.

Moreover, in opposition Trinity Church and Michilli site to the testimony of Jorge Lopez (Lopez), a foreman for defendant Patriot Electrical Corp., who observed the subject area after Plaintiff's accident, and testified that typically capped spliced wires should be boxed up and covered, and the failure to do so creates a dangerous condition (Lopez tr at 127-128, 137). As there is a question of fact as to whether Atlas-Acon created the subject condition by leaving a spliced wire exposed, its application for dismissal of the contribution and common-law negligence claims as against it must be dismissed.

Atlas-Acon's application for summary judgment on its own common-law indemnification claim against Michilli and Trinity Church is premised on the court's finding that Trinity Church

and Michilli are liable under Labor Law § 241 (6). This betrays a misunderstanding of Labor Law § 241 (6), and its strict liability for owners and general contractors. In other words, negligence or active wrongdoing cannot be inferred from the court's determination that Trinity Church and Michilli are liable under section 241 (6). As such, Atlas-Acon's application for summary judgment on its common-law indemnification claims against Michilli and Trinity Church is denied.

CONCLUSION

Accordingly, it is

ORDERED that the branch of defendants The Rector, Church Wardens and Vestrymen of Trinity Church in the City of New York, Michilli Construction, Inc., Michilli Construction, Inc. and Michilli, Inc.'s (collectively, Trinity Church and Michilli) motion (motion seq. No. 011) that seeks summary judgment is denied; and it is further

ORDERED that the branch of Trinity Church and Michilli's motion (motion seq. No. 011) that seeks discovery penalties against third third-party defendant Atlas-Acon Electric Service Corporation (Atlas-Acon) is granted only to the extent that Atlas-Acon is, within 20 days to provide supplemental response, pursuant to the specific directives on page 10 of the accompanying decision; and it is further

ORDERED that third-party defendant A+ Installations Corp.'s (A+ Installations) motion for summary judgment dismissing the third-party complaint and all claims as against it (motion seq. No. 012) is granted; and it is further

ORDERED that the Clerk is to enter judgment accordingly; and it is further

ORDERED that Atlas Acon's motion for summary judgment (motion seq. No. 013) is denied; and it is further

ORDERED that counsel for Trinity Church and Michilli shall serve a copy of this decision, along with notice of entry, on all parties within 10 days of entry.

Dated: February 11, 2019

ENTER:

Hon. CAROL R. EDMEAD, JSC